

Legal Personality and the Responsibility of International Organizations

Guy Henry Feil Jones

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To Professor Kevin Dawkins, for your patient and insightful guidance;

To my family, for your unwavering support and expeditious proofreading;

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Introduction

Whether an international organization is responsible at international law for wrongful acts attributable to it depends upon whether it possesses its own international legal personality. The International Law Commission's Draft Articles on the Responsibility of International Organizations (DARIO) are expressly premised on this point, given that legal personality is an element in the definition of 'international organization' in article 2(a). But 'international legal personality' is not itself defined in the DARIO. This gives rise to a problem of application: how does one determine whether a particular organization has the requisite personality to be responsible under international law?

Considerable debate has occurred over the years on this question between two primary competing schools. This dissertation seeks to resolve that theoretical divide by identifying the most jurisprudentially sound and workable concept of personality in this context. It will be demonstrated that one position, the objective theory, offers a coherent perspective on the personality of international organizations that accords with judicial decisions, relevant practice and the modern conceptual understanding of international law. Accordingly, the criteria employed by the objective approach to distinguish organizations with personality from those without ought to be incorporated into the DARIO. It seems an extremely unsatisfactory state of affairs not to define the very predicate upon which the DARIO - and the international responsibility system generally - is founded.

To this end, Chapter One briefly considers the formulation, content and legal status of the DARIO, before elaborating on the intersection between legal personality and international responsibility. The competing theoretical positions on the legal personality of international organizations are examined in Chapter Two, including an assessment of the relevant jurisprudence from international and domestic courts. Chapter Three is devoted to an argument for the conceptual primacy of the objective approach, grounded in considerations both practical and theoretical. Finally, Chapter Four delves into the related question of the opposability of personality against non-member states: could an injured non-member state refuse to recognise the legal personality of a responsible international organization in order to claim reparation directly from a member state? Resolving these issues will provide necessary clarity as to when international organizations are responsible at international law in accordance with the DARIO.

Chapter One: The Draft Articles on the Responsibility of International Organizations

Formulation

The Draft Articles on the Responsibility of International Organizations (DARIO) were adopted by the International Law Commission (ILC) at its 63rd session in 2011. They represent the culmination of a project that began in 2002 with the aim of codifying and progressively developing the law in this area.¹ Two particular issues are covered in the DARIO: the responsibility of international organizations for internationally wrongful acts, and the responsibility of states for an international organization's conduct. Both were left open in the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARSIWA), an earlier codification exercise completed in 2001. Taken together, the DARIO and the DARSIWA amount to the most comprehensive formulation of the law of international responsibility, reflecting decades of work.

This is not to say that the topic of the responsibility of international organizations was previously neglected; in fact, during the last twenty years, studies of this subject have been completed by the Institut de Droit International,² the International Law Association³ and academic commentators.⁴ Comments made in the Sixth Committee of the United Nations (UN) General Assembly have repeatedly affirmed the practical importance of this area of law,⁵ given that international organizations are now prominent actors in the international arena. By extending the relatively well-established principles of state responsibility,⁶ the DARIO might be viewed as part of a broader trend

¹ *Report of the International Law Commission on the work of its fifty-fourth session* [2002] vol 2, pt 2 YILC 93 at [461].

² Institut De Droit International *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties* (Session of Lisbon, 1 September 1995).

³ International Law Association *Final Report of the Committee on Accountability of International Organisations* (Berlin, 2004).

⁴ See, for example, Moshe Hirsch *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Martinus Nijhoff, Dordrecht, 1995).

⁵ *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-seventh session, prepared by the Secretariat* A/CN.4/529 (2003) at [196]; *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session, prepared by the Secretariat* A/CN.4/537 (2004) at [6]; and *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat* A/CN.4/606 (2009) at [47].

⁶ Jutta Brunnée "International Legal Accountability Through the Lens of the Law of State Responsibility" (2005) 36 NYIL 21 at 47-48.

towards ensuring the accountability of international actors,⁷ which also operates in political, financial and administrative dimensions.⁸ Responsibility, however, remains the primary legal form of accountability, acquiring this centrality due to the difficulties of formulating a workable general theory of obligation for international organizations.⁹ The DARIO's adoption therefore represents a key development in the accountability narrative of international law.

General Principles

In setting out the DARIO, as with the DARSIIWA, the ILC employed the jurisprudential distinction between primary and secondary rules of law first developed by HLA Hart.¹⁰ The law of international responsibility, codified in the DARIO, is composed of secondary rules, which regulate when a breach of a primary obligation occurs and provide for particular consequences in that event.¹¹ Primary rules of international law, in contrast, create the obligations owed by international organizations and are not covered by the DARIO. Article 3 contains the basic secondary rule of this area: an international organization is responsible for its internationally wrongful acts. Under article 4, these are actions or omissions which are attributable to that organization under international law and breach an international obligation. These principles mirror similar provisions on state responsibility which, relatively uncontroversially, are taken to apply equally to international organizations.¹²

⁷ Other parts of this trend include the development of what may be termed a 'global administrative law', enforcing administrative rules and procedures within international institutions. See generally, Benedict Kingsbury, Nico Krisch and Richard Stewart "The Emergence of Global Administrative Law" (2005) 68(3) LCP 15 and Sabino Cassese, Bruno Carotti, Lorenzo Cassini, Eleonora Cavalieri and Euan MacDonald (eds) *Global Administrative Law: The Casebook* (3rd ed, Istituto di Ricerche Sulla Pubblica Amministrazione, Rome, 2012).

⁸ Malcolm Shaw *International Law* (Cambridge University Press, Cambridge, 2008) at 1317.

⁹ Jan Klabbers "The Paradox of International Institutional Law" (2008) 5 International Organizations Law Review 151 at 167.

¹⁰ HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 77-96.

¹¹ For an analysis of the nature of primary and secondary rules in this context, see J Combacau and D Alland "'Primary' and 'Secondary' Rules in the Law of State Responsibility: Categorising International Obligations" (1985) 16 NYIL 81 and Eric David "Primary and Secondary Rules" in James Crawford, Alain Pellet and Simon Olleson (eds) *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) 27.

¹² Philippe Sands and Pierre Klein *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell, London, 2009) at 524 and Iain Scobbie "International Organizations and International Relations" in René Dupuy (ed) *A Handbook on International Organizations* (2nd ed, Martinus Nijhoff, Dordrecht, 1998) 831 at 887. Similar rules are also put forward by Chitharanjan Felix Amerasinghe "The Essence of the Structure of International Responsibility" in Maurizio Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, Leiden, 2005) 3 at 6.

The remainder of the DARIO expands upon this fundamental principle, setting out the circumstances in which an international organization may commit an internationally wrongful act and what such an act entails. There are detailed rules concerning the attribution of conduct to an international organization and when an international organization may be responsible for the act of another organization or state.¹³ Circumstances precluding the wrongfulness of an act include the injured party's consent, self-defence, the taking of countermeasures, *force majeure*, distress and necessity.¹⁴ Commission of an internationally wrongful act imposes obligations on the responsible international organization to cease the act, offer guarantees of non-repetition and make full reparation for any injury.¹⁵ Reparation may be by way of restitution, compensation or satisfaction.¹⁶ Further rules regulate how international responsibility may be invoked and the taking of countermeasures.¹⁷

The DARIO also addresses the alternative issue of when a state will be responsible in connection with the actions of an international organization.¹⁸ Such responsibility may arise if a state aids or assists, or directs or controls, an international organization in committing a wrongful act. A state will equally be responsible if it coerces an organization to commit a wrongful act, or either accepts responsibility or leads the injured entity to rely upon its responsibility. Finally, article 61 provides that a state is responsible where it has effectively circumvented its obligations through causing an organization to act in a particular manner. This provision appears qualitatively different to its neighbours because the attribution of responsibility to the state follows primarily from its legal relationship with the organization, rather than from particular acts or omissions on its part. For that reason, article 61 provokes particular interest.

¹³ *Draft Articles on the Responsibility of International Organizations*, arts 6-9 and 14-19. Published in *Report of the International Law Commission on the work of its sixty-third session A/66/10* (2011) at [87].

¹⁴ *Ibid*, arts 20-25.

¹⁵ *Ibid*, arts 30-31.

¹⁶ *Ibid*, arts 34-37.

¹⁷ *Ibid*, arts 43-57.

¹⁸ *Ibid*, arts 58-63.

Legal Status

After adoption in 2011, the ILC submitted the DARIO to the UN General Assembly, recommending that thought be given to the possibility of a convention on the subject.¹⁹ Subsequently, the General Assembly placed the topic on the provisional agenda of its 69th session, beginning in September 2014.²⁰ However, the likelihood of a future convention appears slight, bearing in mind that no progress on a comparable convention covering the DARSIVA has been made in the twelve years since its adoption by the ILC, despite the relatively strong basis in practice and numerous entries on the General Assembly's agenda.²¹ In consequence, the DARIO might well be left to 'percolate' in the international system,²² lacking binding status in its own right but enforceable to the extent that it reflects customary international law.

The relative lack of international responsibility claims made against or by international organizations leaves the DARIO open to criticism that it is not based in practice,²³ and is therefore effectively an exercise in progressive development rather than codification.²⁴ The better position, however, is to recognise that although a lack of practice pushes some, more technical, articles towards the progressive development end of the spectrum, their omission would render the DARIO incomplete.²⁵ It has also been suggested that the DARIO is modelled too closely on the

¹⁹ *Report of the International Law Commission on the work of its sixty-third session* A/66/10 (2011) at [84] and [85].

²⁰ *Resolution on the responsibility of international organizations* GA Res 66/100, A/Res/66/100 (2011).

²¹ *Resolution on the responsibility of states for internationally wrongful acts* GA Res 56/83, A/Res/56/83 (2001); *Resolution on the responsibility of states for internationally wrongful acts* GA Res 59/35, A/Res/59/35 (2004); *Resolution on the responsibility of states for internationally wrongful acts* GA Res 62/61, A/Res/62/61 (2007) and *Resolution on the responsibility of states for internationally wrongful acts* GA Res 65/19, A/Res/65/19 (2010).

²² Vera Gowlland-Debbas "The Security Council and Issues of Responsibility" (2011) 105 ASIL PROC 348 at 348 (quoting an earlier statement by Thomas Franck concerning the ARSIVA).

²³ Jan Wouters and Jed Odermatt "Are All International Organizations Created Equal?" (2012) 9 International Organizations Law Review 7 at 9. For an analysis of the relationship between practice and selected provisions of the DARIO, see Daphna Shrager "The ILC Draft Articles on the Responsibility of International Organizations: The Interplay Between the Practice and the Rule" (2011) 105 ASIL PROC 351.

²⁴ Such considerations are reflected in Germany's submission to the ILC in 2005 that there is no customary international law on this subject: *Comments and observations received from Governments and international organizations* A/CN.4/556 (2005) at 47. Contrast with Germany's submission in 2011 that the DARIO were "largely satisfactory" and put "into writing various important legal provisions on international organizations": *Comments and observations received from Governments* A/CN.4/636 (2011) at 7.

²⁵ This was the position taken by the Special Rapporteur to the International Law Commission: Giorgio Gaja *Eighth report on responsibility of international organizations* A/CN.4/640 (2011) at [6].

DARSIWA²⁶ - though this is partly a consequence of much of the relevant law arising in the context of claims between states - and that it has made inadequate allowance for the great diversity of international organizations.²⁷ But in broad terms, much of the DARIO relates general principles of the law of responsibility to the specific context of international organizations, and in that respect can be regarded as declaratory of customary international law.²⁸

Treatment of Legal Personality

Article 2(a) defines ‘international organization’, to which the DARIO applies, as:

an organization established by treaty or other instrument governed by international law and *possessing its own international legal personality*. International organizations may include as members, in addition to states, other entities [emphasis added].

In a number of previous conventions, ‘international organization’ has been simply termed “an intergovernmental organization”²⁹ but, to provide greater clarity, the ILC developed a more detailed definition, recognising that international organizations may be created by state entities which are not necessarily governmental and that membership in some organizations is not limited to states.³⁰ The express requirement (in a definitional sense) of international legal personality appears unprecedented in the context of international treaties.³¹ But it is logical to premise an international

²⁶ Wouters and Odermatt, above n 23, at 13. For a contrary point of view, see Christiane Ahlborn “The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the ‘Copy-Paste Approach’” (2012) 9 International Organizations Law Review 53.

²⁷ José Alvarez “Revisiting the ILC’s Draft Rules on International Organization Responsibility” (2011) 105 ASIL PROC 344 at 346-347.

²⁸ Comments along this line have been made in the UN General Assembly: *Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat* A/CN.4/650/Add.1 (2012) at [10].

²⁹ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 26 May 1969, entered into force 27 January 1980), art 2(1)(i); Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (opened for signature 14 March 1975, not yet in force), art 1.1(1); Vienna Convention on Succession of States in Respect of Treaties 1946 UNTS 3 (opened for signature 23 August 1978, entered into force 6 November 1996), art 2(1)(n); and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (opened for signature 21 March 1986, not yet in force), art 2(1)(i). All of these conventions are drawn from texts developed by the ILC.

³⁰ *Draft Articles on the Responsibility of International Organizations, with commentaries*, at 7. Published in *Report of the International Law Commission on the work of its sixty-third session* A/66/10 (2011) at [88].

³¹ Equally, the concept of legal personality appears, on the whole, to be currently neglected in international legal discourse: Janne Nijman *The Concept of Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press, The Hague, 2004) at 387-407.

organization's responsibility on possession of personality. The concept of personality distinguishes between the actors included in a legal system and those which are not,³² and for that reason is commonly taken to mean the capacity to bear rights and owe obligations enforceable under that legal system. An essential feature of holding rights is the ability to bring claims against legal persons infringing those rights and the necessary corollary is that claims must be able to be brought against any body with personality that breaches an obligation.³³ As such, international responsibility follows directly from international legal personality.³⁴

In the particular case of the UN, the International Court of Justice in *Reparation for Injuries* accepted that international organizations may possess international legal personality.³⁵ Practical convenience arguably justifies this conclusion. Given the global significance of many international organizations and the role that they play in the international arena, it is desirable that rights, obligations and powers can be vested in an organization as a distinct entity, rather than simply held and exercised collectively by the individual member states.³⁶ But not all international organizations are endowed with personality. At the far end of the spectrum are forums for inter-state cooperation or associations of states, such as the G-7, while the status of other organizations, perhaps including the Organisation for Security and Cooperation in Europe, can be murky.³⁷ In consequence, there are clearly some international organizations which have personality and are therefore responsible for their wrongful actions in accordance with the DARIO, and other organizations which lack personality, in which case responsibility will devolve upon the member states to which the wrongful act is attributable.

³² Roland Portmann *Legal Personality in International Law* (Cambridge University Press, Cambridge, 2010) at 5.

³³ Sands and Klein, above n 12, at 518.

³⁴ Interestingly, the first scholar to speak of an 'international legal person' (or more accurately, 'persona jure gentium'), Gottfried Leibniz in 1693, used the term to tie the sovereignty of German princes with a responsibility to act in accordance with the law: Nijman, above n 31, at 29 and 77-78.

³⁵ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 179. Astonishingly, the occasional author has argued as recently as 1980 that international organizations possess no legal personality distinct from their member states: see Reinhold Reuterswärd "The Legal Nature of International Organizations" (1980) 49 Nordisk Tidsskrift Int'l Ret 14.

³⁶ Chittharanjan Felix Amerasinghe *Principles of the Institutional Law of International Organizations* (2nd ed, Cambridge University Press, Cambridge, 2005) at 68.

³⁷ Jan Klabbers "Institutional Ambivalence by Design: Soft Organizations in International Law" (2001) 70 Nordic J Int'l L 403 at 410-412.

The question of how to identify organizations with international legal personality therefore assumes critical significance for the application of the DARIO. A clear test is necessary to determine when an international organization may dispute its own personality in order to avoid responsibility and when an injured state may dispute the personality of a responsible organization in order to take a claim directly against a member state.

Chapter Two: Theories and Jurisprudence on the Acquisition of Personality by International Organizations

There are two primary schools of thought concerning how international organizations acquire international legal personality, with each tracing the personality to a different source and prescribing different criteria for determining whether it exists. Earlier commentators had doubted whether international organizations could possess a personality of their own at all,³⁸ but this argument became defunct following *Reparation for Injuries*,³⁹ where the International Court of Justice (ICJ) accepted the personality of the United Nations (UN). Controversy continues, however, over the origin and nature of this personality.

The ‘Will of the Founders’ Theory

Sometimes asserted to be the more popular theory, the ‘will of the founders’ school views the acquisition of international legal personality by an international organization as dependent upon the subjective intentions of the founding states.⁴⁰ These intentions may be explicit, with a provision in the constituent treaty declaring the organization to have personality under international law. Indeed, Soviet writers formerly maintained that express conferral was the only method by which an international organization could gain international personality.⁴¹ But it is now accepted that the founding states’ intentions may also be found implicitly, by considering what actions an organization is empowered to undertake and whether these actions presuppose the status of an international legal person.⁴² If it was the intention of the original member states that the

³⁸ See the extensive collection of pre-1945 scholarly writings noted in Clarence Wilfred Jenks “The Legal Personality of International Organizations” (1945) 22 BYBIL 267 at 267 fn 1.

³⁹ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

⁴⁰ August Reisch *International Organizations Before National Courts* (Cambridge University Press, Cambridge, 2000) at 57. For endorsements of this position, see Philippe Sands and Pierre Klein *Bowett’s Law of International Institutions* (6th ed, Sweet & Maxwell, London, 2009) at 474-476; P R Menon “The Legal Personality of International Organizations” (1992) 4 Sri Lanka J Int’l L 79 at 82; Fritz Mann “International Corporations and National Law” (1967) 42 BYBIL 145; Ignaz Seidl-Hohenveldern “The Legal Personality of International and Supranational Organizations” in *Collected Essays on International Investments and on International Organizations* (Kluwer Law International, The Hague, 1998) 3; Hans Kelsen *The Law of the United Nations* (4th ed, Stevens & Sons, London, 1964) at 329-330; Hugo Hahn “Euratom: The Conception of an International Personality” (1958) 71 Harv L Rev 1001; and Georg Schwarzenberger *International Law* (3rd ed, Stevens & Sons, London, 1957) at 137-138.

⁴¹ See, for example, Grigory Tunkin “The Legal Nature of the United Nations” (1966-III) 119 Recueil Des Cours 1 at 29. For a detailed analysis of the Soviet approach to the personality of international organizations, see Chris Osakwe “Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations” (1971) 65 AJIL 502.

⁴² Henry Schermers and Niels Blokker *International Institutional Law* (5th ed, Martinus Nijhoff, Leiden, 2011) at 989.

organization, for example, conclude treaties, send and receive diplomatic delegations or take claims for international responsibility, then it must also have been their intention that the organization possess international personality. Because of the relative rarity of constituent treaty provisions expressly bestowing personality, this inductive reasoning will often be the test of a particular organization's legal status.

The personality of such entities is, on this view, unequivocally derivative. It stems from an exercise of the sovereign will of states, the original subjects of international law, as expressed in the constituent treaty. Consequently, this theory aligns with a positivist view of the international legal system where the rules binding upon states emerge, primarily, from their consent.⁴³ An international organization does not acquire personality unless the founding states intended, explicitly or implicitly, for it to have this quality, regardless of how the organization acts in practice.⁴⁴ However, where the founders' will is not reflected in the factual reality of the organization, a theoretical disconnect can arise. An international organization might exist on paper only, yet have personality if that is what the founders intended, or conversely, an organization might lack personality in accordance with an express constitutional provision, yet act as a distinct entity on the international plane.

The 'will of the founders' perspective is also compatible with a restrictive conception of the powers of international organizations, whereby all such powers are conferred by the state members and are limited to those necessary for the organization to fulfil the purposes set out in its constituent instrument.⁴⁵ This functionalist position gives rise to the doctrine of implied powers which received apparent endorsement from the ICJ in *Reparation for Injuries*.⁴⁶ Debate continues over the

⁴³ As the Permanent Court of International Justice stated in the *Case of the 'SS Lotus' (France v Turkey)* (1927) PCIJ (Series A) No 10 at 18, "The rules of law binding upon States ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of those common aims. Restrictions upon the independence of States cannot therefore be presumed."

⁴⁴ Jan Klabbbers "Presumptive Personality: The European Union in International Law" in Martti Koskenniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, The Hague, 1998) 231 at 235.

⁴⁵ Ignaz Seidl-Hohenveldern *Corporations in and under International Law* (Grotius Publications, Cambridge, 1987) at 81.

⁴⁶ "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties": *Reparation*, above n 39, at 182.

application of this theory,⁴⁷ but the underlying assumption - that the organization's powers are directly granted by its member states in the constituent treaty - matches the idea that the organization's legal status is also directly drawn from the founding states.

The Objective Theory

The alternative perspective posits that the legal personality of international organizations is bestowed through the objective operation of international law.⁴⁸ According to this view, once an organization meets a particular set of criteria, the international legal system provides it with the capacity to bear rights and owe obligations enforceable under international law, regardless of the founding states' intentions. The various suggested formulations of these objective criteria are all essentially aimed at establishing that the organization exercises a will separate from its member states (the *volonté distincte*).⁴⁹ For example, Ian Brownlie suggests that an organization should have personality when there is:⁵⁰

- (1) a permanent association of states [or other organizations] with lawful objects, equipped with organs;
- (2) a distinction, in terms of legal powers and purposes, between the organization and its member states; and
- (3) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.

⁴⁷ Judge Hackworth, for example, expressed a relatively narrow view in his dissenting opinion in *Reparation for Injuries*, requiring that implied powers flow from an express power rather than simply from the general functions of the organization: *Reparation for Injuries*, above n 39, at 198.

⁴⁸ Schermers and Blokker, above n 42, at 989. For endorsements of this position, see generally, James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 169; Finn Seyersted *Common Law of International Organizations* (Martinus Nijhoff, Leiden, 2008) at 43-64; Finn Seyersted "International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon their Constitutions?" (1964) 4 *Indian J Int'l L* 1; Nigel White *The Law of International Organisations* (Manchester University Press, Manchester, 1996) at 27-30; and Peter Bekker *The Legal Position of Intergovernmental Organizations* (Martinus Nijhoff, Dordrecht, 1994) at 54-61.

⁴⁹ See, for example, Crawford *Brownlie's*, above n 48, at 169; Chittharanjan Felix Amerasinghe *Principles of the Institutional Law of International Organizations* (2nd ed, Cambridge University Press, Cambridge, 2005) at 82-83; and Seyersted "Capacities", above n 48, at 53.

⁵⁰ Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 677. These criteria are repeated in the most recent edition of *Brownlie's Principles*, edited by James Crawford, with the addition of "or other organizations" in point (1): Crawford *Brownlie's*, above n 48, at 169.

Hence the emphasis in this theory is on what the international organization is, as a matter of objective fact,⁵¹ rather than on what the member states intended when it was created.

The original proponent of this approach was Finn Seyersted. Writing in the 1960s, Seyersted started with the idea that international organizations were rarely, if ever, constrained in their actions and regularly exercised powers beyond their constitutional terms. This appeared inconsistent with the doctrine of implied powers, under which an organization's acts could only be valid if they accorded with its express constitutional terms and functions. The way was open, therefore, for an alternative theory, in which international organizations acquired personality under an objective rule of international law and possessed full inherent powers, limited only by constitutional provisions setting out particular purposes and the factual lack of territory and a population.⁵² Despite this position's unmistakable coherence, it has gained few outright supporters,⁵³ with many in the objective school preferring a more moderate approach and stepping away from the idea that international organizations are in the same legal position as states, as general subjects of international law.⁵⁴ In part, Seyersted's theory might be more attractive if it was overtly normative; instead, it suffers from a somewhat inconsistent relationship with practice. Seyersted criticised much of the relevant practice whilst simultaneously claiming that his ideas were empirically based.⁵⁵ All the same, his basic insights continue to provide the foundation for the objective school.

The objective theory has clear parallels with the acquisition of statehood,⁵⁶ basing itself in a rule of general international law that bestows legal personality if specific criteria are satisfied. It reflects the reality of an organization's separate existence, rather than the artificial (and potentially misplaced) intention of the founding states. This ability to override the will of member states gives the theory a non-voluntarist flavour and it therefore sits uneasily with a positivist conception of

⁵¹ Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) at 47-48.

⁵² Seyersted "Capacities", above n 48, at 23 and 40-41.

⁵³ Nigel White is an exception: see White, above n 48, at 31.

⁵⁴ See, for example, Manuel Rama-Montaldo "International Legal Personality and Implied Powers of International Organizations" (1970) 44 BYBIL 111 at 119-122.

⁵⁵ Jan Klabbbers "On Seyersted and his *Common Law of International Organizations*" (2008) 5 International Organizations Law Review 381 at 387.

⁵⁶ Gaetano Arangio-Ruiz *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (Sijthoff & Noordhoff, The Netherlands, 1979) at 246.

international law.⁵⁷ However, this does not remove the organization from the control of its members, which still define the organization's functions, purposes and competences in its constituent instrument and retain the ability to terminate the organization's existence.⁵⁸ The constituent treaty continues to be the legal foundation of the organization but it is not the source of its personality, which instead derives from international law.⁵⁹

The Presumptive Personality Theory

Attempting to strike somewhat of a middle ground is Jan Klabbers' theory of presumptive personality. On his view, neither of the primary schools are fully satisfactory and it is better to take a pragmatic approach whereby a presumption of legal personality arises once an international organization undertakes actions consistent with the possession of such personality.⁶⁰ This presumption may be rebutted with evidence of contrary practice or institutional structure, possibly informed by a consideration of the founders' intent. Personality is treated as a purely formal concept, abandoning the normative claim that particular legal consequences follow from its establishment. Although founded in a careful reading of *Reparation for Injuries*,⁶¹ much of Klabbers' reasoning is consistent with the objective position (though not with Seyersted's idea of inherent powers) and identifies the source of personality as general international law.

While this new perspective is refreshing, it suffers from several significant pitfalls. At a basic level, it is unclear exactly what it would take to successfully challenge the presumption of personality or what consequences would follow if such a challenge took place.⁶² Moreover, presumptions are legal fictions and the arguments offered to justify the reading of *Reparation for Injuries* as utilising a presumption are fairly speculative at best. The general assertion that presumptive personality would

⁵⁷ Klabbers "Presumptive Personality", above n 44, at 241-242.

⁵⁸ Jean d'Aspremont "The Multifaceted Concept of the Autonomy of International Organizations and International Legal Discourse" in Richard Collins and Nigel White (eds) *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London and New York, 2011) 63 at 66.

⁵⁹ Arangio-Ruiz, above n 56, at 246-247.

⁶⁰ Jan Klabbers *An Introduction to International Institutional Law* (2nd ed, Cambridge University Press, Cambridge, 2009) at 49-50. The theory is fully developed, and applied to the European Union, in Klabbers "Presumptive Personality", above n 44, at 243-252.

⁶¹ *Reparation for Injuries*, above n 39.

⁶² Tarcisio Gazzini "Personality of International Organizations" in Jan Klabbers and Asa Wallendahl (eds) *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing, Cheltenham, 2011) 33 at 36.

be consistent with considerations of equity and the lack of any pleaded argument that the UN was not a legal person,⁶³ do not, by themselves, convincingly explain why the ICJ might have thought to reverse the normal order of inquiry without explicitly saying so in the judgment. Finally, the idea that rebuttal of personality is possible through the actions of member states effectively grants the institutional features of an international organization a normative power in international law.⁶⁴ This is contrary to the overall thrust of the theory, which founds the initial presumption on objective reality and avoids giving the organization's internal structure any direct normative power. The theory therefore lacks a clear position on whether the organization's institutional features have direct effect in general international law.

The Gazzini Synthesis

A different attempt at reconciling the two primary schools is made by Tarcisio Gazzini, who contends that an explicit or implicit intention of the founding states is only the first step in the process of obtaining legal personality.⁶⁵ Once such an intention can be discerned, the organization must exercise its powers on the international plane in a manner which confirms itself as a distinct legal entity.⁶⁶ The factors indicating this factual independence are threefold: accepting or taking claims for international responsibility, entering treaties, and claiming immunities or privileges in domestic jurisdictions. Of these, only the first is wholly reliable, because organizations without legal personality may become a party to treaties on behalf of their member states and immunities are granted by domestic legal systems, not international law. But making the organization's personality contingent on its factual conduct negates the possibility, ever present under the 'will of the founders' school, of personality existing on paper only.

The principal issue with Gazzini's thesis is that it is unclear from where exactly the international organization derives its personality. If the intention of the founding states is to be constitutive, then

⁶³ Klabbers "Presumptive Personality", above n 44, at 247.

⁶⁴ Catherine Brölmann *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing, Oxford, 2007) at 87.

⁶⁵ Gazzini, above n 62, at 36-43. A brief summary of this theory can also be found in Tarcisio Gazzini "The Relationship Between International Legal Personality and the Autonomy of International Organizations" in Richard Collins and Nigel White (eds) *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London and New York, 2011) 196 at 196-199.

⁶⁶ This idea is also supported by Jean d'Aspremont "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States" (2007) 4 *International Organizations Law Review* 91 at 93.

why is it necessary to prove manifestations of this personality in practice? If such indicia have evidential value only, then the reasoning is essentially inductive and Gazzini falls within the ‘will of the founders’ school, looking for manifestations of an implied intention. Alternatively, if the source of an organization’s personality is the international legal system itself, then the argument is really for a complicated rule of international law whereby personality is established with proof of the founding states’ intentions and factual independence. But this essentially provides the founding states with a veto over personality granted by international law and there is no attempt to justify why this should be so. The middle ground sought by Gazzini therefore appears unobtainable, with the conceptual differences between the two main theories too wide to bridge.⁶⁷

Competing Images of International Organizations

The doctrinal disagreement over the source of an international organization’s personality can partly be traced to differing conceptions of the organization itself. An international organization may be viewed in an ‘open’ light as a forum for inter-state cooperation or alternatively, as a ‘closed’, independent actor in its own right.⁶⁸ Because international organizations effectively serve both functions, perspectives tend to oscillate between these two images and this contrast informs much of the debate over their legal personality. If international organizations are distinct legal actors, then it is natural for their personality to derive from general international law. If viewed as an open structure, however, the will of the member states assumes much more importance and might therefore be seen as constitutive of personality.⁶⁹

More broadly, the tension between these competing images indicates a general difficulty of fitting international organizations into the structure of a traditionally state-centric international law.⁷⁰ The layered, multi-dimensional nature of international organizations, alternatively seen as actors in their

⁶⁷ Compare with Dapo Akande “International Organizations” in Malcolm Evans (ed) *International Law* (3rd ed, Oxford University Press, Oxford, 2010) 252 at 257, where it is argued that there is little practical difference between the tests for personality prescribed by the two schools.

⁶⁸ Catherine Brölmann “A Flat Earth? International Organizations in the System of International Law” (2001) 70 *Nordic J Int’l L* 319 at 320.

⁶⁹ Brölmann *Institutional Veil*, above n 64, at 77 and 83.

⁷⁰ Jan Klabbbers “(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors” in Jarna Petman and Jan Klabbbers (eds) *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff, Leiden, 2003) 351 at 363.

own right or public *agora* where international issues are to be debated,⁷¹ struggles to match a legal system which typically assesses the personality of closed entities like states. For that reason, David Bederman has argued that the notion of legal personality is incomplete in this context, and that it would be better to move beyond it and view international organizations as communities of interest.⁷² But despite the transparent quality of international organizations, legal personality remains the determinative element of a subject of international law.

Decisions of the International Court of Justice

The landmark judgment of the ICJ on international legal personality arose out of the 1948 assassination in Jerusalem of Count Bernadotte, a UN mediator, by Zionist militants. Discussions ensued in the General Assembly on whether the UN had the capacity to bring an international claim against Israel for reparation covering the damage caused to both it and the victim. An advisory opinion on this issue was requested from the ICJ, which first considered whether the UN was a legal person under international law. The status of the League of Nations had never been clearly determined,⁷³ and there was no directly relevant provision in the UN Charter, with article 104 stipulating only that the UN possesses domestic legal capacity within the territory of its member states.⁷⁴ A proposal to include an article on international legal personality was dismissed at the San Francisco Conference because it was considered that such personality, if it existed, would be implied from the Charter in its entirety.⁷⁵ There was, therefore, no settled position on the legal status of the UN at that point.

After considering the UN Charter's general tenor and the UN's practice, the Court concluded that:⁷⁶

⁷¹ Jan Klabbers "Two Concepts of International Organization" (2005) 2 *International Organizations Law Review* 277 at 279-280 and 282-283. See also Richard Collins "Non-State Actors in International Institutional Law: Non-State, Inter-State or Supra-State? The Peculiar Identity of the Intergovernmental Organization" in Jean d'Aspremont (ed) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, London and New York, 2011) 311 at 313-315.

⁷² David Bederman "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel" (1996) 36 *Va J Int'l L* 275 at 371.

⁷³ Quincy Wright "The Jural Personality of the United Nations" (1949) *AJIL* 509 at 510.

⁷⁴ It has been suggested that this article assumes some form of status under international law: Leland Goodrich, Edvard Hambro and Anne Simons *Charter of the United Nations: Commentary and Documents* (3rd ed, Columbia University Press, New York, 1969) at 619.

⁷⁵ *Documents of the United Nations Conference on International Organization* Vol XIII (1945) at 710.

⁷⁶ *Reparation for Injuries*, above n 39, at 179.

the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

The ICJ then held unanimously that the UN had the capacity, through functional necessity, to bring an international claim relating to damage suffered by itself. A majority held that the UN could claim reparation for damage caused to the victim, but only through a breach of obligations owed to itself. The source of the UN's personality, however, was not clarified and debate continues over which school the reasoning is most consistent with.

When inferring legal personality, the ICJ relied upon the member states' intentions, UN practice in concluding treaties and the idea that personality was necessary for the UN to realise the aims set out in the Charter.⁷⁷ Consequently, the Court's approach might be characterised as inductive, finding personality because particular capacities and functions conferred on the UN require it, while referring to the will of the founders.⁷⁸ There was no real consideration of the subjective intentions of the participants at the Dumbarton Oaks and San Francisco Conferences, but this part of the reasoning is compatible with a search for implied founding intention, as embodied in the Charter and demonstrated by the UN's subsequent practice.⁷⁹ For that reason, it has been argued to support the 'will' theory.

But, more broadly, the import and language of the ICJ's judgment can be read as consistent with the objective approach. The emphasis is on the functions and rights that the UN "is in fact exercising and enjoying",⁸⁰ which highlights the practical reality of the UN's existence rather than the founding intention, and the Charter provisions and their drafting history were not given the

⁷⁷ José Alvarez *International Organizations as Law-Makers* (Oxford University Press, Oxford, 2005) at 131.

⁷⁸ Sands and Klein, above n 40, at 476.

⁷⁹ Christian Henderson "Contested States and the Rights and Obligations of the *Jus Ad Bellum*" (2013) *Cardozo J Int'l & Comp L* 367 at 376.

⁸⁰ *Reparation for Injuries*, above n 39, at 179.

paramount importance that one might expect under the ‘will’ theory.⁸¹ Moreover, it was clearly recognised that legal personality was essential if the UN was to pursue its functions as specified in the Charter. Such indispensability must logically derive from the objective existence of the UN as initially created by, but detached from, the founding members.⁸² The founders’ intentions will establish the competences of the UN but if the factual entity created requires legal personality, then personality must follow through the objective operation of international law. This is confirmed by the statement that the UN “occupies a position in certain respects in detachment from its Members”,⁸³ focusing on the legal distinction between the organization and its member states. It is, therefore, open to the objective school to claim support from *Reparation for Injuries*.⁸⁴

Interestingly, the structure of the ICJ’s judgment reflects the approach taken in the United Kingdom’s (UK) written submission, which of all the pleadings before the Court contains by far the most detailed consideration of international legal personality. In assessing whether the UN possesses international rights and duties, the language and provisions of the UN Charter are examined, as is the UN’s practice in concluding treaties, leading to the conclusion that the UN exists as a separate legal entity and consequently must have personality.⁸⁵ The same considerations are canvassed, in identical order, by the ICJ in its judgment.⁸⁶ None of the pleadings directly considers the source of an organization’s personality, which perhaps explains the Court’s lack of a clear stance on this point. But in line with the objective school, references to the founding states’ intentions are isolated, generally concern the wording of the UN Charter and do not suggest that such intention is constitutive of personality.⁸⁷ This supports an objective reading of *Reparation for*

⁸¹ Klabbers “Presumptive Personality”, above n 44, at 244.

⁸² Amerasinghe *Principles*, above n 49, at 82.

⁸³ *Reparation for Injuries*, above n 39, at 179.

⁸⁴ Rama-Montaldo, above n 54, at 125; Bekker, above n 48, at 59-61; and Crawford *Brownlie’s*, above n 48, at 169. Finn Seyersted cites *Reparation for Injuries* only for the ICJ’s conclusion that the capacities of the UN exceed those expressly set out in the UN Charter: Seyersted “Capacities”, above n 48, at 20.

⁸⁵ *Reparation for Injuries Suffered in the Service of the United Nations (Written Statements)* [1949] ICJ Pleadings 12 at 28-32.

⁸⁶ *Reparation for Injuries*, above n 39, at 178-179.

⁸⁷ See, for example, the UK’s submission that the “language [of the UN Charter] is difficult to reconcile with any other view but that the framers of the Charter regarded the Organization as possessing an international corporate capacity of its own, separate and distinct from that of its individual Members or of the plurality of its members”: *Reparation for Injuries (Written Statements)*, above n 85, at 30.

Injuries, whereby allusions to the will of the founders only pertain to the meaning of UN Charter provisions and how they affect UN practice.

Reparation for Injuries was extremely significant for the development of international institutional law. By holding that the UN possessed international personality, the Court confirmed that international law had moved beyond the nineteenth century state-centric conception and, crucially, no longer observed a dichotomy between active subjects and passive objects.⁸⁸ Instead, any entity governed by international law was an international legal person, with the capacity to bear rights and owe obligations. But much was left uncertain concerning how an international organization may acquire personality. The ICJ's reference to a mixture of intention-based and objective criteria justifications, whether because the Court was seeking a pragmatic middle-ground or because it was not cognisant of the debate, has led to the judgment being cited in support of two fundamentally incompatible positions.⁸⁹ Even though the judgment is arguably most consistent with the objective school, the Court did not clearly commit itself to either position and the decision is therefore not conclusive either way. It certainly sparked much of the subsequent scholarly discussion, but has equally constrained the search for a sound juristic basis for international legal personality by requiring consistency with its (somewhat unclear) reasoning.

In later cases, the ICJ has accepted that the personality of international organizations was established by *Reparation for Injuries*,⁹⁰ and has not provided any further guidance or addressed the theoretical debate. Thus, in *Agreement between the WHO and Egypt*, the Court stated:⁹¹

As was pointed out by the Court in [*Reparation for Injuries*] ... there is nothing in the character of international organizations to justify their being considered as some form of 'super-State' ... International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.

⁸⁸ Bederman, above n 72, at 367.

⁸⁹ Collins, above n 71, at 37.

⁹⁰ Roland Portmann *Legal Personality in International Law* (Cambridge University Press, Cambridge, 2010) at 109.

⁹¹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73 at [37].

Equally, in *Legality of the Use by a State of Nuclear Weapons*, the Court noted that it “need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence.”⁹² It is apparent from the context, however, that in neither instance is the focus of the assertion on the *personality* of international organizations.⁹³ In *WHO and Egypt*, the Court is concerned with the obligations of organizations, responding to a suggestion that organizations possess an unlimited power, greater than that of states, to decide the site of their headquarters and regional offices.⁹⁴ In *Nuclear Weapons*, the ICJ is differentiating the restricted competence of international organizations, under the principle of speciality, from the general competence of states.⁹⁵ Hence the ICJ’s dicta, subsequent to *Reparation for Injuries*, do not advance the issue of how international organizations may obtain legal personality.

The International Law Commission (ILC), in its commentary to the Draft Articles on the Responsibility of International Organizations, claims that in the *Egypt and WHO* and *Nuclear Weapons* dicta, quoted above, the ICJ “appears to take a liberal view of the acquisition by international organizations of legal personality under international law.”⁹⁶ But both statements are

⁹² *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66 at [25].

⁹³ Maurice Mendelson “The Definition of ‘International Organization’ in the International Law Commission’s Current Project on the Responsibility of International Organizations” in Maurizio Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, Leiden, 2005) 371 at 385-386.

⁹⁴ “The Court notes that in the World Health Assembly and in some of the written and oral statements before the Court there seems to have been a disposition to regard international organizations as possessing some form of absolute power to determine and, if need be, change the location of the sites of their headquarters and regional offices. But States for their part possess a sovereign power of decision with respect to their acceptance of the headquarters or a regional office of an organization within their territories; and an organization’s power of decision is no more absolute in this respect than is that of a State. As was pointed out by the Court in [*Reparation for Injuries*] ... there is nothing in the character of international organizations to justify their being considered as some form of ‘super-State’ ... International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties. Accordingly, it provides no answer to the questions submitted to the Court simply to refer to the right of an international organization to determine the location of the seat of its regional offices”: *WHO and Egypt*, above n 91, at [37].

⁹⁵ “The WHO could only be competent to take those actions of ‘primary prevention’ which fall within the functions of the Organization as defined in Article 2 of its Constitution. ... The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them”: *Nuclear Weapons*, above n 92, at [24]-[25].

⁹⁶ *Draft Articles on the Responsibility of International Organizations, with commentaries*, at 9. Published in *Report of the International Law Commission on the work of its sixty-third session A/66/10* (2011) at [88].

taken out of context and neither directly supports the proposition argued for. This assertion has therefore been rightly criticised as misleading.⁹⁷ Instead, the more accurate position is that the ICJ has not clearly expressed a view on the doctrinal debate, though it has provided a reference point for the discussion with *Reparation for Injuries*. Contrary to the ILC's claims, ICJ judgments furnish very limited guidance in the search for a convincing juristic and practical basis for the legal personality of international organizations.

Decisions of Municipal and Regional Courts

Whenever an international organization is impleaded as a party to a case before a municipal court, it must be a legal person in that jurisdiction. Domestic legal personality is governed by the rules of the particular national legal system and is conceptually separate from international legal personality; one does not necessarily imply the other. Provisions in the constituent treaties of international organizations sometimes oblige member states to grant the organization the status of a legal person within their jurisdiction.⁹⁸ But if there is no such provision or if it is unenforceable in the forum state's courts, international law need not have any bearing on the question of domestic legal personality.

Municipal courts have, however occasionally considered the international personality of particular organizations.⁹⁹ European courts have expressly or impliedly recognised the personality of certain

⁹⁷ Mendelson, above n 93, at 386.

⁹⁸ See, for example, Charter of the United Nations 1 UNTS xvi (opened for signature 26 June 1945, entered into force 24 October 1945), art 104, which stipulates that the "Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

⁹⁹ International personality may be relevant to the domestic status of an international organization in two respects. First, some legal systems, particularly in Western Europe, reason directly from international personality to domestic personality, which makes the former a necessary preliminary question. Secondly, it can be argued that conflict of laws principles, in common law systems, should lead to the same result. The general rule is that the status of an entity should be determined by the law of the place where it was created, and because international organizations are created under international law, a finding of international personality should equate to domestic personality in the forum state: Albert Venn Dicey, JHC Morris and Lawrence Collins *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, Sweet & Maxwell, London, 2006) at 1339-1340. See also Mann, above n 40, at 157.

organizations when accepting them as defendants,¹⁰⁰ and several United States courts have done the same.¹⁰¹ Challenges to the personalities of the International Tin Council (ITC) and the Arab Monetary Fund have also been considered by courts in the UK. For the former, however, legislative actions of the UK Government were determinative,¹⁰² and for the latter, the House of Lords employed ordinary conflict rules to accept the organization's personality as established by a federal decree in the United Arab Emirates.¹⁰³ None of these cases contains any detailed exploration of the nature of international legal personality or refers to the competing theoretical schools.

In contrast, Advocate General Darmon's opinion in proceedings brought by creditors of the ITC before the European Court of Justice¹⁰⁴ clearly takes an objective approach.¹⁰⁵ First, the express provision for personality in the ITC's constituent treaty was treated as going to domestic, not international, status¹⁰⁶ and consequently was given much less weight than in the House of Lords' speeches in *JH Rayner*. Secondly, *Reparation for Injuries* was taken as setting out objective criteria

¹⁰⁰ *In re Poncet* (1948) 15 ILR 346 (Federal Tribunal of Switzerland); *Republique italienne, Ministère italien des transports et Chemins de fer de l'État italien v Beta Holdings SA et Autorité de sequestre de Bâle Ville* [1966] (Federal Tribunal of Switzerland, discussed at (1975) 31 ASDI 225 and in Amerasinghe *Principles*, above n 49, at 71); the *European Economic Community* case (Federal Tribunal of Switzerland, discussed at (1978) 34 ASDI 61 and in Amerasinghe *Principles*, above n 49, at 71 fn 16); *Case Concerning the Award in the Westland Helicopters Arbitration* (1989) 28 ILM 687 (Court of Justice of Geneva and Federal Tribunal of Switzerland); *United Nations Relief and Rehabilitation Administration v Daan* (1950) 16 ILR 337 (Supreme Court of the Netherlands); *Iran-United States Claims Tribunal v AS* (1983-5) 94 ILR 321 (Local Court of the Hague, District Court of the Hague and Supreme Court of the Netherlands); *Branno v Ministry of War* (1954) 22 ILR 756 (Italian Court of Cassation); *Mazzanti v HAFSE and Ministry of Defence* (1954) 22 ILR 758 (Tribunal of Florence); and *United Nations v B* (1952) 19 ILR 490 (Tribunal Civil of Brussels).

¹⁰¹ *International Tin Council v Amalgamet Inc* 524 NYS 2d 971 (NY 1988) and *In re Hashim* 188 BR 633 (Bankr Ct Dec 1995). In neither case was the US a member of the relevant international organization. Where the US is a member, the International Organizations Immunities Act 22 USC § 288-288F provides the organization with juridical personality if it has been nominated by the President via executive order. For applications of this statute, see *Weidner v International Telecommunications Satellite Organization* 392 A 2d 508 (DC Ct App 1978); *Broadbent v Organization of American States* 628 F 2d 25 (DC Cir 1980); and *Mendaro v The World Bank* 717 F 2d 610 (DC Cir 1983).

¹⁰² *JH Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL). For detailed analysis of this litigation in the United Kingdom courts, see Romana Sadurska and Christine Chinkin "The Collapse of the International Tin Council: A Case of State Responsibility?" (1990) 30 Va J Int'l L 845 and Geoffrey Marston "The Personality of International Organisations in English Law" (1997) 2 Hofstra L & Pol'y Symp 75 at 90-98. The judgments in the Court of Appeal, *JH Rayner Ltd v Department of Trade and Industry* [1989] 1 Ch 72 (CA), contain a reasonably detailed analysis on whether international personality precluded member state liability but the theoretical positions on its source and acquisition were not examined.

¹⁰³ *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114 (HL).

¹⁰⁴ Case C-241/87 *Maclaine Watson and Company Limited v Council and Commission of the European Communities* [1990] ECR I-01797 (Advocate General's Opinion).

¹⁰⁵ Portmann, above n 90, at 235-236.

¹⁰⁶ *Maclaine Watson*, above n 104, at [133].

for international personality, which the Advocate General went on to apply to the ITC. Because the ITC was set up to pursue its own objectives, employing its own means and exercising a distinct decision making power, with the position of its member states defined in relation to it,¹⁰⁷ it was held to be an international legal person. The jurisprudential significance of this opinion, however, remains limited because there was no consideration of the merits of the alternative ‘will of the founders’ position.

Conclusion

Two competing schools therefore present contrasting perspectives on the acquisition of legal personality by international organizations. Under an objective approach, personality derives from the operation of general international law; under a ‘will of the founders’ approach, personality derives from the subjective intentions of the founding states. Attempts to find a middle ground are ultimately unpersuasive. In *Reparation for Injuries*, the ICJ did not take a clear stance on the source of personality, leaving its judgment open to different interpretations although, bearing in mind the influence of the pleadings, it is perhaps most consistent with the objective position. Subsequent decisions of the ICJ have not advanced the issue and relevant jurisprudence from domestic courts is scant. If the primacy of one school is to be apparent, therefore, theoretical considerations must be decisive.

¹⁰⁷ Ibid, at [134] to [136].

Chapter Three: The Conceptual Primacy of the Objective Approach to the Acquisition of Personality by International Organizations

In this chapter, it will be argued that the objective school is the most convincing explanation of the source and nature of an international organization's international legal personality. That is to say, such personality is bestowed through the objective operation of international law, regardless of the subjective intentions of the founding states.

The Role of the International Legal System

When considering the source of a particular entity's personality, an appropriate starting point is the function of the personality concept in a system of law. As defined in *Reparation for Injuries*, personality is effectively the capacity to possess rights and duties enforceable under that legal system.¹⁰⁸ For that reason, personality might be seen as a threshold condition, satisfaction of which allows an entity to carry out acts recognised by, and to participate in, international law.¹⁰⁹ If so, regulation of the acquisition of personality would be analogous to the operation of municipal legal systems, which typically prescribe that individuals of a certain age and mental capacity, and a range of artificial bodies, are legally relevant actors.¹¹⁰

There are important structural differences between international law and municipal legal systems, and these flow on into differences in the conceptual role of personality. Most prominently, the absence of a centralised law-making institution in international law means that international legal personality is sometimes thought to include the ability to create law.¹¹¹ Thus state practice, with a sufficient *opinio juris*, leads to binding rules of custom. Here, personality has a legitimating function in justifying the power of states on the international plane.¹¹² Secondly, there is no authoritative law of persons at international law, so the determination of which entities have personality is not as clear as it might be in municipal law. Article 34(1) of the Statute of the International Court of Justice (ICJ) prescribes that only states may be parties to cases before it but

¹⁰⁸ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 179.

¹⁰⁹ Jan Klabbbers "The Concept of Legal Personality" (2005) 11 *Ius Gentium* 35 at 37.

¹¹⁰ Roland Portmann *Legal Personality in International Law* (Cambridge University Press, Cambridge, 2010) at 7-8.

¹¹¹ *Ibid*, at 8-9.

¹¹² MNS Sellers "International Legal Personality" (2005) 11 *Ius Gentium* 67 at 72.

this does not suggest that states are the only actors with international legal personality.¹¹³ In consequence, international personality may be a descriptive title awarded after the fact to entities which have undertaken actions consistent with its possession, rather than a threshold condition for performing such acts in the first place.¹¹⁴

In either respect, though, personality remains a device used by a legal system to regulate which entities are entitled to participate in it. The crucial normative point is that the legal system itself makes this determination. A particular actor should not logically be able to grant itself the ability to bear rights and obligations under a system of law;¹¹⁵ instead, that legal system must contain rules delineating which actors are able to acquire personality and which are not. In philosophical terms, personality is an ‘institutional legal fact’ since legal persons are socially determined, unlike ‘brute facts’ which are physical occurrences.¹¹⁶ An institutional legal fact is only created when constitutive rules determine its existence.¹¹⁷ International law must, therefore, contain constitutive rules concerning the creation of legal persons and in that way control which entities have the capacity to bear enforceable rights and obligations.

A necessary assumption in this reasoning is that the international legal order represents the highest source of authority in the international realm, above the will of sovereign states.¹¹⁸ This order is clearly no longer composed solely of states, with sub-state entities and international organizations currently playing important roles in the international arena.¹¹⁹ As such, the nineteenth-century state-centric conception of international law is now thoroughly discredited.¹²⁰ The traditional view encapsulated in *Case of the ‘SS Lotus’*, that the basis of obligation in international law derived from

¹¹³ Portmann, above n 110, at 9 fn 6.

¹¹⁴ Catherine Brölmann *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing, Oxford, 2007) at 69-70.

¹¹⁵ Ibid, at 68.

¹¹⁶ Ramses Wessel “Revisiting the International Legal Status of the EU” (2000) 5 *European Foreign Affairs Review* 507 at 513. Wessel draws upon the work of DWP Ruiter: see DWP Ruiter *Institutional Legal Facts: Legal Powers and Their Effects* (Kluwer Academic Publishers, Dordrecht, 1993).

¹¹⁷ Wessel, above n 116, at 514.

¹¹⁸ Brölmann *Institutional Veil*, above n 114, at 83. For a defence of international law as a coherent legal order, see HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 208-231.

¹¹⁹ Christoph Schreuer “The Waning of the Sovereign State: Towards a New Paradigm for International Law?” (1993) *EJIL* 447 at 449.

¹²⁰ Portmann, above n 110, at 269.

states' consent to be bound,¹²¹ might also be thought to lack modern-day relevance. The concept of customary international law has developed considerably since 1927 and presently requires only *general* practice among the states most particularly affected, plus *opinio juris*,¹²² and not individual state consent. Equally, the development of *jus cogens* norms and *erga omnes* rules strongly militates against the proposition that there is no significant separation between the will of states and the international legal order.¹²³ Hence there should be no conceptual objection to rules of international law, as opposed to the consent of states, regulating which actors possess the requisite qualities for personality.

Analogies with Statehood

If the personality of international organizations is created by operation of international law, there are clear parallels with the acquisition of statehood. The dominant view at present is that statehood is not a fact transcending the international legal system, but rather a status bestowed if particular objective criteria are met.¹²⁴ State sovereignty is a quality imparted by the international legal system and not an absolute, pre-existing power. As such, international law contains rules regulating which entities qualify as states and when such a status may be lost.¹²⁵ This is analogous to the objective school, under which an international organization's personality also derives from rules of international law.

In making this point, the important differences between states and international organizations are not overlooked. There are obvious factual distinctions, given that international organizations lack territory and populations, and there is no functional limitation on the competences of states, as there

¹²¹ *Case of the 'SS Lotus' (France v Turkey)* (1927) PCIJ (Series A) No 10 at 18, "The rules of law binding upon States ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of those common aims. Restrictions upon the independence of States cannot therefore be presumed."

¹²² Statute of the International Court of Justice 1 UNTS xvi (opened for signature 26 June 1945, entered into force 24 October 1945), article 38(1). See also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3 at 43.

¹²³ For a somewhat different perspective, viewing international law as inextricably tied to the self-interest of states, see generally, Jack Goldsmith and Eric Posner *The Limits of International Law* (Oxford University Press, Oxford, 2005).

¹²⁴ James Crawford *The Creation of States in International Law* (2nd ed, Clarendon Press, Oxford, 2006) at 5.

¹²⁵ Portmann, above n 110, at 253.

is for international organizations.¹²⁶ Equally, it might be argued that international organizations are not truly autonomous subjects because, being created under a treaty to which they are not a party, they lack the ability of states to terminate their own existence.¹²⁷ But these distinctions do not necessarily suggest that the source of their legal personality should also be different. Provided international organizations possess sufficient autonomy from their founding states to exercise a distinct will on the international stage,¹²⁸ there is no obstacle to their personality being granted by the objective operation of international law, just like statehood.

This argument also accords with the widely accepted understanding of international organizations as derivative subjects of international law, unlike states which are original subjects. Because international organizations originate in constituent treaties created by states, their *factual* existence is incontestably derivative.¹²⁹ But this does not mean that their *legal* existence is equally so. Instead, international organizations may acquire rights and duties under both their founding treaties and general international law.¹³⁰ There is no reason, therefore, why the legal status of international organizations may not be bestowed by the international legal system on the basis of factual attributes granted by member states in the constituent treaty. This would allow international organizations to claim a personality that exists independently of the founding treaty,¹³¹ despite that being the source of their factual existence.

The Unsatisfactory Nature of the Search for the Founders' Intentions

Under the 'will of the founders' theory, whether an international organization possesses legal personality is determined by the subjective intentions of the founding states. These intentions may

¹²⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66 at [25].

¹²⁷ Jean d'Aspremont "The Multifaceted Concept of the Autonomy of International Organizations and International Legal Discourse" in Richard Collins and Nigel White (eds) *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London and New York, 2011) 63 at 66.

¹²⁸ For discussion of the institutional autonomy of international organizations, see *ibid*, at 70-76 and Tarcisio Gazzini "The Relationship Between International Legal Personality and the Autonomy of International Organizations" in Richard Collins and Nigel White (eds) *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London and New York, 2011) 196 at 199-208.

¹²⁹ Antonio Cassese *International Law in a Divided World* (Clarendon Press, Oxford, 1986) at 76-77.

¹³⁰ *Ibid*, at 86.

¹³¹ Aaron Fichtelberg *Law at the Vanishing Point: A Philosophical Analysis of International Law* (Ashgate Publishing, Hampshire, United Kingdom, 2008) at 81.

either be express - set out in a provision of the constituent treaty - or implied from the constituent treaty as a whole. But if express personality provisions were truly constitutive, they might be expected to be fairly common. States will generally consider the question of personality when setting up an international organization, since it goes to the heart of what the organization may do on the international plane, and there is no clear advantage (in most cases)¹³² in leaving this issue ambiguous. But, despite an early plea to include express personality articles in the interests of clarity,¹³³ most constituent treaties do not do so.¹³⁴ Indeed, prior to the 1990s they were extremely rare and it is only in more recent times that they have become more conspicuous.¹³⁵ There is, therefore, a curious lack of relevant practice to support the assertion that express constitutional provisions are, or ought to be, determinative of legal personality.¹³⁶

More fundamentally, treating the explicit intention of the founding states as constitutive raises the unattractive possibility that an organization's legal status will be inconsistent with how it acts on the international stage. If, hypothetically, an organization exercises a distinct will, undertaking rights and owing obligations on its own behalf, an express treaty provision declaring it to not be an

¹³² The exception might be the Organization for Security and Co-operation in Europe. For more on this, see below. A few reasons for creating international organizations of vague status are canvassed in Jan Klabbers "Institutional Ambivalence by Design: Soft Organizations in International Law" (2001) 70 *Nordic J Int'l L* 403 at 411 and 416-419.

¹³³ Clarence Wilfred Jenks "The Legal Personality of International Organizations" (1945) 22 *BYBIL* 267 at 272.

¹³⁴ Henry Schermers and Niels Blokker *International Institutional Law* (5th ed, Martinus Nijhoff, Leiden, 2011) at 988. Also relevant in this regard is the deliberate decision of the drafters of the UN Charter not to include an express declaration of international legal personality because it was considered "superfluous to make this the subject of a text. In effect, it will be determined implicitly from the provisions of the Charter as a whole": *Documents of the United Nations Conference on International Organization* Vol XIII (1945) at 710. Somewhat surprisingly, this decision was barely addressed by the ICJ in *Reparation for Injuries*.

¹³⁵ See, for example, Agreement Establishing the African Development Bank 1276 UNTS 3 (7 May 1982), art 50; Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 154 (opened for signature 15 April 1994, entered into force 1 January 1995), art 7; Agreement on the Establishment of the International Network for Bamboo and Rattan 2132 UNTS 197 (6 November 1997), art 1(2); Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 4(1); Agreement Establishing the Agency for International Trade Information and Cooperation as an Intergovernmental Organization 2256 UNTS 417 (opened for signature 19 December 2002, entered into force 30 April 2004), art 13; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community OJEC C 306 (opened for signature 13 December 2007, entered into force 1 December 2009), art 55; Statute of the International Renewable Energy Agency (opened for signature 26 January 2009, entered into force 8 July 2010), art 8(A); and Agreement for the Establishment of the International Anti-Corruption Agency as an International Organization (opened for signature 2 September 2010, entered into force 8 March 2011), art 1(2).

¹³⁶ Jan Klabbers "Presumptive Personality: The European Union in International Law" in Martti Koskeniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, The Hague, 1998) 231 at 237.

international legal person should surely be disregarded. Equally, an organization expressly endowed with personality but which acts only as a forum for, or on behalf of, its members would be a legal person on paper only.¹³⁷ Because personality is a quality that should logically be granted by the international legal system rather than by particular actors, it ought to reflect objective reality.

If so, what effect do express provisions conferring personality actually have? As terms of international treaties, they will bind the member states to treat the organization as an international person.¹³⁸ But beyond that, when considering whether the organization has personality under international law, the better position might be that such provisions have evidential value only. An express declaration of personality indicates that the member states, at the time of founding, envisaged the organization exercising a distinct will, bearing rights and obligations on its own account. Notwithstanding such a declaration, if the constituent treaty does not otherwise implement that intention or the organization acts differently in practice, then the rules of international law may decline to bestow personality on the basis that the objective criteria for its acquisition are not met.

In the absence of an express constitutional provision, the ‘will’ school reasons that the members’ intention to bestow legal personality must be implied from the provisions of the constituent treaty, taken as a whole and as applied in practice. This approach carries little risk that the organization’s legal status will be inconsistent with the factual reality. But it is still unsatisfactory, because the features of the constituent instrument asserted to be indicators of implied intention are better viewed as practical manifestations of the objective criteria for personality. This may be seen in the argument of Ignaz Seidl-Hohenveldern, a ‘will’ theory proponent, that legal personality may be implied through an organization’s practice, as permitted under its constituent treaty, in concluding treaties, exchanging diplomatic representatives, arranging its own internal functioning, receiving privileges and immunities from domestic courts and participating in the affairs of other international organizations.¹³⁹ All these actions are representative of the ‘will’ approach but essentially demonstrate that the organization exercises a distinct identity, bearing rights and obligations on its own account. Seidl-Hohenveldern recognises the importance of this distinct identity - the essence of

¹³⁷ Similar comments were made by the Special Rapporteur to the International Law Commission: Giorgio Gaja *First report on responsibility of international organizations* A/CN.4/532 (2003) at [19].

¹³⁸ Nigel White *The Law of International Organisations* (Manchester University Press, Manchester, 1996) at 27-28.

¹³⁹ Ignaz Seidl-Hohenveldern “The Legal Personality of International and Supranational Organizations” in *Collected Essays on International Investments and on International Organizations* (Kluwer Law International, The Hague, 1998) 3 at 12-18.

the objective approach - later in his essay.¹⁴⁰ So, in effect, the search for an implied intention is looking to identify particular consequences of an organization's distinct will and reasons backwards to possession of legal personality.

This fact presumably lies behind one commentator's observation that, in practice, the difference between the two primary theoretical positions is one of terminology and not outcome.¹⁴¹ Bearing in mind, however, the normative proposition that personality ought to be granted by the international legal order, the conclusion must be that the search for implicit intention is a fiction. In reality, it simply pinpoints the downstream manifestations of the exercise of a distinct will. Whether an international organization possesses a distinct will is, of course, dependent upon what attributes the founding members endowed it with in its constituent treaty. But to reason inductively that these attributes indicate an implicit intention to give the organization legal personality and that this intention is constitutive of such personality, is potentially circular.¹⁴² For instance, while the fact that an organization has entered international treaties may demonstrate possession of personality, its justification for entering such treaties is that it is an international legal person.

The Unsatisfactory Nature of a Formal Approach to Personality

The circular reasoning inherent in an inductive approach to legal personality can be legitimately disregarded if personality is viewed as a purely formal concept. From this perspective, personality would be a mere descriptive label, bestowed after the fact as a status which carries with it no particular consequences.¹⁴³ Because personality would be a result rather than a threshold precondition, international law becomes an open system, where any entity which is the subject of a relevant norm, such as holding a right, duty or capacity, can be described as an international legal person.¹⁴⁴

¹⁴⁰ Ibid, at 30.

¹⁴¹ Dapo Akande "International Organizations" in Malcolm Evans (ed) *International Law* (3rd ed, Oxford University Press, Oxford, 2010) 252 at 257.

¹⁴² Richard Collins "Non-State Actors in International Institutional Law: Non-State, Inter-State or Supra-State? The Peculiar Identity of the Intergovernmental Organization" in Jean d'Aspremont (ed) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, London and New York, 2011) 311 at 318.

¹⁴³ Hans Kelsen *General Theory of Law and State* (Russell & Russell, New York, 1961, translated by Anders Wedberg) at 250. See also Philippe Sands and Pierre Klein *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell, London, 2009) at 476-477.

¹⁴⁴ Portmann, above n 110, at 174.

A formal approach to the personality of international organizations, however, is neither desirable nor correct. Partly, this is because it robs the notion of personality of any real usefulness; as a purely descriptive concept, it has no bearing on the capacities or competences of international organizations or any other subjects of international law. Yet this is the particular issue which it is invoked to solve.¹⁴⁵ Hence, the ICJ in *Reparation for Injuries*, when faced with the question of whether the UN had the capacity to bring an international claim against Israel, first considered whether the UN had international personality.¹⁴⁶ Equally, possession of international personality is a pre-condition for application of the Draft Articles on the Responsibility of International Organizations (DARIO). If the organization does not have its own personality, the DARIO is not applicable to it and any claims must be made directly against the member states. Under a formal conception, however, personality could not be bestowed as such a general categorisation. It would instead exist only in relation to particular norms and particular entities,¹⁴⁷ essentially abdicating the function given to it under international law.

Moreover, personality cannot be purely declaratory since it has an important constitutive role in international law. This is by way of recognition that the entity has been accepted as a valid actor, in its own right, in the international legal system,¹⁴⁸ with the added consequence that it acquires a measure of autonomy and is protected from external interference.¹⁴⁹ The concept of personality has been used in academic discourse since the latter part of the twentieth century in order to recognise the legitimacy of new participants in that arena.¹⁵⁰ *Reparation for Injuries* is a prime example of this theoretical function put into practice. As such, personality, at a normative level, is constitutive of the rights and obligations held by an international organization. Rather than being an empty label, possession of personality should theoretically entail possession of certain basic capacities. It

¹⁴⁵ Manuel Rama-Montaldo “International Legal Personality and Implied Powers of International Organizations” (1970) 44 BYBIL 111 at 113.

¹⁴⁶ *Reparation for Injuries*, above n 108, at 178.

¹⁴⁷ Christian Henderson “Contested States and the Rights and Obligations of the *Jus Ad Bellum*” (2013) 21 Cardozo J Int’l & Comp L 367 at 375.

¹⁴⁸ Jan Klabbers “(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors” in Jarna Petman and Jan Klabbers (eds) *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff, Leiden, 2003) 351 at 367-368.

¹⁴⁹ Klabbers “Concept of Legal Personality”, above n 109, at 63.

¹⁵⁰ Janne Nijman *The Concept of Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press, The Hague, 2004) at 346 and 406.

is therefore logical to conceptualise it as a threshold in the DARIO and for participation in international law generally. On this material approach, the reasoning of the inductive approach remains circular, implying personality from actions and legitimising actions through personality, and is therefore unattractive. This is a crucial reason for favouring the objective school.

The Capacities and Competences of International Organizations

Given that personality ought to be a material concept, there must be specific consequences flowing from its possession. These consequences represent the capacities of an international organization. It is important to note the difference between legal personality and legal capacity: the former is a status, either possessed or not, whereas the latter is an asset, setting out what actions the organization may be qualified to take.¹⁵¹ An entity may therefore be endowed with capacity in greater or lesser degrees, unlike personality which is an absolute quality. The ICJ's statement in *Reparation for Injuries* that the UN had "a large measure of international personality"¹⁵² has rightly been criticised as overlooking this qualitative distinction.¹⁵³

Lively debate has occurred over the extent of an international organization's capacities. On one side, Finn Seyersted has argued that organizations possess inherent powers¹⁵⁴ to take any actions necessary to achieve their aims, subject only to negative limitations in their constituent instruments.¹⁵⁵ The premise is that organizations are in essentially the same legal position as states, as original subjects of international law, despite suffering from factual limitations like the lack of territory or populations. But others have argued instead that capacities derive from the will of the member states rather than general international law.¹⁵⁶ On this view, the powers of an international

¹⁵¹ Wessel, above n 116, at 510.

¹⁵² *Reparation for Injuries*, above n 108, at 179.

¹⁵³ Schermers and Blokker, above n 134, at 993 fn 37.

¹⁵⁴ For consideration of the nature of a legal power, see Andrew Halpin "The Concept of a Legal Power" (1996) 16 Oxford Journal of Legal Studies 129.

¹⁵⁵ Finn Seyersted "United Nations Forces: Some Legal Problems" (1961) 37 BYBIL 351 at 453-460; Finn Seyersted "International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon their Constitutions?" (1964) 4 Indian J Int'l L 1 at 38-39; and Finn Seyersted *Common Law of International Organizations* (Martinus Nijhoff, Leiden, 2008) at 392-397. This position also receives support from Nigel White: see White, above n 138, at 131-133.

¹⁵⁶ Ignaz Seidl-Hohenveldern *Corporations in and under International Law* (Grotius Publications, Cambridge, 1987) at 82-83 and Seidl-Hohenveldern "Legal Personality", above n 139, at 35. For criticism of Seyersted's arguments while still accepting that some capacity derives from general international law, see Rama-Montaldo, above n 145, at 119-122.

organization are more limited, restricted either to those specifically attributed to it in its constituent treaty (the doctrine of attributed powers) or, in a wider formulation, to those which may be implied as necessary for the performance of its functions (the doctrine of implied powers).¹⁵⁷

The best position, however, is found somewhere in the middle of these two opposing perspectives. Capacities, in the sense of *potential* entitlements to take particular actions,¹⁵⁸ flow from personality, which ought to be granted by general international law so imposing restrictions according to the will of the founding states is not a logical necessity. But, on the other hand, the personality of international organizations is not equivalent to statehood,¹⁵⁹ so it would be going too far to argue that such organizations have the same capacities as states. Instead, personality must (only) entail the basic capacities essential for the organization to act as a legal person in the international arena.¹⁶⁰ In general terms, these are the capacities to conclude treaties with other international persons, take claims of international responsibility and conduct diplomatic relations.¹⁶¹ These are not, however, the outside limits of what an organization may do; if an action moves beyond the basic capacities, it may still be justified if the capacity to do so is expressed in, or may be implied from, the organization's functions and purposes set out in its constituent instrument.¹⁶² For example, the power to maintain peacekeeping forces was held implicit in the UN Charter by the ICJ in *Certain Expenses*.¹⁶³ The basic capacities, though, are inherent in the fact of international legal personality, and should therefore be possessed by every person recognised under international law, regardless of whether it is a state, international organization or something else.

Capacity, of course, is only the potential to perform an activity; whether an organization may actually do so must be determined by reference to its *competence*. This is where the key difference

¹⁵⁷ Jan Klabbers *An Introduction to International Institutional Law* (2nd ed, Cambridge University Press, Cambridge, 2009) at 55-66.

¹⁵⁸ Peter Bekker *The Legal Position of Intergovernmental Organizations* (Martinus Nijhoff, Dordrecht, 1994) at 63.

¹⁵⁹ *Reparation for Injuries*, above n 108, at 179.

¹⁶⁰ Rama-Montaldo, above n 145, at 124 and 139-144.

¹⁶¹ Identical or very similar arguments have been made by Akande, above n 141, at 258; Klabbers *Introduction*, above n 157, at 40-44; Wessel, above n 116, at 511; Bekker, above n 157, at 63-64; and Cassese, above n 129, at 86-88.

¹⁶² Rama-Montaldo, above n 145, at 131.

¹⁶³ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151.

between international organizations and states emerges. States are *prima facie* empowered to take any action unless proven incompetent to do so; international organizations, on the other hand, may only act within their demonstrated competence and they are only competent to undertake activities necessary for the achievement of their purposes and in accordance with their functions.¹⁶⁴ This is the principle of functional limitation, reflected in the ICJ's statements in *Reparation for Injuries* that the UN's rights and duties "must depend upon its functions and purposes as specified or implied in its constituent documents and developed in practice",¹⁶⁵ and in *Legality of Nuclear Weapons* that international organizations do not "possess a general competence" and are "governed by the 'principle of speciality'".¹⁶⁶

Exactly how necessary the asserted power must be to the organization's functions or purposes is a topic of some contention,¹⁶⁷ but the issue need not be settled here. The critical point is that an international organization's functions and purposes, as defined in its constituent instrument, restrict what it is competent to do, despite the existence of basic capacities inherent in the nature of personality. So if it was not necessary for an organization to conclude treaties in order to pursue its functions and purposes, it would not have the competence to do so although the capacity to do so follows from its personality. By virtue of the principle of functional limitation, which forms part of the internal institutional law of the organization and does not derive from general international law, there is no practical difference between this material approach and a formal approach to personality.¹⁶⁸ In either case, what an organization may actually do is dependent upon the terms of its constituent instrument, as amplified by the implied powers doctrine. But crucially, the material approach, which distinguishes between capacities and competences, avoids the circular reasoning involved in implying personality from evidence of particular actions undertaken by the organization.¹⁶⁹

¹⁶⁴ Bekker, above n 157, at 76.

¹⁶⁵ *Reparation for Injuries*, above n 108, at 180.

¹⁶⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66 at [25].

¹⁶⁷ Chittharanjan Felix Amerasinghe *Principles of the Institutional Law of International Organizations* (2nd ed, Cambridge University Press, Cambridge, 2005) at 97. See also Bekker, above n 157, at 81-85.

¹⁶⁸ Brölmann *Institutional Veil*, above n 114, at 82.

¹⁶⁹ Collins, above n 142, at 319.

Support for this position may be found in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986.¹⁷⁰ Although not yet in force, the Convention recognises in its preamble that “international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes”. It further states in article 6 that the “capacity of an international organization to conclude treaties is governed by the rules of that organization.” The terminology is not quite right, in that ‘capacity’ in article 6 should perhaps be replaced with ‘competence’. However, the Convention appears broadly consistent with the proposition that international organizations have an inherent capacity to conclude treaties, by virtue of possessing legal personality,¹⁷¹ though their actual competence to do so must be determined by reference to their constituent instruments.¹⁷²

The Organization for Security and Co-operation in Europe

The issue of international legal personality has been particularly contentious in relation to the Organization for Security and Co-operation in Europe (OSCE). Accordingly, the OSCE is a perfect case to demonstrate the advantages of the objective school because, as personality aligns with factual reality rather than the subjective intentions of the founding states, the OSCE’s legal status may be seen to evolve over time.

The OSCE was founded in 1975 by the Helsinki Final Act,¹⁷³ a document with no legal effect. It began as a mere conference of states,¹⁷⁴ focusing on security and human rights issues. Obligations are imposed on members under its processes but these are often characterised as political rather than

¹⁷⁰ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (opened for signature 21 March 1986, not yet in force). For an overview of this Convention, see Neri Sybesma-Knol “The New Law of Treaties: The Codification of the Law of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations” (1985) 15 Ga J Int’l & Comp L 425.

¹⁷¹ Klabbers *Introduction*, above n 157, at 252. The relevance of the capacity/competence distinction in this context is primarily theoretical, given that in practice there is little difference between this approach and a broad interpretation of the implied powers doctrine.

¹⁷² This proposition was argued for prior to the Convention being drafted: see Gunther Hartmann “The Capacity of International Organizations to Conclude Treaties” in Karl Zemanek and L-R Behrmann (eds) *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (Springer-Verlag, New York, 1971) 127 at 150-151 and 162.

¹⁷³ Conference on Security and Co-operation in Europe: Final Act 14 ILM 1292 (1 August 1975).

¹⁷⁴ In fact, until 1 January 1995, it was called the Conference on Security and Co-operation in Europe: Miriam Sapiro “Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation” (1995) 89 AJIL 631 at 631.

legal, and its actions may be simply a collective exercise of the powers of its participating states.¹⁷⁵ Lacking a distinction between the legal powers of the organization on an international level and those of its participating states, the OSCE would fail to meet the basic objective criteria for international personality.

But developments in the OSCE's functions have necessitated a reconsideration of its status. In the early 1990s, it acquired a distinct institutional form with the creation of a Secretariat, Permanent Council and Parliamentary Assembly. Some attempt was made to facilitate its actions in 1993 when the participating states agreed to accord it domestic legal personality within their respective jurisdictions.¹⁷⁶ Practical difficulties persist, however, because a number of member states deny that it has international personality. Such difficulties arise particularly in relation to legal protection of OSCE officials on international missions, co-operation with other organizations and agreements with participating states.¹⁷⁷ In consequence, the possibility of giving the OSCE a formal legal basis in a constituent instrument and affirming its personality on the international plane has been considered. A draft convention to that effect was developed in 2007,¹⁷⁸ but the process has since stalled for political reasons.

The point, though, is that in many respects the actions and functions of the OSCE are now indistinguishable from those of other organizations with unequivocal legal personality.¹⁷⁹ If the OSCE does now meet the basic objective criteria (though it is not yet clear that this is so), with a permanent structure and legal powers on the international plane, distinct from those of its participating states, then the political discussions about 'formally' endowing it with personality would be beside the point. The OSCE would have acquired this status through operation of international law, even though this would be directly contrary to the subjective intentions of its founding states in 1975.¹⁸⁰ In this way, the great advantage of the objective approach is

¹⁷⁵ White, above n 138, at 39

¹⁷⁶ Sapiro, above n 174, at 635. Also in 1993, the OSCE was granted observer status in the UN General Assembly: *Resolution on observer status for the Conference on Security and Co-operation in Europe in the General Assembly* GA Res 48/5, A/Res/48/5 (1993).

¹⁷⁷ Schermers and Blokker, above n 134, at 991.

¹⁷⁸ Sonya Brander "Making a Credible Case for a Legal Personality for the OSCE" *OSCE Magazine* (Vienna, March 2009) at 18.

¹⁷⁹ Seyersted *Common Law*, above n 155, at 51-52.

¹⁸⁰ Brölmann *Institutional Veil*, above n 114, at 85.

demonstrated: by avoiding artificial ties to founding intentions and instead reflecting factual reality, the personality of international organizations is able to evolve as their activities do.¹⁸¹

Conclusion and Recommendations

In summary, the objective approach clearly presents the most coherent and convincing explanation of the juristic basis for the international legal personality of international organizations. On a conceptual level, the function of the concept of personality indicates that it ought logically to derive through operation of the rules of the relevant legal system, rather than being bestowed by particular actors. This would make the granting of personality analogous to the acquisition of statehood, even though the factual reality of an organization remains derivative. The alternative approach, focusing on the ‘will of the founders’ as expressed explicitly or implicitly in the constituent instrument may ignore the objective reality of the organization’s existence, which general international law ought to reflect.

Moreover, an inductive approach, in effect, simply identifies the practical manifestations of the objective criteria for personality and suffers from circularity of reasoning. This circularity cannot be accepted because a formal approach to personality is unattractive and incorrect. Instead, personality is a material concept, entailing certain basic capacities essential to the status of an international legal person, though what an organization may actually do is subject to the functional limitation of its competences. Finally, the objective approach is particularly advantageous since, because it reflects reality, an organization’s legal status may evolve over time as its activities and functions change. The OSCE is a prime example of this process.

It therefore appears that the International Law Commission (ILC) is correct in favouring the objective school in its commentary to the DARIO, but for the wrong reasons. The primacy of this theory does not emerge from the (rather equivocal) ICJ jurisprudence, as asserted by the ILC, but rather from a theoretical analysis, as presented above. Since clarity in the application of the DARIO is essential, it is recommended that an objective definition of ‘international legal personality’ be inserted into article 2.¹⁸²

¹⁸¹ Klabbers “Institutional Ambivalence”, above n 132, at 415.

¹⁸² This amendment has also been suggested in passing by Chittharanjan Felix Amerasinghe “Comments on the ILC’s Draft Articles on the Responsibility of International Organizations” (2012) 9 International Organizations Law Review 29 at 30.

The key feature of objective personality is factual and legal autonomy on the international plane - in effect, a distinct will.¹⁸³ Of the various formulations of objective criteria proposed, Ian Brownlie's appear the most appropriate.¹⁸⁴ Thus, article 2 of the DARIO should be amended to include a new paragraph, stating that an international organization possesses its own 'international legal personality' if there is:

- (1) a permanent association of states, or other organizations, with lawful objects, equipped with organs;
- (2) a distinction, in terms of legal powers and purposes, between the organization and its member states; and
- (3) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.

The insertion of this text would make it clear which organizations may be responsible in their own right under the DARIO, in contrast to those which lack personality, where responsibility for their actions will devolve upon the member states.

¹⁸³ Wessel, above n 116, at 515.

¹⁸⁴ Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 677 and James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 169. For alternative (but in many respects very similar) formulations, see Amerasinghe *Principles*, above n 167, at 82-83; Rama-Montaldo, above n 145, at 144; and Seyersted "Capacities", above n 155, at 53.

Chapter Four: Opposability of an International Organization's Personality Against Non-Member States

This chapter considers whether a non-member state may overlook the personality of an international organization, once it is established through objective criteria under international law. Specifically, could an injured non-member state disregard the responsible organization's personality in order to take a claim directly against a member state? Reasons for seeking to do so might be financial, if the organization lacks sufficient funds to compensate for the injury, or perhaps political. But this will only be possible if the personality of international organizations is not automatically opposable against third parties.

Theoretical Positions

There are two principal schools of thought on this issue. One contends that an international organization's legal personality is automatically opposable only against member states, and not against third parties in the absence of express or implied recognition. What constitutes implied recognition is not entirely clear,¹⁸⁵ but actions such as concluding a treaty or exchanging diplomatic representatives would likely qualify. These presuppose acceptance that the organization is a distinct entity on the international plane and, as a consequence, would presumably estop the state from denying the organization's personality in future.

Proponents of this view¹⁸⁶ often base their argument on the principle of relativity of treaties. Because a treaty cannot create rights or obligations for a third party in the absence of consent,¹⁸⁷ the constituent instrument of an international organization has no legal effect upon non-member states. Accordingly, the founding members' decision to create an international organization through a

¹⁸⁵ Jan Klabbers "Presumptive Personality: The European Union in International Law" in Martti Koskenniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, The Hague, 1998) 231 at 236.

¹⁸⁶ See Philippe Sands and Pierre Klein *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell, London, 2009) at 479-480; Maurice Mendelson "The Definition of 'International Organization' in the International Law Commission's Current Project on the Responsibility of International Organizations" in Maurizio Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, Leiden, 2005) 371 at 382-384 and 388-389; Ignaz Seidl-Hohenveldern "The Legal Personality of International and Supranational Organizations" in *Collected Essays on International Investments and on International Organizations* (Kluwer Law International, The Hague, 1998) 3; Ignaz Seidl-Hohenveldern *Corporations in and under International Law* (Grotius Publications, Cambridge, 1987) at 86-93; Fritz Mann "International Corporations and National Law" (1967) 42 BYBIL 145 at 152-153; Hugo Hahn "Euratom: The Conception of an International Personality" (1958) 71 Harv L Rev 1001 at 1048-1051; and Georg Schwarzenberger *International Law* (3rd ed, Stevens & Sons, London, 1957) at 128 and 138.

¹⁸⁷ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 26 May 1969, entered into force 27 January 1980), art 34.

treaty should not oblige a non-member state to accept that organization as an international legal person. Emphasis is also placed on the fact that international organizations are derivative, rather than original, subjects of international law, and thus recognition ought to be constitutive, rather than declaratory as is generally accepted for states. This position can stand on its own, but it aligns nicely with the ‘will of the founders’ school,¹⁸⁸ where personality itself derives directly from the intentions and actions of the founding states.

The alternative position contends that, once established, an organization’s legal personality is automatically opposable against all other parties in the international legal system.¹⁸⁹ From this perspective, recognition has a declaratory role only: opposable personality exists, independently of the actions of non-member states, as an objective fact.¹⁹⁰ This does not force non-member states to interact with the organization. Instead, they may always conduct any necessary relations solely with the member states and avoid direct contact with the organization.¹⁹¹ But this would be a purely political stance, and if the organization committed an internationally wrongful act causing harm to that state, it would not be possible for it to disregard the organization’s personality and take the relevant claim against a member state.

Just as the non-opposable school aligns with the ‘will of the founders’ position, the opposable school often draws upon objective arguments concerning the source of an international organization’s legal personality. Opposability, however, is a conceptually separate question from the method of acquiring personality and therefore falls to be addressed on its own. There is an academic tendency to term automatically opposable personality ‘objective’,¹⁹² but because one position is not

¹⁸⁸ Somewhat differently, it has been argued that to require recognition is itself inconsistent with tracing personality to the will of the founders. On this view, the necessity of recognition means that their will cannot be wholly constitutive: Klabbers “Presumptive Personality”, above n 185, at 235-6.

¹⁸⁹ Finn Seyersted “Is the International Personality of Intergovernmental Organizations Valid vis-a-vis Non-Members?” (1964) *Indian J Int’l L* 233, and to substantially the same effect, Finn Seyersted *Common Law of International Organizations* (Martinus Nijhoff, Leiden, 2008) at 380-391. See also James Crawford *Brownlie’s Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 170-171; Dapo Akande “International Organizations” in Malcolm Evans (ed) *International Law* (3rd ed, Oxford University Press, Oxford, 2010) 252 at 259; and Andrew Stumer “Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections” (2007) 48 *Harv Int’l LJ* 553 at 573.

¹⁹⁰ Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) at 48.

¹⁹¹ Seyersted “Non-Members”, above n 189, at 255.

¹⁹² See, for example, Chittharanjan Felix Amerasinghe *Principles of the Institutional Law of International Organizations* (2nd ed, Cambridge University Press, Cambridge, 2005) at 86.

necessarily mandated by the other, such a blurring of terminology will be avoided here. Nonetheless, it is worth noting that the opposability debate reflects the differing viewpoints as to the source of legal personality: the objective operation of general international law or the founding states' intentions. More broadly, this can be tied back to contrasting conceptions of international organizations, as open or closed entities.¹⁹³ Non-opposable personality evokes an 'open' image of organizations as legal regimes existing purely between member states. Automatically opposable personality, on the other hand, suggests that organizations are 'closed' beings, as independent actors in their own right.¹⁹⁴ The issue, therefore, strikes at the heart of the conceptualisation of international organizations.

Judicial Consideration

In *Reparation for Injuries*, the International Court of Justice (ICJ) considered the opposability of the United Nations' (UN) legal personality. This was necessary because Israel was not a member of the UN at the time of the assassination of Count Folke Bernadotte, which gave rise to the UN's claim against it.¹⁹⁵ On this point, the Court held that:¹⁹⁶

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 an entity possessing objective international personality, and not merely personality recognised by them alone ...

As a step in the development of international institutional law, this finding was extremely important. Opposability of personality confirmed the UN as an effective legal actor in a previously state-centric system and opened the way for other international institutions to become the same.¹⁹⁷ Unfortunately, though, the Court's reasoning was directed purely at the UN; there was no attempt to lay out particular criteria for when the personality of an international organization will be

¹⁹³ Catherine Brölmann "A Flat Earth? International Organizations in the System of International Law" (2001) 70 Nordic J Int'l L 319 at 321.

¹⁹⁴ Catherine Brölmann *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing, Oxford, 2007) at 88-89.

¹⁹⁵ Count Bernadotte was assassinated on 17 September 1948 and Israel became a member of the United Nations on 11 May 1949: *Admission of Israel to membership in the United Nations* GA Res 273, III (1949).

¹⁹⁶ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 185.

¹⁹⁷ David Bederman "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel" (1996) 36 Va J Int'l L 275 at 369-370.

automatically opposable and when it will not.¹⁹⁸ For that reason, the non-opposable school will generally treat the UN as a special case and argue that the personality of all other organizations need not be observed by non-members.¹⁹⁹ Commentators highlight the Court's emphasis on the UN's near universal membership and the express recognition, earlier in the judgment, that it is "at present the supreme type of international organization."²⁰⁰ These factors, in conjunction, are probably unique to the UN and are logically conducive to opposable personality.²⁰¹

But equally, the ICJ did not explicitly suggest that opposable personality should be limited to the UN. While noting that the UN membership encompassed the majority of the international community, the Court did not make this an express condition for opposable personality.²⁰² As a result, the argument is open that in practice the Court's finding has been extended to all international organizations, regardless of the number of member states.²⁰³ Partly, this is because there are very few, if any, occasions when the opposability of an organization's personality has been legitimately disputed. On a more theoretical level, however, if recognition is not constitutive in one case, it is difficult to reason why it necessarily should be so for others. The size of an organization's membership arguably does not affect the position of a non-member, as far as decisions to interact with that organization are concerned.²⁰⁴ *Reparation for Injuries* may therefore be viewed as supporting automatic opposability of personality.

¹⁹⁸ Amerasinghe *Principles*, above n 192, at 87.

¹⁹⁹ Mendelson, above n 186, at 384-385. See also Ignaz Seidl-Hohenveldern "Liability of Member States for Acts or Omissions of an International Organization" in Sabine Schlemmer-Schulte and Ko-Yung Tung (eds) *Liber Amicorum Ibrahim FI Shihata: International Finance and Development Law* (Kluwer Law International, The Hague, 2001) 727 at 732-733.

²⁰⁰ *Reparation for Injuries*, above n 196, at 179. Contrast this with Judge Badawi Pasha's statement in his dissenting opinion at 212 that the "political character of the Organization and its importance in the hierarchy of international bodies cannot be pertinent in this case, nor can it justify the granting to the Organization, to the exclusion of other bodies, of a right not derived from a provision common to all."

²⁰¹ Richard Collins "Non-State Actors in International Institutional Law: Non-State, Inter-State or Supra-State? The Peculiar Identity of the Intergovernmental Organization" in Jean d'Aspremont (ed) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, London and New York, 2011) 311 at 316-317.

²⁰² Amerasinghe *Principles*, above n 192, at 90.

²⁰³ Crawford *Brownlie's*, above n 189, at 171.

²⁰⁴ Amerasinghe *Principles*, above n 192, at 90.

Recognition has arguably been held to be constitutive for the International Committee of the Red Cross (ICRC). In *Prosecutor v Simic*,²⁰⁵ the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held that the ICRC possessed a customary international law right to confidentiality, and in doing so, considered that it has international legal personality. The ICRC is an association of private persons, not an international organization, but it is given functions and responsibilities under the Geneva Conventions of 1949 and the two Additional Protocols of 1977.²⁰⁶ That the vast majority of states are parties to these Conventions was crucial to the Trial Chamber's finding that the ICRC is an international legal person.²⁰⁷ It might therefore be argued that recognition by the international community has effectively conferred personality upon the ICRC,²⁰⁸ leading to a right of non-disclosure of confidential information enforceable against an individual.

The significance of this reasoning, however, must surely be limited when considering the opposability of an international organization's personality against a non-member state. The ICRC is not an international organization, but rather a *sui generis* private entity with some acknowledgment of its functions at international law. Its international status, therefore, would presumably not derive from the objective operation of international law, but instead from acceptance by states in the manner outlined by the Trial Chamber. Moreover, *Simic* does not concern an attempt by a state to dispute the personality of the ICRC. Opposability itself, in terms of whether a state which is not party to the Geneva Conventions would be entitled to disregard its personality, is not in issue. But the finding that recognition can play a constitutive role at international law for private associations is certainly worthy of note.

²⁰⁵ *Prosecutor v Simic (Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness)* ICTY Trial Chamber IT-95-9-T, 27 July 1999.

²⁰⁶ Geneva Convention I 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950), arts 3, 9 and 10; Geneva Convention II 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950), arts 3, 9 and 10; Geneva Convention III 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950), arts 3, 9, 10 and 126; Geneva Convention IV 75 UNTS 387 (opened for signature 12 August 1949, entered into force 21 October 1950), arts 3, 10, 11 and 143; and Geneva Convention Protocol I 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978), art 81.

²⁰⁷ *Simic*, above n 205, at [46]-[48] and fn 9.

²⁰⁸ Roland Portmann *Legal Personality in International Law* (Cambridge University Press, Cambridge, 2010) at 114 and Christian Henderson "Contested States and the Rights and Obligations of the *Jus Ad Bellum*" (2013) 21 *Cardozo J Int'l & Comp L* 367 at 378-379.

Consideration of the opposability issue in domestic courts has been meagre. In *International Tin Council v Amalgamet*,²⁰⁹ the New York Supreme Court accepted the International Tin Council as a defendant, of which the United States (US) was not a member, without any mention of express or implied recognition.²¹⁰ Equally, the Swiss courts have, on several occasions, recognised the personality of organizations despite Switzerland not being a member.²¹¹ In *Arab Monetary Fund v Hashim*, Hoffmann J (as he then was) made an obiter comment that under international law, there is no obligation on a state to recognise an organization if it was not a party to the constituent treaty.²¹² The Court of Appeal and House of Lords did not address this point on appeal. On balance, then, little guidance on the opposability of personality can be obtained from the jurisprudence of domestic courts.

Practice

Express recognition of an international organization's personality by a non-member state is extremely rare. The sole example in the last seventy years is that of Switzerland recognising the UN in a 1946 agreement concerning the utilisation of premises in Geneva previously occupied by the League of Nations.²¹³ In the preceding negotiations, the recognition provision was seen as necessary because Switzerland was not a member of the UN,²¹⁴ though this all occurred before *Reparation for Injuries*. Save for this exception, there is, in effect, a complete absence of formal recognition of international organizations in state practice.²¹⁵

²⁰⁹ *International Tin Council v Amalgamet Inc* 524 NYS 2d 971 (NY 1988).

²¹⁰ Interestingly, there is provision made for a form of recognition of international organizations in United States law. Under the International Organizations Immunities Act 22 USC § 288-288F, the President may nominate an international organization by executive order to enjoy the same privileges and immunities as those held by foreign states. No such nomination was made in the case of the International Tin Council.

²¹¹ *In re Poncet* (1948) 15 ILR 346 (Federal Tribunal of Switzerland) and *Case Concerning the Award in the Westland Helicopters Arbitration* (1989) 28 ILM 687 at 689 (Court of Justice of Geneva and Federal Tribunal of Switzerland).

²¹² *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114 (Ch D) at 120.

²¹³ "The Swiss Federal Council recognises the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organization cannot be sued before the Swiss courts without its express consent": Interim Agreement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council 1 UNTS 165 (signed 11 June 1946, entered into force 1 July 1946), art 1.

²¹⁴ Mendelson, above n 186, at 387.

²¹⁵ Hans Blix "Contemporary Aspects of Recognition" (1970-II) 139 Recueil Des Cours 587 at 621.

In terms of guidance on recognition, the US Restatement of Foreign Relations Law suggests that a non-member state is not obliged to recognise the personality of an international organization which has only a few members or is regional in nature. If the organization has a substantial membership, then its personality will be opposable against all states.²¹⁶ This appears to be drawn from a reading of *Reparation for Injuries* as conferring opposable personality upon all universal (or nearly-universal) organizations. In the United Kingdom (UK), a 1978 letter from the Minister of State, Foreign and Commonwealth Office, suggests that a financial organization, created by a treaty to which the UK is not a party, would ordinarily enjoy legal personality in the UK without executive recognition. If the courts were to require such recognition, the Foreign and Commonwealth Office would give it, provided that the entity possessed legal personality under its constituent instrument and within the jurisdiction of at least one member state.²¹⁷ The function of recognition referred to here, however, primarily relates to domestic legal personality,²¹⁸ and there is certainly no general practice of recognition of international organizations by the UK executive.²¹⁹

On several occasions, a non-member state has attempted to dispute an international organization's personality. Without exception, however, these actions would appear to be motivated by political views or practical constraints and do not demonstrate adherence to any conceptual legal position. In 1939, Germany and Italy brought a complaint to Switzerland concerning radio transmission of alleged propaganda from Swiss territory by the League of Nations.²²⁰ Switzerland did not accept responsibility, but encouraged the League of Nations to stop the transmissions, which it later did. This accorded with the Swiss policy of neutrality and did not reflect any acceptance that Germany and Italy were entitled to hold Switzerland responsible for activities of the League. Moreover, Germany and Italy were both formerly members of the League and thus would presumably be estopped from denying its personality, even if it were not automatically opposable. In legal terms,

²¹⁶ American Law Institute *Restatement of the Foreign Relations Law of the United States* (3rd ed, St Paul, Minnesota, 1987) § 223.

²¹⁷ The relevant correspondence, between the Minister of State, Foreign and Commonwealth Office and the Deputy Governor of the Bank of England, is published in Geoffrey Marston (ed) "United Kingdom Materials on International Law 1978" (1978) 49 BYBIL 329 at 346-348.

²¹⁸ Compare Katherine Reece Thomas "Non-Recognition, Personality and Capacity: The Palestine Liberation Organization and the Palestinian Authority in English Law" (2000) 29 Anglo-Am L R 228 at 244.

²¹⁹ Geoffrey Marston "The Personality of International Organisations in English Law" (1997) 2 Hofstra L & Pol'y Symp 75 at 110-111.

²²⁰ Ignaz Seidl-Hohenveldern "Responsibility of Member States of an International Organization for Acts of that Organization" in *Collected Essays on International Investments and on International Organizations* (Kluwer Law International, The Hague, 1998) 63 at 64.

their actions may be better seen as exercising a purported right to require neutral states to ensure another party does not use their territory in a non-neutral manner.²²¹

For many years, the Union of Soviet Socialist Republics (USSR) refused to recognise or interact with the European Economic Community (EEC).²²² In 1974, the EEC decided to create a Centre of Professional Training in West Berlin. The USSR argued that this violated the Quadripartite Agreement,²²³ because it effectively established new links between the Federal Republic of Germany (FRG) and West Berlin. Due to its stance on the EEC, the USSR sought to hold the FRG responsible for breach of this agreement and argued, in effect, that it was entitled to disregard the EEC's personality.²²⁴ This action was driven by political concerns and because the EEC did not accept that the USSR was able to lift its 'institutional veil',²²⁵ practical significance to the opposability debate is limited. Moreover, this is arguably not a legitimate refusal to acknowledge personality anyway, due to possible implied recognition of the EEC in the USSR's earlier efforts to establish relations between itself and the Council of Mutual Economic Aid, and the EEC and its member states.²²⁶

Two more recent events may reflect efforts to disregard the legal personality of the North American Treaty Organization (NATO). On 7 May 1999, during the bombing campaign conducted by NATO against Yugoslavia, five bombs hit the Chinese Embassy in Belgrade. Three Chinese reporters were killed, and significant damage to the building resulted.²²⁷ After months of acrimony, the US

²²¹ Seyersted "Non-Members", above n 189, at 256.

²²² See, for example, the reservation of the USSR when ratifying the International Natural Rubber Agreement 1201 UNTS 191 (opened for signature 6 October 1979, entered into force 23 October 1980) at 396: "In the event that the European Economic Community becomes a party to this Agreement, the participation of the Union of Soviet Socialist Republics in this Agreement will not give rise to any obligations on its part to the European Economic Community." This declaration was not accepted by the United Kingdom Government.

²²³ Quadripartite Agreement 880 UNTS 124 (opened for signature 3 September 1971, entered into force 3 June 1972).

²²⁴ Seidl-Hohenveldern *Corporations*, above n 186, at 89-90.

²²⁵ The term 'institutional veil' was coined by Brölmann *Institutional Veil*, above n 194.

²²⁶ Seidl-Hohenveldern "Responsibility", above n 220, at 68-69.

²²⁷ International Criminal Tribunal for the Former Yugoslavia *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (The Hague, 13 June 2000) at [80].

formerly apologised and negotiated a settlement with China.²²⁸ At first sight, it might appear that China overlooked NATO's personality and took a claim of international responsibility directly against the US.²²⁹ But, in fact, the bombing was directed and led by the US, with the NATO command structure apparently lacking control over the planes that flew the mission.²³⁰ It is therefore likely that the US was responsible for the damage in its own right. NATO, on the other hand, would arguably lack responsibility because it did not have effective control over the attack.²³¹

Following the conclusion of the NATO bombing campaign, Serbia and Montenegro brought claims against ten NATO member states in the ICJ, arguing that the use of force had been unlawful. These *Legality of Use of Force* cases were struck out for lack of jurisdiction.²³² If jurisdiction existed, however, the ICJ would have been forced to consider whether NATO possessed its own international legal personality and whether this personality was opposable against a non-member state.²³³ The filing of such claims might suggest that Serbia and Montenegro should not have to

²²⁸ \$4.5 million was paid in compensation to victims of the bombing and surviving relatives and \$28 million was paid to China for damage to the Embassy: Elisabeth Rosenthal "US Agrees to Pay China \$28 Million for Bombing" *The New York Times* (online ed, New York, 16 December 1999).

²²⁹ Somewhat differently, it has been argued that these events demonstrate that NATO lacks international legal personality: Tarcisio Gazzini "The Relationship Between International Legal Personality and the Autonomy of International Organizations" in Richard Collins and Nigel White (eds) *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London and New York, 2011) 196 at 203 and fn 50.

²³⁰ Craig Whitney "US Military Acted Outside NATO Framework During Kosovo Conflict, France Says" *The New York Times* (online ed, New York, 11 November 1999).

²³¹ Under article 7 of the *Draft Articles on the Responsibility of International Organizations*, the "conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct." Contrast with *Behrami and Behrami v France* (71412/01) Grand Chamber, ECHR 2 May 2007 and *Saramati v France, Germany and Norway* (78166/01) Grand Chamber, ECHR 2 May 2007, where the European Court of Human Rights preferred a test of ultimate authority and control.

²³² *Legality of Use of Force (Yugoslavia v United States of America) (Provisional Measures)* [1999] ICJ Rep 916; *Legality of Use of Force (Yugoslavia v Spain) (Provisional Measures)* [1999] ICJ Rep 761; *Legality of Use of Force (Serbia and Montenegro v United Kingdom) (Preliminary Objections)* [2004] ICJ Rep 1307; *Legality of Use of Force (Serbia and Montenegro v Portugal) (Preliminary Objections)* [2004] ICJ Rep 1160; *Legality of Use of Force (Serbia and Montenegro v Netherlands) (Preliminary Objections)* [2004] ICJ Rep 1011; *Legality of Use of Force (Serbia and Montenegro v Italy) (Preliminary Objections)* [2004] ICJ Rep 865; *Legality of Use of Force (Serbia and Montenegro v Germany) (Preliminary Objections)* [2004] ICJ Rep 720; *Legality of Use of Force (Serbia and Montenegro v France) (Preliminary Objections)* [2004] ICJ Rep 575; *Legality of Use of Force (Serbia and Montenegro v Canada) (Preliminary Objections)* [2004] ICJ Rep 429; and *Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Rep 279.

²³³ Also raised was the issue of whether member states are jointly and severally liable for the actions of an organization with personality: Stumer, above n 189, at 557. See also Dan Sarooshi *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, Oxford, 2005) at 47-49.

accept NATO's personality. But in fact, it was not possible for NATO to be impleaded directly because, under article 34(1) of the Statute of the ICJ, only states may be parties to contentious cases before it. Serbia and Montenegro had no option but to file against NATO's member states and hence these claims should carry little weight in the opposability debate.

The few cases when a non-member state has sought to disregard the personality of an international organization thus provide little support for the non-opposable school. In each situation, the actions of the non-member states have been primarily motivated by political or practical concerns, rather than a belief that the personality of the organization is not opposable against them under international law. Together with the absence of a general practice of express recognition or non-recognition of international organizations, this leaves the non-opposable theory without basis in current practice.²³⁴ The automatically opposable school therefore appears more sound.

The Conceptual Primacy of Automatic Opposability

Additional to the (admittedly somewhat equivocal) support in jurisprudence and practice for automatic opposability of an international organization's legal personality, there are several powerful theoretical arguments as to why this is the better position. First, it aligns with the modern understanding of the relationship between statehood and recognition. The constitutive theory of state recognition is now generally accepted to be flawed; statehood exists independently of formal acts of recognition by other states.²³⁵ This is not to say that recognition may not have political significance, but it is declaratory only, providing evidence of statehood but not establishing it. Deliberate non-recognition of an entity claiming statehood by an accepted state does not qualify the latter to ignore the status of the former. In part, this is because statehood is determined by objective criteria and derives from the operation of general international law.²³⁶ If the same is true for the personality of international organizations, as was argued in Chapter Three, then it is logical for recognition of organizations to be declaratory rather than constitutive too.

²³⁴ Amerasinghe *Principles*, above n 192, at 87-88.

²³⁵ James Crawford *The Creation of States in International Law* (2nd ed, Clarendon Press, Oxford, 2006) at 19-28. For an alternative analysis, arguing that neither the constitutive nor the declaratory view of recognition can be coherently maintained, see Martti Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company, Helsinki, 1989) at 236-245.

²³⁶ Crawford *Creation*, above n 235, at 5.

Personality and statehood are different concepts, leaving the analogy imperfect. Hence the arguments that recognition need not function identically for each,²³⁷ especially since states are original subjects of international law whereas international organizations, owing their existence to the actions of states, are merely derivative entities.²³⁸ There is no legal entity behind a non-recognised state with which a non-recognising state may prefer to interact, yet a non-member state may always choose to conduct relations directly with member states rather than through the interface of an international organization. But this argument fails to justify why recognition should be constitutive, given that personality does not derive from the actions of states. Because only the factual existence of an organization is created by the founding states, with personality objectively granted through international law, statehood and personality both issue from the same source. Consequently, recognition ought to operate in an identical, declaratory fashion in each case.²³⁹

Similar considerations dispose of what is probably the strongest argument for the non-opposable school, that due to the relativity of treaties, personality does not have to be accepted by non-member states. It is an accepted rule of international law, codified in article 34 of the Vienna Convention on the Law of Treaties 1969,²⁴⁰ that a treaty cannot impose obligations upon, or establish rights for, a non-party state without its consent. An international organization is factually created by its constituent instrument and its legal personality might create obligations for a non-member in the sense of forcing it to present any international responsibility claims to that organization, rather than to a member state whose organs carried out the offending action.²⁴¹ If so, consent, in the form of recognition, would be necessary before personality would be opposable against a state which is not a party to the organization's constituent instrument.

Some commentators have sought to combat this argument by positing that the organization's founding treaty is more than a mere contract between the member states. Instead, it might be viewed as a constitution, creating a separate legal order which does not raise the same concerns

²³⁷ Mendelson, above n 186, at 388 fn 67.

²³⁸ Hahn, above n 186, at 1049-1050.

²³⁹ Seyersted "Non-Members", above n 189, at 261.

²⁴⁰ Vienna Convention, above n 187.

²⁴¹ Sands and Klein, above n 186, at 479-480.

over the relativity of treaties.²⁴² Without casting judgment on the merits of this approach, it is possible to move past the relativity of treaties argument by once again examining the link between the constituent instrument and the organization's legal personality. The organization is factually established by the founding treaty but its personality derives instead from general international law. Personality is not a direct legal effect of the treaty²⁴³ and therefore the consent of third party states is not a precondition to making that personality opposable against them. Moreover, it is difficult to see opposable personality as an obligation in a strict sense anyway; a non-member state may always pursue a political strategy of limiting its interactions to the member states, and just as statehood does not give the subject a right to impose obligations on another state without consent, there is no suggestion that opposable personality allows an organization to do the same.²⁴⁴ Hence the relativity of treaties is no obstacle to opposability of personality.

A more idiosyncratic argument for non-opposable personality is put forward by Ignaz Seidl-Hohenveldern. International organizations rarely hold property in non-member states and tend to have fewer financial reserves available for compensation than their member states. As such, an injured state may view the responsible organization as a 'worse debtor' than the member state which, if the organization lacked personality, would in the normal course be obliged to compensate for the injury. Seidl-Hohenveldern draws upon the private law principle that a creditor is not obliged without consent to exchange a relatively 'good debtor' for an inferior one. Applying that principle to this situation, a non-member state should be able to dispute the personality of the organization responsible for damage caused to it.²⁴⁵

At a preliminary level, caution is necessary when applying private law analogies to international organizations. This is not to say that such analogies can never be instructive; quite the opposite,

²⁴² Brölmann *Institutional Veil*, above n 194, at 89. For a detailed analysis of the idea of constituent instruments as constitutions, see Christiane Ahlborn "The Rules of International Organizations and the Law of International Responsibility" (2011) 8 *International Organizations Law Review* 397 at 412-417.

²⁴³ Gaetano Arangio-Ruiz "The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue" (1997) 1 *EJIL* 1 at 15.

²⁴⁴ Seyersted "Non-Members", above n 189, at 253.

²⁴⁵ Ignaz Seidl-Hohenveldern "The Legal Personality of International and Supranational Organizations" in *Collected Essays on International Investments and on International Organizations* (Kluwer Law International, The Hague, 1998) 3 at 20-22.

given the potential for gaps in international law²⁴⁶ and the recognition of general principles of law as a source of international law in article 38(1)(c) of the Statute of the ICJ. But the difficulty arises in that international organizations really have no parallel in private law, and even if such a parallel could be found, different domestic legal systems address the liability of members of artificial legal persons, such as companies, partnerships and *sociétés en nom collectif*, in different ways.²⁴⁷ Hence the claimed application of the ‘exchange of debtors’ principle to international organizations is questionable.

More substantively, even if the principle is accepted in this context and member states do remain responsible following a conferral of powers upon an international organization, this responsibility should logically exist whether the non-member state has recognised the personality of the organization or not.²⁴⁸ Such responsibility would arise as a matter of secondary or concurrent liability, in addition to the organization’s primary responsibility. Whether the ‘exchange of debtors’ principle is applicable to international organizations therefore has no bearing on the opposability debate. Application of that principle does not lead to a right to disregard the responsible international organization’s personality.

The current discourse on member state liability is, in fact, much more sophisticated than blanket application of an ‘exchange of debtors’ principle. Several studies have concluded that there is no rule of international law whereby member states are secondarily liable for the obligations of an international organization purely by reason of their membership.²⁴⁹ Moreover, the potential responsibility of member states for an organization’s acts arguably depends upon the form in which

²⁴⁶ Christiane Ahlborn “The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the ‘Copy-Paste Approach’” (2012) 9 International Organizations Law Review 53 at 56. For specific consideration of the use of public and administrative law principles in international institutional law, see Dan Sarooshi “The Role of Domestic Public Law Analogies in the Law of International Organizations” (2008) 5 International Organizations Law Review 237.

²⁴⁷ Rosalyn Higgins “Report for Institute de Droit International, The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties” in *Themes and Theories: Selected Essays, Speeches and Writings in International Law* (Oxford University Press, Oxford, 2009) 834 at 864.

²⁴⁸ Seyersted “Non-Members”, above n 189, at 248-249.

²⁴⁹ Chittharanjan Felix Amerasinghe “Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent” (1991) 85 AJIL 259 at 280; Higgins “Report”, above n 247, at 862-863; Institut De Droit International *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties* (Session of Lisbon, 1 September 1995), arts 5 and 6; and Brölmann “Flat Earth”, above n 193, at 335. See also *JH Rayner Ltd v Department of Trade and Industry* [1989] 1 Ch 72 (CA) at 185 per Kerr LJ, though contrast Nourse LJ (dissenting) at 210.

a particular state power was conferred upon that organization. Using Dan Sarooshi's typology,²⁵⁰ a state may either establish an agency relationship, or delegate or transfer powers to the international organization. Which form the conferral takes depends upon its revocability, the degree of control retained by the state over the organization's exercise of the powers and whether the state reserves a right to concurrently utilise such powers. In each case, the member state's responsibility for internationally wrongful acts caused through the organization's exercise of these powers is different. As a principal, the state will be responsible for acts falling within an agency situation, but with a delegation of powers, responsibility cannot be attributed to the state purely through its relationship with the organization. If the powers were transferred, the issue is more complex but state responsibility may arise where the state's internal law empowers the organization's international exercise of the conferred powers.²⁵¹ In effect, these developments in the theory of member state responsibility render irrelevant the 'exchange of debtors' principle, regardless of any merit it may have once possessed.

Many of the arguments put forward by the non-opposable school are ultimately premised on an outdated conception of international law. To make the opposability of personality contingent upon recognition by individual states recalls a transitional period in international law when states were no longer viewed as the only relevant subjects, but the will of states represented the essence of binding obligations. State consent was the only route through which other international actors might acquire legal personality, making recognition essential.²⁵² Karl Strupp, Arrigo Cavaglieri and Georg Schwarzenberger previously supported this proposition, but it is no longer an accurate description of the international legal system. With the emergence of a legal order over and above sovereign states,²⁵³ the recognition conception is anachronistic. The assumptions underpinning it are inconsistent with the current view of statehood as a status objectively conferred by international law

²⁵⁰ Sarooshi *International Organizations*, above n 233, at 28-32.

²⁵¹ Ibid, at 50-51 (agency relationships), 63-63 (delegations) and 101-107 (transfers). The issue of member state responsibility considered here is limited to responsibility arising purely through the legal relationship between the organization and the state. A member state may alternatively be responsible through its own acts or omissions committed in connection with the organization's internationally wrongful acts, in which case responsibility would effectively be analogous to party liability in criminal law. See articles 58, 59, 60, 62 and 63 of the *Draft Articles on the Responsibility of International Organizations* (published in *Report of the International Law Commission on the work of its sixty-third session A/66/10* (2011) at [87]).

²⁵² Portmann, above n 208, at 80-84. According to *Simic*, state consent remains a route through which private associations, like the ICRC, may acquire some form of international legal personality: *Simic*, above n 205, at [46]-[48].

²⁵³ See Christoph Schreuer "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" (1993) EJIL 447.

rather than a pre-existing fact²⁵⁴ and also with the position that general international law may apply to a state regardless of its specific consent.²⁵⁵ Concerns expressed about allowing the actions of only a few founding states to create new international subjects²⁵⁶ therefore lack cogency. In the modern understanding of international law, conferral of personality is a matter for the international legal order, and ought to take effect regardless of individual recognition by states.

It remains to consider the possibility of drawing a distinction between open and closed organizations.²⁵⁷ Arguments have been made, based on *Reparation for Injuries*, that opposable personality is only a feature of international organizations with a universal membership; if the organization is regional in character, or closed to certain states, its personality will only be opposable through recognition.²⁵⁸ Universal membership, however, was not treated as a precondition of opposable personality in *Reparation for Injuries* but only cited in connection with the Court's finding. More particularly, if the personality of all international organizations derives from general international law, there is no logical reason for this difference. A non-member state should in principle be no more justified in disregarding the personality of a closed or regional organization than that of one which it has had the opportunity to join.

Non-member states are protected against organizations of a fraudulent nature by article 61 of the Draft Articles on the Responsibility of International Organizations (DARIO). Under this article, a non-member state is entitled to lift the 'institutional veil' and take a claim for international responsibility directly to a member state where that state has essentially circumvented its

²⁵⁴ Crawford *Creation*, above n 235, at 5.

²⁵⁵ Portmann, above n 208, at 248-264 and 269.

²⁵⁶ Mendelson, above n 186, at 388.

²⁵⁷ Note that 'open' and 'closed' are used here to refer to whether membership in an international organization is open to all states or only to a select few. This contrasts with the use of these terms in the discussion, above, of the competing images of international organizations.

²⁵⁸ Henry Schermers and Niels Blokker *International Institutional Law* (5th ed, Martinus Nijhoff, Leiden, 2011) at 990-991. See similarly *Restatement of the Foreign Relations Law of the United States*, above n 216, at § 223.

obligations through the actions of the international organization.²⁵⁹ States accordingly may not set up organizations in order to commit internationally wrongful acts with impunity.²⁶⁰ This leaves without foundation the concern, arguably lying behind the asserted open-closed distinction, that automatically opposable personality leaves a non-member state vulnerable to such scenarios. Neither principle nor policy therefore supports making an exception to opposable personality for closed organizations.

Conclusion

That the international legal personality of international organizations ought to be opposable against non-member states, even in the absence of recognition, is substantiated by both theory and practice. On that ground, the automatically opposable school is clearly the more correct position to take. Once an organization's legal personality is established under general international law on the basis of objective criteria, a non-member state is not entitled to disregard it. The only exception operates in the limited circumstances set out in article 61 of the DARIO. The provisions of the DARIO should therefore be expected to apply equally to states suffering injury through an internationally wrongful act of an international organization, whether they are members of that organization or not. International organizations are responsible in an identical fashion to member and non-member states alike.

²⁵⁹ Article 61 reads "(1) A state member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the state's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the state, would have constituted a breach of the obligation. (2) Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization." This article is towards the progressive development end of the spectrum but the underlying idea, preventing abuse of an international organization's separate personality, received broad endorsement in submissions by states to the International Law Commission: Giorgio Gaja *Seventh report on responsibility of international organizations* A/CN.4/610 (2009) at [77]. Support for this idea is also present in academic commentary: see, for example, Moshe Hirsch *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Martinus Nijhoff, Dordrecht, 1995) at 170-172.

²⁶⁰ For consideration of this exception to opposable personality, see Jean d'Aspremont "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States" (2007) 4 *International Organizations Law Review* 91 and Odette Murray "Piercing the Corporate Veil: The Responsibility of Member States of an International Organization" (2011) 8 *International Organizations Law Review* 291. Also, more generally, see Stumer, above n 189.

General Conclusions

The DARIO is currently on the provisional agenda of the 69th session of the UN General Assembly, beginning in September 2014, with a view to considering whether it may form the basis of a possible convention on the responsibility of international organizations.²⁶¹ This convention - of which the likelihood, on a realistic assessment, is slight - would be an important step towards ensuring the legal accountability of international organizations. Responsibility, however, is premised under international law upon the possession of legal personality and it is essential for clarity of application of the DARIO that this premise be adequately defined. Currently, the DARIO contains no guidance as to when an international organization acquires personality and the commentary to the DARIO merely asserts that the ICJ has apparently taken a liberal view of this issue, omitting to set any particularly stringent requirements.²⁶² That is, unfortunately, misleading because, as demonstrated above, the ICJ's jurisprudence does not clearly address the question and the dicta cited by the ILC are taken out of context.

It is therefore recommended that the DARIO be amended to include a specific definition of 'international legal personality' applicable to international organizations. With such a definition in place, it will be clearly apparent which organizations are responsible under the DARIO for internationally wrongful acts. All other organizations, lacking personality, will not be legally responsible and any states injured by their acts or omissions must take their claims for reparation to any member states to which responsibility is attributable. This definition ought to be founded on the objective criteria for possession of personality, pointing to the existence of factual and legal autonomy on the international plane. Despite a significant doctrinal divide, the objective theory most cogently explains the juristic basis of such personality, as deriving from the general operation of international law in a similar manner to statehood.

Some have argued that once the personality of an international organization has been established, a non-member state retains a right to overlook it. This right would essentially give an injured non-member state the option of claiming reparation from the responsible international organization or from a member state to which the particular actions might otherwise be attributable if the organization lacked personality. This argument, however, lacks any real basis in practice and,

²⁶¹ *Resolution on the responsibility of international organizations* GA Res 66/100, A/Res/66/100 (2011).

²⁶² *Draft Articles on the Responsibility of International Organizations, with commentaries*, at 9. Published in *Report of the International Law Commission on the work of its sixty-third session* A/66/10 (2011) at [88].

bearing in mind that the source of personality is general international law, its asserted theoretical justifications are ultimately unpersuasive. Once the objective criteria for personality are met, the organization is necessarily responsible to both member and non-member states in accordance with the DARIO.

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