

PART II

GENERAL ISSUES

2 Personality of international organizations

Tarcisio Gazzini

INTRODUCTION

The legal personality of international organizations is a classic but always topical and complex theme in international law, a theme to which a remarkable number of works have been dedicated and which continues to attract the attention of governments, international organizations themselves, and scholars.¹ It is nowadays undisputed that international organizations may possess legal personality in international law – although not identical to that of states – as well as in national legal systems. It is equally undisputed that international organizations may conclude international treaties, bring and receive international claims, send and receive legations, and enjoy privileges and immunities before national courts. However, many questions still remain unsettled or controversial, including how an international organization acquires international legal personality; in what such a personality is different from that of states; and how the responsibility for internationally wrongful acts is to be allocated between the organization and its members.

This chapter discusses the process through which an international organization may acquire international legal personality and the main features of such a personality. It also touches upon issues of international responsibility and immunities that are fully treated elsewhere in this book. It finally deals with the legal personality international organizations may enjoy within the jurisdiction of member and non-member states.

INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

The traditional departing point to discuss the international legal personality of international organizations is the *Reparation for Injuries* advisory opinion delivered by the International Court of Justice (ICJ) in 1949. After observing that ‘the subjects of law in any legal system are not necessarily identical’, the Court held that the United Nations possessed international legal personality and could bring an international claim against another subject of international law.²

Both the premise and the conclusion are nowadays undisputed not only with regard to the United Nations but in general. The argument developed by the Court, nevertheless, is to a large extent circular as ‘the ICJ inferred from the specific powers bestowed on the UN that it had international personality and then went on to deduce from the existence of such personality that it had the specific power to bring an international claim for one of its officials’.³

Almost 60 years later, the concept of international legal personality remains rather a nebulous one⁴ and there is still no satisfactory definition of international legal personality.⁵ In 1949 the Court noted that this is a ‘doctrinal expression’ (*Reparation for Injuries Suffered in the Service of the United Nations*, 1949: 178) and provided a partial definition by observing that the United Nations ‘is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims’ (*Reparation for Injuries Suffered in the Service of the United Nations*, 1949: 179). Yet, according to the current standard definition, ‘[h]aving international legal personality for an international organization means possessing rights, duties, powers and liabilities etc. as distinct from its members or its creators on the international plane and in international law’ (Amerasinghe, 2005: 78).

The risk of circularity of the definition of international legal personality is reflected also in the following passage elaborated from the standpoint of the responsibility of international organizations: ‘Norms of international law cannot impose on an entity “primary” obligations or “secondary” obligations in case of a breach of one of the “primary” obligations unless that entity has legal personality under international law. Conversely, an entity has to be regarded as a subject of international law even if only a single obligation is imposed on it under international law.’⁶

MAIN THEORIES ON ACQUISITION OF INTERNATIONAL LEGAL PERSONALITY

Two main schools of thought have emerged as to how an international organization acquires international legal personality. Curiously, both rely to a certain extent on the *Reparation for Injuries* advisory opinion.

According to the so-called will theory, the crucial element is the intention of its founders to create a new subject of international law. This may be expressly established in the constituent instrument – which is normally a treaty – or be inferred from it if there is no specific provision. From this perspective, international organizations possess international legal personality ‘because the status is given to them, either explicitly or, if there is no constitutional attribution of this quality, *implicitly*’.⁷ Accordingly, the legal personality enjoyed

by the organization derives from the will of its members contained in the constitutive instrument.⁸ Kelsen is one of the leading advocates of this theory. For him, '[a]n international community possesses juridical personality in the field of international law if the treaty constituting the community confers upon its organs the competence to exercise certain functions in relation to the members and especially the power to enter into international agreements establishing duties, rights and competences of the community' (Kelsen, 1951: 329).

There are two main problems with this theory. First, it postulates that the international organization has been effectively created and is functioning as intended. Second, making the international personality of the organization dependent on the will of the founders is problematic with regard to the relationship between the organization and non-members. Relying on recognition by non-member states would not only contradict the essence of the theory, but also scarcely be useful considering that the shortcomings and controversial aspects of recognition of states would only be amplified in the case of recognition of international organizations.

For the so-called objective theory, on the contrary, the question is a factual one as 'it is not the provisions of the constitution or the intention of its framers which establish the international personality of a state or an intergovernmental organization, but the objective fact of its existence' (Seyersted, 1964a: 39–40). From this perspective, the legal personality of international organizations is – like that of states – original. The distinct will (*volonté distincte*) of the organization, which is the essence of the theory, however, has not been fully elucidated and remains to a large extent a legal fiction. Not even the adoption of binding decisions by majority would be an irrefutable proof of such a distinct will. Yet, nothing prevents member states from establishing an organization deprived of international legal personality and accepting nonetheless that its organs – which are to be considered as common organs of the member states – can adopt binding decisions by a majority vote.

There is however no need to overstate the opposition of the two theories. On the contrary they have elements that are not necessarily mutually exclusive. Several authors have overcome the doctrinal debate by defining a set of criteria that the organization must satisfy in order to acquire international legal personality. In this perspective, the following elements have been identified: (a) a permanent association of states equipped with organs; (b) a distinction, in terms of legal powers and purposes, between the organization and its members; (c) the existence of legal powers exercisable on the international level.⁹

Alternatively, it has been suggested that 'as soon as the organization performs acts which can be explained only on the basis of international legal personality, such an organization will be presumed to be in possession of

international legal personality'.¹⁰ The theory relies on the *Reparation for Injuries* advisory opinion, fully appreciates its manifold reasoning but seems to have inherited from it some degree of circularity too. The theory is based on a rebuttable presumption created by the concrete performance of acts by the organization as legal person on the international level. However, it is not clear who can challenge such a presumption, what are the consequences of a successful challenge, and how the acts performed by the organization could be explained and attributed from the standpoint of international responsibility.¹¹

THE ACQUISITION OF INTERNATIONAL LEGAL PERSONALITY AS A PROCESS

It is submitted that the acquisition of international legal personality by international organizations is a process ignited by the intention of the contracting parties to create a new subject of international law.¹² An expression of will by some subjects of international law is indispensable – yet not sufficient.¹³ Such an expression of will does not necessarily need to take the form of an international treaty. When it does, the intention of the contracting parties can be expressly declared in a specific provision of the treaty or be inferred from the treaty itself.¹⁴

The constituent instrument normally defines the powers of the future organization (see below, the section Nature of international legal personality). It remains nonetheless an act between the contracting parties and as such it imposes rights and obligations exclusively upon them. They have agreed to create a permanent organization equipped with organs (Quadri, 1968: 531) and to accept the acts and decisions of the organization once established (Reuterswärd, 1980: 17). At the same time, they are also the holders of the corresponding subjective rights and in particular the right to request other contracting parties to take the measures agreed upon to create the organization and to respect its acts and decisions.

Although the contracting parties have agreed to confer to the international organization certain powers,¹⁵ at this stage, the international legal personality of the international organization is only potential (Kasme, 1960: 31). Yet, '[e]ven if a treaty provision were intended to confer international personality on a particular organization, the acquisition of legal personality would depend on the actual establishment of the organization. It is clear that an organization merely existing on paper cannot be considered a subject of international law' (Gaja, 2003: 11). The constitutive instrument is only the legal basis upon which the organization could *materially* be established (Arangio-Ruiz, 1997: 15).

Article 281 of the Treaty establishing the European Community (TEC; since the entry into force of the Lisbon Treaty Article 47 TEU), for instance, is one of the rare examples of treaty provisions providing for international legal personality.¹⁶ The majority of the constitutive instruments of international organizations do not contain an express provision on their international legal personality. The intention of the founders to create such an organization, however, can be inferred from the constitutive instrument as in the case of the United Nations. The Charter is silent on the matter, but a number of its provisions, including Articles 41, 42, 43, 63 and 75 reveal that the founders intended to establish an organization possessing international legal personality.¹⁷

Both the TEC and the Charter were the material basis upon which the would-be members agreed to establish the organization and bestow it with certain powers. This was necessary but not sufficient. There was no guarantee that contracting parties would have complied with their obligations¹⁸ and that the organization would ever exercise its powers independently from its members.

Thus, it is only through the concrete exercise of these powers that the international organization may acquire international legal personality, provided it is able to affirm itself as an entity distinct and independent from the contracting parties – now members. Similarly to the personality of other subjects of international law, the international personality of international organizations is ultimately a matter of fact. It derives from the emergence of ‘an entity materially able – in certain matters – to act and to manifest a will in such condition of independence as to distinguish itself from any other international person’.¹⁹ From this perspective, the acquisition of international legal personality by an international organization is based – like any other subject of international law – on customary international law. Accordingly, such a personality must be considered as primary since it is not the legal effect of its constituent instrument.²⁰ The international organization will enjoy international personality on the same footing as states without altering the horizontal structure of the international community.²¹

This is compatible with the *Reparation for Injuries* advisory opinion.²² The Court held that ‘*practice* – in particular the conclusion of conventions to which the organization is a party – has confirmed this character of the organization, which occupies a position in certain respects in detachment of its members’ and that ‘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’.²³

Whether an international organization possesses international legal personality, consequently, must be ascertained by assessing its performance, as an entity distinct from its member states, of acts in the international legal order. Yet, this is just another application of the principle of effectiveness that

characterizes the whole international legal order. Like states, international organizations become subjects of international law when they are capable of participating in international legal relations in conditions of independence. Unlike the case of states, however, such a capacity is not coupled with the effective and permanent exercise of sovereign powers over a given territory and population, and normally manifest itself only in the relationships with other subjects of international law.

EVIDENCE OF THE INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

The question whether an international organization possesses international legal personality can be solved only through the analysis of its practice, bearing in mind that such legal personality is not the inevitable consequence of the creation of an international organization (ILA Report, 1998: 604). Such an analysis is conducted primarily by international and national tribunals as well as by states – whether member or not of the organization – and other organizations. There is no guarantee that the outcome will be consistent. Quite the contrary, the risk of divergences and legal uncertainty is unavoidable. This is not peculiar to international organizations and indeed can also concern the legal status of territorial entities.²⁴ Rather, it can be attributed to the horizontal structure of the international legal order.

International Responsibility

The most reliable test to ascertain the international legal personality of a given organization remains the acceptance of international responsibility for acts committed by its organs, and, conversely, the bringing of international claims for allegedly unlawful acts committed by other subjects in violations of its rights.²⁵ These are manifestations – rather than consequences – of the international legal personality of the organization. Yet, international personality is to be inferred from international responsibility, not the other way around (Quadri, 1968: 534–5; Giardina, 1964: 177).

The United Nations is clearly one of the best examples of international organizations capable of bringing and receiving claims against or from other subjects of international law. The *Reparation for Injuries* advisory opinion is extraordinary in seizing in the international claim advanced by the United Nations with regard to Count Bernadotte one of the first manifestations of the United Nations as subject of international law able to express a will distinct from its members and to independently enter into legal relationships with other subjects of international law.

The United Nations has also accepted international responsibility on a number of occasions, especially in respect of unlawful acts committed in the context of peacekeeping operations.²⁶ It has been observed that '[a]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation'.²⁷

Another valuable example is the European Community. The organization is not merely a forum for member states to discuss and organize their mutual relations. It is an actor on the international plane that has assumed international responsibility in relation to the obligations and sought respect for the rights falling within its own areas of competence, and has participated both as claimant and respondent in international disputes, particularly within the framework of the World Trade Organization (WTO).²⁸

The European Community has fully manifested its international legal personality, on the one hand, by accepting responsibility for international wrongful acts, either exclusively or jointly with its members, and, on the other hand, by asserting its rights through the remedies available in international law including, when applicable, resort to international tribunals.

It has taken responsibility with regard to violations of the obligations stemming from its membership – alongside with each of its members – to the WTO. It has accepted exclusive responsibility in areas where there had been a transfer of sovereignty from the members to the organization. In *European Communities – Customs Classification of Certain Computer Equipment*, for instance, the European Community asserted that responsibility for infringements of the obligations related to the tariff concessions was entirely its own and not of the two member states involved in the dispute.²⁹ Leaving aside the procedural issue of the dispute, what is important for the purpose of this chapter is that, on the one hand, the United States held the European Communities responsible for the alleged breaches of the General Agreement on Tariffs and Trade (GATT) obligations, and on the other hand that the European Community was ready to accept responsibility.

The European Community has also accepted responsibility, this time jointly with its members, with regard to the obligations imposed by mixed treaties like those concluded between the Community and its member states on the one hand and the African Caribbean and Pacific (ACP) states on the other hand.³⁰ As confirmed by the European Court of Justice (ECJ), in the absence of derogations expressly laid down in a given treaty, 'the Community and its member states as partners of the ACP states are jointly liable to those latter states for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance' (*Parliament v. Council*, 1994: I-625, 661–662).

The picture is different in the case of the North Atlantic Treaty Organization (NATO). The exclusive attribution to the members of an organization for acts committed during the military intervention in the Federal Republic of Yugoslavia carried out within the framework of the organization militates against the international legal personality of the organization. The events related to the accidental bombing of the Chinese embassy in Belgrade that occurred on 7 May 1999 are an interesting example.³¹ Although NATO immediately expressed its regrets and opened an investigation on the matter, it was the United States – the national state of the aircraft that carried out the air strike – that in the following months entered into bilateral negotiations with China. The offer of immediate *ex gratia* payments to the victims made by the United States (US State Department, *Report on Accidental Bombing of Chinese Embassy*, 1999) was finalized on 16 December 1999 when the two governments signed an agreement providing for compensation damages in favour of China (*Press Statement* of 16 December 1999 of the US State Department). In the same direction seem to point the arrangements related to the international responsibility for unlawful acts committed by IFOR/SFOR in Bosnia-Herzegovina (Guillaume, 1997) and KFOR in Kosovo.³²

International Treaties

The conclusion of treaties is another important indicator of the international legal personality of international organizations. The act may represent a manifestation of the distinct will of the organization, which is the essence of its international personality. The treaty, accordingly, may create and modify the international rights and obligations between the organization and possibly its members on the one side, and the other contracting party or parties on the other side.

It must, however, be noted that nothing prevents an international organization deprived of international legal personality from concluding international treaties. In this case, the organ of the organization is to be considered as common organ of the member states and its acts as acts jointly performed by the member states. The treaty therefore produces its effects with regard to the member states on the one side, and the other contracting party or parties on the other side.³³ The treaty concluded between the Organization for Security and Cooperation in Europe (OSCE) – an organization, which is generally considered as not possessing international legal personality – and the Federal Republic of Yugoslavia in 1998 is a case in point.³⁴

Moreover, the importance of headquarter agreements is rather limited as normally they provide for the legal personality in the domestic legal system of the host state, regardless of its membership in the organization (Gaja, 2003: 109). In other words, they govern the legal rights and obligations within the

jurisdiction of the host state and as such regard the domestic legal personality of the organization that is quite independent from its international legal personality (see below, the section Legal personality in domestic law).

For the purpose of establishing the international legal personality of an organization, more important than the conclusion of treaties is compliance with the obligations imposed and the enjoyment of the rights granted thereby. Of course, the issue of implementation is intimately related to that of the international responsibility for breaches of the treaties.

The treaties concluded by the European Community are illustrative as they can be implemented either jointly by the organization and its members or exclusively by the organization depending of the repartition of competences within the European Community. In *Kupferberg*, the ECJ held that it was for both the Community institutions and the member states to ensure compliance with the obligations arising from the Free Trade Agreement between the European Community and Portugal (*Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, 1982).

By way of contrast, it has been observed that '[given] the "vertical" structure of the EC system as it concerns the authorities of the member states (customs administration) acting as implementing authorities of EC law in a field of exclusive Community competence [the] EC took the view that the actions of these authorities should be attributed to the EC itself and emphasised its readiness to assume responsibility for all measures within the particular field of tariff concessions, be they taken at EC level or at that of the member states'.³⁵

Immunities

Immunities are also often referred to as an indicator of the international legal personality of international organizations.³⁶ From the perspective of the international organization, claiming immunity may be the confirmation of its international legal personality. From the perspective of the tribunal, refraining from exercising jurisdiction may be the result of the application to the organization as subject of international law of the principle *par in parem non habet jurisdictionem*.

Yet, this is not necessarily the case and the enjoyment of immunities is rather an unreliable indicator of the international legal personality of international organizations. In this context, international organizations are not interacting *with* other subjects of international law on the international level – as in the case of international responsibility or conclusion of treaties – but rather seeking immunity from jurisdiction *in* a given state.

A state may be obliged under an international agreement to grant immunity to the organization. The overwhelming majority of international organizations,

most of which do not claim international legal personality, have concluded headquarter agreements or other agreements governing privileges and immunities. As a result, disputes normally arise in states that have concluded such an agreement with the concerned organization. In this case, the decision of the municipal tribunal will depend on the content of the treaty and its status in domestic law. In the absence of such an agreement or when the agreement cannot be applied by the tribunal due to domestic rules, it can be argued that the state is still obliged under customary law to refrain from exercising jurisdiction due to the international legal personality of the organization.³⁷

Whether an international organization is immune from jurisdiction in a given state ultimately hinges on the domestic law of that state. As held in *League of Arab States v. T.*, ‘jurisdictional immunity has the effect of depriving the courts normally competent *under domestic law* of their power to exercise jurisdiction over the claim’.³⁸

Depending on the rules governing the relationship between international law and domestic law in force in the concerned state, the adoption of a domestic measure may be indispensable to grant immunity to the organization and to comply with an international obligation. Until such a measure has been adopted, domestic courts may exercise their jurisdiction, although this may imply the commission by the state of an international wrongful act.

However, international organizations do not necessarily have to possess international legal personality in order to be immune from jurisdiction. Indeed, a state may certainly grant immunity to an international organization not possessing international legal personality by treating the organization as a collectivity of states and its organs as common organs through which member states perform jointly certain acts. Assuming that these acts committed individually by each member state would have attracted immunity under international law, it is logical for a tribunal to abstain from exercising its jurisdiction when they are performed collectively through an international organization.³⁹

In *Cristiani v. Italian Latin-American Institute*, the Italian Court of Cassation admitted that ‘neither the doctrine nor the jurisprudence reflect any discernible *communis opinio* as to the requisite correlation between international legal personality and immunity’. It then held that ‘whatever the basis of jurisdictional immunity may be, generally it is recognized by the doctrine and jurisprudence that it may be relied upon by union of states, either when they enjoy legal personality or when they form a collectivity of states’ (*Cristiani v. Italian Latin-American Institute*, 1985, 1992: 24–5).

A clear confirmation that immunity from jurisdiction does not necessarily depend on whether the organization possesses international legal personality⁴⁰ is the OSCE, an organization that although deprived of international legal personality is entitled to immunity from jurisdiction in the member states. The recent Swiss law on privileges and immunities granted by Switzerland as host

state, for instance, applies to organizations, entities and individuals regardless of their international legal status.⁴¹ Significantly, in the message to the Parliament, the government introduced a distinction between international organizations and international institutions and maintained that only the former possess international legal personality. It pointed out that '[l]'organisation intergouvernementale dispose toujours de la personnalité juridique internationale, qui lui est conférée par le traité international qui la crée. Tel n'est pas le cas de l'institution internationale qui jouit toutefois d'une place particulière dans les relations internationales. Nous pouvons citer comme exemples des institutions telles que l'Organisation pour la sécurité et la coopération en Europe (OSCE) [...]'.⁴²

Indeed, international organizations deprived of such personality may still be entitled to immunity from jurisdiction. Whether and to what extent this is the case depends on the relevant rules of international law and ultimately on the domestic law of the concerned state.

NATURE OF INTERNATIONAL LEGAL PERSONALITY

The question of the international personality of international organizations calls for a yes or no answer.⁴³ It must be kept distinct from the question of the powers the organization can exercise. In this respect, it has been pointed out that '[w]hile it may be true that considerations of functional necessity limit an organization's capacities or even competence to perform certain acts, that does not change the fact that it is a subject of international law'.⁴⁴

In the *European Road Transport Agreement* decision, the ECJ made an important distinction between the 'capacity' and the 'authority' of the European Community to conclude international agreements. The former stems from its international legal personality, whereas the latter is determined by relevant primary and secondary EC Law.⁴⁵

It is undisputed that the legal personality enjoyed by international organizations is not identical to that enjoyed by states. The two main differences are that international organizations lack general competence and do not exercise in a permanent manner governmental powers over a given population and territory.

As pointed out by the ICJ, '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' (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996: 66, 78).

Although the powers of international organizations are discussed in detail elsewhere,⁴⁶ it is worth noting that the powers of an international organization are defined in the first place by its constituent instrument or the expression of will upon which the organization has been created.⁴⁷ However, the constituent instrument must be interpreted taking into account not only any subsequent agreements between all members but also subsequent practice. Yet, the powers defined in the constituent treaty may be informally modified through subsequent practice by the generality of the member states.⁴⁸ Such a possibility is widely accepted, especially with regard to the UN Charter⁴⁹ as consequential to the fact that contracting parties remain ‘the transaction’s exclusive and absolute *domini*’.⁵⁰

Furthermore, it has been the consistent position of the ICJ that the United Nations ‘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’.⁵¹ The so-called implied powers doctrine has gained general acceptance, although it must be kept in mind that it is ‘designed to implement within reasonable limitations, and not to supplant or vary, expressed powers’.⁵²

The powers of the organization, nonetheless, are not defined exclusively and permanently by its constituent instrument supplemented by subsequent practice. It has been observed that ‘[o]ne or more states may also purport to confer additional powers on an organization on an *ad hoc* basis by use of a treaty that is separate from the constituent treaty’ (Sarooshi, 2005: 19).

Finally, although international organizations lack a permanent territorial basis, they may in exceptional cases administer territories and exercise governmental powers over them. The temporary exercise of governmental powers by the United Nations in Cambodia, East Timor and Kosovo are cases in point.⁵³

LEGAL PERSONALITY IN DOMESTIC LAW

Completely different and independent from – although not unrelated to – international legal personality is the legal personality international organizations may enjoy within the jurisdiction of a state. Such a legal personality includes the capacity to contract, acquire and dispose of property, to institute legal proceedings and to perform any other legal act as necessary for the fulfilment of the organization’s functions.⁵⁴

Domestic legal personality does not presuppose international legal personality nor is it a necessary consequence thereof.⁵⁵ On the one hand, states may confer domestic legal personality to an international organization irrespective of its condition in international law.⁵⁶ On the other hand, international organi-

zations that possess international legal personality do not automatically enjoy legal personality within the jurisdiction of states, nor even those of states that are members of the organization.

A state may be obliged under international law to confer domestic personality to an international organization. Such an obligation is often imposed by the constitutive treaty of the organization upon the member states. It can also stem from a headquarter agreement or an agreement on immunities and privileges concluded by member or non-member states. However, the obligation remains independent from the international legal personality the organization may enjoy. As pointed out by the Italian Court of Cassation 'the provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting states'.⁵⁷

In the absence of a provision in the relevant instruments, it is generally accepted that member states are obliged under customary law to grant domestic legal personality to international organizations.⁵⁸ This is certainly the case of the host state – regardless of its membership to the organization – since as a matter of fact the organization cannot function without possessing domestic legal personality, at least to the extent this is necessary for the fulfilment of its functions (Kunz, 1949: 849).

At any rate, an international organization can be granted domestic legal personality not in order to comply with an international obligation but on the basis of a political commitment or even expedience. This is the position, for instance, of the United Kingdom with regard to the OSCE.⁵⁹

Regardless of the existence of an international obligation, however, the position of the organization within the jurisdiction of each state continues to be determined by the domestic law of the concerned state.⁶⁰ Clearly, if such an obligation exists and the state does not comply with it, it would commit an international wrongful act and incur international responsibility. Yet, '[f]or a national court, confronted with the issue of the domestic legal personality of an international organization, it is a rule of domestic law that determines the legal status of such an entity within the domestic legal sphere' (Reinisch, 2000: 46).

Depending on the constitutional or other rules on the relation between municipal and international law, domestic legal capacity of international organizations may derive directly from the relevant treaty or may require the enactment of domestic measures. Hence, 'national legal systems will have their own techniques and methods of determining whether an international organization has legal personality which is effective in those respective systems' (Amerasinghe, 2005: 69).

In jurisdictions where international treaties are part of the law of the land without the enactment of any domestic act being necessary, the ratification of

the agreement imposing upon members the obligation to ensure that the organization possess domestic legal personality is sufficient. In *Balfour, Guthrie & Co. Ltd et al. v. United States et al.*, for instance, a US District Court held that the United Nations possessed legal personality in the United States and as such could institute legal proceeding by virtue of Article 104 of the Charter.⁶¹

On the contrary, in jurisdictions where an internal act is indispensable to give effect to international treaties in municipal law, the international organization does not possess domestic legal personality until such an act has been adopted. In *JH Rayner Ltd v. Department of Trade and Industry*, for instance, the House of Lords held that '[w]ithout the Order in Council the I.T.C. had no legal existence in the law of the United Kingdom [...] What brought it into being into English law was the Order in Council and it is the Order in Council, a purely domestic measure, in which the constitution of the legal persona is to be found'.⁶²

The domestic legal personality of an organization in a non-member state may be more problematic. Several decisions admit that, in the absence of an *ad hoc* agreement between the international organization and the concerned non-member state – followed where necessary by appropriate domestic measures – an international organization possesses domestic legal personality if it has been incorporated in at least one foreign state. This may be explained in terms of comity⁶³ or by resorting to the rules of private international law.⁶⁴

CONCLUSIONS

A few questions concerning the legal personality of international organizations are undisputed whereas many others remain controversial. It is generally accepted that international organizations may possess legal personality both in international law and domestic law. Several theories have been put forward as to how an international organization becomes subject of international law. It has been argued in this chapter that this occurs through a process set off by some states or other subjects of international law, and culminating with the emergence of the organization as an independent subject capable of entering into legal relationships on the international plan.

Bringing and receiving international claims as well as implementing international treaties are the typical and intimately related manifestations – rather than the consequences – of such a personality. Indeed, the question of international legal personality is important essentially from the standpoint of the responsibility for internationally wrongful acts committed by or against the organization. As such, it has practical relevance only for a handful of international organizations, namely those that may carry out military operations, exercise governmental powers over a territory, or generally perform activities that may engage their international responsibility.

Neither the conclusion of treaties nor the enjoyment of immunities are reliable tests for the international legal personality of international organizations. On the one hand, an organization deprived of international personality may conclude international treaties. In this case the organ of the organization acts as common organ of the member states whereas the treaty produces its effects vis-à-vis the member states and the other contracting party.

On the other hand, a state can grant immunity to an organization that does not possess international legal personality or might even be obliged to do so under a treaty. Under customary international law, moreover, the principle *par in parem non habet jurisdictionem* may operate not only when the international organization is considered as a subject of international law, but also when the organization is merely the instrument through which several states collectively engage in a certain conduct. In any case, however, the real question is whether the acts committed by an international organization attract immunity from the perspective of the distinction between acts *jure imperii* and *jure gestionis*.

Finally, there is no direct relationship between international legal personality and domestic legal personality: an international organization may possess international but not domestic personality, or the other way around. International law may impose upon a state the obligation to ensure that an international organization – regardless of its international status – possesses legal personality within its jurisdiction. Furthermore, nothing prevents a state from conferring domestic legal personality to an organization deprived of personality in international law. Indeed this has occurred quite frequently. The crux of the matter, however, remains the domestic law of the concerned state, and particularly its provisions on the relationship between international and domestic law.

NOTES

1. The most referred to general studies on international organizations include: D.W. Bowett (1982), H.G. Schermers and N.M. Blokker (1995), P. Sands and P. Klein (2001), J. Klabbers (2009), N.D. White (2005), C.F. Amerasinghe (2005).
2. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory opinion, ICJ Reports (1949: 174). In *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory opinion (1980: 90), the Court confirmed that ‘international Organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law’.
3. A. Reinisch (2000: 55). See also D.W. Bowett (1982: 337), P. Sands and P. Klein (2001: 473), N.D. White (2005: 44). As noted by B. Conforti (2000: 115), this is partly due to the formulation of the question posed by the General Assembly.
4. N.D. White (2005: 32), J. Klabbers (2009: 51), further observes that ‘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’.

5. According to E. Lauterpacht (1976: 403) 'there is no definition of personality in international law which is sufficiently comprehensive to apply in some constructive or realistic way to all the different types of entity which operate in the international field'. See also M. Mendelson (2005: 371).
6. G. Gaja (2003: 8). According to C. Dominicé (1995: 19), '[c]e n'est pas parce qu'une personne ou entité est destinataire de normes juridiques qu'elle devient sujet de droit. C'est parce qu'elle a la qualité de sujet de droit que des normes juridiques peuvent lui conférer des droits ou lui imposer des obligations'.
7. Schermers and Blokker (1995: para. 1565); italics as in the original.
8. In *European Molecular Biology Laboratory v. Germany* (1990: 20) it was held that '[i]nternational organizations were not original, but derived subjects of public international law. Their status therefore had to be determined by reference to the establishing and headquarters agreements'.
9. I. Brownlie (2008: 677). The ILA Committee on Accountability of International Organizations (1998: 604–5) indicated the following criteria: (a) the provision [in the constitutive instrument] of particular powers, either expressly or by way of necessary implication from the grant of functions to the organization, (b) the possession by the organization of a certain level of capacity or competence to press its own claims internationally, as distinct from the separate claim of its members, (c) the capacity to enter into international agreements in its own right, and (d) the ability of organs of the organization to take decisions by majority voting.
10. J. Klabbbers (2009: 49–50). The theory is fully developed and applied to the European Union in the same author's 'Presumptive Personality: The European Union in International Law', in M. Koskeniemi (1998: 231).
11. The ILA Report (1998: 605), conceded that '[t]he criteria for [...] third party level of international personality are rather unclear [...] one may need to consider whether there is a presumption in favour of objective personality for all international organizations which have international personality and if so, how that operates and under which conditions may it be rebutted'.
12. The term 'contracting parties' here refers to the subjects – states or international organizations – that have taken legal commitments towards the creation of an international organization.
13. The mere inclusion in a treaty of a provision on the international legal personality of the organization bears little relevance unless it is followed by concrete action. See for instance Article 18 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, according to which the International Centre for the Settlement of Investment Disputes has full international legal personality. Its inclusion was dictated by the desire of contracting parties to create 'a wholly separate and distinct entity, particularly with regard to the World Bank', as stressed by the Chairman of the Conference (Documents Concerning the Origin and the Formulation of the Convention, Washington, 1968, vol. II, p. 380). See also C. Schreuer (2001: 67–68).
14. As observed by N.D. White (2005: 33) 'there is no need for an express provision in the constituent treaty of the organization for it to have personality'.
15. On the conferral by states of powers to international organizations, see D. Sarooshi (2005).
16. It reads: 'The Community Union shall have legal personality'. In *France v. Council* (1994: para. 24) the ECJ held that 'the Community alone, having legal personality pursuant to Article 210 [later Article 281 of the Treaty, now Article 47 TEU] [...] has the capacity to bind itself by concluding agreements with a non-member country or an international organization'. A provision identical to Art. 281 was included in the Constitution for Europe (2004: Article I-7). In the Final Report dated 1 October 2002, the Working Group III on Legal Personality of the European Union endorsed the view that the European Union legal personality should replace the existing legal personalities of the Communities (2002: paras 8 ff.).
17. At the San Francisco Conference, the proposal to expressly state that the United Nations possesses international legal personality (Doc. 2 G/7 (k) (1), in 3 *UNCIO* 343) was rejected in order to avoid any possible misunderstanding on the nature of the organization, see the position of the United States, in Department of State, *Report to the President on the Results of the San Francisco Conference* (1945: 157–8).

18. See the failed attempt to establish the International Trade Organization in 1948, although article 89 of its draft constitutive instrument expressly provided for international legal personality. It is worthwhile noting that some of the key provisions of the Charter, namely Article 43 and following, have remained dead letter.
19. G. Arangio-Ruiz (1979: 246 ff). See also R. Quadri (1968: 531).
20. G. Arangio-Ruiz (1950: especially p. 73 ff). See also, by the same author, the works referred to above (1979, 1997). According to F. Seyersted (1964a: 100), international organizations become 'general subjects of international law, *ipso facto* on the basis of general and customary international law, in basically the same manner as States'. According to C. Dominicé (1984: 163) 'une organisation interétatique est dotée de la personnalité juridique internationale en vertu du droit international général lorsqu'elle réunit un ensemble de critères objectifs'.
21. That the United Nations is not a super-state was held by the ICJ in *Reparation for Injuries*, (1949: 179). In this sense also the *Report to the President* (1945). In literature, see G. Arangio-Ruiz (1997).
22. G.G. Fitzmaurice (1952: 4) noted that in the *Reparation for Injuries* 'the Court found in effect [...] that the international personality of the Organization was a question of fact' and concluded that 'the existence of international personality as an objective fact is [...] capable of producing consequences outside the confines of the Organization'.
23. *Reparation for Injuries* (1949: 179) (Italics added). According to G. Gaja (2003: 11) '[t]he entity [...] needs to have acquired a sufficient independence from its members so that it cannot be regarded as acting as an organ common to the members. When such an independent entity comes into being, one could speak of an 'objective international personality', as the Court did in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*. The characterization of an organization as a subject of international law thus appears as a question of fact'.
24. The Republic of China – Taiwan, Republika Srpska and Kosovo are just but a few examples of controversial territorial entities.
25. This is without prejudice to the co-existence and co-ordination of international responsibility of member states. On the question, which is beyond the purpose of this chapter, see N.M. Blokker, Chapter 12 in this volume. See also G. Gaja (2004: 3 ff.); ILA Committee of the International Law Association on Accountability of International Organizations (2004: 797).
26. The United Nations, for instance, accepted responsibility for the acts carried out during the military operations carried out in Congo and settled the related claims through a series of agreements (535 UNTS 191, 564 UNTS 193, 565 UNTS 3, 585 UNTS 147, 588 UNTS 197). See also A. Di Blase (1974: 250). On the complex question of attribution of international personality in operations in which more organizations are involved, see G. Gaja (2009: 8 ff) and the cases and articles referred to.
27. Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, quoted in 56 *YBILC* (2004) 112. In his report to the General Assembly dated 20 September 1996 (para. 17), the Secretary General admitted that '[t]he international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations'.
28. Intervention of the Representative of the European Community before the United Nations General Assembly, Sixth Committee, 27 October 2003, A/C.6/58/SR.
29. Report of the Panel, 5 February 1998 (paras 4.9 to 4.15). As noted by P. Koutrakos (2006: 177) 'the ambiguities and complexity of determining competence have not seriously challenged the ability of the Community to act within the WTO structure'.
30. Similarly, the European Community considers itself responsible alongside its member states with regard to breaches of the obligations deriving from Trade-Related aspects of Intellectual Property Rights (TRIPS) and TRIPS agreements. This reflected the concurrent competence of the organization and its members in these areas, see European Court of Justice, Opinion 1/94 (1994: I-5267).
31. The episode refutes the conclusion reached by E. Stein and D. Carreau (1968: 602), according to whom 'NATO has evolved into an international organization endowed with its own

international personality and legal order, possessing an extensive, complex institutional machinery, and engaged in activities of common interests that can no longer be imputed to individual members singly and severally' (footnote omitted).

32. T. Stein (2002: 181), M. Guillaume (1997: 243). *Contra* A. Pellet (1997: 193).
33. T. Perassi (1954: 145 ff.) observes that a common organ is simultaneously the organ of all member states. According to the ILA Report (1998: 603) '[w]ithout personality, international organizations are no more than collections of members requiring rights, obligations and powers to be held and used by law by those members'. In *Certain Phosphate Lands in Nauru* (Nauru v. Australia) (1992: 240, para. 47) the Court held that 'the three Governments mentioned in the Trusteeship Agreement constituted, in the very terms of that Agreement, "the Administering Authority" for Nauru; that this Authority did not have an international legal personality distinct from those of the States thus designated'.
34. *Agreement on the OSCE Kosovo Verification Mission* (1998). See also OSCE Permanent Council Decision No. 263 (1998).
35. Information note dated 7 March 2003, attached to a letter from the Director-General of the Legal Service of the European Commission to the United Nations Legal Counsel (2003: 2), quoted in G. Gaja (2004: 6).
36. On immunities and privileges, see A. Reinisch, 'Privileges and Immunities', Chapter 6 in this volume.
37. In *Iran-US Claims Tribunal v. A.S.* (1994: 329) the Netherlands Supreme Court held that international organizations are entitled under 'unwritten international law' to the privilege of immunity from jurisdiction, at least in the state in whose territory it has its seat. In *Cristiani v. Italian Latin-American Institute* (1985, 1992: 26) the Italian Court of Cassation held that once it is established that an organization possesses legal personality '[t]here is no doubt that it is also entitled to jurisdictional immunity (irrespective of the presence or absence of treaty provisions explicitly granting that right) pursuant to the rule of customary international law *par in parem non habet jurisdictionem*'. See also *Food and Agriculture Organization v. INPDAI* (1982, 1992: 6). *Contra*, *Groupeement d'entreprises Fougerolle v. CERN* (1992, 1996: 211) where the Swiss Supreme Court held that '[t]he jurisdictional immunity of international organizations is not derived from their international legal personality. Since such organizations, by contrast to States, are not full subject of international law, their immunity is always based on an instrument of public international law'. In literature, see A. Reinisch (2000: 145 ff.), H. Fox (2002: 469), I. Brownlie (2008: 680 ff.), G. Gaja (2003: 11). According to P. Sands and P. Klein (2001: 489), however, 'it is difficult to argue that all international organizations are to enjoy privileges and immunities by virtue of a rule of customary international law'.
38. *League of Arab States v. T.* (2001, 2005: 96) (italics added). The Court found that Belgian Courts were entitled to exercise their jurisdiction since the treaty granting immunity was concluded by the King of Belgium but had not been approved by the Parliament.
39. For the purpose of this chapter suffice it to mention that according to the prevailing view, international organizations – similarly to states – normally enjoy restricted immunity. In *Food and Agriculture Organization v. INPDAI* (1982: 1992) the Court held that '[d]octrine and jurisprudence are mostly oriented towards a concept of restrictive immunity, connected with the dichotomy between acts *jure imperii* and *jure gestionis*, and do not grant immunity where the foreign body enters into a contract of private law with an Italian National'. In *Iran-US Claims Tribunal v. A.S.* (1994: 329), the Netherlands Supreme Court held that immunity must be granted 'in respect of all disputes which are immediately connected with the performance of the tasks entrusted to the organization'. In *Groupeement d'entreprises Fougerolle v. CERN* (1992, 1996: 211) however, the Swiss Supreme Court held that '[i]nternational organizations enjoy absolute and complete immunity without any restriction'. See also *Z.M. v. Delegation of Arab League* (1993, 2000: 647). A change towards restricted immunity, however, was prospected by the Swiss Supreme Court in an *obiter dictum* in *A. SA et consorts v. Conseil federal* (2004: 321–2). See A. Reinisch (2000) and 'Privileges and Immunities', Chapter 6 in this volume; E. Gaillard and I. Pingel-Lenuzza (2002).
40. The opposite view has been traditionally held by the Italian Court of Cassation, see, for instance, *Food and Agriculture Organization v. INPDAI* (1982, 1992: 6).

41. Loi fédérale sur les privilèges, les immunités les facilités, ainsi que sur les aides financiers accordées par la Suisse en tant qu'Etat hôte (2007).
42. Message relatif à la loi fédérale sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu'Etat hôte (Loi sur l'Etat hôte, LEH, 2006: 7617). See also the International Organisations Bill, recently adopted by the United Kingdom, with explanatory note.
43. See H.G. Schermers and N. Blokker (1995: para. 1570) who rightly criticize the position expressed in *Reparation for Injuries* advisory opinion (1949: 179), that the United Nations possesses 'a large measure' of international personality. See also C. Dominicé (1995: 18), N.D. White (2005: 31–32).
44. P.H.F. Bekker (1994: 57) (italics as in the original).
45. Case 22/70, *Commission v. Council (re: ERTA)*, (1971: especially paras 14–16). For a full discussion of the case, see P. Koutrakos (2006: 78 ff.). According to P.H.F. Bekker (1994: 51 ff.), international legal personality involves three elements: personality, capacity and competence.
46. See V. Engström, Chapter 3 in this volume.
47. In the *Nuclear Weapons*, Advisory opinion (1996: 79), the ICJ pointed out that '[t]he powers conferred on international organizations are normally the subject of an express statement in their constituent instruments'.
48. According to B. Winarski, diss. op. in *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory opinion (1962: 230–231) 'if a practice is introduced without opposition in the relations between the contracting parties, this may bring about, at the end of a certain period, a modification of a treaty rule, but in that event the very process of the formation of the new rule provides the guarantee of the consent of the parties'.
49. See, for instance, S. Engel (1965: 108), R. Zacklin (1968: 171 ff.)
50. G. Arangio-Ruiz (1979: 284–285, esp. note 183). He also notes that states are 'the masters of the existence, of the survival, of the duration of the treaty's rules and of any rights and duties deriving therefrom'.
51. *Reparation for Injuries Suffered in the Service of the United Nation* (1949: 179). See also *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory opinion, ICJ Reports (1954: 57), *Nuclear Weapons*, Advisory opinion (1996: 79). The later opinion contains a reference to 'subsidiary powers which are not expressly provided for in the basic instruments which govern their activities'.
52. G.H. Hackworth, diss. op. in *Administrative Tribunal* case (1954: 80). In *Certain Expenses*, Advisory opinion (1962: 133), France emphasized that '[l]es Etats Membres des Nations Unies ont souscrit, qu'ils soient Membres originaires ou non, aux engagements de la Charte, mais rien de plus. La Charte est un traité par lequel les Etats n'ont aliéné leur compétence que dans la stricte mesure ils ont consenti'.
53. See, in particular, S.R. Ratner (1993), C. Stahn (2001).
54. See, for instance: Article 104 of the UN Charter and Article I of the Convention on the Privileges and Immunities of the United Nations; Article IV of the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (1951); Article 282 TEC, Article XII UNESCO.
55. In *JH Rayner Ltd v. Department of Trade and Industry* (1989, 1990: 708), the International Tin Council (ITC) was considered as a body that 'as an international persona, had no status under the laws of the United Kingdom'. G. Gaja (2003: 11), observes that '[l]egal personality under international law does not necessarily imply legal personality in domestic law. On the other hand, the absence of legal personality under domestic law does not affect its status under international law, and hence the possibility that the organization incurs international responsibility. But see C. Dominicé (1984: 165), according to whom '[l]orsqu'une organisation interétatique est dotée de la personnalité juridique internationale, sa capacité juridique dans les ordres internes n'est que le reflet, la conséquence nécessaire et inéluctable, de sa qualité de sujet de droit international'. See also G. Marston (1997).
56. A clear example is the OSCE which enjoys legal personality within the United Kingdom on the basis of the International Organisations Act.
57. *Istituto Universitario Europeo v. Piette* (1999: 1313), as translated by G. Gaja (2003: 10, footnote 50).

58. See, for instance, J.-F. Lalive (1953: 304 ff.). According to P. Reuter (1958: 232) '[i]nternational organizations that possess international legal personality "have the right to obtain from the national law of each State the legal status appropriate to the proper exercise of their functions inside each country"'. For Amerasinghe (2005: 76), the members of the organization are *probably* obliged to grant it legal personality in their respective jurisdiction. P. Sands and P. Klein (2001: 477), in turn, maintain that '[e]ven in the absence of any explicit instrument or provision of that kind, any international obligation must be deemed to enjoy an independent legal personality in domestic legal orders, since this will almost always prove necessary to enable it to discharge its functions on a daily basis'.
59. See *International Organisations Act* (2005: 11). See also OSCE, 'Decision on Legal Capacity and Privileges and Immunities' (1993) (non legally binding). In literature, see M. Sapiro (1995: 634–5).
60. On the application of domestic law to international organizations see A. Reinisch (2005: 124 ff.).
61. *Balfour, Guthrie & Co. Ltd et al. v. United States et al.* (1950: 324). Similarly, in *M. v. Organisation des Nations Unies et Etat Belge* (1966, 1972: 450), the Civil Tribunal of Brussels held that '[b]y Article 104 [of the United Nations Charter] the organisation enjoys in the territory of its Members such legal capacity as may be necessary to it'.
62. House of Lords, *JH Rayner Ltd v. Department of Trade and Industry* (1989, 1990: 712). In *Arab Monetary Fund v. Hashim* (1991: 10), it was held that '[t]he *Tin Council* reaffirmed that the English courts cannot identify and allow actions by international organisations which sovereign states by treaty agree to bring into existence'. Such an effect by the Order in Council derives from the International Organisations Act 1968. Alternatively, the international organisation can acquire domestic personality through the enactment of a piece of legislation.
63. See, for instance, *Arab Monetary Fund v. Hashim* (1991: 12); *In Re Hashim and Others* (1995, 1997: 424 ff.).
64. See, for instance, H.G. Schermers and N.M. Blokker (1995: 999–1000). For a sceptical view about the application of rules of private international law, however, see A. Reinisch (2000: 51).

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