3

The legal position of international organizations

Introduction

International organizations are generally counted among the subjects of international law, together with states, individuals and perhaps some other entities as well.[1] Thus, in accordance with the standard definition of 'subject', they are deemed capable of independently bearing rights and obligations under international law.[2]

This has not always been the case. In the late nineteenth and early twentieth century, it was customary for international lawyers to claim that states, and states alone, could independently bear rights and obligations under international law.[3] Other entities were not to be considered as subjects or, at best, were analysed in state-centric terms: as gatherings of states, or as derogations from statehood (servitudes, for example) or as essentially unclassifiable experiments.[4] And the question as to whether international organizations could be regarded as subjects of international law reverberated well into the second half of the twentieth century.[5]

[1] Sometimes also international corporations, national liberation movements and belligerents are counted among the subjects of international law.

[2] Compare, e.g., Bin Cheng, 'Introduction to Subjects of International Law', in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* (Dordrecht, 1991), 23–40. A recent study of the EC as a subject of international law is Jan Vanhamme, *Volkenrechtelijke beginselen in het Europees recht* (Groningen, 2001).

[3] See David J. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 VaJIL, 275–377.

[4] Thus, Verzijl treats the League of Nations and the UN under the heading of 'exceptional and unique persons', alongside belligerents, internationalized territories and the pope. See J. H. W. Verzijl, *International Law in Historical Perspective. Part II: International Persons* (Leiden, 1969), esp. pp. 303–5.

[5] See, e.g., John Fischer Williams, 'The Status of the League of Nations in International Law', reprinted in his *Chapters on Current International Law and the League of Nations* (London, 1929), 477–500; C. Wilfred Jenks, *Law In the World Community* (London, 1967), esp. p. 7; also C. N. Okeke, *Controversial Subjects of Contemporary International Law* (Rotterdam, 1974), chs. 10–11.

As the International Court of Justice recognized in the *Reparation for Injuries* opinion, international law's subjects may come in various shapes and guises. The Court held that: '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community'.[6]

There is no standard set of rights and obligations each and every subject of international law possesses; instead, 'subject' is a relative notion, the precise contents of which may differ from subject to subject and even between various subjects of the same category. While is it generally recognized that at least international organizations and individuals can be viewed as subjects of international law, not all individuals enjoy the exact same bundle of rights and obligations. Similarly, not all organizations possess identical sets of rights and obligations.

Indicators of 'subjectivity'

The idea of 'subjects' of the international legal system is a confusing idea, and the confusion stems in part from being conflated with the notion of international legal personality. For many authors, understandably, subjectivity and legal personality are one and the same, and there is nothing particularly wrong with treating them as such in pragmatic fashion.[7] Yet, strictly speaking, they are not identical. To be a subject of international law is to be given an academic label: a subject of international law is the legitimate subject of international legal research and reflection. Any attempt by an international lawyer to study, for example, the workings of the city of Amsterdam, or of the Finnish Icehockey Association, or the Roman Catholic church, can be challenged in terms of subjectivity: as these are not generally regarded as subjects of international law, the international legal scholar may have to address claims that he or she could have spent his or her time better.

While subjectivity is, thus, a status conferred by the academic community (and thus by definition inaccurate and sketchy), personality is, in principle at any rate, a status conferred by the legal system. The confusion then stems from the circumstance that the international legal system does not have a

[6] *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174, p. 178.

[7] So, e.g., Bengt Broms, 'Subjects: Entitlements In the International Legal System', in R. St J. MacDonald & D. M. Johnston (eds.), *The Structure and Process of International Law* (The Hague, 1983), 383–423.

single authority endowed with the power to confer personality; indeed, in an important sense, the academic community makes up the legal system.[8]

Given the fluid nature of the very notion of subjects of international law, and the circumstance that different subjects may entertain different sets of rights and obligations under international law, the precise degree of rights and obligations is a matter of analysis, and as a starting point most international lawyers will determine the extent of 'subjectivity'[9] of any possible subject with the help of three indicators.[10] The first is, whether the subject in question possesses the right to enter into international agreements; the second is whether they have the right to send and receive legations; and the third is whether they can bring and receive international claims. These are not, to be sure, strictly legal requirements; we cannot maintain that if an organization does not exercise one of them, it therefore ceases to be an organization.[11] Much less do they constitute a comprehensive definition of subjects of international law. At best, they can be viewed as indicators: to the extent that proposed subjects score on any of these indicators, they can be deemed to be subjects of international law.

Where those indicators themselves come from is a different matter altogether.[12] The International Court, in the *Reparation for Injuries* opinion, alluded to the existence of at least two of them (the right to enter into treaties, and the right to bring claims), but without specifying their source. Presumably, then, those indicators are best viewed as the result of inductive analysis: as all subjects of international law are seen to possess at least one of

[8] The same type of thinking underlies Schachter's famous conception of the 'invisible college of international lawyers'. See Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review*, 217–26.

[9] The word is a Germanism, and not a very pretty one at that. Unfortunately, I cannot think of an alternative.

[10] This derives loosely from Ian Brownlie, *Principles of Public International Law* (4th edn, Oxford, 1990), p. 58. A similar list, with the addition of privileges and immunities (which, apparently, are regarded as granted automatically through operation of law) is used by Amir A. Majid, *Legal Status of International Institutions: SITA, INMARSAT and EUROCONTROL Examined* (Aldershot, 1996), pp. 176–84. The approach is, admittedly, not without flaws, as the yardstick used is the state. See Broms, 'Subjects', p. 383.

[11] With respect to the European Union, such an argument is made by Astéris Pliakos, 'La nature juridique de l'Union européenne' (1993) 29 RTDE, 187–224.

[12] As a matter of method, perhaps the idea as such was inspired by Hohfeldian analysis. Hohfeld held, in a nutshell, that all legal relationships can be analysed by using four different terms, their negatives and their opposites: Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919; Westport, CN, 1978).

those characteristics, together they become a decent yardstick with which to measure the degree of subjectivity. Whereas states possess all three simply by reason of being states, other subjects usually do not, or at least not in an unlimited fashion.

Treaty-making capacity?

The treaty-making capacity (*jus tractatuum*) of international organizations has long been subject to some debate. Judges Fitzmaurice and Spender, for example, in their joint dissenting opinion to the first *South West Africa cases*,[13] wondered aloud whether the League of Nations ever possessed such capacity and could thus have been a party to the mandate South Africa held over South West Africa (nowadays known as Namibia).

At present, the treaty-making capacity of international organizations has, in general, been accepted.[14] What is still a matter of debate, though, is where this capacity springs from, the main bone of contention being whether such power derives directly from public international law or rather from the constituent instrument of the organization in question. If the former is the case, then the capacity is, in principle, unlimited; if the latter holds good, then the capacity to enter into treaties is, in principle, limited, unless the constituent treaty grants the organization a blank cheque.

The 1986 Vienna Convention on the Law of Treaties Concluded with or between International Organizations appears, eventually, to choose the first option. According to its preamble, 'international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfillment of their purposes'; the formulation appears to suggest that capacity derives from international law.[15] While it may be limited by the reference to the functions and purposes of the organization,

[13] *South West Africa cases* (Ethiopia v. South Africa; Liberia v. South Africa) preliminary objections, [1962] ICJ Reports 319, esp. pp. 495ff.

[14] See generally, below, chapter 13.

[15] Karl Zemanek, 'The United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations: The Unrecorded History of its General Agreement', in Karl-Heinz Böckstiegel *et al.* (eds.), *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht: Festschrift für Ignaz Seidl-Hohenveldern* (Cologne, 1988), 665–79. Seyersted argued in 1983 that it could not be any other way; see Finn Seyersted, 'Treaty-making Capacity of Intergovernmental Organizations: Article 6 of the International Law Commission's Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations' (1983) 34 ÖZöRV, 261–7.

such criteria are rather flexible to begin with and, moreover, can be changed at will by the member-states.

Article 6 of the 1986 Convention further specifies in holding that '[t]he capacity of international organizations to conclude treaties is governed by the rules of that organization'.[16] Thus, while capacity stems from public international law, it is governed (and thus potentially limited) by the specific rules of the organization, and those are described as including 'the constituent instruments, decisions and resolutions adopted in accordance with them and established practice of the organization'.[17]

As will be demonstrated below, this must also include implied powers or even inherent powers of organizations (if these exist at all), as with many organizations specific powers to enter into specific kinds of agreements are not granted explicitly. If they exist at all, they are usually deemed to be implied somehow in the rules of the organization, or perhaps considered to be inherent in the fact of 'organizationhood'.

And if the capacity to conclude treaties flows directly from international law, then at least on this point the position of organizations is akin to that of states. For, with states too, their capacity derives directly from international law, and, with states too, it is not unusual that the capacity is, in turn, hemmed in by 'internal' concerns. The clearest example thereof is perhaps that enshrined in the Japanese constitution (the renunciation of war and the threat or use of force), which also makes the participation of Japan in international military operations extremely controversial.[18]

The right to send and receive legations?

Do organizations, generally speaking, have the right to send and receive missions (*jus missionis*)? The answer must be in the affirmative, as practice reveals that, generally speaking, a number of international organizations have permanent missions with states, and that states have permanent missions with international organizations.

Thus, in December 1995, some 125 states had diplomats accredited to the European Community. Most of those combine their EC accreditation with being their state's ambassador to Belgium and perhaps some other states as

[16] Seyersted, 'Treaty-making Capacity', offers a vigorous critique.

[17] Article 2 (1) (j) of the 1986 Convention.

[18] For a useful overview, see Hisashi Owada, 'Japan's Constitutional Power to Participate in Peacekeeping' (1997) 27 *New York University Journal of International Law & Politics*, 271–84.

well.[19] The EC itself also has missions, for instance in Geneva, Tokyo and Washington, DC.

Moreover, it is not only states that may have missions with international organizations, and *vice versa*. It is far from unique for international organizations to have missions with one another, and as the International Court of Justice implicitly confirmed in 1988, other entities may have missions as well. *In casu*, the issue related to the observer mission of the Palestine Liberation Organization with the UN, which had been in existence since 1974.[20]

The existence of the *jus missionis* is also indicated by the conclusion of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The Convention purports to regulate the diplomatic relations engaged in by a group of international organizations, which already indicates that there is something to be regulated. The fact that, despite having been concluded in 1975, it still awaits its entry into force does not in any way affect that conclusion.[21]

Right to bring and receive claims?

Finally, as early as 1949 the International Court of Justice affirmed that international organizations may have the capacity to bring international claims. It did so in its *Reparation for Injuries* opinion, and the Court appeared to imply that the right to bring claims was inherent in being an organization. At any rate, it failed to indicate the specific source of the right, stating simply that '[i]t cannot be doubted'[22] that the UN could lodge a claim against a member-state, and that the right to present claims regarding damage done to the UN itself was 'clear'.[23]

[19] The information is derived from Commission Européenne, *Corps diplomatique accrédité auprès des Communautés européennes et représentations auprès de la Commission: Décembre 1995* (Luxembourg, 1995).

[20] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, advisory opinion, [1988] ICJ Reports 12. The European Community' accreditation list (see previous note) mentions nineteen non-state entities, ranging from international organizations such as the UN to territories such as Hong Kong and Macao, and the Maltese Sovereign Order.

[21] The Convention requires, in accordance with Article 89, the consent to be bound of thirty-five states.

[22] *Reparation for Injuries*, p. 180. [23] *Ibid*.

The content of the right to bring claims was also clear, in the Court's view:

> Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the [ICJ's] Statute.[24]

As a practical matter, the possibilities for international organizations to bring claims may be subject to limitations. Thus, there is no doubt that, at present, they cannot be a party before the ICJ in contentious proceedings.[25] Article 34 (1) of the ICJ Statute specifies clearly that '[o]nly states may be parties in cases before the Court'.

No considerations of principle, however, stand in the way of international organizations bringing (or receiving) claims before other tribunals. The courts of various states have had opportunity to address claims brought by or against international organizations, and organizations have also appeared before various arbitral tribunals. However, while no considerations of principle stand in the way, whether it is actually possible for international organizations to sue or be sued may depend on issues of immunity (to be discussed elsewhere[26]), as well as on whether or not they have standing,[27] which in turn may or may not depend on whether they are to be considered as having legal personality.

[24] *Reparation for Injuries*, p. 177. Note that, in the Court's view, notions such as 'competence' and 'capacity' of international organizations are synonymous. Sometimes, in the literature, much stress is placed on a distinction between the two, but such appears unwarranted. At the very least, it may be remarked that the distinction does not, as such, play a very prominent role in other legal systems.

[25] Nevertheless various authors have advocated a *jus standi* for international organizations before the ICJ. So, e.g., Paul Szasz, 'Granting International Organizations *Ius Standi* in the International Court of Justice', in A. S. Muller *et al.* (eds.), *The International Court of Justice: Its Future Role After Fifty Years* (The Hague, 1997), 169–88. Elihu Lauterpacht has proposed to vest suitable organizations with the power to present claims to the ICJ not so much in relation to their own rights as legal entities, but rather on behalf of the international community at large. See Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge, 1991), pp. 62–4.

[26] See below, chapter 8.

[27] See, e.g., *Arab Monetary Fund* v. *Hashim and others*, decision of 21 February 1991, UK House of Lords, 85 ILR 1. For an illustrative example regarding a non-governmental organization before the EC Court, see Case C-321/95 P, *Stichting Greenpeace Council and others* v. *Commission* [1998] ECR I–1651.

Legal personality under domestic law

Hypothetically, entities can possess legal personality under any legal system, dependent on whether they meet the requirements which that legal system posits for acceptance of the entity's personality. Each legal system is, essentially, free to develop its own requirements; requirements may thus differ from state to state. The requirements under Brazilian law may differ from those of the US, which in turn may be substantially different from those of Kuwait, or from those (if any) posited by the international legal system.

That is not to say that those various differing legal personalities are unrelated. For one thing, as will be indicated below, a legal person under the laws of state X may often be recognized as having personality by state Y, as comity may demand that state Y will not debate the validity of grants of personality by state X. But there is also a connection (or at least there used to be) between domestic and international legal personality. As Bederman reminds us, in the first half of the twentieth century domestic legal systems often looked at international law for guidance: entities could be granted domestic personality on the basis of them having already been granted international legal personality.[28]

In order to overcome this roundabout way of doing things, many constituent treaties of international organizations nowadays make some form of provision as regards their personality under the domestic law of their member states.[29] Thus, Article 104 of the UN Charter states: '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 fulfillment of its purposes.'

The formula used in Article 104 of the Charter comes close to being a blank cheque, and reflects something of a 'functional necessity' test, speaking as it does of 'such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes'. Generally, this is taken to imply that the organization possesses the largest possible degree of personality as recognized in domestic law.

Something similar applies to the EC, under Article 282 (ex-Article 211) TEC. This provision starts by saying that '[i]n each of the member-States,

[28] Bederman, 'The Souls of International Organizations', p. 351.

[29] Not all, though. The constituent documents of, *inter alia*, the Western European Union, the North Atlantic Treaty Organization and the Council of Europe are silent on the issue.

the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws.'

Again, thus, the provision grants a broad scope of personality under domestic law. Article 282 (ex-Article 211) TEC proceeds by giving some illustrations: the Community 'may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings'.

Of course, such provisions can only affect the organization's position within its member-states. The EC, for example, cannot itself decide whether it also has legal personality in, say, Ethiopia: such would depend on Ethiopian law. This follows logically from an important principle of the law of treaties: the *pacta tertiis* maxim, as codified in Article 34 of the 1969 Vienna Convention on the Law of Treaties and holding that states cannot create rights or obligations for third parties without the consent of those third parties.

Should the EC wish to sue an Ethiopian company in Ethiopia, then it is up to the Ethiopian courts whether or not to allow the EC to do so. In such a case, the courts may well ask the advice of the government. If, for example, the Ethiopian government has recognized the EC, such may not be much of a problem. The point is, however, that international law is silent on this issue: it all depends on Ethiopian law.

A nice case in point is the case of the *Arab Monetary Fund* v. *Hashim and others*.[30] The Arab Monetary Fund, established in 1976 as an organization comprising twenty Arab states plus the Palestine Liberation Organization, brought proceedings in the English courts against its former Director-General, Dr Hashim, and some other individuals, charging a misappropriation of AMF funds. The defendants moved to strike, claiming that the AMF did not possess personality under English law. The House of Lords would eventually hold that the AMF could sue Dr Hashim; their Lordships held, *per* Lord Templeman, that the Fund was given legal personality by the United Arab Emirates (where it had its seat), and that comity required that the 'status of an international organisation incorporated by at least one foreign state should also be recognised by the Courts of the United Kingdom'.[31]

[30] For an analysis, see Geoffrey Marston, 'The Personality of International Organisations in English Law' (1997) 2 *Hofstra Law & Policy Symposium*, 75–115, pp. 98–103.

[31] *Arab Monetary Fund*, p. 13. The earlier decisions of the High Court and the Court of Appeal are reproduced in 83 ILR 243.

The point to note is, of course, that considerations of international law hardly entered the picture.[32] The House of Lords argued that under English law, recognition of foreign corporate bodies is a matter of comity, provided the foreign states where those bodies are registered are themselves recognized by the Crown.[33] Moreover, the legal personality of the Fund in the United Arab Emirates was itself, so the House of Lords held, a matter which had been decided by the law of the United Arab Emirates. As Lord Templeman put it:

> when sovereign states enter into an agreement by treaty to confer legal personality on an international organisation, the treaty does not create a corporate body. But when the AMF agreement was registered in the UAE by means of Federal Decree No. 35 that registration conferred on the international organisation legal personality and thus created a corporate body which the English courts can and should recognise.[34]

The *Arab Monetary Fund* v. *Hashim* case conveniently illustrates to what extent issues of international and domestic law may get entangled when it comes to personality under domestic law, and it also illustrates a fundamental degree of uncertainty concerning the legal nature of international organizations themselves. Thus, the respondents felt fit to argue that the AMF had created not just one legal person, but that there had been twenty-one legal personalities (one each for every member-state and the PLO) and that 'it is not clear whether Dr Hashim embezzled the money of the UAE fund or the money of a fund established by some other Arab state'.[35] Whereas the argument failed to convince both the majority and the dissenting Lord, it is telling in its own right that it was made to begin with.

The domestic legal personality of an organization may also extend to its organs, and even its subsidiary bodies. Thus, the UN's Office of Legal Affairs, in 1990, unhesitatingly advised a Director at a subsidiary body of the General Assembly, the UN Development Programme (UNDP), that representatives of UNDP have the authority to conclude contractual

[32] See similarly the decision of the Utrecht Distict Court (The Netherlands) of 23 February 1949 in *UNRRA* v. *Daan*, in 16 AD (1949) 337.

[33] And note that the reason for Lord Lowry to dissent also resided in considerations of English law: the status of international organizations in English law was controlled by the International Organizations Act of 1968, which in essence provides that organizations are recognized by means of an Order in Council. No such order had been made concerning the AMF.

[34] *Arab Monetary Fund*, p. 5. [35] As rendered by Lord Templeman, *ibid*., p. 7.

arrangements. According to the Office of Legal Affairs, this authority flows from the Charter's provision on personality in Article 104.[36] The authority does not go so far, however, as to allow a subsidiary body to participate in the creation of a corporate body under some domestic legal system, largely because such would be difficult to reconcile with the international status of the organ and its staff.[37]

International legal personality

The position of international organizations in various domestic legal systems is usually explicitly provided for in the constituent treaty of the organization; the main problem to overcome then is the position in non-member-states. By contrast, the international legal personality of organizations has traditionally given rise to serious and heated doctrinal debates. In essence, the debate has been dominated by two contending theories,[38] both of which invoke the International Court's opinion in *Reparation for Injuries* in support: the 'will theory' (or 'subjective theory', perhaps) and the 'objective theory' of personality.

The *Reparation for Injuries* opinion arose out of the establishment of the state of Israel, which created enough unrest in the Middle East for the UN to send a mediator: the Swedish Count Folke Bernadotte. Unfortunately, Count Bernadotte and several of his associates lost their lives, and consequently the UN wondered whether it could bring a legal claim against the entity it held responsible. Consequently, the General Assembly of the United Nations asked the Court whether the UN would possess such a right, and, as already noted, the Court answered in the affirmative.

In the process, the Court devoted some attention to the question of international legal personality, presumably for two related reasons. First, the UN Charter itself did not contain anything on the possibility of the UN bringing a claim. Second, even if the Charter had contained something, Israel was, at the time, not yet a member-state, and there remained thus the

[36] See UNJY (1990), pp. 276–7. The same position was taken with respect to the personality of the UN Council for Namibia in municipal law (see UNJY (1982), pp. 164–5), as well as in a reply to a questionnaire from the Institut de Droit International (see UNJY (1976), pp. 159–77).

[37] UNJY (1990), pp. 259–60, again concerning UNDP.

[38] Kuyper identifies four contending theories, but acknowledges that not all of these are, as it were, active. See Pieter Jan Kuyper, 'The Netherlands and International Organizations', in H. F. van Panhuys *et al.* (eds.), *International Law In the Netherlands, volume II* (Alphen aan den Rijn, 1979), 3–41, esp. pp. 15–19.

question as to whether a right to bring a claim would be opposable against Israel to begin with.

The Court would reach the conclusion that indeed the UN was to be regarded as having international legal personality and as having the right to bring a claim, both in its own name and in the name of its employees, but, unfortunately, it remains something of a mystery as to why exactly the Court reached that conclusion. And that, in turn, makes it possible to invoke the decision in support of two diametrically opposed theories.

Under the 'will theory' (by far the more popular of the two), it is the will of the founders of the organization which decides on the organization's legal personality. Thus, if the founders intend to endow their creation with personality under international law, then such will be the case. If they wish to withhold legal personality from their creation, then here too their intention will control the issue.

The main attraction of the will theory resides, no doubt, in being in conformity with positivist notions. Generally, international law is thought to be based on the freely expressed consent of states,[39] and therefore the same should apply to the creation of international organizations. It is difficult to go against states' wishes in international law, so when states have clear intentions concerning the legal personality of international organizations they have established, then those intentions must be respected.[40]

A serious problem is, however, that relatively few constituent treaties provide explicitly for the international legal personality of organizations.[41] The UN Charter, for one, lacks such a provision: the topic was considered during the drafting of the Charter, but the Subcommittee bearing responsibility for what was to become Article 104 (quoted above) eventually rejected a proposal to refer to international legal personality alongside domestic legal personality: they did not think any explicit reference was necessary.[42]

[39] In accordance with the classic *Case of the SS Lotus*, [1927] Publ. PCIJ, Series A, no. 10.

[40] The UN's Office of Legal Affairs seems to work on this theory. See, e.g, its opinion on a proposed Asian Clearing Union, in UNJY (1971), pp. 215–18.

[41] At best, the provisions are ambiguous, providing quite simply that the organization concerned 'shall have legal personality' or similar terms. Thus, e.g., Art. 281 (formerly Art. 210) TEC. Also not devoid from ambiguity is Art. XVI (1) of the FAO constitution, which holds that the FAO 'shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution'. Clearly limited to domestic legal personality are, *inter alia*, Art. 39 ILO, Art. 66 WTO, Art. 47 ICAO and Art. 95 (2) Benelux.

[42] As the UNESCO constitution incorporates Art. 104 of the Charter (see Art. XII UNESCO), here too an explicit endowment with international legal personality is absent.

Another problem for the will theory is that it opens up the possibility that the international legal personality of an organization is an empty concept: what if a number of states decided to create an international organization and endow it with international legal personality, yet no one is willing to enter into any engagements with it? Under such a scenario, personality would be an empty concept, devoid of meaning, something which might exist on paper but with no empirical reverberations.

In order to overcome this problem, many advocates of the will theory resort to recognition by third parties of an organization's international legal capacity, but that renders the will theory incoherent: if the question of an organization's international legal personality depends ultimately (or even partly) on recognition by third parties, then the importance of the will of the founders becomes difficult to sustain.[43]

Indeed, some scholars have seen fit to reverse the situation, to such an extent that the will theory can hardly be deemed to be based on the will of the founders anymore. Thus, Bieber purposefully lists recognition as the decisive factor,[44] and Timmermans, re-writing the pertinent chapter in Kapteyn & VerLoren van Themaat's classic Dutch-language textbook on European Community law, even goes so far as to proclaim that since the EC has been recognized by so many states, its international legal personality has become objective.[45] In other words: those (if they exist at all) who do not wish to do business with the EC have no choice but to accept its personality, simply because so many before them have done so. Clearly, the point as such makes sense, but equally clearly it cannot be explained by relying solely on the will of the founding states, and it is this circumstance which renders the will theory incoherent.[46]

Some of these objections are met by the main rival of the will theory, the so-called 'objective theory' of personality as devised, in the early 1960s, by

[43] Recognition is, in any event, something of a misnomer, as Köck correctly argues. He goes on to posit the somewhat curious argument that, since recognition is a purely political act anyway, there is no legal answer to the question of whether an organization should be recognized. See H. F. Köck, 'Questions Related to the Recognition of the European Communities' (1997) 2 ARIEL, 49–68.

[44] Compare the introduction to his *Draft of a Consolidated Treaty of the European Union*, European Parliament, Directorate-General for Research, Working Paper, political series W-17/Rev., March 1996, p. 15.

[45] P. J. G. Kapteyn & P. VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen na Maastricht* (5th edn, Deventer, 1995), pp. 63–4.

[46] Perhaps it is also useful to note that explicit acts of recognition of organizations are extremely rare.

Norwegian international lawyer Finn Seyersted.[47] According to Seyersted, the legal personality of international organizations follows the same pattern as that of states: as soon as an entity exists as a matter of law, i.e., meets the requirements that international law attaches to its establishment, that entity possesses international legal personality. For states, this follows from their acquisition of statehood; for organizations, then, it follows from acquisition of 'organizationhood'. Importantly, then, the will of the founders does not decide on personality as a separate matter.

An obvious question then is: what are the requirements of international law with respect to 'organizationhood'? Seyersted's main criterion was that the organization must possess a distinct will of its own,[48] but that raises the problem of the extent to which such a distinct will is more than a useful legal fiction. As long as an organization is not empowered to take decisions binding its membership by a mere majority of its members, one can hardly speak, in any literal sense, of the organization as having a 'distinct will';[49] unanimous decisions, after all, can always be traced back to the member-states.

Moreover, and more fundamental, Seyersted's objective theory raises the prospect of going against the intentions of the founders, and therewith elevates itself to *jus cogens* status. Surely, if states intend their creation to be devoid of international legal personality, then such intention ought to be respected, and cannot be overruled by a rule of general international law saying that organizations shall have international legal personality irrespective of a clear contrary intention on the part of the founders. Or rather, such a rule would be meaningless if one cannot force the organization to act as an international legal person.

It should come as no surprise, then, that practice has shown a more pragmatic approach to questions of international legal personality, perhaps best captured by the phrase 'presumptive personality': as soon as an organization performs acts which can only be explained on the basis of international

[47] More recently, Seyersted's approach has found some support in Nigel D. White, *The Law of International Organisations* (Manchester, 1996).

[48] See Finn Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities Really Depend on the Conventions Establishing them*? (Copenhagen, 1963), esp. p. 47.

[49] Indeed, as late as 1980 the idea of a 'distinct will' was vehemently denied. See Reinhold Reuterswärd, 'The Legal Nature of International Organizations' (1980) 49 Nordisk TIR, 14–30.

legal personality, such an organization will be presumed to be in possession of international legal personality.[50]

The notion of presumptive personality is supported by the above-mentioned *Reparation for Injuries* opinion of the International Court of Justice. In an often-quoted passage, the Court held 'that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring claims'.[51] The surprising element in this passage is that the Court left it unspecified whether those fifty states had actually used their power to create an entity with international legal personality. The Court merely presumed this to be the case, and as no one bothered to rebut the presumption, it survived.[52]

That presumption, moreover, could hardly have been related to the intentions of the founders. These, as noted earlier, wittingly decided not to provide for the personality at international law of the UN, holding such a provision to be 'superfluous'. Instead, the drafters argued, the issue of personality 'will be determined implicitly from the provisions of the Charter taken as a whole'.[53]

The one drawback (if it is a drawback) of the presumptive approach is that it tends to make a mockery of the few instances where founders have actually made a provision granting their creation international legal personality. If it is true that an organization will be presumed to have international legal personality unless and until the opposite can be shown, does that not imply that a grant of personality is utterly useless?

The answer must be in the negative. At the very least, as Amerasinghe has pointed out, explicitly to endow an organization with personality under international law indicates that the founders wish to create an entity which

[50] See, for more details, Jan Klabbers, 'Presumptive Personality: The European Union in International Law', in Martti Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, 1998), 231–53.

[51] *Reparation for Injuries*, p. 185. The reference to 'objective' personality is sometimes taken to mean that the UN is somehow qualitatively different because of its creation by what was at the time the vast majority of states. Thus, e.g., Köck, 'Recognition of the European Communities'.

[52] The emphasis political scientists place on the actual activities of the organization suggests a similar approach. See, e.g., Teija Tiilikainen, 'To Be or Not to Be? An Analysis of the Legal and Political Elements of Statehood in the EU's External Identity' (2001) 6 *European Foreign Affairs Review*, 223–41.

[53] *United Nations Conference on International Organization* (Documents), vol. 13 (London, 1945), p. 817.

is somehow separate from their aggregate, and that circumstance may be of evidentiary value when it comes to, for example, deciding on whether or not the member-states of an organization incur liability for the activities of the organization.[54] While the attribution of personality alone is not decisive (and cannot be decisive), it does provide an indication of what the drafters may have had in mind.

Concluding remarks

Presumably, the main position regarding the personality of international organizations in domestic law is that personality is controlled by the rules of the organization. However, under international law personality is, pragmatically, treated as a presumption, to be rebutted if the evidence points in the other direction. Thus, if the organization's constituent documents are silent on personality, and the organization performs no acts which point to personality, then personality will be absent. However, the absence of an explicit attribution alone will not settle the issue: many organizations can be seen to perform international legal activities despite the absence of an explicit grant of personality, and at times their preparatory works may even indicate, as with the UN, that the absence of any reference was intended.

And this, then, points to another, more general consideration: perhaps we should be careful not to make too much of the very notion of personality (at least under international law) to begin with.[55] After all is said and done, personality in international law, like 'subjectivity', is but a descriptive notion: useful to describe a state of affairs, but normatively empty, as neither rights nor obligations flow automatically from a grant of personality.[56]

Indeed, otherwise it is difficult to explain how an entity such as the European Union, which is not explicitly endowed with international legal

[54] C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, 1996), pp. 68–70, and ch. 9. The Italian Court of Cassation, in *Cristiani* v. *Italian Latin-American Institute* (decision of 25 November 1985, in 87 ILR 20), seems to have treated a grant of personality as the basis of jurisdictional immunity, through the working of the *par in parem non habet jurisdictionem* maxim.

[55] In a similar vein, Ige Dekker & Ramses Wessel, ' "Lowering the Corporate Veil": Het recht der internationale organisaties vanuit de institutionele rechtstheorie', in M. A. Heldeweg *et al.* (eds.), *De regel meester: Opstellen voor Dick W. P. Ruiter* (Enschede, 2001), 5–22, p. 10.

[56] Except, arguably, a very abstract sort of rights, such as the right to conclude treaties; still, those rights may also pertain to non-persons. After all, as practice indicates time and again, entities of doubtful legal personality engage in acts such as treaty-making. See, e.g., by way of illustration, Paola Gaeta, 'The Dayton Agreements and International Law' (1996) 7 EJIL, 147–63.

personality, and, therefore, many feel, not possessing international legal personality, can nonetheless perform international acts. For, issues of personality notwithstanding, the European Union does conclude agreements, does make the type of unilateral statements which may involve legally binding commitments, and has even taken on the administration of a town (Mostar) in the aftermath of the Yugoslavia crisis.[57] Such activities are inexplicable in the absence of international legal personality, unless international legal personality is itself a normatively empty (and essentially descriptive) concept.[58]

It would seem, then (despite the International Court's suggestion in *Reparation for Injuries*[59]) that personality is by no means a threshold which must be crossed before an entity can participate in international legal relations; instead, once an entity does participate, it may be usefully described as having a degree of international legal personality.

Some even go further, and argue that the very metaphor of personality is misleading, at least partly. Bederman has observed that to think of organizations as 'persons' is, in effect, to deny their fundamental nature as 'communities'. Organizations, as Bederman points out, 'see themselves as the legal embodiment of communities, with complex interplays of equal and subordinate relations with states, with other organizations, and within the organs of the entity itself'.[60] To use the metaphor of 'personality' fails to do justice to this complexity, and may even be misleading. In Bederman's view, organizations are more important 'as places for the harmonization of policies, the exchange of ideas and even the making of friends than as centers of power in the international system'.[61]

While Bederman surely has a point in suggesting that the notion of 'personality' is not terribly helpful, one may wonder whether the 'community' notion will be more helpful. Or rather, it seems he does not go far enough.

[57] See, e.g., Outi Korhonen & Jutta Gras, *International Governance in Post-conflict Situations* (Helsinki, 2001), pp. 31–48.

[58] The legal personality of the EU has given rise to an impressive body of literature. Some of the more thoughtful essays on both sides of the divide include Ramses A. Wessel, 'The International Legal Status of the European Union' (1997) 2 *European Foreign Affairs Review*, 109–29 (claiming personality partly to be implied), and Esa Paasivirta, 'The European Union: From an Aggregate of States to a Legal Person?' (1997) 2 *Hofstra Law & Policy Symposium*, 37–59 (urging a grant of personality).

[59] After all, the Court started its analysis of the UN's right to bring claims by establishing its personality, thus suggesting that personality is a threshold.

[60] Bederman, 'The Souls of International Organizations', p. 371.

[61] *Ibid*., p. 372 (emphasis omitted).

He is, as the title of his wonderful essay indicates, in search of the souls of international organizations; but what if organizations do not have a recognizable soul to begin with?

Indeed, the point was made earlier that the soul of organizations (to adopt his metaphor) swirls around in the midst of a tension between viewing the organization as a distinct entity (be it a 'person' or a 'community'[62]) and seeing it as merely the vehicle of its member-states. Upon such a vision, it is the very fact that organizations are represented in one form or another which warrants scrutiny.

[62] The two may be conceptually closer than would appear at first sight; it is telling that organizations are described as the 'embodiment' (as physical a metaphor as 'personality') of communities.