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"Legal Personality of International Organizations in the Absence of a Constituent Legal Instrument The Case of the OSCE"

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PART I: INTERNATIONAL ORGANIZATIONS

A- Introduction

In parallel with the gradual change, or perhaps evolution, in legal scholars' perception as regards who can be the subjects of international law, international (intergovernmental) organizations have emerged as effective players in international relations through their daily based interactions with states, other legal entities as well as individuals. With such interactions increasing on the one hand and contributing to the creation and interpretation of international law on the other, questions relating to legal status (legal personality, legal capacity and powers along with privileges and immunities) of international organizations have frequently become a field of legal study.

Various definitions have been offered regarding the characteristics of international organizations. In its work on responsibility of international organizations the International Law Commission (ILC) has agreed on a rather detailed working definition as follows:

> International organization means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.[1]

Understandably, the mandate of the establishment of international organizations' responsibility entailed a precise determination by the Commission of the core elements of the definition.

While the definition of international organization has not yet been put

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[1] ILC Draft Article 2 (a) (Responsibility of International Organizations). [2011] *Yearbook of the International Law Commission*, Vol. II, Part Two. In his first report, Special Rapporteur Gaja proposed the following definition: "[f]or the purposes of the present draft articles, the term 'international organization' refers to an organization which includes States among its members insofar it exercises in its own capacity certain governmental functions" (UN Doc A/CN.4/532 (2003)).

to (international) judicial test[2], the International Court of Justice (ICJ) considered in its landmark Advisory Opinion (*Reparation for Injuries*) the characteristics of the United Nations as an international organization so as to determine whether these characteristics would include for the United Nations a right to present an international claim.[3] Examining the terms of the Charter and considering what characteristics its drafters intended to give to the United Nations, the Court equated being subject of international law to being an international person and concluded that as a subject of international law the United Nations is "capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[4]

In its work on the law of treaties between states and international organizations or between international organizations, which culminated in the adoption of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[5] (1986 VCLT), the ILC decided to keep its earlier elastic definition, taken from the Vienna Convention on Law of Treaties: "International organization means an intergovernmental organization."[6]

The term *international organization* in this definition is understood as composing "mainly of states, and in exceptional cases, one or two international organizations and having in some cases associate members which are not yet states or which may be other international organizations".[7]

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[2] Catherine Brölmann, *The Institutional Veil in Public International Law –* International Organizations & the Law of Treaties, 2007, p.15.
[3] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: ICJ Reports,* 1949, p.174, at 7.
[4] *ibid*, at 9.
[5] Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vol. II (United Nations publication, Sales No. E.94.V.5).
[6] 1986 VCLT, Article 2, 1 (i).
[7] Report of the ILC on the work of its thirty-fourth session, Article1, Commentary (19). [1982] *Yearbook of International Law Commission*, Vol.II Part Two, at 21. Reference is made in the commentary to some special situations such as that of the United Nations within ITU, EEC within GATT.

As for the literature, *Amerasinghe,* for example, suggested that an international organization exists provided that the following five criteria are met: “(i) establishment by some kind of international agreement among states; (ii) possession of what may be called a constitution; (iii) possession of organs separate from its members; (iv) establishment under international law; and (iv) generally, but not always, an exclusive membership of states or governments”. [8] As *Odello* puts it, existence of international subjects, including international organizations is a matter of fact.[9] Once an entity comes into being, as established under international law by an international agreement and possessing a constitutive instrument, then arises the question of whether that entity is to be called a legal person. Relevance of the existence of an entity with its legal personality is so strong that “whenever there is an international entity, there is a legal person. Legal personality is nothing more (or less) than independent existence within international legal order.”[10]

The criteria set by *Amerasighne* to determine legal existence of international organizations refers to, *inter alia,* the constitution of the entity and some kind of international agreement on which the entity is established. What if the entity comes into being without such elements in place? Will there not be a talking of a legal existence? Will the entity in question be without legal personality? If so, what about its capacity?

These questions are relevant also in the case of the Organization for Security and Co-operation in Europe (OSCE), which has no constituent legal instrument determining its membership, purpose and rules. Classified by *Klabbers* as the leading example of soft organizations[11], the OSCE has

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[8] C. Felix Amerasinghe, *Principles of the Institutional Law of International Organizations*, Second Edition, Cambridge, 2005, p.9.
[9] Marco Odello, “The Developing Legal Status of the Organization for Security and Co-operation in Europe”, *Anuario de derecho internacional*, 2006, XXII, p.357.
[10] Ramses A. Wessel, “Revisiting the International Legal Status of the EU”, *European Foreign Affairs Review* 5, 2000, p. 510.
[11] Jan Klabbers, “Institutional Ambivalence by Design: Soft Organizations in International Law”, *Nordic Journal of International Law* Vl. 70, Issue 3, 2001, p.409.

introduced itself as a non-legal institution, claiming however that there is not much difference between itself and a fully-fledged international organization.[12] That being the case, problems arising from the lack of OSCE's international legal personality as well as inconsistent application of privileges and immunities granted to the Organization for its effective functioning brought together representatives of the OSCE participating States and legal experts in search of a lasting solution, a practice that has failed so far.

The draft *Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE* (draft OSCE Convention), prepared by an informal working group of experts established by an OSCE Ministerial Council decision[13], offered a comprehensive solution to the problems encountered, yet fell short of being adopted by the Ministerial Council. The reason advanced by a group of participating States against the adoption of the draft Convention was that the draft Convention should and could be adopted only in parallel with a constituent legal instrument (Charter/Statute). While the question of the legal status of the OSCE still remains a legal and political debate among the participating States with number of options on the table, the debates are accompanied by legal actions recently taken by two states, Austria and Poland, who signed headquarters agreements with the OSCE, through which international legal personality of the Organization has been recognized by the two host countries.

[12] The OSCE *Handbook* (Third Edition, Vienna, July 2002) puts it as follows: "The OSCE has a unique status. On the one hand, it has no legal status under international law and all its decisions are politically but not legally binding. Nevertheless, it possesses most of the normal attributes of an international organization: standing decision-making bodies, permanent headquarters and institutions, permanent staff, regular financial resources and field offices. Most of its instruments, decisions and commitments are framed in legal language and their interpretation requires an understanding of the principles of international law and the standard techniques of the law of treaties. Furthermore, the fact that OSCE commitments are not legally binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law."

[13] OSCE (Brussels) Ministerial Council decision No.16/06 of 5 December 2006.

The question whether the OSCE enjoys international legal personality as a fully-fledged international organization, given the lack of a constituent instrument, will be dealt with in this thesis including by taking into consideration of functions of the Organization. The first part will be devoted to the general framework of international organizations, with special emphasis on legal theories relating to legal personality and legal powers of international organizations. The second part will focus exclusively on the OSCE addressing the efforts to strengthen the legal status of the OSCE and putting to test the prominent theories on legal personality of international organizations.

B- A Brief History of International Organizations

The earliest modern use of the phrase *international organization* can be traced back to the writings of *Walther Schücking*, a judge at the Permanent Court of International Justice, in 1907[14] and 1908[15], while credit is paid to the Scotch jurist *James Lorimer* as the inventor of the term.[16] It was not until the establishment of the League of Nations that the phrase enjoyed wider acceptance. Prior employments of the phrase failed to capture the precise and appropriate combination of the elements that make up what we understand from this specific term today. As *Potter* rightly put it, neither the world of the nations nor the nations of the world were ready for it.[17]

This can be explained by the dominance, in that period, of the realist school in international relations theory, which regards nation-states as the main players and international organizations as barely relevant, set aside international non-governmental organization.[18] According to this oldest theoretical approach in international relations, also known as statist,

[14] *Die Zukunft*, edited by Maximilian Harden, August 17, 1907 (B. Pitman Potter, "Origin of the Term International Organization", *AJIL*, Vol.39, No.4, 1945, p.805).
[15] Staatsrechtliche Abhandlungen, Festgabe für Paul Laband, Tübingen, 1908, p.535 (Potter, "Origin of the Term International Organization", p.805).
[16] Potter, "Origin of the Term International Organization", p.806.
[17] *ibid.*, p. 806.
[18] Bob Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day*, Oxfordshire, 2009, p.5.

mercantilist, and nationalist theory, international relations center around sovereign nation-states seeking power and exercising power against each other. The hostile and dangerous environment surrounding nation states forces them to prepare for armed conflicts.[19]

International organizations started to grow in numbers only after the creation of relatively stable system of sovereign states in Europe.[20] While traces of modern international organizations can be found in the ancient Greek Achaean League[21], through which city-states sought to discourage conflict and generate cooperation[22], modern international organizations could have been established as a consequence of the 1648 Treaty of Westphalia, which defined the principles of sovereignty[23] and became the new constitution of

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[19] Kelly-Kate S. Pease, *International Organizations-Perspectives on Governance in the Twenty-First Century*, Second Edition, New Jersey, 2003, p.6. The writer notes that the realist framework is based on four assumptions: First, the state is the principal unit of analysis. While realists recognize that non-state actors do exist, they are not as important because, ultimately, they are responsible to the state or, at least, are vulnerable to state action. Second, the state is a unitary and rational actor. The state behaves as if it were a single entity capable of engaging in a cost-benefit analysis when selecting courses of action or policy. Third, international relations are essentially conflictual relations. Forth, international issues are divided between high and low politics.

[20] Clive Archer, *International Organizations*, Second Edition, London, 1992, p.4.

[21] An Hellenistic era confederation of Greek city-states on the northern and central Peloponnese, which existed between 280 B.C. and 146 B.C.

[22] K. Harold Jacobson, *Networks of Independence*, Second Edition, New York, 1984, at 8; Robert Riggs & Jack Plano, The United Nations: International Organization and World Politics, Second Edition, Belmont, 1994, at 1-2 (from Jose E. Alvarez, *International Organizations as Law-makers*, New York, 2005, p.18).

[23] In *Palmas Case*, a dispute over the Island of Palmas between the Netherlands and the United States, heard by the Permanent Court of Arbitration in 1928, Max Huber formulated the classic definition of sovereignty: "*Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state*." Published in 22 AJIL 867-912 (1928), at 875 (from Henry G. Schermers & Niels M. Blokker, *International Institutional Law*, Third Revised Edition, The Hague, 1997, p.10).

states in Europe[24]. Increasing interaction among independent nation states gave rise to the establishment of international organizations. Accordingly, *Archer* drew attention to four preconditions for nation states to establish international organizations[25]:

(i) existence of independent nation states;

(ii) interaction between these entities;

(iii) acknowledgement that existing the problems should be attributed to the co-existence of nation states;

(iv) recognition of the need for establishing institutional mechanisms for regulating the relations between states.

With interaction among individuals and societies increasing and intensifying thanks to a large extent to advances in communications technology nation states have become interdependent in solving many complex problems in various fields. Thus, international cooperation in particular among the major players of the time has become necessary in order to find comprehensive solutions to address complexities of situations arising from problems concerning more than two states that could not be solved through bilateral mechanisms, be they consular or diplomatic. As a result, international conferences with *ad hoc* temporary nature have become suitable means where interests of states concerned could be represented at the same forum.[26]

The earlier forms of such conferences[27] focused mainly on drafting a peace treaty in the aftermath of a war. Successful as they may have been in

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[24] Gerard J. Mangone, *A Short History of International Organization*, New York, 1954, at 98-123 (from Alvarez, *International Organizations as Law-makers*, p.18).

[25] Archer, *International Organizations,* p.4.

[26] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.2.

[27] For example, *Peace of Westphalia* (1648) ending the Thirty Year's War (1618-1648) in the Holy Roman Empire, and the Eight Year's War (1568-1648) between Spain and the Dutch Republic; *Peace of Utrecht* (1713), which helped end the War of Spanish Succession (1701-1714).

seeking peaceful solutions to problems brought by armed conflicts, these *ad hoc* conferences were flawed and a number of shortcomings were described as to their limits and quality.[28] *Amerasinghe* gives the following account of these shortcomings[29]:

(i) Each problem called for a new conference;

(ii) The conferences were hardly utilized as platform for discussions and decisions but for reflection of national policies;

(iii) Held on the invitation of the sponsors, the conferences lacked a membership system;

(iv) Decisions were taken unanimously, where the will of majority could be challenged even on substantial issues;

(v) They served as a platform for discussions on political issues rather than legal ones;

(vi) They proved inadequate in solving political questions and even more inadequate when it came to the regulation of relations between the peoples of different countries.

Because of the shortcomings inherent in *ad hoc* conferences, cooperative forms of state practice evolved towards the stage of permanent international organizations with organs that function permanently and meet periodically.[30] In this regard, Vienna Congress[31] has a particular relevance as it aimed at maintenance of peace, in addition to establishing it, within the new European system it had set up[32].

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[28] Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, Fifth Edition, London, 2001, note 1, p. 3ff.

[29] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.2.

[30] Report to the International Law Commission by Abdullah El-Erian, Special Rapporteur, 1963. [1963] Yearbook of International Law Commission, Vol. II, p.162 (*UN Doc. A/CN.4/161 and Add.1*: First report on the relations between states and inter-governmental organizations).

[31] *Congress of Vienna* (1814-1815), chaired by Metternich of Austria, constituted the first of a series of meetings called *Concert of Europe*, and served as a model for the League of Nations as well as the United Nations.

[32] Worth to mention from among the conferences following the Vienna Congress are the *Paris Conference* of 1856, the *Vienna Conference* of 1864,

> It was considered by its leading participants as the forerunner of a series of regular consultations among the great powers which would serve as board meetings for the European community of nations.[33]

Having terminated the Napoleonic Wars between 1803-1815, Vienna Congress marked the first systemic attempt to regulate international affairs by means of regular international conferences[34]. With its Final Act having been signed by all of the parties, the Congress also introduced the technique of multilateral treaty. From among the international conferences, special emphasis is placed on the two Hague International Peace Conferences of 1899 and 1907, which, too, used the technique of multilateral conventions for regulating law of war. Universal character of the Hague Conferences[35] is an important element of their contribution to the development of international organizations[36]. Given increasingly interdependent nature of relations between nation states, *ad hoc* conferences were replaced with periodic ones to solve problems requiring multilateral approach.[37] The trend spread out not only in Europe but also in the New World. As such, evolution from *ad hoc* to periodic character of the regional conferences in the Pan –American system[38], which culminated in the establishment of the Organization of American States some decades later, influenced the functioning of international organizations in several ways:

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the *Prague Conference* of 1866, the *London Conferences* of 1871 and 1912-13, the *Berlin Conferences* of 1878 and 1884-85, and the *Algericas Conference* of 1906, to cite a few.

[33] Inis L. Claude, *Swords into Plowshares: The Problems and Progress of International Organizations*, Second Edition, New York, 1959, p.23.

[34] Malcolm Shaw, *International Law*, Sixth Edition, New York, 2008, p.1283.

[35] The first Conference was attended by twenty-six states while the second was attended by forty-four states.

[36] [1963] Yearbook of the International Law Commission, Vol. II, p.163.

[37] Schermers & Blokker, *International Institutional Law,* p.2.

[38] See the conferences of, Panama 1826, Washington 1889; Mexico City 1901, Rio de Janerio 1906, Buenos Aires 1910, Santiago 1923, Havana 1928, Montevideo 1933, Lima 1938, Panama 1939, Havana 1940, Rio de Janerio 1942, Chapultepec 1945, Rio de Janerio 1947, Bogotá 1948.

(i) The conferences were convened as decided by the previous ones rather than through an initiative of any state;

(ii) A standing administrative organ, the Pan-American Union, set the agenda;

(iii) Preparatory work could be undertaken before each conference;

(iv) More elaborate and formal procedural arrangements could be made thanks to the periodic nature of the conferences.[39]

States engaged in more efficient cooperation among themselves also in non-political technical issues through public international unions set up by multilateral treaties, such as the European river commissions: the Central Commission for Navigation on the Rhine[40] (1815) and the European Danube Commission[41] (1856). The main idea was to ensure that the freedom of navigation is respected in the interest of riparian States. International public administrative unions that proliferated afterwards, such as the International Telegraph Union (1865), which became the International Telecommunication Union-ITU, the General Postal Union-later the Universal Postal Union-UPU (1874), the International Bureau of Industrial Property (1883), and the international Union of Railway Freight Transportation (1890), differed from the *ac hoc* conferences in that they offered innovations such as permanent secretariats, periodic conferences, majority of votes. These innovations laid the basis for contemporary international organizations.[42]

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[39] [1963] *Yearbook of the International Law Commission*, Vol. II, p.164 (Harold Vinacke, *International Organization*, New York, F.S.Crofts & Co., 1934, p.98-99; *American Journal of International Law,* 29 (2)).

[40] Archer notes that the earliest international organization was probably the commission established by the Rhine Octroi Convention of 15 August 1804 to administer the navigation of the River Rhine, which commission became a victim of Napoleonic wars. The Commission was re-established in 1831, 10 years after a similar international commission for the Elbe was set up. See, Clive Archer, “An Introduction to International Organizations”, *The Europa Directory of International Organizations*, Forth Edition, London & New York, 2002, p.3.

[41] See, the Advisory Opinion No.14 of the Permanent Court of International Justice, where the European Danube Commission has been treated as forming a necessary unit and described as not a State but an international institution with a special purpose. PCIJ, Series B. No.14, p.54, and p.64.

[42] Shaw, *International Law,* 1284.

In 1919, the Versailles Peace Conference[43], which ended the First World War, brought together representatives of states, who were concerned mainly with drafting a peace treaty so that the Great War would be *the war to end all wars*. This intergovernmental meeting of the states representatives gave birth to the first international organization whose principal mission was to promote international cooperation and to achieve international peace and security: the League of Nations.[44] The League also aimed at, *inter alia*, introducing mechanisms for peaceful settlement of disputes as well as addressing issues regarding labour conditions[45], minorities, traffic in women and children, just treatment of native inhabitants, supervision of the trade in arms and ammunitions, and freedom of communication and of transit for the commerce.[46] The Versailles Treaty (Part I) establishing the League of Nations-the forerunner of the United Nations- is therefore the "progenitor of the modern universal international organization."[47]The League's contribution to the progress of international organization, it has been held, is far greater than any other institution in history.[48]

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[43] Archer maintains that the Versailles Peace Conference is a good time and place to start giving account of the rise of international organizations. Archer, *International Organizations*, p.3.

[44] Kant's idea of a league of nations to control conflict and promote peace between states dates as far back as 1795. See, Immanuel Kant, *Perpetual Peace: A Philosophical Essay*.

[45] The International Labour Organization (ILO) was established as an agency of the League of Nations, following the Treaty of Versailles. It deals with labour issues, particularly international labour standards and decent work for all. Conventions adopted by the ILO are considered as international labour standards even if not ratified by enough number of governments for entry into force. The Declaration on Fundamental Principles and Rights at Work, adopted by the ILO at its 86th International Labour Conference, in 1998, lays down four principles: (i) the right of workers to associate freely and bargain collectively; (ii) the end of forced and compulsory work; (iii) the end of child labour; (iv) the end of unfair discrimination among workers. The ILO now stands as a specialized agency of the United Nations, and is a member of the United Nations Development Group.

[46] League of Nations, *Covenant of the League of Nations*, 28 April 1919 available at: http://www.unhcr.org/refworld/docid/3dd8b9854.html [accessed on 22 December 2012].

[47] Alvarez, *International Organizations as Law-makers, op. cit.*, p.18.

[48] B. Pitmann Potter, *An Introduction to the Study of International Organization,* Fifth Edition, New York, 1948, p.257.

Despite its contribution to international diplomacy and in particular its efforts in addressing economic and social issues, the League failed to prevent the Second World War in 1939. The failure is explained by the League's two major deficiencies; the first being its failure to acquire a universal character[49], the second that of it being regarded as a victor's charter[50]. Yet the League system is regarded as having provided a stepping stone towards the more enduring United Nations as it introduced a more centralized and systematic form for cooperation on a global scale.[51]

The main innovation of the twentieth century was the establishment in June 1945, at an international conference held in San Francisco, USA, of the United Nations, whose structure resembled in many aspects that of its forerunner, the League of Nations. That the Security Council was established as a UN body with primary responsibility, under the constituent instrument, the UN Charter, for the maintenance of international peace and security is the main difference from the system introduced by the League of Nations whereby the relations between its Assembly and Council and the competences of each were vaguely defined. Established as the principle judicial organ of the United Nations is the International Court of Justice, which took over from the Permanent Court of International Justice of the League of Nations. The Court's role was to settle legal disputes between states submitted to it by them and to give advisory opinions on legal matters referred to it by duly authorized United Nations organs and specialized agencies. Among the novelties introduced by the UN system was an Economic and Social Council, where the world's economic, social and environmental challenges were discussed and debated with a view to issuing policy recommendations, and a Trusteeship Council, which suspended operation on 1 November 1994, with

[49] Despite President Wilson's resolve in forming a general association of nations as reflected in Fourteen Points he had issued, the United States never joined the League of Nations. Besides, departure of Italy, Germany and Japan from the League rendered it incapable of achieving its objectives.
[50] Dissatisfaction with the post-war regime was apparent not only in the case of Germany, in particular after Hitler came to power, but also in the case of Italy and Japan, both states being on the winning side.
[51] Archer, "An Introduction to International Organizations", p.23.

the independence of Palau, the last remaining United Nations trust territory, on 1 October 1994. Failure of the League of Nations in preventing armed conflicts drove the founders of the United Nations to establish an international organization that would function more efficiently than the previous one, an effort that resulted in conferring on the UN Secretary-General wider authority then his predecessor. Given the armed conflicts since the UN's inception this aim is yet to be achieved. Discussion is focused in particular on the composition of the Security Council, of both permanent and non-permanent seats, for good reasons.

Collapse of the Soviet Union in 1991 ended the Cold War period, a development that led to a number of co-operative agreements between East and West. Softening of the relations had impact also on the Conference on Security and Co-operation in Europe, which transformed into a permanent organization. That development will be dealt in detail in the coming pages. To do this, the question of definition needs to be visited first.

C- Definition

Jeremy Bentham coined the term *international* in his book *Principles of Morals and Legislation* (1789). The writer suggested that the term *international jurisprudence* should replace the term *law of nations*, which he deemed to be a misnomer. When it comes to describing activities conducted between states and their representatives, however, it is the term *international* that is often deemed misnomer, and the term *interstate* or *intergovernmental* is suggested to replace it. What is more, the confusion spills over the term *organization* when the two terms are used together. The term *international organization* is often used interchangeably with two other terms; namely, *intergovernmental organization* and *international institution*.[52] There are also

[52] For the use of a rather generic term of international institutions, encompassing both treaty organs and international organizations, see, e.g., Alan E. Boyle, "Saving the World? Implementation of International Environmental Law through International Institutions" (1991) 3 *Journal of Environmental Law*, p. 229-245. See, also, Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral

some specific forms of international cooperation, which constitutes the scope of this study: what used to be the Conference on Security and Co-operation in Europe. For the sake of consistency with its widespread usage the term *international organization* will be employed in this study.

Giving an all-encompassing definition for international organization is no easier task than setting a proper designation. In other words, "*omnis definitio in iure civili periculosa rarum est enim, ut non subverti posset.*"[53]

Difficulty in defining such organizations in a comprehensive manner is attributed to their being social constructs, rather than creatures of nature, which are "created by people in order, presumably, to help them achieve some purpose, whatever that purpose may be."[54] This attribution renders it structurally impossible to formulate a single definition to capture all possible variations of international organizations.

a) The Work of the ILC

In his first report on "Relations between States and Inter-Governmental Organizations"[55], *El-Erian*, Special Rapporteur of the International Law Commission, classified the definitions found in the literature into three categories:

Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000), 94 *AJIL*, p.623-659.

[53] "All legal definitions are dangerous for a definition can rarely escape being discredited", the 2nd century Roman jurist *Iavolenus*, (from, Sam Muller, *International Organizations and Their Host States: Aspects of Their Relationship*, The Hague, 1995, p.3).

[54] Jan Klabbers, *An Introduction to International Institutional Law,* Second Edition, Cambridge, 2009, p.6.

[55] In response to the UN General Assembly resolution 1289 (XIII) of 5 December 1958, whereby the General Assembly invited the International Law Commission to consider the question of relations between States and inter-governmental international organizations, the Commission decided to consider the question in due course and appointed Abdullah El-Erian as its Special Rapporteur. For the first report see, [1963] *Yearbook of the International Law Commission*, Vol.II, pp. 159-186 (documents A/CN.4/161 and Add.1, and A/CN.4/L.103).

(i) Those assimilating or integrating the phenomenon of international organization into the classical patterns of international law[56];

(ii) Those projecting the present understanding of international law retrospectively to cover earlier experiences[57];

(iii) Those emphasizing the essential elements of international organizations.[58]

El-Erian listed the essential elements to be found in definition of international organization as the *conventional basis*, the *institutional element* and the *separate entity* of the organization, and referred to definitions provided by *Brierly* and Sir *Gerald Fitzmaurice* in their reports on the law of treaties to the International Law Commission. According to *Brierly*;

> An international organization is an association of States with common organs, which is established by Treaty.[59]

While *Brierly*'s definition fails to capture the element of the *separate entity* of the organization, definition offered by *Fitzmaurice* meets all of the listed essential elements:

> The term international organization means a collectivity of States established by treaty, with a constitution and common organs,

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[56] See, Dionisio Anzilotti, *Cours de Droit International*, Paris, 1929, p.283; Hans Kelsen, *Principles of International Law*, New York, 1952, p.172.

[57] See, Stanley Hoffmann, *Organisation Internationale et Pouvoirs Politiques des Etats,* p.12, Paris, 1954.

[58] See, Charles Chaumont, L'O.N.U, Paris, 1962, p.5; Suzanne Bastid, *Droit des Gens*, Principes généraux, p.329, (Université de Paris, Institut d'Etudes politiques); Paul Reuter, Institutions Internationales, 3rd, 1962, p.189; Charles Cheney Hyde, *International Law, chiefly as interpreted and applied by the United States*, 2nd, Boston, 1947, p. 131.

[59] [1963] *Yearbook of the International Law Commission*, Vol.II, p.166 (A/CN.4/23, Article 2); [1950] *Yearbook of the International Law Commission,* Vol.II, pp.222-248.

> having a personality distinct from that of its member States, and being a subject of international law with treaty-making capacity.[60]

Given that *Fitzmaurice* formulated his definition in the context of the law of treaties reference to the treaty-making capacity, which necessitates the mention of the quality of subject of international law, can be explained in the context of his study.

In his report on "Relations between States and Inter-Governmental Organizations"[61], *Leonardo Díaz González*, Special Rapporteur of the International Law Commission, noted that according to the terminology most commonly used by writers on international law;

> An international organization is a permanent grouping of States with organs, which are intended, in matters of common interest, to express views that differ from those of the member States.[62]

In its work on the Law of Treaties between States and International Organizations or between International Organizations the International Law Commission noted that the definition[63] of *international organization* "should be understood in the sense given to it in practice: that is to say, as meaning an organization composed mainly of states, and in some cases having associate members which are not yet states or which may even be other international organizations."[64]

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[60] [1963] *Yearbook of the International Law Commission*, Vol.II, p.166 (A/CN.4/101, Article 3).

[61] At its thirty-first session, in 1979, the Commission appointed *Leonardo Díaz González*, as its Special Rapporteur to replace Abdullah El-Erian, who had resigned upon his election as the judge of the ICJ. For his second report on relations between States and international organizations, see [1985] *Yearbook of the International Law Commission,* Vol.II, Part I (documents A/CN.4/391 and Add.1).

[62] [1985] *Yearbook of the International Law Commission* Vol.II, Part I, at 106.

[63] "International organization means an intergovernmental organization." 1986 VCLT, Article 2, 1 (i).

[64] [1982] *Yearbook of International Law Commission*, Vol.II, p.148.

Likewise, the term *public international organization* has been used in some legal instruments when referring to international organizations.[65]

The International Law Commission, in its work on responsibility of international organizations has agreed on the following rather detained working definition:

> International organization means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.[66]

The Commission has not intended to give an all-encompassing definition serving for all purposes but has come up with a definition for the purposes of the draft articles, and it has outlined certain common characteristics of the international organizations. Instead of succinctly defining *international organizations* as *intergovernmental organizations* the Commission has adopted a different definition for several reasons. Firstly, one wouldn't give much information by defining international organizations as intergovernmental organizations. It is not even clear whether the term *intergovernmental organization* refers to the constituent instrument or to actual membership. Secondly, the term *intergovernmental* is not an appropriate one since some international organizations have been established by state organs other than governments or by those organs together with governments. It should be added that states are not always represented by governments within organizations. Thirdly, the term *intergovernmental organization* may give an impression that an organization, which includes among its members entities other than states is excluded.[67] In addition to the preference of the term *international* over *intergovernmental*, the International Law Commission has added the following sentence to the definition in order

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[65] See Article 34 of the *Statute of the International Court of Justice*; Article 12 of the *Constitution of the International Labour Organization*.
[66] ILC Draft Article 2 (a) (*Responsibility of International Organizations),* [2011] *Yearbook of International Law Commission*, Vol.II, Part Two.
[67] See the Commentary, Article 2 (3), p.43.

to avoid any misunderstanding: "International organizations may include as members, in addition to States, other entities."

There is no question with regard to the membership of international organizations, which have a treaty-making capacity. However, even if the entity other than a State does not possess a treaty-making capacity, or cannot take part in the adoption of the constituent instrument, it may still be accepted as a member of the organization so established.[68]

b) International Instruments

The ILC's elastic definition of *international organization* has been employed identically in the four Vienna Conventions that have been concluded on representation of states in their relations with international organizations of a universal character[69], on succession of states in respect of treaties[70], on law of treaties[71], and on law of treaties between states and international organizations or between international organization.[72] According to that definition "international organization means an intergovernmental[73] organization." As noted in the commentary to Article 2 of the 1969 Vienna

[68] *ibid.*, p.45.
[69] Article I (1) (1) of the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* of 14 March 1975 (UN Doc. A/CONF.67/16; United Nations publication, Sales No. E.75.V.12).
[70] Article 2 (1) (n) of the *Vienna Convention on Succession of States in respect of Treaties* of 23 August 1978 (United Nations, *Treaty Series*, vol.1946, p.3).
[71] Article 2 (1) (i) of the *Vienna Convention on the Law of Treaties* of 23 May 1969 (United Nations, *Treaty Series*, vol.1155, p.331; United Nations publication, Sales No. E.70.V.5)).
[72] Article 2 (1) (i) of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* of 21 March 1986 (UN Doc. A/CONF.129/15).
[73] The term "intergovernmental organization" has been used, *inter alia*, in OAS Charter, Art.124 (For the purposes of the present Charter, InterAmerican Specialized Organizations are the intergovernmental organizations established by multilateral agreements and having specific functions with respect to technical matters of common interest to the American States.)

Convention on the Law of Treaties, the definition aims at making it clear that the rules of non-governmental organizations are excluded.[74]

In addition to the term *international organization*, definition has been provided for *international organization of universal character* in the Convention on the Representation of States in their Relations with International Organizations of a Universal Character as the following:

> International organization of universal character means an organization whose membership and responsibilities are on a world-wide scale.[75]

The meaning of the term *international organization of universal character* derives from Article 57 of the United Nations Charter.[76] The ILC noted that "the question whether an international organization is of universal character depends not only on the actual character of its membership but also on the potential scope of its membership and responsibilities."[77]

It should be noted here that the main purposes of the abovementioned instruments are not to regulate the status of international organizations, but, for example in the case of 1986 VCLT, the regime of treaties to which one or more international organizations are parties. The ILC deemed it sufficient to stick to the definition provided for in the Vienna Convention on Law of

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[74] [1966] *Yearbook of the International Law Commission* Vol.I, Part II, at 190.

[75] Article I (1) (2) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975.

[76] Article 57 of the United Nations Charter reads: "(1) The *various specialized agencies, established by inter-governmental agreement and having wide international responsibilities*, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63. (2) Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies." (Emphasis added.)

[77] Commentary to the draft articles on the representation of States in their relations with international organizations, [1971] *Yearbook of the International Law Commission* Vol.II, Part I, at 184.

Treaties for the purposes of the respective draft articles. Although the definition emphasizes the *inter-state* character of international organizations, it is recognized that, in exceptional cases, an international organization may be composed of one or more international organizations.[78] Therefore, it can safely be concluded that while serving for the purposes of the respective Conventions, definitions provided in these instruments fall short of offering a core set of definitional elements.

c) Literature

Although definitions in literature vary in terms of the essential elements of the organization, one reason being the tension between strict adherents to the state sovereignty and those pursuing the protection of community interest, they may help to bring together some common essential elements of a definition. One such definition, which falls short of covering all of the organizations is offered by *Bindschedler*. According to *Bindschedler*;

> The term international organization denotes an association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfill particular functions within the organization.[79]

The definition excludes international organizations based on a constituent instrument other than a treaty. The writer also regards an organization's constituent treaty as the basis of both its establishment and its operation.

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[78] [1982] *Yearbook of International Law Commission*, Vol.II Part Two, at 21.
[79] Rudolf L., Bindschedler "International Organizations, General Aspects", *Encyclopedia of Public International Law*, R. Bernhardt (ed.), Volume II, North-Holland 1995, p.1289.

In his authoritative[80] definition *Virally* describes an international organization as "an association of States, established by agreement among its members and possessing a permanent system or a set of organs, whose task it is to pursue objectives of common interest, by means of cooperation among its members."[81]

After referring to the eight criteria [82] listed by the *Yearbook of International Organizations* (1976/7) for inclusion under the rubric of international organization and examining the basic characteristics offered by some writers[83] *Archer* has listed the outstanding features under three headings: (i) membership; (ii) aim; (iii) structure. According to his definition an international organization is "a formal, continuous structure established by agreement between members (governmental and/or non-governmental) from two or more sovereign states with the aim of pursuing the common interest of the membership."[84]

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[80] Quoted by Nigel White, *The Law of International Organizations*, Second Edition, 2005, note 6, p.2; Brölmann, *The Institutional Veil in Public International Law*, note 21, p.16.

[81] Michel Virally, "Definition and classification: a legal approach", 29 *International Social Science Journal*, 1977, p. 58-72.

[82] See Archer, *International Organizations*, *op. cit.*, p.33. "The criteria are summarized as follows: (1) The aims must be genuinely international with the intention to cover at least three states; (2) Membership must be individual or collective participation, with full voting rights, from at least three states and must be open to any individual or entity appropriately qualified in the organization's area of operations. Voting must be so that no one national group can control the organization; (3) The constitution must provide for a formal structure giving members the right periodically to elect governing bodies and officers. Provision should be made for continuity of operation with a permanent headquarters; (4) Officers should not all be of the same nationality for more than a given period; (5) There should be a substantial contribution to the budget from at least three states and there should be no attempt to make profits for distribution to members; (6) Those with an organic relationship with other organizations must show it can exist independently and elect its own officials; (7) Evidence of current activities must be available; (8) There are some negative criteria: size, politics, ideology, fields of activity, geographical location of headquarters, nomenclature are irrelevant in deciding whether a set-up is an 'international organization' or not."

[83] See, *ibid*, p.34, for definitions offered by Michael Wallace & David Singer; Jack Plano & Jon Riggs; Alvin LeRoy Benett; G.I.Tunkin; Christopher Osakwe; Grigory Morozov; Paul Reuter; Charles Pentland; Pierre Gerbet.

[84] *ibid.*, p.37.

While membership of two or more sovereign states is prerequisite for an entity to be called international organization, the definition does not limit the membership to states or official state representatives.[85]

Ridruejo has listed six characteristic elements of an international organization:

(i) Interstate character;
(ii) Voluntary basis;
(iii) Permanent organs;
(iv) Autonomous will;
(v) Its own competence;
(vi) Co-operation between its members to meet common interests.[86]

The writer underlines the importance of the pursuance of common interests of the members, an approach adopted also by *Archer*.[87]

Brownlie has defined the characteristic elements as follows:

(i) A permanent association of States, or other organizations, with lawful objects, equipped with organs;

(ii) Distinction, in terms of legal powers and purposes, between the organization and its member states; and

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[85] The writer's explanation suggests that state representatives, along with states, could be among the members of an international organization.

[86] J. A. Pastor Ridruejo, *Curso de derecho internacional publico y organizaciones internacionales*, Madrid, 1992, p.687-690 (from Finn Seyersted, *Common Law of International Organizations,* Leiden, 2008, p. 38).

[87] Another writer underlining the importance of the element of common interest is the Austrian jurist *Zamanek*. He defines international organization as an autonomy-organized association of states established by collective agreement to the pursuit of common interests of the members' community (*…eine international Organisation ist eine durch Kollektivvertrag geschaffene autonom organisierte völkerrechtliche Verbindung von Staaten zur Verfolgung gemeinsamer Interessen der Mitgliedergemeinschaft)*. Karl Zemanek, *Das Vertragsrecht der Internationalen Organisationen*, Vienna 1957, p.17.

(iii) The existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.[88]

In his study on international organizations and their host states, *Muller* has set three requirements that an international organization should meet:

(i) It must be established by an international agreement;
(ii) It must have its own, separate organs;
(iii) It must be established under international law[89].

He has noted, however, that these criteria do not suggest a clear-cut definition as it leaves room for maneuver and interpretation.

In contradiction to the prevailing doctrine, which holds that international organizations come into existence by treaty, which is not binding on non-member states, *Seyersted* declined the need for a treaty either to constitute an intergovernmental (international) organization, or to establish it as a subject of international law.[90] Indeed, not all international organizations are established by treaties, *i.e.* legally binding international agreements irrespective of their designation. Quite a number of international organizations have been established pursuant to decisions taken in international conferences.[91] An existing international organization, also, may create an organization. The United Nations, for instance, has created several organizations by resolution.[92] The Nordic Council was established by parallel decisions of the parliaments of Denmark, Iceland, Norway and Sweden only to be followed by a treaty subsequently. Rather than considering

[88] James Crawford, *Brownlie's Principles of Public International Law,* Oxford, Eighth Edition, 2012, p. 169.
[89] Muller, *International Organizations and Their Host States: Aspects of Their Relationship,* p.4.
[90] Finn Seyersted, "Objective International Personality of Intergovernmental Organisations. Do Their Capacities Really Depend upon Their Constitutions?", Copenhagen, 1963*,* p.46.
[91] For example, the Asian-African Legal Consultative Committee, the Inter-American Defense Board, and the International Wool Study Group.
[92] For example, the United Nations Industrial Development Organization (UNIDO), and the United Nations Children's Fund (UNICEF).

establishment by a treaty as a constituent element of being an international organization, *Seyersted* underlined that only one condition is necessary but also sufficient: "international organs (i.e. organs established by two or more sovereign communities) (i) which are not all subject to the authority of any other organized community except that of participating communities acting jointly through their representatives on such organs; and (ii) which are not authorized by all their acts to assume obligations (merely) on behalf of the several participating communities."[93]

Klabbers has listed three characteristic elements of an international organization:

(i) International organizations are usually created between states;

(ii) Many of these organizations are established by means of a treaty;

(iii) An international organization must possess at least one organ, which has a will distinct from the will of its member States.[94]

Drawing attention to the lack of universally accepted definition of what constitutes an international organization, *Schermers* and *Blokker* have defined international organizations, for the purposes of their study, as forms of cooperation (i) founded on an international agreement (ii) creating at least one organ with a will of its own, (iii) established under international law.[95]

Among the scholars pointing out to the seemingly wide consensus on constitutive elements of international organizations while recognizing the lack of a generally accepted definition is *Reinisch.* The writer defines international organizations as entities;

(i) consisting predominantly of states;

(ii) created by international agreements;

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[93] Seyersted, "Objective International Personality of Intergovernmental Organisations. Do Their Capacities Really Depend upon Their Constitutions?", p.53.

[94] Klabbers, *An Introduction to International Institutional Law,* p. 6-12.

[95] Schermers & Blokker, *International Institutional Law*, p.33.

(iii) having their own organs; and,
(iv) entrusted to fulfill some common (usually public) tasks.[96]

As regards the possession of a legal personality distinct from member states, the writer regards this distinction as a consequence rather than constitutive criterion of international organizations.

The definition of international organizations retained in the new edition of *Bowett*'s text book distinguishes five core traits in organizations. International organizations are thus defined as entities;

(i) composed of states and/or other international organizations;
(ii) established by treaty;
(iii) having an autonomous will distinct from that of its members;
(iv) having been vested with legal personality; and,
(v) capable of adopting norms addressed to its members.[97]

The definition excludes entities the status and functioning of which are regulated by one or more national laws, such as international non-governmental organizations and inter-state agencies, and includes those established within the framework of agreements establishing institutional arrangements for putting into effect of substantive norms.[98]

While pointing out to the distinction between public and private international organizations, *Amerasinghe* has underlined that the former is "normally created by a treaty or convention to which states are parties and the members of the organization so created are generally states, though sometimes but rarely governments may constitute the membership."[99] Rather than

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[96] August Reinisch, *International Organizations Before National Courts*, Cambridge University Press, 2000, p.5.
[97] Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions,* p.16.
[98] *ibid.*, p.17.
[99] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.9.

defining public international organizations, the writer identified the following basic characteristics:

(i) Establishment by some kind of international agreement among states;

(ii) Possession of what may be called a constitution;

(iii) Possession of organs separate from its members;

(iv) Establishment under international law; and

(v) Generally, but not always, an exclusive membership of states or governments.[100]

Some of the elements in the definitions cited above seem to enjoy broader recognition while some remain open for debate. As opposed to 'inter-state' character offered by scholars like *Virally* and *Ridruejo*, it is generally recognized that international organizations, albeit composing predominantly of states, consist of international organizations as well. Therefore, one core element of the definition relates to the composition of international organizations, which includes other international organizations in addition to states.

Another element that seems to enjoy wide support is *establishment by international agreement*. The term *international agreement* covers those entities established by legal instruments governed by international law in addition to those established by treaties as narrowly defined in Vienna Convention on Law of Treaties. Therefore, entities established by an instrument like a resolution of states or for example, of the United Nations, fall within the definition of international organizations albeit not created by a treaty. This brings us to the conclusion that lack of a constituent instrument has no impact on an entity's being classified as an international organization. Although *Seyersted* declined the need for a treaty, the conditions he listed, namely whether or not the entity's organs are authorized by all their acts to assume obligations merely on behalf of the several participating communities

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[100] *ibid*., p.9.

can be checked only on the basis of an international agreement in whatever form it might be.

Another element that seems to enjoy support in literature is the will of the organization distinct from that of its member states. This element is reinforced with the existence of organs as an element of permanency. The element of *distinct will* highlights the distinction between international organizations and other cooperative forms of state practice, such as *ad hoc* conferences predating the emergence of international organizations. Determining on whether an entity possesses autonomous will distinct from its members, however, is not an easy task to fulfill, and requires examining theories relating to legal personality and powers of international organizations addressed below.

Inclusion of legal personality as a constitutive element in a general definition is not necessary and may create a problem of circularity if one is to determine if an entity could be granted legal personality based on whether it meets definitional elements that include legal personality. This external attribute is given by the legal order itself. However, element of legal personality may be resorted to in cases where specific types of international organizations are addressed, as in the ILC's work on responsibility of international organizations.

No definition will be taken as basis for the purposes of this work. However, the Organization for Security and Co-operation in Europe will be assessed against the various characteristics listed above with special emphasis being given to the impact of lack of a constituent instrument

D. Classification

International organizations have been classified in a number of ways, depending on the purpose of such classifications. In its work on relations between states and inter-governmental organizations, the ILC first dealt with classifications pertaining to the nature of international organizations being (i) temporary (or *ad hoc*) or permanent, and (ii) public (inter-governmental) or private (non-governmental) as follows:

i. The classification of international organizations into temporary (or *ad hoc*) or permanent organizations[101]: Noting that this classification was adopted by some writers[102], the ILC concludes that this classification does not seem warranted. Temporary conferences are not to be treated as international organizations as they lack the institutional element. Lacking an entity separate from those of the participating states, periodic conferences fail to be treated as international organizations either.

ii. The classification of international organizations into public (inter-governmental) and private (non-governmental) organizations: Despite their importance, private international organizations, qualified as non-governmental organizations in the Charter of the United Nations[103], are not considered as international organizations. Private international organization is not created by treaty, and its members are not states.[104]

The ILC then examined classification of international organizations according to (i) membership and (ii) function as follows:

i. Classification of international organizations according to membership. This classification has been examined under two subheadings:

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[101] [1963] *Yearbook of the International Law Commission*, Vol.II, p.167. (A/CN.4/161 and Add.1).

[102] Reference was made to G. Schwarzenberger, *A Manual of International Law*, Vol I, p. 227 (fourth ed., London 1960); F. I. Kozhevnikov, *International Law,* USSR Academy of Sciences, p.320.

[103] UN Charter, Article 71 reads: " The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned."

[104] [1963] *Yearbook of the International Law Commission*, Vol.II, p.167.

(a) According to the scope of membership: universal and regional organizations. Universal organization is defined as one, which includes all the states of the world as its members. The ILC notes therefore that the definition does not apply to any international organization. As for regional organizations, the ILC draws attention to the fact that the United Nations Charter does not provide a definition for regional arrangements, and notes therefore that it remains unclear to what extent the concept of regional arrangements can be stretched.[105]

(b) According to the procedure of admission to membership: organizations with automatic procedures and organizations with regulated procedures of admission. An organization with an automatic procedure of admission is defined as one the admission of which depends solely on the will of the prospective member- the Universal Postal Union, up to 1947, and the specialized agencies being examples of such group. It is observed however that there are hardly any organizations with completely automatic procedure of admission. An organization with regulated procedure of admission, on the other hand, is defined as those, which prescribe certain conditions for admission, whether objective or discretionary. It is observed that element of political discretion cannot be practically eliminated even when admission is subject to fulfillment of objective conditions.[106]

ii. Classification of international organizations according to function;

(a) According to the scope of activities: general and specialized international organizations. The general international organization is defined as one whose jurisdiction covers the whole fabric of international relations. Reference is made to *Oppenheim*'s definition which emphasizes the comprehensive character of its scope of activities:

> "(…) an association of States of potentially universal character for the ultimate fulfillment of purposes which, in relation to

[105] *ibid.*, p.167.
[106] *ibid.*, p.168.

individuals organized in political society, are realized by the State."[107]

Apart from universal organizations, it is possible to classify regional organizations as general provided that their scope of activities are global and political. Specialized international organization is defined as one, having a specific limited object and purpose, be it cultural, technic, social or humanitarian.[108]

(b) According to the division of power: legislative, administrative and judicial organizations. This classification is offered if we consider the functions of international organizations as public functions.[109]

(c) According to the extent of authority and power of the organization vis-à-vis states: policy-making, operative and supranational organizations. The policy-making or deliberative organization is defined as the one "which is wholly confined to the development of international policies through adoption of resolutions and making recommendations to member governments and depending wholly on governments for the implementation of the policy."[110] The operative organization, on the other hand, is one which has "administrative operative responsibilities independent from the governments which created it. The governments' delegates lay down the policy but the organization would have the funds and the powers to carry them out without relying upon governments to do so."[111]

Lying on the outer limit of international organizations and on the border of federalism, supra-national organizations are defined as

[107] *ibid.*, p.168 (See, Lassa Oppenheim, *International Law: A Treatise*, Eighth Edition, H. Lauterpacht ed., Vol.I: Peace, 1955, p.370).
[108] *ibid.* p.168.
[109] *ibid.* p.168. It is observed that "sometimes all these functions are undertaken by different organs of the same organization, e.g., the United Nations."
[110] *ibid.*, p.168. Reference is made to Oppenheim, International Law, Vol.I, (8th Ed. Lauterpacht) (London 1955), p.370.
[111] *ibid.,* p. 168.

"organizations which replace governments in the exercise of sovereign powers legislation, adjudication or the ultimate use of coercion in a direct way over the populations and territories of member states without having, in doing this, to pass through their own governments."[112]

Classifications employed by the ILC are not meant to be exhaustive, and different classifications can be made depending on the purpose of the specific study. Therefore, the ILC's work, while not exhaustive, is sufficient to address various aspects of relations between states and international organizations to which legal consequences are to be attached. The main emphasis placed on membership and function of international organizations seems broadly recognized in literature.

While noting various criteria employed to classify international organizations *Schermers* and *Blokker* have emphasized that the most fundamental criterion is the one suggested by *Virally*: the function of international organizations[113]. According to *Virally,* "it is an organization's function that constitutes its true raison d'être. And it is in order that it may perform this function that its member states have established it and take part in its operation, bearing the costs and accepting the constraints that inevitably derive from it. Moreover, the organization's structure is directly determined by its function or purpose."[114]

Using the notion of function as a fundamental criterion, the writers have elaborated three distinctions between international organizations: (i) universal versus closed organizations; (ii) intergovernmental versus supranational organizations; (iii) special versus general organizations. The writers noted that, unlike in universal organizations, greater harmony and cohesion exists among member states in closed (regional) organizations,

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[112] *ibid.*, p. 169. The European communities, which are possessed of direct, if limited, legislative, executive and adjudicative powers are given as the most important examples of this category.
[113] Schermers & Blokker, *International Institutional Law,* p.49.
[114] Michel Virally, "Definition and Classification of International Organizations: A Legal Approach", p. 66.

which increases the institutional opportunities. They further highlighted the distinction between the network of relations conducted within intergovernmental and supranational organizations, which is wider in the latter while confined to relations between national governments in the former. The writers also drew attention to the powers of special or technical organizations arising from their special knowledge and limited purposes, which is absent in the case of general organizations.[115]

In the Austrian Handbook of International Law[116], *Schmalenbach* classifies international organizations according to the criteria based on (i) scope of membership; (ii) organization's objectives and tasks; (iii) degree of integration; (iv) degree of organization.

Under the criterion based on the scope of membership, international organizations are divided into two: *universal/open* and *regional/closed* organizations. *Schmalenbach* notes that while open membership is desirable for universal international organizations, fulfilling the tasks of the organization becomes difficult due to the diversity of political systems and different economic levels of the member states. However, in regional organizations, where criterion for membership lies in political, economic or geographical similarities, greater homogeneity of the member states leads to their greater integrity.[117]

Under the second criterion, international organizations are classified as those with general-political objectives (general international organizations) and those with technical functions (specialized organizations). While the first group has a large field of activities (UN, OAS, AU), the second group has narrow and outlined objectives (UPU).[118]

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[115] Schermers & Blokker, *International Institutional Law,* p.33-44.
[116] Kirsten Schmalenbach & Christoph Schreuer, *Österreichisches Handbuch des Völkerrechts*, Band I-Textteil, 5. Auflage, Manz, (Edited by August Reinisch,) 2013, p.214-219.
[117] *ibid*., p.208.
[118] *ibid.*, p.209.

Under the criterion based on the integration of member states, *Schmalenbach* warns us that the term *intergovernmental organization* is sometimes confused with *supranational organization* (mostly used for the EU, but also for ECOWAS and CARICOM), and lists the characteristics of supranational organizations as the following: i) authority of the organization to take binding decisions on member states; ii) authority of the organization to take decisions also against the will of individual member states; iii) priority of the organization's law over the law of member states; iv) effective enforcement measures; v) direct application of decisions in member states without implementing measures (direct effect on individuals); vi) having parliamentary organ; vii) having judiciary with mandatory jurisdiction; viii) having financial sources other than contributions by member states.[119]

As regards the classification based on the degree of organization, *Schmalenbach* notes that in addition to the usual international organizations with a fixed structure and a typical organizational construction, there are less structured or informal associations of states whose character as international organization is often controversial. *Schmalenbach* reminds us that the CSCE, an institutionalized multilateral diplomatic process which was not based on an agreement under international law, was not an international organization, but in the course of its institutionalization process was renamed as the OSCE albeit its non-legal status remaining unchanged due to some objections from participating States. As another example, *Schmalenbach* advises that despite having all the attributes of an international organization the Benelux-Union did not acquire international legal personality due to the declaration of the will of member states to that end. However, the writer notes, such entities can practically evolve into international organizations if the member states recognize the growing sovereignty of the organs in the international area (GATT evolving into WTO). Under this classification, *Schmalenbach* also notes that there are informal groups of states that are not international organizations such as G8, G20, Non-Aligned Movement, Group of 77.[120]

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[119] *ibid.*, p.210.
[120] *ibid,* p.211.

It is worth noting that *Schmalenbach*'s classification mentions the OSCE among the informal and less structured organizations whose legal status is controversial but eligible to evolve into typical international organizations should participating States recognize the sovereignty of its organs, which is an issue feeding the discussions of the OSCE's legal personality.[121]

As will be examined below, an organization's function is determinative of establishing its legal status, in particular if not expressed explicitly in its constituent instrument. Therefore, taking into account the purpose of the study at hand, and using the notion of function as the core criterion, the following distinctions can be made based on the purposes, membership status and relationship network of international organizations: i) Political-technical; ii) universal-regional; iii) intergovernmental-supranational.

E- Legal Personality Under International Law

To be a legal person is to be the subject of rights and duties. As *Kelsen* noted, "there must exist something that has the duty or the right."[122] Once an entity is subject of a given legal system it is capable of independently bearing rights and duties under that system. In other words, once the status of legal personality is awarded in a legal order, the person in question enters into the legal domain and becomes capable of bearing rights and duties distinct from its members in that same legal order. Legal personality can be conferred only on subjects of a legal system: in the field of domestic legal system on those standing as subjects of that system; in the field of international legal system, accordingly, on those standing as subjects of international legal system. For that reason the question of legal personality goes hand in hand with that of the subjects of law.

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[121] See discussions on OSCE's international legal personality below, Part II/C.
[122] Hans Kelsen, *General Theory of Law and State*, (New York: Russel & Russel, Wedberg trans.), 1945, p.93.

Thus, it takes us to examine peculiarities of these subjects. Three peculiarities of a subject of a legal system have been listed:

(a) A subject has duties that make him/her accountable, according to the rules of the system, for any behaviour at variance with that allowed by the system;

(b) A subject has *locus standi* to claim and enjoy the benefits afforded by the system that binds him/her.

(c) A subject possesses the capacity to enter into contractual relationships with other legal persons recognized by their system of law[123].

Who, then, is the subject of rights and duties? This question leads us to the concept of legal personality.

According to *Hobbes,* who dedicated a key chapter to the concept of personality (Of Man);

> A person is he, whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether Truly or by Fiction.
> When they are considered as his own, then is he called a Natural Person; and when they are considered as representing the words and actions of another, then is he a Feigned or Artificial Person.[124]

In *Leviathan*, which is regarded as one of the earliest and most influential examples of social contract theory, *Hobbes* suggests that in order to ensure peace and order *natural persons* surrender their liberty by concluding a

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[123] Nkambo Mugerwa "Subjects of International Law", in Max Sørensen (ed.) *Manuel of Public International Law*, London, 1968, p.249.
[124] Thomas Hobbes, *Leviathan*, Chapter XVI, "Of Persons, Authors, And Things Personated", 1651 A.D.

covenant among themselves that creates a Sovereign Power, an *artificial person*. The Sovereign is a *conditio sine qua non* for creation of the state.

Hobbes' use of personality does not include the concept of international legal personality, as *Hobbes* did not recognize the law of nations.[125] However, his classification of persons into natural and artificial ones gives light to the designation employed in contemporary domestic legal systems. Similar to *Hobbes*' definition, domestic legal systems (law of persons) confer legal personality (*persona iuris*) upon two categories of persons: natural or legal (juridical) persons. Human beings, as natural persons, obtain their personality at birth, while legal persons acquire this qualification upon registration with relevant authorities or after having met the requirements for recognition as a legal person. While human beings are "prototype"[126] of legal persons, which entities (corporations, associations, partnerships, foundations, trusts, societies, companies etc) qualify for being called legal persons is left to domestic law to decide.

Since the notions of *subjects of international law* and *international legal personality* are generally used interchangeably[127], in international law, too, it is to be determined which entities are to be endowed with rights and duties and which consequences are to be attached to their legal actions.

Legal personality determined in international law, which is called international legal personality[128], differs from that determined in domestic law. *Portmann* has listed two peculiarities to that effect:

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[125] See, Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, The Hague, 2004, p.53.

[126] Ignaz Seidl-Hohenveldern & Gerhard Loibl, *Das Recht der Internationalen Organisationen einschliesslich der Supranationalen Gemeinschaften* 38, Fifth Revised Edition, 1992 (Quated in Schermers & Blokker, p. 975, note 3.).

[127] Schmermers & Blokker, *International Institutional Law,* p.1559.

[128] The term "international legal person" (*persona jure gentium*) was first used by *Leibniz*. See, Jan H. Verzijl, *International Law in Historical Perspective*, Vol.II: International Persons, 1969, at 2. The scholar included the term in the *Praefatio* to his *Codex Juris Gentium diplomaticus*, Hanover, 1963. *Nijman* notes that Leibniz introduced the notion of *persona jure gentium*

The first peculiarity is that "international personality not only denotes the quality of having rights and duties as well as certain capacities under the law, but that it also includes *competence to create the law*."[129] Absence of centralized legislator in international law, as opposed to domestic law where centralized state power creates the law, necessitates that international person should have such competence. That states, as international persons, are competent to create international law is of no point of dispute. Whether other international persons including international organizations have such competence is a question that invites differing views.

The second peculiarity, as noted by *Portmann*, is the lack of *centralized law of persons* in the international legal system. The writer notes that the question of international personality is not determined comprehensively either by a pertinent treaty or by established rules of international law.[130] Given the absence of established international law of persons, the writer concludes that guidelines on personality in international law are inferred mostly from general considerations of the nature of the international legal system. However, he draws attention to the fact that although state practices and case law are constantly taken into account when dealing with the subject of international legal personality, their interpretation

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(international legal personality) in order to conjoin his politically realistic concept of "relative sovereignty" with his ideal of justice-based European order. The concept of international legal personality is attributed to relative sovereigns (German Princes) and by possessing international legal personality they were conceptually connected with or included in the system of *ius gentum*. See, Nijman, p.77.

[129] Roland Portmann, *Legal Personality in International Law*, Cambridge University Press, 2010, p.8.

[130] *ibid*, p.9. Portmann notes that in contrast to the law of treaties or international responsibility, the law of persons has never been selected for codification by the International Law Commission, although this was suggested in 1949 (*Survey of International Law Commission in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission, Memorandum submitted by the Secretary-General,* UN Doc. A/CN.4/1/Rev.1, at 19-22).

is related to differing theoretical positions, avoiding consequently consensus on the implications of such practical developments.[131]

Those two peculiarities, namely the competence to create the law and absence of centralized law of persons in international legal system have been widely taken into consideration by writers while determining on who would be the subjects of international law.

a) Traditional Approach: *States Only*

Until the 20th century overwhelming majority of writers on international law were of the view that only states could be recognized as legal persons in international law. [132] Therefore, only states could independently bear rights and obligations under international law. As *Lauterpacht* observed it:

> The orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law.[133]

Personification of states as the subjects of international law, however, has not been immune to criticism in particular given the solid personhood of human being before law. *Brierly*'s definition of international law as "the body of rules and principles of actions, which are binding upon civilized states in their relation with one another"[134] does not aim at personifying states though it is possible, according to the scholar, to regard states as the subjects of international law since we have personified them. Advocate of the international order, *Brierly* concluded that international legal theory, which

[131] *ibid,* p.10-12.
[132] Hans Aufricht, "Personality in International Law", American Political Science Review, 37, p.216.
[133] Hersch Lauterpacht, *International Law: Collected Papers,* Cambridge, 1975, Vol.II, p.489.
[134] James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace 1*, Sixth Edition (Humphrey Waldock Edition, London), 1963, p.1.

had for centuries been closely intertwined with the doctrine of the sovereign state, should distance itself from its heritage.[135]

> Actually states are not persons, though it is often convenient to personify them; they have no wills except the wills of the individual human beings who direct their affairs; and they exist not in a political vacuum but in continuous political relations with one another. The subjection of states to law needs no special philosophical explanation other than that by which we explain the subjection of individuals to the law of the state; the differences between that law and international law are important,…but they do not lie in metaphysics nor in any mystical qualities of the entity called state sovereignty.[136]

As regards *Brierly*'s concept of international legal personality, *Nijman* notes that three elements must be singled out: i) The entity *state* should not be attributed any kind of mystical qualities; ii) The image of the state as a *person* is rejected and redefined as an *institution*; iii) Only *individual human beings* have the capacity to display the will of their own, not states.[137]

The conception of international personality taking states as the only international legal persons has been developed mainly by restorative scholars, such as, *Triepel*[138]*, Cavaglieri*[139]*, Oppenheim*[140] and *Anzilotti* .[141] The scholars treated states as the sole subjects of international law. This line of argumentation equates statehood with international personality.

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135 Nijman, *The Concept of International Legal Personality,* p.138.
136 Brierly, *The Law of Nations,* at 34 and 62-63.
137 Nijman, *The Concept of International Legal Personality,* p.138.
138 See, Heinrich Triepel, *Droit International et Droit Interne*, Bibliothèque française de Droit des Gens de la Fondation Carnegie, Paris, 1920.
139 See, Arrigo Cavaglieri, Règles Générales du Droit de la Paix, 26 Recueil des cours de l'Académie de droit international, p. 318-319 (1929-I).
140 Oppenheim, *International Law: A Treatise, supra* Note 107.
141 Anzilotti, *Cours de Droit International, supra,* Note 56.

Nijman examined "four characteristics of these scholars in order to understand how they used international legal personality:

i) the endeavor to reconcile international law with sovereignty;

ii) the complete separation of the state from the law, whereby the state is perceived as a social phenomenon pre-dating international law;

iii) a general adherence to dualism; and

iv) the featuring of the concept of international legal personality in the characterization of international society as an inter-state society".[142]

She concluded that;

> By linking international legal personality exclusively to the state person, these scholars used the concept to reaffirm the classical identity of the international society and international law…Consequently, they considered that international law was based on power and it derived from and was limited by the sovereign power of states, including the power to apply international law. The recognition of international legal personality was used as an instrument to include or exclude members from the civilized Family of Nations.[143]

As *Nijman* concluded, *Oppenheim* held that;

> The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules, which the civilized States consider legally binding in their intercourse, every State, which belongs to the civilized States, and is, therefore, a member of the Family of Nations, is an International Person. Sovereign States exclusively are International Persons-i.e. subjects of International Law.[144]

[142] Nijman, *The Concept of International Legal Personality,* p.117.
[143] *ibid*, p.122.
[144] Oppenheim, *International Law: A Treatise,* p.99.

Since the Law of Nations, as *Oppenheim* called it, is based on the common will of states[145], be it express as laid down in a law-making treaty or tacit as part of international custom, states are the main subjects of international law. Subjects of rights and obligations arising from international law are only and exclusively states. Rights and duties of persons other than states are not relevant for international law. As international law emanates from common state will, it applies only to the states having consented to it.

In the well-known *Case of the S.S. Lotus*, the Permanent Court of International Justice focused solely on states when describing international law as governing relations between independent states:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between the co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[146]

It is maintained that "if an entity amounts to a 'state' it has the potential or 'capacity' to avail itself of all of the rights and to be subject to all of the duties known to the international system."[147] For an entity to acquire statehood, four criteria needs to be met: (i) a permanent population, (ii) defined territory, (iii) government, (iv) capacity to enter into relations with

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[145] Exclusive focus of Triepel, Anzilotti and Oppenheim on the common will of states as the source of international law, Portmann notes, has to be related to the emerging legal positivism in nineteenth-century German public law. See, Portmann, p.59.

[146] *Case of the S.S. Lotus* (Judgment), 1927 PCIJ Series A No.10, at 18.

[147] Martin Dixon-Robert McCorquodale-Sarah Williams, *Cases & Materials on International Law*, Sixth Edition, 2016, p.137.

other states.[148] Entities other than states, including international organizations, "can assert some degree of international personhood for particular purposes, but the state is considered the most complete expression of international legal personality."[149]

By the mid-1920s the proposition that personality in the law of nations was an exclusive quality of states began to loose ground. As international organizations became abundant with the advent of the new century answering the complex needs of international community that necessitated international cooperation, the need to recognize their personality in the international plane, in addition to bestowing this quality in domestic legal order, turned the notion of absolute state sovereignty into an obsolete conception.

In his legal opinion on the juridical status of the Cape Spartel Lighthouse regime[150] *Marchegiano* concluded that;

> If we attribute the term *international personalities* a broader acceptation, such as is adopted by many writers, there is no doubt that, in addition to states, we may consider as *international persons* all those entities whose juridical situation is governed, whose rights and obligations are determined, and whose competency is extended or restricted, by public international law. *International personality*

[148] See Article 1 of Montevideo Convention on the Rights and Duties of States (1933).

[149] Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law, 2000. (Dixon & McCorquodale & Williams*, Cases & Materials on International Law*, p.139).

[150] Established in 1865 and disbanded in 1958, the International Commission for the Cape Spartel Lighthouse was among the very first international organizations created in the modern era. The Commission was charged with the management of the lighthouse constructed in 1864 at Cape Spartel, facing the Atlantic Ocean eight miles from Tangier and about thirty from Gibraltar. The constitutive instrument of the Commission, the Cape Spartel Convention, was signed at Tangier on May 31, 1865, between the Sultan of Morocco and a number of States and remained in force until terminated by a protocol on March 31, 1958. See, David Bederman, "The Souls of the International organizations: legal Personality and the Lighthouse at Cape Spartel", *Virginia Kournalof International Law*, 36, p. 277-377.

> (according to the opinion of a great authority) and the character of state are two entirely different conceptions, and the existence of the former in no way implies the existence of the latter: international personality exists in every association or collective entity clothed with recognized international competency. We share this opinion.[151]

The trend as such resulted in proliferation of actors, including international organizations, recognized by law as legal persons possessing the capacity to have and maintain certain rights, and being subject to perform specific duties.

It is generally accepted that the main opposition against recognizing international organizations as other subjects of international law, therefore as international persons, was the fear that they might emerge as international actors who could challenge the states' roles in international relations. State-oriented line of thinking disliked the prospect of a competition between states as the sovereign and equal actors and international organizations as entities created by states. This explains why it has been easier for states to recognize domestic legal personality of international organizations. One remedy that can be offered to address such concerns is that international organizations come into being, and act in the international plane, not against but in harmony with the will of states who create them. However, it can also be argued against this line of thinking that international personality is attributed to the organization by international law based on a factual situation. These two contentious views will be discussed below.

b) Contemporary Approach: *Non-State Actors As Well*

While acknowledging the primacy of states in international law, *Schwarzenberger* did not regard personality as an exclusive peculiarity of states. States that are members of an international organization may treat the

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[151] Giuseppe Marchegiano, "The Juristic Character of the International Commission of the Cape Spartel Lighthouse", 25 *American Journal of International Law*, 1931, p.340.

organization in question as a subject of some rights and duties for limited purposes:

> The original subjects of international law are sovereign States. …Nonetheless, it is a mistake to deduce from this state of affairs that sovereign States alone are eligible to be subjects of international law. This is a matter within the discretion of each of the existing subjects of international law. States, which are members of an international institution, may agree to treat such an international institution as a subject of international law for limited purposes. Non-members, however, may choose completely to ignore the existence of an international institution, as happened in the case of the League of Nations. …Every State is free to grant or to refuse to grant such recognition. It follows that a certain entity may have international personality in relation to one or several existing subjects of international law, but may lack such status in relation to others. …There is no inherent impossibility in granting international personality to individuals.[152]

It is, therefore, up to states to grant recognition to international organizations; and when granted, they are treated as subjects of international law for limited purposes. In this regard, *Portmann* has listed three propositions for what he called *recognition conception*:[153]

(a) States are the highest authorities in international relations. Individuals and entities created by national law are represented by their home state in the international realm.

(b) International law can only emanate from the state will and is only binding on those states having consented to it. It is up to states, as the

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[152] Georg Schwarzenberg, *A Manual of International Law*, First Edition, London, 1947, p.25-26.

[153] Portmann, *An Introduction to the Study of International Organization,* p.84.

only international legislators, to grant recognition to entities taking part in the international legal system.

(c) Although it is widely presumed that only states are international persons, they can recognize non-state entities as limited international organizations.

Among the writers challenging the traditional view that only states could be holders of rights and duties granted by international law was *Kelsen*, who held that individuals too could be subjects of international law.

> Thus law can impose duties and responsibilities or confer rights only upon human individuals. But it is said that law obligates and authorizes not only individuals, but also juristic persons, and that especially international law obligates and authorizes not individuals but juristic persons by obligating and authorizing states. This is the traditional theory: Only states, states as juristic persons, are the subjects of international law. Or, in other terms: International law imposes duties and responsibilities and confers rights upon states only, and not upon individuals, human beings. This doctrine is untenable. The subjects of international law, too, are individuals.[154]

Kelsen notes that states, as juristic persons, apart from individuals constituting them, are subjects of international law, and that this does not contradict with the reality that individual human beings when addressed by international law also become such subjects. Juristic persons as distinct in existence from real persons are instruments of jurisprudence facilitating the definition of legal phenomenon. Juristic persons are not the reality of either positive or natural law. When one speaks of duties or rights of a juristic person, he actually refers to a specific conduct of an individual human being. Yet this individual human being acts as a member or organ of that juristic person, and the rights or duties in question belong to the individual human

[154] Hans Kelsen, *Principles of International Law,* New York, Lawbook Exchange edition, 2003, 2012, p.97.

being provided he acts as such a member or organ of that juristic person. In conclusion, the question "Who is the subject of a specific legal order?" (To whom are the norms of that specific legal order applied?) cannot be answered as only juristic persons, and not real ones. On the contrary, real persons step in as subjects addressed by that legal order. However, rights and duties that belong to individual human beings differ considerably from those that real persons have when they act as members or organs of juristic persons. Distinct from the individual rights and duties in the former, rights and duties in the latter have collective nature in that they belong to individuals representing the juristic person. Similarly, responsibility of juristic persons is a collective responsibility of individuals representing them.[155]

In contradiction with the traditional theory that only states may become subjects of international law, *Kelsen*'s explanation of international legal personality is *a posteriori* concept open, without limitation, to individuals as well as international organizations that are addressed by an international norm. It should be kept in mind, however, that the focus is on the conduct of individual human beings:

> All law is regulation of human behavior. The only social reality to which legal norms can refer are the relations between human beings. Hence, a legal obligation as well as a legal right cannot have for its contents anything but the behavior of human individuals. If, then, international law should not obligate and authorize individuals, the obligations and rights stipulated by international law would have no contents at all and international law would not oblige or authorize anybody to do anything.[156]

Yet any entity on which the international legal system confers rights, duties or capacities is an international person.[157] In parallel to the explanation of legal personality in domestic law, international organizations become

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[155] *ibid*, p.96-100.
[156] Hans Kelsen, *General Theory of Law and State*, p.342.
[157] *ibid.*, p.99.

international persons when an international norm addresses the conduct of an individual who acts as a member or organ of an international organization. International personality is a consequence of possessing international obligations and authorizations, and not precondition for holding them.[158]

Portmann summarizes the *formal conception*, as he called *Kelsen*'s explanation, as follows[159]:

(a) International personality is an open concept, and is used to describe which entities are governed by international law. There's no *a priori* presumption for a certain entity to be an international person as personality is only acquired *a posteriori*.

(b) There are no further consequences attached to being an international person. International persons do not automatically possess fundamental rights and duties nor are they automatically authorized to formally contribute to the creation of international law.

In doctrinal analyses, *Schwarzenberger*'s *recognition conception* and *Kelsen*'s *formal conception* are generally merged into the *implied powers* doctrine.[160] Despite the similarities, however, *Portmann* draws attention to the basic differences between the two conceptions in particular when it comes to *implied powers* and *implied recognition*. When applying the formal conception, a constituent instrument of an international organization is examined with a view to deriving from it rights, duties or capacities, which have been provided for explicitly[161] or implicitly. Once established, these powers determine the organization's legal personality. Examination of the

[158] Portmann, *Legal Personality in International Law, op. cit.*, p.174.
[159] *ibid*, p.177.
[160] *ibid*, p.103.
[161] According to some writers an international organization carries legal personality only if it is explicitly attributed to the organization in its constituent instrument. This school of thought, formerly maintained in particular by Soviet writers, however, does not enjoy much support. See, Grigory Ivanovich Tunkin, "The Legal Nature of the United Nations", 119 *Recueil des Cours de l'Académie de droit international* (1966 III), at 20-25.

constituent instrument, in the case of the recognition conception, is exercised with the aim of establishing whether states parties to the instrument have intended to recognize legal personality of the organization. "Such capacities are not implied powers to be deduced from the analysis of the constitution, but legal consequences attached to being a recognized international person."[162]

It is now well established that international organizations as non-state actors may possess international legal personality. Whether an international organization has gained such status would be determined taking into consideration of its various aspects, i.e. its constitution, its actual powers, in particular its capacity to enter into relation with states and other international organizations as well as its capacity to conclude treaties.

c) Theories of International Legal Personality of International Organizations

Absence of a centralized legislative authority in international legal plane, as opposed to that in domestic law, capable of assessing the need to grant international legal personality to an international organization drove scholars into a debate on when it may be required that an entity be accorded international legal personality and, when required, how to establish the threshold that needs to be crossed so that such personality may be acquired. Such doctrinal debates on international legal personality of international organizations have not come to a standstill and are far away from reaching consensus on a theory devoid of flaws.

The major difficulty arises when a constituent instrument of an international organization is silent on the issue of legal personality or when it has not been expressly provided that the organization has been granted international legal personality. And this is the case for many of the organizations. Even the UN Charter lacks a provision on the Organization's international legal personality. The issue was considered during the drafting

[162] Portmann, *Legal Personality in International Law,* p.103.

process of the Charter, and the subcommittee responsible for drafting UN's domestic legal capacity, which stands now as Article 104, declared that it was not necessary to refer to international legal personality alongside domestic personality.

When a constituent instrument provides the organization with such personality, member states would then recognize it as having legal personality distinct from that of theirs. If not, then the debate is shaped by a number of doctrines providing explanation for the basis of international legal personality for international organizations.

Two contending theories are generally listed as prominent in the doctrinal debate: (i) the *will theory* (or *subjective theory,* as *Klabbers* put it); and (ii) the *objective theory* of personality. The former has been reinforced with a broader interpretation as suggested by the adherents of the *inductive approach* or the *implied powers* theory. In addition, *Klabbers* developed one another: *presumptive theory*.

i. Will Theory

The *will theory* takes as basis the will of the founders of the organization. It is up to the founders of the organization to endow it with international legal personality. If they intend to do so, they can do it. An obvious manifestation of such intention could be found in the constituent instrument of the organization. Adherents of the positivist doctrine maintain that such personality exists only if explicitly attributed to the organization in its constitution. That strict interpretation inevitably encountered the problem that only few of the organizations have explicitly been conferred with legal personality in their constitutions. What's more, absence of such an explicit provision in a constitution would not necessarily indicate that the founders of the organization had wished to withhold legal personality when they created it.

Failure to correspond to the shortcomings of the *will theory* drove its adherents to introduce a broader interpretation of the theory. According to that broader interpretation, organizations are legal persons not *ipso facto*, but because the status is given to them, either explicitly (*will theory*) or, if there's no constitutional attribution of this quality, *implicitly*[163] (*inductive approach* or *implied powers*). That school of thought is also based on the will of the founders of the organization, the difference being whereas it is manifest in the constitution of the organization in the former, it should be worked out, or invented perhaps, in the latter.

Therefore, it is the will of the founding States of the organization, embodied in a constituent instrument (constitution) of the organization, which determines whether or not the organization has legal personality. The will of the states, if not expressed explicitly in the constituent instrument of the organization, could be established from their intentions implied in the document. Purposes and functions of the organization could provide guidance to this end. *Schwarzenberger* highlighted the importance of the purposes and functions of the institution (international organization) in question in this regard:

> When sovereign States agree on the establishment of an international institution, they may find it convenient to endow it with an international personality of its own in order to enable it to perform its allocated functions with greater efficiency. Whether they have taken this step is entirely a question of their expressed or implied intentions…If the constitution of an international institution does not settle expressly this question, it becomes necessary to ascertain the intention of the contracting parties in some other way. In particular, the purposes and functions of the institution in

[163] Schermers & Blokker, *International Institutional Law,* p.1565.

question “as specified or implied in its constituent documents and developed in practice” may offer valuable clues.[164]

Since constituent instruments stand as the basic source of reference under the will theory to determine the will of the founders including as regards the legal status of the organization created, it will be useful to elaborate on what is meant by constituent instrument.

International organizations are mostly created by means of a treaty, which is defined as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.[165] A constitutive treaty is a legal instrument that establishes an institution with one or more organs with a will distinct from that of those states creating it[166]. As the definition of treaty suggests, constituent instruments are given various names such as treaty[167], agreement[168], convention[169], constitution[170], charter[171], statute[172] or covenant[173]. In addition to the prevailing practice according to which international organizations are created by means of treaty, there are organizations created by a resolution of an already existing organization or a conference of states.[174] It should be noted

[164] Georg Schwarzenberger, *International Law*, Vol. I, International Law as Applied by International Courts and Tribunals: I, Third Edition, London, 1957, p. 138.
[165] Vienna Convention on the Law of Treaties, Art. 2,1(a).
[166] Catherine Brölmann, “Specialized Rules of Treaty Interpretation: International Organizations”, Amsterdam Center for International Law, No.2012-01, p. 3.
[167] E.g., Treaty on European Union, Treaty on a European Economic Area.
[168] E.g., Articles of Agreement for IBRD, IDA, IMF; Agreements for ITC, UNRRA, WTO.
[169] E.g., Conventions for the establishment of CERN, ESA, Eurocontrol, ICAO, IMO, MIGA.
[170] E.g., the Constitutions of FAO, ILO, UNESCO, UPU, WIPO, WHO.
[171] E.g., the Charter of BSEC, OAS, UN.
[172] E.g., the Statute of the CoE, IAEA, ICJ; the Statutes for Administrative Tribunals of ILO, UN, World Bank.
[173] E.g., the Covenant of the League of Nations.
[174] Examples of such organizations include UNIDO and UNICEF created by the UN, Nordic Investment Bank created by Nordic Council, European Civil

that such a resolution creating an international organization is governed by international law.[175]

Constituent instruments design the legal framework of international organizations by drawing the organizational structure and thus determining the powers of the organs. The institutional aspect of constituent instruments justifies them being treated as a distinct class as affirmed by the ICJ in its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* brought by the World Health Organization (WHO):

> From a formal standpoint, the constitutive instruments of international organizations are multilateral treaties...but the constitutive instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task or realizing common goals…their character which is conventional and at the same time institutional.[176]

Similar to constitutions of States, constituent instruments of international organizations are living bodies of rules addressing the needs of today and possible challenges of the future. As *Petersmann* suggested, constituent instruments "should provide for enough rigidity so as to have sufficient normative grasp on real events, but also for enough flexibility so as

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Aviation Conference created by ICAO, Pan American Institute of Geography and History (PAIGH) and OPEC. See also the Final Acts of the Plenipotentiary Conference of the ITU (Kyoto, 1994). For the possibility of international organizations being established by resolutions, see Karl Zemanek, "The legal foundations of the international system: General course on public international law" *Recueil des Cours,* Volume 266, 1997, p.116

[175] According to the ILC draft articles on the responsibility of international organizations, an international organization is "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality" (Art. 2/a).

[176] ICJ Reports, 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* p.66, 74-5.

not to be swayed away."[177] Flexible nature of constituent instruments allow for emergence, when needed, of further rules (resolutions, decisions) to be adopted by competent organs of the organization. Therefore rules of international organizations, when widely defined, "means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organizations adopted in accordance with those instruments, and established practice of the organization."[178]

Based on the will of states expressed in constituent instruments, the *will theory* stands as the prevailing view regarding the basis of international legal personality of international organizations. The International Court of Justice, too, resorted to the will theory in its broader version in its advisory opinion on *Reparation of Injuries.*[179]

In its observation of the question as to whether the Organization has the capacity to bring an international claim, the Court regarded the question as

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[177] Hans G. Petersmann, *The Legal Evolution of the International Monetary System since Bretton Woods*, 2 German Yearbook of International Law, p. 376-402 (1982), at 395 (Schermers & Blokker, *International Institutional Law*, p.713).

[178] ILC draft articles on the responsibility of international organizations, Art. 2 (b). See also 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Art. 2,1(j).

[179] Upon assassination of the Swedish international agent Count Folke Bernadotte, serving on a mediatory mission to Palestine as authorized on May 15, 1948, the General Assembly of the United Nations sought direct reparations for damage to the institution and indirect damages for the members of the Bernadotte family. To this end, the Assembly decided, at its 169th Plenary Meeting on 3 December 1948, to request advisory opinion of the International Court of Justice on the following legal questions:
"I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or persons entitled through him? II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?" *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: ICJ Reports,* 1949, p.174.

tantamount to asking whether the Organization has international personality as it underlined that the United Nations was characterised as an international person and a subject of international law, capable of possessing international rights and duties and capacity to maintain its rights by bringing international claims.

While the Court struck a vague link between the subjectivity and international legal personality of the United Nations, opinions of scholars are divided on whether the two concepts are the same or whether there exists a difference between them. Some scholars even question the usefulness of the concept of a subject of international law. Among those scholars, *Clapham* notes that the question of international legal personality has remained entangled with the misleading concept of subjects of international law, and suggests "concentrating on the rights and obligations of entities rather than their personality and moving from the debate on 'subjectivity' to the capacity of the entity to enjoy rights and bear obligations."[180]

However, the Court approached the question from other way around and concentrated rather on international legal personality of the United Nations in order to determine whether it had the capacity to bring international claims:

> Has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members rights, which it is entitled to ask them to respect. In other words, does the Organization possess international personality?[181]

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[180] Andrew Clapham, "Human Rights Obligations of Non-State Actors", 2006, p. 60-62, 68-69, 83 (Merja Pentikäinen, "Changing International 'Subjectivity' and Rights and Obligations under International Law-Status of Corporations", *Utrecht Law Review*, Vol.8, Issue 1, 2012, p.151).
[181] ICJ Reports, 1949, *Reparation for injuries*, p.178.

The Court therefore treated legal personality as threshold that should be crossed in order for the organization to be regarded as entitled to file international claims. The Court started by defining capacity to bring an international claim, and noted that "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."[182]

According to the Court, while it is beyond doubt that such a capacity belongs to the State, whether the Organization, in the international sphere, has that capacity can be answered through the inquiry into its legal personality. For if the Organization is recognized as having that personality, it is entitled to bring such claims in international sphere.

Notwithstanding the lack, in the Charter, of specific authorization to that effect, the Court suggests that attainment of the principles and purposes specified in the Charter of the United Nations renders the attribution of legal personality indispensable. Since "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" the Court concluded that the Organization has international personality, which merely means that the Organization "is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims."[183]

According to the Court, therefore, having capacity to operate in international plane necessitates possessing *a large measure of international personality*, and that regard should be made to the purposes and functions of

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[182] *ibid.* p.177.
[183] An international person as the United Nations is, the Court noted, it certainly is not a State, nor its legal personality, rights and duties are the same as those of a State. Neither is it a super-State, whatever that expression may mean. (*Reparation for injuries*, p.179)

the organization as specified or implied in its constituent document in order to determine the limits of its capacity:

> Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice…the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.[184]

In order to determine whether the United Nations had the capacity to bring an international claim, in other words, whether it had legal personality, the Court felt the need to examine the constituent instrument of the Organization. Since there was not a specific provision to that end, the Court concluded after examining the principles and purposes of the Organization that their attainment rendered the attribution of legal personality indispensable. Therefore, the Court did make use of the will theory in its broader form. However, as will be seen below, the Court's reasoning lent support also to the objective theory of personality, leaving the issue in ambiguity.

Moreover, although the ICJ reached the conclusion that indeed the United Nations 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, the reason why the Court reached this conclusion has remained unclear.[185] The Court recognized the international personality of the United Nations only; and related that recognition, to the "purposes and principles […] specified in the Charter of the United Nations", to the culmination of development in the establishment of that organization, and to the special tasks given to it. But in the light of the Advisory Opinion it is still

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[184] ICJ Reports, 1949, *Reparation for injuries*, p.180.
[185] Klabbers, *An Introduction to International Institutional Law,* p.47.

an open question: what is the legal status of the international organizations, which have less ambitious aims, do not mark any culmination of development, and are not entrusted with special tasks.[186]

ii. Objective Theory

The second prominent doctrine, the *objective theory* of personality, takes as basis not the will of the founders but the mere existence of the organization with certain criteria. It would suffice for an organization to meet some objective criteria in order to acquire legal personality. As an alternative to the will theory, *Brownlie* noted that international organizations are capable of attaining objective legal personality independent of recognition by performing certain functions on the international plane, and summarized the criteria thus required as follows:

(i) a permanent association of states, or other organizations, with lawful objects, equipped with organs;

(ii) distinction, in terms of legal powers and purposes, between the organization and its member states; and

(iii) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states[187].

Brownlie underlined that the organization should be distinct, in terms of legal powers and purposes, from its members, and drew attention to the specific attribute of the objective legal personality for international

[186] Jerzy Sztucki, "International Organizations as Parties to Contentious Proceeding Before the International Court of Justice?", *International Court of Justice-Its Future Role After Fifty Years*, (ed. by Muller, Raic and Thuranszky), Kluwer Law International, The Hague 1997, p.143.
[187] Crawford, *Brownlie's Principles of Public International Law,* p.169.

organizations, which renders that personality opposable to third states, even though the organization in question is normally the creation of treaty.[188]

Amerasinghe suggested the following objective criteria basic to the concept of international personality for international organizations:

(i) an association of states or international organizations or both (a) with lawful objects and (b) with one or more organs which are not subject to the authority of any other organized communities than, if at all, the participants in those organs acting jointly;

(ii) the existence of a distinction between the organization and its members in respect of legal rights, duties, power and liabilities, etc (in the Hohfeldian sense) on the international plane as contrasted with the national or transnational plane, it being clear that the organization was intended to have such rights, duties, power and liabilities.[189]

According to the *objective theory* of personality, developed mainly by *Seyersted,* an organization possesses international legal personality as soon as it comes into existence, meeting the requirements that international law attaches to its establishment. The Scandinavian writer drew parallels between the patterns that states and international organizations follow to come into existence as a matter of law.[190] In the case of states, the writer noted, it is

[188] Reference is made to ILC's commentary to Draft Article 2, where it is said that "it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present articles". (ILC Report 2011, A/66/10, 76).

[189] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.82.

[190] According Seyersted, international organizations are, from a legal point of view, general subjects of international law, *ipso facto* on the basis of general and customary international law, in basically the same manner as states. The great difference between states and international organizations is not one of law but of fact, namely that most organizations are not in a practical position to exercise their "inherent" international capacities to the same extent as states, because they have no territory and no population, but not because they lack the capacity to exercise jurisdiction over territory or persons. The extent

either through an understanding between the inhabitants of a territory, or through imposition by a group, which assumes power over such inhabitants. There's no need for an agreement between its members. What is legally important is that it exists and possesses the objective characteristics of a state: territory, population and a sovereign government. Similarly, once an organization is established, it becomes a general subject of international law and thus acquires objective legal personality, *ipso facto,* by virtue of international law, not through its constitution. There's only one condition, which is necessary but also sufficient: that it should have international organs (i.e. organs established by two or more sovereign states), which are not all subject to the authority of any one state or other organized community[191] (but only to that of participating states acting jointly through their representatives on such organs) which perform sovereign and/or other international acts in their own name[192] and which are not authorized by all their acts to assume obligations (merely) on behalf of the several participating communities.[193]

When drawing comparison between the two types of the subjects of international law, namely states and international organizations, the writer noted that the only criterion common to them both is the fact that they have organs, which are sovereign (self-governing) or not subject to the jurisdiction of any one other organized community.[194] While some writers point to the fact that international organizations have no territory and that they depend upon their member states, which are themselves subjects of international law, *Seyersted* emphasized that he had used the concept of sovereignty "not in a

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of difference when performing international acts and when exercising international rights and duties is to be attributed to their factual opportunities and is not related to their legal capacities. Seyersted, *Common Law of International Organizations,* p.68.

[191] Seyersted notes that voluntary delegation of certain limited powers, for example to the host State or another Organization in the field of social security for the officials is not prevented. Seyersted, *Common Law of International Organizations,* p.40.

[192] Seyersted warns that the latter reservation excludes confederations as defined by Alf Ross: Laerebog i Folkeret (Third Edition, Copenhagen, English translation of the second edition, "A Textbook of International Law", London, 1947, § 15A.

[193] *ibid*, p.40-41.

[194] *ibid*, p.41.

restrictive territorial sense, but broadly as meaning legally independent (i.e. not subject to the jurisdiction) of any other organized community except the participating physical or legal persons acting jointly through the organs of the organization, state or other organized community concerned."[195]

As explained above, adherents of the *objective theory* maintain that international organizations derive their powers not from their constitutions, as in the case of *will theory,* but from international law, and that they possess objective legal personality once they have been established in accordance with the criteria required. Therefore, the international legal personality of the organization hinges on its factual exercise of powers independently from its member states as expression of distinct will[196]. In other words, international legal personality of an international organization is a matter of fact and depends on the organization's effective power to engage in international relations, by performing functions and powers independently from other international subjects.[197]

Objectiveness of the personality means that it is valid *vis-à-vis* non-members. This was reflected also in the 1949 ICJ Advisory *Opinion* on *Reparation for Injuries Suffered in the Services of the United Nations*, in which the Court recognized the United Nations as an "entity possessing objective international personality, and not merely personality recognized by them (founding states) alone."[198]

While recognition may have some relevance in the context of personality of international organization, as will be discussed below, it is generally accepted that recognition by third parties (non-member states) is not a prerequisite for the legal existence of that organization *vis-à-vis* recognizing

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[195] *ibid*, p.42.

[196] Tarcisio Gazzini, "The relationship between international legal personality and the autonomy of international organizations", *International Organizations and the Idea of Autonomy,* (Eds. Richard Collins & Nigel White), Oxon, 2011, p.197.

[197] Guglielmo Verdirame, *The UN and Human Rights. Who Guards the Guardian?* Cambridge University Press, 2011, p.60

[198] ICJ Reports, 1949, *Reparation for injuries*, p.185.

or non-recognizing parties. When analogy is made with regard to the recognition of states, it would be safe to assert that recognition may have declaratory, rather than constitutive, effect on the personality of an international organization. As *Amerasinghe* put it, "the objective personality does not depend on recognition but on a legal status flowing from the existence of certain facts associated with the creation of the organization, which implies a declaratory view of recognition, if it takes place at all, recognition not being necessary for the existence of personality."[199]

When deciding on the Organization's capacity to bring international claims when the defendant state is not a member of the organization, the Court recognized the objective international personality of the Organization. This means that the legal personality of the United Nations is not dependent upon prior recognition by a non-member state. In other words, recognition by non-member states of an international organization is not determinative on whether a legal claim could be brought against them. The Court formulated the recognition of objective international personality of the Organization as follows:

> The Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing 'objective international personality', and not merely personality recognized by them alone, together with capacity to bring international claims.[200]

While the Court's formulation makes it clear that prior recognition of an international organization by third states is not a condition to be met for that organization to acquire objective legal personality, it sets forth from the assumption that such a status of personality could be acquired only through the will (power) of the (Member) States, leaving the door open for adherents

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[199] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p. 91.
[200] ICJ Reports, 1949, *Reparation for injuries,* p.185.

of the both theories to resort to that formulation to support their views. However, *Reinisch* noted that the concept of objective legal personality developed by the court in *Reparation* Case "should be kept apart from the concept developed by *Seyersted* which finds a basis for the legal personality of international organizations not in the 'subjective will' derived from treaties, but rather in either the 'objective' circumstance of their existence or in custom."[201]

The theory of objective legal personality seems to enjoy some support from the unfinished work of the ILC on relations between states and international organizations. Draft Article 5 submitted by the Special Rapporteur provides that "International organizations shall enjoy legal personality under international law and under internal law their member states (...)"[202] In his interpretation of the Article, *Reinisch* suggests that it could be argued that the legal personality does not exclusively result from the will of the states creating the organization, but might be a consequence of (customary) international law. The support is lent stronger in Draft Article 6, which clarifies that the treaty-making power of an international organization is determined by the relevant rules of that organization and by international law. As the relevant rules of the organization is described in Draft Article 1(1)(b) as including not only the constituent instrument of the organization but also its decisions and resolutions adopted in accordance therewith and its established practice, customary rules might be relevant as well.[203]

The writer further notes that ILC's completed work of the Convention on the Law of Treaties Between States and International Organizations or Between International Organizations also stands supportive of the theory of objective legal personality. Referring to the preambular paragraph 11 and Article 6 of the Convention, *Reinisch* holds that "(t)his could be understood as

[201] Reinisch, *International Organizations Before National Courts*, p.56.
[202] Report to the International Law Commission by Leonardo Díaz-González, Special Rapporteur. [1989] Yearbook of International Law Commission, Vol. II, Part One, p.153-168 (*UN Doc. A/CN.4/424*: Fourth Report on Relations Between States and International Organizations -Second part of the Topic).
[203] Reinisch, *International Organizations Before National Courts*, p.58.

an affirmation of the view that international organizations enjoy certain capacities-constitutive for their international personality- independently from an express conferment of them by their member states. One may thus, for instance, still maintain that the treaty-making capacity of an international organization itself flows from general international law."[204] He notes, however, that the theory that international organizations enjoy international legal personality as a matter of customary law is not generally accepted, and that majority of the writers contend that the international personality of an organization is determined –either expressly or implicitly- by an organizations constituent instrument.[205]

Ambiguities in the Court's decision in *Reparation* Case coupled with drawbacks of the two theories urged scholars to develop competing views to explain various aspects of the question of international legal personality. Theory of presumptive personality is one of them.

iii. Theory of Presumptive Personality

When addressing the question of legal personality, *Klabbers* first drew attention to the distinction between *subjectivity* and *legal personality*, as opposed to many writers treating them one and the same. *Klabbers* treated subjectivity as an academic label and held that an international organization, being a subject of international law, is a legitimate subject of international legal research and reflection. As an academic label, subjectivity is conferred by the academic community whereas personality is, in principle, a status conferred by the legal system.[206] However, the lack of a single authority endowed with the power to confer legal personality in international law, on the one hand, and absence of standard set of rights and obligations for each and every subject of international law, on the other, complicates the question. The writer refers to three indicators, advanced by most international lawyers, to determine the extent of subjectivity of possible subjects. The three

[204] *ibid.,* p.59.
[205] *ibid*. p.59.
[206] Klabbers, *An Introduction to International Institutional Law,* p.39.

indicators thus referred are i) "whether the subject in question possesses the right to enter into international agreements; ii) whether they have the right to send and receive legation; and iii) whether they can bring and receive international claims."[207] While the writer recognizes that these are not strictly legal requirements, he holds that "to the extent that proposed subjects score on any of these indicators, they can be deemed to be the subjects of international law."[208]

Having noted that states possess all the three indicators, *Klabbers* applied them to international organizations as follows:

(a) Treaty making capacity (*jus tractatuum*): It is generally accepted that international organizations do have such capacity as deriving directly from public international law.[209] As the capacity springs from international law it is unlimited except for its for the functions and purposes of the organization.[210] Stemming from public international law, capacity of international organizations to conclude treaty is governed by their specific rules, including the constituent documents, duly adopted by them.[211]

(b) The right to send and receive legations (*jus missionis*): The writer confirms the existence of *jus missionis* making reference to the practice that reveals a number of international organizations having permanent missions with states, and *vice versa*, as well as the 1975 Vienna Convention

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207 *ibid.*, p.40.
208 *ibid.*, p.40.
209 Reference being made to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, preamble: "international organizations possess the capacity to conclude treaties which is necessary for their functions and the fulfillment of their purposes".
210 *ibid.*, p.41.
211 Article 2(1)(j) of the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations

on the Representation of States in Their Relations with International Organizations of a Universal Character.[212]

(c) The right to bring and receive claims: *Klabbers* refers to the 1949 *Reparation for Injuries* case, where the International Court of Justice affirmed that capacity implying that the right to bring claims was inherent in being an organization, and notes, however, that the Court failed to indicate the specific source of the right.[213] While acknowledging the capacity of international organizations to bring and receive claims, the writer underlined that possibility of international organizations to sue or to be sued may depend, *inter alia*, on their standing, "which in turn may or may not depend on whether they are to be considered as having legal personality."[214]

Thus, *Klabbers*' approach to the question of legal personality of international organizations is shaped with the organizations' involvement in legal activities. Before moving to the theory that *Klabbers* developed, it would be useful to note how the writer compared the two previous concepts, the *will theory* and the *objective theory* of personality, and pointed to their drawbacks. *Klabbers* first examined the *will theory*, which he announced as by far the more popular of the two, and held that it is the will of the founders of the organization that determines whether a given organization does have legal personality. Founders' intention to confer or withhold legal personality is determinative. Now that international law is based on freely expressed consent of States, the same should apply to the creation of international organizations. Therefore, if states agree to confer international legal personality on an international organization, that consent is only to be respected. Attractiveness of this concept, then, is its conformity with positivist

[212] *ibid.*, p.42. That the Convention has not yet entered into force, the writer notes, does not in any way contradict the fact that there's a need to regulate diplomatic relations engaged in by international organizations.
[213] The Court simply stated that "...it cannot be doubted 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.", *Reparation for Injuries*, p.180
[214] *ibid.*, p.44

notions.[215] Since states cannot be bound by rules they have not themselves created, as the Permanent Court International Justice pointed in the *Case of the S.S.Lotus*[216], consequently, the writer deducts, it is up to the founders of an organization to decide whether or not to endow their organization with international personality.[217]

After underlining the attractiveness of the will theory, *Klabbers* drew attention to it's serious drawbacks. Firstly, he noted that in practice constituent instruments of only a few international organizations provide expressly that these organizations have legal personality in international law.[218] Actually, from among the instruments granting full personality to the organization established thereby, some refer to capacities that are usually governed by domestic law, adding to the ambiguity of the issue.[219] The UN Charter is not among the few which has explicitly granted such personality.

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[215] See Brierly, *op.cit,* for the explanation and comparison of the two leading international legal theories, namely the naturalist theory and the positivist theory. The writer explains that while naturalist view holds that the principles of the law or at least the most fundamental of them can be deduced from the essential nature of state-persons, positivist view regards the law merely as the sum of the rules by which these state-persons have consented to be bound by. The positivist doctrine, then, explains the binding force of the rules of international law as arising from the supposed fact that states have consented to be bound by them.

[216] See *supra* Note 146.

[217] Jan Klabbers, "Presumptive Personality: The European Union in International Law", *International Law Aspects of the European Union, Martti Koskenniemi (Ed), Kluwer Law International*, The Hague, 1998, p.235.

[218] For example, European Coal and Steel Community, Art. 6; European Community, Art. 210; Central American Bank of Economic Integration, Art.1; African Development Bank, Art.50; International Fund for Agricultural Development, Art.10, Section 1; International Olive Oil Council, Art.6.1; West Africa Rice Development Association, Art.II.1 (taken from Schermers & Blokker, op. cit., p.978, note 7).

[219] For example, Art. 39 of the ILO Convention reads as follows:
"*The International Labor Organization shall possess full juridical personality and in particular the capacity:*
(a) to contract;
(b) to acquire and dispose of immovable and movable property;
(c) *to institute legal proceedings.*"
See also IMF Constitution, Art. 9, Section 2; and Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), Art. 1, b.

Article 104 of the UN Charter[220] refers to domestic personality only.[221] The report of the Subcommittee on the juridical status of the United Nations reads as the following:

> As regards the question of international juridical personality, the Subcommittee has considered it superfluous to make this subject of a text. In effect, it will be determined implicitly from the provisions of the Charter taken as a whole.[222]

Another problem, the writer underlined, is related to the possibility of an international organization being endowed with international legal personality and yet no state entering into engagements with it. What is the use of having international legal personality then? What's more, if it is only the will of founding states to be resorted to determine the legal status of an international organization, it would not suffice to endow the organization with legal personality valid *vis-à-vis* non-member states simply because a mere agreement between, and binding upon, member states would not have a binding effect upon third parties.

This drawback necessarily introduced the recognition mechanism to play a role in reinforcing the will theory. What's lacking in a constituent instrument, i.e manifestation of the will of the founding states to establish the entity with legal personality, would be compensated through recognition by third parties of the organization as such. Yet, *Klabbers* questioned the usefulness of the efforts of the adherents of will theory, who resort to recognition by third states of the international legal personality of an international organization in order to overcome this problem. The writer warned that "if the question of an organization's legal personality depends

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[220] Art. 104 of the UN Charter reads: *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.*
[221] See also WIPO Convention, Art. 12 (1); UNIDO Convention, Art. 21 (1); IAEA Statute, Art. XV; OAS Charter, Art.133; OPCW Convention, Art. VIII, Section 48.
[222] XIII UNCIO, Doc.803, IV/2/A/7, San Fransisco, 1945, 817.

ultimately (or even partly) on recognition by third parties, then the importance of the will of the founders becomes difficult to sustain."[223]

Klabbers also warned against the possibility of an international organization engaging international torts *vis-à-vis* non-member States and yet incurring no liability, since, according to the will theory and in conjunction with recognition mechanism, an organization that has not been endowed with legal personality is unable to commit wrongful acts. The writer rightly maintains that "an organization which performs acts under international law, whether recognized or not, will in doing so have to respect pertinent norms of general international law, and thus has international obligations." Recognition by third parties cannot be decisive in determining whether an international organization has engaged in an internationally wrongful act.[224]

After pointing to the drawbacks of the *will theory*, *Klabbers* dealt with the *objective theory* of personality, according to which organizations possess international legal personality as soon as they have met the criteria of organizationhood. The writer notes that the will of the founding states, under *objective theory*, has no determinative effect upon the legal personality of the organization, yet those states may limit the competences of an international organization enjoying full international legal personality, by its constituent treaty or other rules of the organization.[225]

With the will of states "relegated to somewhat subservient status"[226], as regards the legal personality of the organization, the *objective theory* escapes many problems that the *will theory* has encountered. There's no need to interpret the will of the founding states when there's no explicit grant of legal personality to the organization in its constituent instrument. Accordingly, there's no need to determine whether third parties have recognized the organization as an international legal person.

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[223] Klabbers, *An Introduction to International Institutional Law*, p. 48.
[224] Klabbers, "Presumptive Personality: The European Union in International Law", p.238.
[225] *ibid.*, p.240.
[226] *ibid.,* p.240.

Yet, the *objective theory* has its own drawbacks. Now that an organization enjoys legal personality as soon as it meets certain criteria, then the problem arises so as to determine which criteria are to be met. *Klabbers,* starts by questioning the criteria of international law with respect to organizationhood. According to the writer, the criterion that the organization must possess its own distinct will, as advanced by *Seyersted*, seems problematic since it would make no sense to speak of an organization's distinct will as long as it is not empowered to take decisions binding its membership by a mere majority of its members.[227] An international organization, which can take such decisions only by consensus rather than by majority is therefore likely to be questioned on whether it has a distinct will.

The more important criticism that *Klabbers* brought against the *objective theory* is that it would be in conflict with the intentions of the founders, who may have wished to devoid the organization of legal personality. Such an intention should be respected and cannot be overruled by a rule of general international law suggesting that an organization shall have legal personality whether or not the founders have intended so.[228]

The writer examined the Court's opinion in *Reparation for Injuries* case from the viewpoints of the two contending theories. The Court first set forth to determine whether the UN had international personality *vis-à-vis* its member States. Since there was no provision in the UN Charter granting international personality to the UN, the Court ascertained the intentions of the founders of the Organization:

> Has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect…To

[227] Klabbers, *An Introduction to International Institutional Law*, p.49.
[228] *ibid.,* p.49.

answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization[229].

The writer found that phrase remarkable first because despite the fact that the founders of the UN had intentionally refrained from explicitly endowing the Organization with international legal personality, the Court decided to fill the vacuum by figuring out what the founders had in mind when drafting the Charter of the UN. What's more, "the Court did not limit itself to figuring out what the Charter explicitly said, or left unsaid, about personality." The writer noted that while this approach stands short of supporting the *objective theory*, it also invalidates the *will theory* as it conflicted with the wills of the founders.[230]

Another part of the judgment, which according to the writer rejects the *will theory*, is as follows:

> In the opinion of the Court, 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.[231]

The writer noted that the distinction between the intention of the founders and the fact that the Organization exercises and enjoys the functions and rights seemed to support the *objective theory* rather than the *will theory*. Likewise, the writer noted that the following phrase lent support to the *objective theory*:

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[229] ICJ Reports, 1949, *Reparation for injuries,* p.178.
[230] Klabbers, "Presumptive Personality: The European Union in International Law", p.244.
[231] ICJ Reports, 1949, *Reparation for injuries,* p.179.

> It is difficult to see how such a convention (Convention on the Privileges and Immunities of the United Nations) could operate except upon the international plane and as between parties possessing international personality.[232]

Klabbers noted, however, that on some other points the Court seemed to favour the *will theory*. He brought attention to the Court's acknowledgement of the fact that the founders of the United Nations equipped the Organization with the competence so that it could discharge its functions:

> It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.[233]

The writer also cited another part of the Court's opinion as an evidence of supporting the will theory: "…but to achieve these ends the attribution of international personality is indispensable."[234]

Pointing to various parts of the Court's opinion, *Klabbers* concluded that the proponents of both contending theories could invoke (and are actually invoking) it in support of their theories; however, by giving support to both theories, the Court in fact supported neither theory.[235]

As both contending theories did have some drawbacks despite their strengths, there arouse a need to develop competing theories. A more pragmatic approach elaborated in practice as regards the question of international legal personality is to *presume* it existing as soon as the organization in question performs acts which can only be explained on the

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[232] *ibid.*
[233] *ibid.*
[234] *ibid.*
[235] Klabbers, "Presumptive Personality: The European Union in International Law", 245.

basis of international legal personality.[236] Formulation of Article 104 of the UN Charter, which deals with the Organization's legal capacity under domestic laws of Member States, seems to offer support for the *presumptive theory*. *Klabbers* argued that there can be two explanations why the suggestion to have Article 104 to encompass the UN's legal personality was rejected: i) either the Member States did not wish to create an international legal person or wished to create an extremely limited person, an explanation which conflicts with the Court's interpretation of the intention of the founders; ii) or, that they were concerned only with creating the United Nations designed to reach certain purposes. While Member States felt the need to address the question of domestic legal personality of the UN, they may have thought that it was not necessary to deal with the question of international legal personality since, when needed, they would presume that regardless of the UN Charter, the UN would possess international legal personality anyway.[237]

The notion of *presumptive personality*, *Klabbers* noted, finds reflection in the International Court of Justice in its advisory opinion in *Reparation for Injuries*. When dealing with the question whether the United Nations has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused a) to the United Nations, b) to the victim or to persons entitled through him when the defendant State is not a Member of the Organization, the Court held that the Member States had the power to create an entity with objective international personality, and without specifying whether those Member States had actually used their power to that end, presumed that this was the case.[238]

What is, then, the added value of explicitly endowing the organization with international legal personality at the very beginning now that it would be

[236] Klabbers, *An Introduction to International Institutional Law,* p.50.
[237] Klabbers, "Presumptive Personality: The European Union in International Law", p.248.
[238] Klabbers, *An Introduction to International Institutional Law, op. cit.,* p.50. See, Amerasinghe, p.67-69.

possible to presume it having such personality later on in any case? Whether grant of legal personality under what is called presumptive approach would make any sense is a question that *Klabbers* answered in the affirmative. Referring to *Amerasinghe*, he noted that granting legal personality to an international organization indicates, at the very least, "that the founders wish to create an entity which is somehow separate from their aggregate, and that circumstance may be of evidentiary value when it comes to, for example, deciding whether or not the member states of an organization incur liability for the activities of the organization."[239] The writer also suggested that bestowing an organization with legal personality might facilitate the acquisition of privileges and immunities.[240]

While developing his theory, *Klabbers* offered an analysis of the international legal personality of the European Union putting the three theories mentioned above to the test. Notwithstanding absence of an explicit conferral of international legal personality upon the European Union in the Treaty establishing the European Union (TEU: the Maastricht Treaty[241]),

[239] *ibid.*, p.50
[240] *ibid*, p.51.
[241] OJ C 191/1. Article 1 TEU reads: "…the high Contracting Parties establish among themselves a European Union." Neither the 1992 Maastricht Treaty nor the 1997 Amsterdam Treaty, amending the Treaty on European Union (1997 OJ C 340/1) contained any provision regarding legal personality of the Union. It was not until the adoption of the 2007 Lisbon Reform Treaty that the Union was explicitly endowed with legal personality (OJ C 202 (2016)- Consolidated version). With the entry into force on 1 December 2009 of the Lisbon Reform Treaty, which amended both the Treaty on European Union (TEU) and the Treaty on the European Community (TEC), renaming the latter "Treaty on the Functioning of the European Union" (TFEU) and replacing the EC by the EU, the lengthy process of granting of full legal personality to the has come to an end. Article 47 TEU now reads: "*The Union shall have legal personality*." Article 335 TFEU reads: "*In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.*" However, questions concerning international legal personality of the EU have not yet been resolved. While agreeing that the Union enjoys legal personality both via doctrine of *implied powers* and, since Lisbon, on the basis of an express constitutional provision, Blokker asserts the question whether and to what extent individual EU institutions and entities (for example European Investment Bank, European Central Bank, Europol, European Aviation Safety

Klabbers demonstrated that the European Union must be regarded as an international legal person without borrowing support either from the *will theory* or from the *objective theory* of personality, and concluded that "the Union can only be understood on the *presumption* that the Union possesses international legal personality."[242] He noted that while silence in the TEU as regards the EU's legal personality was interpreted by some observers as the EU's lack of capacity to act under international law[243], others[244] were of the view that the EU could act internationally only by means of borrowing powers and institutions from the Communities, which had already been provided with international legal personality[245]. A third group of observers focused on the

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Agency, Frontex, etc.) *themselves* enjoy international legal personality remains unresolved. See, Niels Blokker, "International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law", Yearbook of European Law, Vol.35, No.1, 2016, pp.471-483.

242 Klabbers, "Presumptive Personality: The European Union in International Law", p.233 (emphasis added).

243 Reference was made to P.J.G. Kapteyn and P. VerLoren van Themaat, *Inleiding tot het Recht van de Europese Gemeenschappen na Maastricht*, Kluwer, Deventer, 1995, p.756. See, *ibid.* p.231.

244 Reference was made to U. Everling, "Reflections on the structure of the European Union", (1992) Common Market Review, 1053-177. See, *ibid.*, p.231.

245 1951 Treaty of Paris (261 UNTS 149), which established the European Coal and Steel Community (ECSC) explicitly provided for international legal personality of the ECSC. Article 6 of the Treaty reads: "*The Community shall have legal personality. In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives. In each of the MSs, the Community shall enjoy the most extensive legal capacity accorded to legal persons constituted in that state; it may, in particular acquire or dispose of movable or immovable property and may be a party to legal proceedings.*" 1957 Treaties of Rome, which established the European Economic Community (EEC, later became European Community-EC, 298 UNTS 11) and the European Atomic Energy Community (EURATOM, 298 UNTS 167), contented itself with the first sentence of Article 6 of the Treaty of Paris ("*The Community shall have legal personality*") in respective provisions (Article 210 of EEC Treaty; Article 184 of EURATOM Treaty) inviting ambiguity on whether that provision covered both national and international legal personality of the Communities. It can be deduced from practice and the case law of the European Court of Justice (ECJ, Case 22/70, Commission v. Council (ERTA), [1971] ECR 263, para. 14) that this provision also covered the international legal status of the two Communities. See, Blokker, "International Legal Personality of the European

merger of the Union and the Communities, and contended that "since the Community is an international legal person, so too, by extension, is the European Union."[246] According to *Klabbers* these views were driven by two assumptions. First, the views were based on the assumption that international legal personality is a quality that can be granted to the Union solely by the will of its member states; and, second, they assume that it was an intentional act (or intentional omission) of the drafters of the Maastricht Treaty not to endow the Union with international legal personality.[247]

When analyzing the EU's legal personality in the context of the *will theory*, *Klabbers* questioned whether the absence of any provision on Union's legal personality in the Maastricht Treaty should result in the Union being treated as an entity devoid of legal personality, or whether the theory fails to explain the Union's international legal personality. Although some observers interpreted the absence of explicit conferral of legal personality on the Union as an intentional act[248], which consequently would explain the Union as an

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Communities and the European Unions: Inspirations from Public International Law", p.474.

[246] Reference was made to A. Von Bogdandy and M. Nettesheim, "Die Verschmelzung der Europäischen Gemeinschaften in der Europäischen Union" (1995) *Neue Juristische Wochenschrift* 2324-2328, The Dörr, "Noch einmal: Die Europäischen Union und die Europäischen Gemeinschaften", (1995) *Neue Juristische Wochenschrift*, 3162-3165, and M. Pechstein, "Rechtsubjektivität für die Europäische Union?", (1996) *Europarecht*, 137-144. See, Klabbers, "Presumptive Personality: The European Union in International Law", p.231.

[247] *ibid*, p. 233. Two opinions prevailed during the drafting process of the Maastricht Treaty. While one group considered that equipping the Union with legal personality would compromise national sovereignty of member states, other group contended that it would impinge on the legal personality of the Community. See, Philippe de Schoutheete and Sami Andoura, "The Legal Personality of the European Union", *LX Studia Diplomatica 1*, Egmont European Affairs Publication, 2007, p.1.

[248] Reference was made to Martin R. Eaton, "Common Foreign and Security Policy" in David O'Keeffe and Patrick M. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Chancery Law Publications, London, 1994, pp.215-225, p.223. Referring to the position of the Dutch Presidency, supported by the Director General of the Commission Legal Service, Eaton notes that there was a clear intention during the negotiations not to confer legal personality to the Union. See, Klabbers, "Presumptive Personality: The European Union in International Law", p.238.

entity devoid of legal personality based on the *will theory*, *Klabbers*, moving from the preparatory works of the Treaty, regarded the absence of such a provision not as manifestation of an actual intention to withhold legal personality from the Union, but rather as a result of an oversight, which would render will-based arguments ill-founded in explaining the legal status of the Union[249]. *Klabbers* further argued that even if intention of the drafters to withhold legal personality from the Union had been established, the value of such intention would be problematic given that the question of recognition, or lack thereof, on the part of third parties would still remain[250].

Under the *objective theory, Klabbers* did not hesitate to announce that the Union possessed international legal personality. The Union met all the requirements of an international organization that are common in most descriptions, namely being created by agreement between subjects of international law (the Maastricht Treaty), possessing at least one organ (the European Council), and having purposes of its own[251]. As for the requirement of possessing a distinct will, *Klabbers* is of the view that the Union must be regarded as having such an attribute, a bit of legal fiction as it may be, since the whole idea of lifting foreign and security policy, and justice and home affairs, into a common structure, could be explained under the assumption that

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[249] The view that non-reference to the international legal personality of the EU in its constituent instrument is not a decisive factor has found support also from Hafner. He argued that "the omission does not necessarily imply the absence of any international legal personality since the latter's explicit assertion would have only declaratory effect." See, Gerhard Hafner, "The Amsterdam Treaty and the Treaty-Making Power of the European Union. Some critical comments", *Liber Amicorum Professor Seidl-Hohenveldern-in honour of his 80th birthday*, Kluwer Law International, Dordrecht, 1998, pp.257-284, p.267.

[250] Klabbers, "Presumptive Personality: The European Union in International Law", p.239.

[251] Objectives of the Union enshrined in Article B of the Maastricht Treaty included (i) promoting economic and social progress which is balanced and sustainable, (ii) assessing its identity on the international scene, in particular through the implementation of a common foreign and security policy, (iii) strengthening the protection of rights and interests of nationals of its member states through the introduction of a citizenship of the Union, (iv) developing close cooperation on justice and home affairs, and (v) maintaining in full the *acquis communautaire*.

the drafters intended to create a *corporate* will rather than a mere *aggregate* of the wills of the member states[252]. However, *Klabbers* further notes that even the Union's international legal personality could be established under the objective theory, "it does not tell us whether the Union actually acts externally, or whether its personality is devoid of contents."[253]

Apparently the intention of the drafters of the Maastricht Treaty as regards legal personality of the Union cannot be established without ambiguity. Moreover, even if it had been clearly established that the intention of the drafters was to create the Union as a non-person that clarity would not be decisive in light of the *Reparation for Injuries* opinion. That being the case, *Klabbers* resorted to the practice of the Union when applying the *presumptive theory* to determine its legal status. Importing the ICJ's line of thinking in *Reparation for Injuries*[254] to the case of the EU, *Klabbers* argued that if the European Union is performing acts which can only be explained on the basis of possession on international legal personality then the *presumption* that the Union enjoys such a personality can be confirmed. He, therefore, first drew attention to the adoption of a *common position* as the most usual form of the Union's international Action[255]. In light of the principles expressed by the ICJ, in particular in 1974 *Nuclear tests* cases[256], he contended that common

[252] Klabbers, "Presumptive Personality: The European Union in International Law", p.243. It is interesting to note that when explaining the existence of *distinct will* of the European Union, the most salient requirement under the *objective theory*, Klabbers borrows from the *will* of the founders of the Maastricht Treaty.
[253] *ibid*., p.243.
[254] See *infra* Note 916.
[255] Article J.2 (2) of the Maastricht Treaty reads: "Whenever it deems it necessary, the Council shall define a common position. Member States shall ensure that their national policies conform on the common positions."
[256] See *infra* Note 742. Holding that France had become unilaterally bound by virtue of a series of official statements it had made expressing intention to cease its nuclear tests, the Court said: "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral obligation. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected." Australia v. France [1974] ICJ Reports 253, para.46.

positions adopted by the Union may bind itself under international law, provided their wording justifies third parties to rely on them in good faith.

Moreover, *Klabbers* emphasized that the Union possessed the main attributes on international legal personality; namely the treaty-making power, the capacity to bring international claims, and the right to send and receive missions. As for the treaty-making power of the Union, he contended that the exchange of letters on information and consultation procedures concluded between the European Union and Norway, Austria, Finland and Sweden prior to the accession of these states to the Union[257] implies that the Union possesses the *ius tractatus*[258]. Another instrument that *Klabbers* referred to as evidencing the international legal personality of the EU is the Memorandum of Understanding on the European Union Administration of Mostar[259]. *Klabbers* noted that although the EU was not a party to the MoU (but member states were), it was negotiated and signed by the CFSP-troika and the Commissioner responsible for external political relations, and entered into force upon signature. According to *Klabbers*, signature as a legal act placed on the Union the responsibility for the administration of the city of Mostar, a commitment entered on behalf of the states rather than the EU. Since the MoU binds the EU, "that, in turn, implies that the Union must be an international legal person."[260]

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[257] OJ 1994, C 241/399.

[258] Klabbers, "Presumptive Personality: The European Union in International Law", p.251.

[259] *Tractatenblad*, 1994, No.183. Klabbers noted that formally the MoU is an agreement between the member states of the EU "acting within the framework of the Union", the member states of the Western European Union, the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the local administration of Mostar East, the local administration of Mostar West, and the Croats of Bosnia and Herzegovina, and he draw attention to the fact that international legal personality of most of these entities prior to the conclusion of the MoU would have been doubtful. See, Klabbers, "Presumptive Personality: The European Union in International Law", Note 98.

[260] Klabbers, "Presumptive Personality: The European Union in International Law", p.251. Unlike Klabbers, Gautier contended that the competence of the Union to conclude treaties could not be sufficiently demonstrated on the basis of the provisions of the Treaty of Maastricht or confirmed by the practice (administration of the city of Mostar). See, Philippe Gautier, J.A. Frowein and

Klabbers also noted that in its landmark *ERTA* decision the European Court of Justice confirmed the *presumptive* approach derived from the *Reparation for Injuries* opinion.[261] The case concerned the *implied powers* of the European Community to conclude treaties under international law. The EC Commission applied for annulment of the Council's proceedings regarding the negotiation and conclusion by the Member States of the Community of the European Road Transport Agreement. To decide on the objection of inadmissibility of the application, the Court first examined which authority was empowered to negotiate and conclude the Agreement since, as the Court remarked, "the legal effects of the proceedings differ according to whether they are regarded as constituting the exercise of powers conferred on the Community, or as acknowledging a coordination by the Member States of powers which remained vested in them."[262] Referring to Article 210 of the EC Treaty, which reads "The Community shall have legal personality", the Court held that this provision meant "that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty…"[263]. However, the link between the legal personality of the Community, as provided for in Article 210, and the capacity thereof to conclude agreements with third states remained unexplained. The only feasible conclusion to be drawn from the Court's reference to Article 210, *Klabbers* noted, "is that the Court, by doing so, must have regarded Article 210 as giving rise to a strong *presumption* of international legal personality."[264]

R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Kluwer Law International, 2000, p.361.

[261] Klabbers, "Presumptive Personality: The European Union in International Law", p.248.

[262] ECJ, Case 22/70, Commission v. Council (ERTA), [1971] ECR 263, para. 5.

[263] *ibid*, para.14

[264] Klabbers, "Presumptive Personality: The European Union in International Law", p. 249.

Having examined the two theories, namely the *will theory* and the *objective theory*, *Klabbers* concluded 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 it."[265] If an entity has not been explicitly endowed with international legal personality, in other words, if the constitution of the entity is silent on personality issue, then the decision on whether it has international legal personality will be given based on the organization's involvement in legal activities. An organization, which performs legal acts that point to its international legal personality, will be *presumed* as having such personality even in the absence of explicit grant of that personality. That *presumption* will apply even if preparatory works may suggest that absence of a constitutional provision granting personality to the organization reflects the real intention of the founders of the organization, as in the case of the United Nations.[266]

Apparently, the *presumptive theory* of personality is a successful attempt to strike a middle ground between the *will theory* and the *objective theory*. An organization which exists and performs legal acts which can only be explained on the basis of its international legal personality is *presumed* to have it. This argument lends support to the *objective theory* but differs from it as it allows for "denial based on practice or intent, thus avoiding the pitfall that *Seyersted*'s objective personality attains *jus cogens* like status."[267] On the other hand, the possibility of rebuttal of legal personality through practice and intent seems to offer some support to the *will theory* albeit the will of the founders does not play a constituent role in the process. It should also be noted that the possibility of rebuttal of personality by member states introduces "normative force in international law for institutional features"[268] of the organization, and consequently runs counter to the very foundation of the theory, which treats personality as a purely formal concept rather than a normative feature.

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[265] Klabbers, *An Introduction to International Institutional Law,* p.51.
[266] *ibid,* p.50.
[267] Klabbers, "On Seyersted and his Common Law of International Organizations", *International Organizations Law Review* 5 (2008), p.387.
[268] Brölmann, *The Institutional Veil in Public International Law,* p.87.

F- Legal Personality of International Organizations Under Domestic Law

Having capacity to operate in international plane, in other words, possessing international legal personality does not *per se* entitle the organization to perform legal actions in national plane. Only an international organization bestowed with domestic legal personality can enter into legal relationships in national plane, and for example be a party to legal proceedings before domestic courts. *Reinisch* reminds us of some cases where national courts paid attention to the personality of the international organization concerned to decide whether they could adjudicate the underlying dispute.[269]

The Belgian case, *Manderlier v. Organisation des Nations Unies et l'État Belge*[270] illustrates this point. The case was about a claim lodged by a Belgium citizen against the United Nations for compensation for the loss of his property burnt and looted by UN Force in Congo in January 1962. The question of the immunity of United Nations set aside, the Civil Tribunal of Brussels noted that the United Nations was set up by the Charter of the United Nations of 26 June 1945, approved in Belgium by the Law of 14 December 1945, and therefore concluded that United Nations was competent to appear in legal proceedings in Belgium as a result of the legal personality it enjoyed in the territory of each member state. It reasoned: "By Article 104 of that Charter the Organization enjoys in the territory of each of its Members such legal

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[269] Reinisch, *International Organizations Before National Courts,* p.38.
[270] *Manderlier v Organisation des Nations Unies et l'État Belge (Ministre des Affaires Etrangères)*, Brussels Civil Tribunal, 11 May 1966, (1966) Journal des Tribunaux 721; (1972) 45 ILR 446; Case Note by J. Salmon, 'De quelques problèmes poses aux tribunaux belges par les actions de citoyens belges contre l'O.N.U. en raison de faits survenus sur le territoire de la République démocratique du Congo, (1966) Journal des Tribunaux 713; Court of Appeals of Brussels, 15 September 1969, (1969) 69 ILR 139; Case Note by P. De Visscher, 'De l'immunité de juridiction de l'Organisation des Nations Unies et du caractère discrétionnaire de la compétence de protection diplomatique', (1971) 25 Revue critique de jurisprudence belge 456, at 460.

capacity as may be necessary to it. The defendant is consequently competent to appear in legal proceedings in Belgium."[271]

In another case, legal personality of the UN Relief and Rehabilitation Administration (UNRRA) was dealt with by a Dutch court in *UNRRA v Daan* case.[272] UNRRA instituted the legal proceeding at Cantonal Court Amersfoort against its former employee in order to recover the money paid in excess of the amount due. The defendant contended that UNRRA did not have domestic legal personality required to bring suit in domestic courts. The court held that the Agreement establishing UNRRA – to which the Netherlands was a party – gave UNRRA "power to acquire and transfer property, to conclude contracts and perform all legal acts appropriate to the fulfillment of its task (…) As a result it must also be considered a legal person under Dutch law, and as such competent to act as a party to legal proceedings."[273]

In a similar case in Belgium, this time both the United Nations and UNRRA brought a suit against a former employee for the return of money paid erroneously. Defendant in *United Nations and UNRRA v B*[274] case contended that both organizations lacked the legal personality required to be able to bring suit in domestic courts. However, the Civil Tribunal of Brussels rejected this argument on the basis that the Washington Agreement setting up UNRRA was ratified by a Belgian Law of 3 August 1944[275], and the Charter of the United Nations was ratified in Belgium by a Law of 14 December 1945. The Court held that public international establishments, recognized by Belgium law, had thus juridical personality in Belgium and convicted the

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[271] *Manderlier v Organisation des Nations Unies et l'État Belge (Ministre des Affaires Etrangères),* (1972) 45 ILR 446, at 450.
[272] *UNRRA v Daan*, Cantonal Court Amersfoort, 16 June 1948, District Court Utrecht, 23 February 1949, Supreme Court (Hoge Raad) of the Netherlands, 19 May 1950.
[273] *UNRRA v Daan*, (1951) NJ 150; (1955) 82 Journal de droit international (Clunet) 855-87; (1949) 16 ILR 337-8.
[274] *United Nations and UNRRA v B*, Tribunal Civil of Brussels, 27 March 1952.
[275] Arrêté-Loi du 3 Août 1944, 'Accord relatif à l'Administration des Nations unies pour l'Organisation des Secours et de la Reconstruction', Moniteur Belge, 11 Août 1945, 5062.

defendant to restitute the money to the United Nations.[276]

In the case of *United Nations v Canada Asiatic Lines Limited*[277], the Canadian Superior Court of Montreal analyzed the legal personality of the United Nations to determine whether the organization had the right to institute legal proceedings at domestic courts in Canada. It decided that the United Nations possessed legal personality and had the right to institute legal proceedings.

Therefore, the connection between domestic and international legal personality of an international organization arises as an important question. When dealing with the relevance of the international legal personality of international organizations for their domestic personality, *Klabbers* refers to *Bederman,* who noted that in the first half of the twentieth century international entities could be granted domestic personality if they already were bestowed with international legal personality.[278]

a) Relationship Between International and Domestic Legal Personalities of International Organizations

Reinisch places closer scrutiny on the effect of international legal personality within domestic law. He distinguishes the relationship between international and domestic legal personality from the relationship between domestic legal personality as required by international law and the one as accorded under domestic law. He notes that in both situations it is possible to adopt a declarative or a constitutive view.[279]

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[276] *United Nations and UNRRA v B*, Tribunal Civil of Brussels, (1952) 19 ILR 490.
[277] *United Nations v Canada Asiatic Lines Ltd*, Superior court Montreal, 2 December 1952, Rapports de Pratique du Québec (1954) 158-60; (1954) 48 AJIL 668; (1958 II) 26 ILR 622.
[278] David Bederman, "The Souls of the International organizations: legal Personality and the Lighthouse at Cape Spartel", p.351.
[279] Reinisch, *International Organizations Before National Courts,* p.60.

On the relationship between international and legal personality, he notes that those who subscribe to a declarative view would argue that an entity with international legal personality should also have domestic legal personality automatically. On the other hand, those who adhere to a constitutive view would assert that domestic legal personality is a separate issue and that an entity's international legal personality bears no effect on it being granted domestic legal personality.

As regards the relationship between domestic legal personality under international law and that as accorded under domestic law, he notes that the declarative view would maintain that, if a norm of international law provides for domestic legal personality, that personality is automatically given under domestic law; whereas the constitutive view would assert that though states might be obliged by international law to bestow an entity with domestic legal personality, such a consequence would depend upon the domestic legal order.[280]

To put it in short, while adherents of the declarative view maintain that domestic legal personality of an international organization directly results from its international legal personality, those who adhere to the constitutive view maintain that domestic legal personality stems from the domestic law of the respective countries concerned and not directly from any treaty or from the organization's international legal personality. With that explanation, *Reinisch* concludes that the constitutive view appears to rest on firm ground and that the declarative view contains a number of problematic elements. He notes that international law does not require that international legal rules should become directly effective under national law and that such an effect could be envisaged as an extreme form of monism[281]. As he rightly puts it, while international law, be it a rule of a treaty or customary law, may oblige states to confer upon an entity domestic legal personality under their respective domestic legal orders, it is left to the obligated states to decide on

[280] *ibid.,* p.60.
[281] *ibid.*, p.60.

how to carry out their obligations[282]. Whether they fulfill their obligations by giving direct effect to them or by means of implementing legislation is up to the states to decide.

b) Basic Modalities of Implementing International Rules in National Plane

Moving from a survey of national legal systems, *Cassese* notes that there are two basic modalities that states apply when implementing international rules: *automatic standing incorporation of international rules* and *legislative ad hoc incorporation* of *international rules.*[283]

Under the first mechanism (*automatic standing incorporation of international rules*) a domestic rule (constitution or law, or in the case of judge-made law, court decisions) requires that (self-executing) rules of

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[282] For more information on how the two main theories, monism and dualism, deal with the interaction between international law and domestic law, see Lassa Oppenheim, *International Law: A Treatise*, *op. cit.*, p.35. According to the dualist view, "the Law of Nations and the Municipal law of the several States are essentially different from each other. They differ, first as regards their sources. The sources of Municipal Law are custom grown up within the boundaries of the State concerned and statutes enacted by the law-giving authority. The sources of International Law are custom grown up among States and law-making treaties concluded among them. (…), secondly, regarding the relations they regulate. Municipal Law regulates relations between individuals under the sway of a State and the relations between the State and the individual. International Law, on the other hand, regulates relations between States. (…), thirdly, with regard to the substance of their law: whereas Municipal Law is a law of a sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between, sovereign States, and is therefore a weaker law. (…) monist doctrine (…) rejects all three premises of the dualists. It denies, in the first instance, that the subjects of the two systems of law are essentially different and maintains that in both it is ultimately the conduct of the individuals which is regulated by law, the only difference being that in the international sphere the consequences of such conduct are attributed to the State. Secondly, it asserts that in both spheres law is essentially a command binding upon the subjects of the law independently of their will. Thirdly, it maintains that International Law and Municipal Law, far from being essentially different, must be regarded as manifestations of a single conception of law."

[283] Antonio Cassese, International Law, Second Edition, Oxford, 2005, p.220

international law are applied by all state officials as well as other individuals, be they nationals or foreigners, on the territory of the state. Such international rules (treaty or customary rules) are automatically incorporated into national law in a permanent way. Therefore, there is no need for the passing of *ad hoc* legislation for incorporation into national law of rules of international law as long as such rules are of self-executing nature.[284]

As for the second mechanism (*legislative ad hoc incorporation of international rules*) parliamentary authorities need to pass specific legislation so that international rules could become applicable within the national legal system. Parliaments can do this in two ways. Either they enact a law, which translates the treaty provisions into national legislation, setting out in detail the various obligations, powers and rights stemming from those provisions (*statutory ad hoc incorporation of international rules*), or they enact a law, without reformulating the international rule to be applied, requiring that (self-executing) rules of international law are applied by all state officials as well as other individuals, be they nationals or foreigners, on the territory of the state (*automatic ad hoc incorporation of international law*). The difference between *automatic ad hoc incorporation of international law* and the abovementioned *automatic standing incorporation of international rules* is that while incorporation is effected on a case-by-case basis in the former, there is no need to pass a specific legislation in the latter since the relevant domestic rule, which requires automatic application of self-executing international rules is applicable to all such rules.[285]

In the case of EU, the doctrine of *direct applicability* prevails. As opposed to the abovementioned mechanism of *legislative ad hoc incorporation of international rules,* direct applicability of EU law ensures that EU law is incorporated into the domestic law of the Member States without the need for its specific implementation. Therefore, there's no need (as there is in dualist countries like UK) to pass an Act of Parliament to give effect to it. Thus, the founding treaties, their amendments duly ratified,

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[284] *ibid.*, p.220.
[285] *ibid.*, p.220.

protocols and conventions attached to them are directly applicable. Direct applicability of secondary sources[286] are addressed in Article 288 of the Treaty on the Functioning of the European Union (TFEU).[287] Although direct applicability of regulations are explicitly recognized in Article 288 TFEU, in exceptional cases there may arise a need for Member States to take implementing measures[288]. When asked whether provisions of a regulation can be incorporated into Italian law by internal measures reproducing the contents of that regulation in such a way as not to affect its substance, the ECJ held that:

> *By virtue of the obligations arising from the Treaty and assumed on ratification, Member States are under a duty not to obstruct the direct applicability inherent in regulations and other rules of Community law.*[289]

Although the Treaty is silent on direct applicability of decisions, it is held that the principle of direct applicability applies also to decisions, irrespective of whether they are addressed to a Member State or to a natural or to a legal person as well as to decisions, which have no identified

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[286] Secondary sources of EU law are listed in Article 288 TFEU as regulations, directives and decisions. The provision states that recommendations and opinions have no binding force, and thus they are neither legal acts nor considered as sources of EU law.

[287] Article 288 TFEU reads:
"To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
Recommendations and opinions shall have no binding force."

[288] Reinisch states that such a need may arise if provisions of regulations are "not sufficiently clear and precise or, more likely, if they expressly provide for such implementing measures." See, August Reinisch, Essential Questions in EU Law, Cambridge University Press, New York, 2009, p. 34.

[289] Case 34/23, Variola SpA v. Amministrazione italiana delle Finanze [1973] ECR 981

addressees.[290] In a preliminary ruling on a question concerning whether individuals could rely upon Council decisions addressed to Member States which related to the VAT directive, the ECJ stated that in cases where:

> the Community authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness (*l'effet utile*) of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts would not take it into consideration as part of Community law[291].

As for directives, it should be recognized that they are not designed to be automatically operative in national legal systems. While Member States to which they are addressed are under an obligation to achieve the objectives set out those directives, they maintain their discretionary powers to determine the procedures and methods necessary to attain these objectives. *Kaczorowska* notes that "while English scholars are of the view that directives are not directly applicable since they require implementing measures[292], (scholars from monist school)[293] argue that Member States only have powers to implement directives, which is quite different from the incorporation of international treaties into municipal law".[294] Drawing attention to the directives' role as a primary tool for legal *harmonization*, Reinisch notes that "they are intended to lead to an 'approximation of the law', not to absolute unification, as do regulations. By leaving the choice of implementation to the Member States, directives are a *means of federalism.*" He warns, however, against serious problems that may arise due to improper implementation of

[290] Alina Kaczorowska, *European Union Law*, Second Edition, 2009, p.296.
[291] Case 9/70, *Franz Grad v. Finanzamt Traunstein* [1970] ECR 838. See, Reinisch, Essential Questions in EU Law, p.56.
[292] John Tillotson, European Community Law, Second Edition, London: Cavendish, 1996, p.69.
[293] Robert Kovar, "La contribution de la cour de justice à l'edification de l'ordre juridique communautaire", (1993) 4/1 Requeil de l'Académie de droit européen, p.57.
[294] For conflicting views regarding direct applicability of EU directives, see Alina Kaczorowska, *European Union Law*, Second Edition, 2009, p.300.

directives by the Member States, and states that "inspired by its *effet utile* approach, the ECJ has developed a jurisprudence according to which even provisions of directives may exceptionally be considered directly effective." See, ibid. 56-5[295]

In Case 26/62, *N. V. Algemene Transport,* the ECJ was asked, *inter alia*, for a preliminary ruling on whether Article 12 of the EEC Treaty had direct application within the territory of a Member State, in other words, whether nationals of such a state could, on the basis of the article in question, lay claim to individual rights which the Court must protect. When ruling in the affirmative, the Court reasoned that;

> The European Economic Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.
>
> Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[296]

Similarly, in Case 28/67, *Firma Molkerei,* the ECJ rendered a preliminary ruling on interpretation of Articles 95 and 97 of the EEC Treaty (Articles 100a and 102 of the EC Treaty) in which it formulated the doctrine

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[295] Reinisch, Essential Questions in EU Law, p.56-57.

[296] Case 26/62, *N. V. Algemene Transport – En Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Revenue Administration,* [1963] ECR 1, 12

of direct applicability and held that provisions of Community law should be incorporated into the domestic legal system of Member States without the need for passing implementation legislation.[297]

c) International Obligations Regarding Domestic Legal Personality of International Organizations

Modalities that states apply when implementing international rules are relevant also to the question of how legal personality of international organizations is dealt with in national legal systems. So are the rules of international law governing the issue of legal personality of international organizations. Treaty norms and rules of customary international law can be examined in addition to national legal systems in this regard.

i. Treaty Norms

Many international agreements, in particular, constituent treaties of international organizations contain provisions regarding the personality of the organization. Such provisions allow the organizations to act as legal persons within the domestic legal order of member states. Self-executing provisions on legal personality of the organization become directly effective in monist legal systems. In most cases, though, an obligation is imposed on member states to recognize the legal personality of the respective organizations in their legal systems. While some constituent treaties expressly grant legal personality to the organization in national law, others not containing any provision dealing with domestic legal personality, it is argued, must be deemed to have implicitly conferred such personality.[298]

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[297] Preliminary ruling No.28/67, Firma Molkerei-Zentrale Westfalen v. Hauptzollamt (Paderborn) [1968] ECR 143, 154: "*The complexity of given situations in a State cannot alter the legal nature of a directly applicable Community provision, especially as the Community rule must be applied with the same force in all Member States.*"

[298] Reinisch, *International Organizations Before National Courts,* p.44.

Many of the legal instruments provide international organizations with legal capacity to exercise their functions.[299] The formula used in Article 104 of the UN Charter[300], reflecting something of a functional necessity test, as *Klabbers* called it, is regarded as implying that the organization possesses the largest possible degree of personality as recognized in domestic law[301]. While the Treaty on European Union expressly provides the Union with legal personality[302], the Treaty on the Functioning of the European Union provides that the Union possesses the most extensive legal capacity accorded to legal persons under respective domestic legal systems of the Member States, and

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[299] Constitution of the Food and Agriculture Organization (FAO), Art XVI reads: "1. The Organization 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.". Constitution of the World Health Organization (WHO), Art 66 reads: "The Organization shall enjoy in the territory of each Member such legal capacity as may be necessary for the fulfilment of its objective and for the exercise of its functions.". Constitution of the United Nations Industrial Development Organization (UNIDO), Art 21 reads: "The Organization shall enjoy in the territory of each of its Members such legal capacity and such privileges and immunities as are necessary for the exercise of its functions and for the fulfilment of its objectives.". Constitution of the UN Educational, Scientific and Cultural Organization (UNESCO) deals with the question of legal personality of the Organization by making reference to the relevant provisions of the UN Charter. Article 12 of the Constitution reads: "The provisions of Articles 104 and 105 of the Charter of the United Nations Organization concerning the legal status of that Organization, its privileges and immunities, shall apply in the same way to this Organization.". Convention on International Civil Aviation [Constitution of the international Civil Aviation Organization (ICAO)] Article 47 reads: "The Organization shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the Constitution and laws of the state concerned." See also Constitution of the International Telecommunication Organization (ITU) (International Telecommunication Convention, Article 17); Constitution of the World Intellectual Property Organization (WIPO) (Convention establishing WIPO, Art 12.1); Agreement establishing the International Fund for Agricultural Development (IFAD) Article 10, Section 1, 2; Constitution of the European Atomic Energy Agency (Euratom) (Treaty establishing Euratom, Article 185); Charter of the Organization of American States (OAS), Article 133; Treaty establishing the Latin American Integration Association (ALADI), (1980 Montevideo Treaty), Article 52.

[300] *Supra* Note 220.

[301] Klabbers, *An Introduction to International Institutional Law,* 44.

[302] TEU Article 47 reads: "The Union shall have legal personality."

further specifies the most important aspects of that capacity.[303] Many of the treaties contain similar provisions.[304]

Likewise, bilateral headquarter agreements may contain an express provision which directly grants legal personality or imposes an obligation to the host state to provide it domestically. [305]

While in most cases an organization enjoying international legal personality may be granted legal personality as a whole under domestic law, there are cases that specific organs of such organizations have acquired separate legal personality under domestic legal system of respective countries.[306] Subsidiary organs of the United Nations[307], such as UNICEF,

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[303] TFEU Article 335 (ex Article 282 TEC) reads: "In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings (...)"

[304] Constitution of International Labor Organization (ILO), Art. 39; Agreement of International Monetary Fund (IMF), Art IX, Section 2; Agreement of International Bank for Reconstruction and Development (World Bank) Art VII, Section 2; Agreement of International Finance Corporation (IFC), Art VI, Section 2; Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), Article 1 (b).

[305] For instance, Article 2 of the Agreement between the Republic of Austria and the Energy Community Regarding the Seat of the Secretariat of the Energy Community of 29 May 2007 provides the following: "The Republic of Austria recognizes the international juridical personality of the Energy Community, deriving from the Treaty Establishing the Energy Community, and its legal capacity within Austria, in particular its capacity: (a) to contract; (b) to acquire and dispose of immovable and movable property; (c) to institute and respond to legal proceedings; and (d) to take such other action as may be necessary or useful for its purpose and activities." Section 16 of the Agreement between the International Atomic Energy Agency and the Republic of Austria regarding the Headquarters of the International Atomic Energy Agency reads: "The Government recognizes the juridical personality of the IAEA and, in particular, its capacity: (a) to contract; (b) to acquire and dispose movable and immovable property, and; (c) to institute legal proceedings."

[306] The European Investment Bank, the Supply Agency of Euratom and the European Central Bank enjoy legal personality, respectively, in municipal legal systems separate from the principal Organization (EU) (Schermers & Blokker, p.996).

UNRWA, WFP and UNDP have regularly entered into commercial contracts and agreements with states in their own names.[308] Although, there are some cases where national jurisdictions refused to recognize legal personality of United Nations subsidiary organs[309], these bodies are the United Nations organs and possess the legal capacity as conferred upon the United Nations.

ii. Custom

Although international organizations are endowed with domestic legal personality in express provisions of many of the constitutive treaties, as seen above, there may be cases where the customary source of such personality is questioned. *Reinisch* examined two such situations: (1) where the constituent treaty is silent on the question of domestic legal personality of the

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[307] The United Nations Charter does not give definition for the concept of "subsidiary organ". However, according to the Secretary-General's Summary of Internal Studies of Constitutional Questions relating to Agencies within the Framework of the United Nations, a "subsidiary organ" is one, which is established by, or under the authority of, a principal organ of the United Nations in accordance with Article 7, paragraph 2, of the Charter, by resolution of the appropriate body. Such an organ is integral part of the Organization (UN Doc A/C.1/758).

[308] For example, Section 2(a) of General Assembly Resolution 57/1 establishing UNICEF provides that UNICEF "shall be authorized to receive funds (…) and generally, to acquire, hold or transfer property, and to take any other legal action necessary or useful in the performance of its objectives and purposes."

[309] A Syrian court considered in *XX v UNRWA* (1955-1956) that the UN Relief and Works Agency was a public body of the Republic of Syria (*XX v UNRWA* Syrian Court, 1955-6, Annual Report of the Director of UNRWA, 7 UN GAOR, Supp.(No.13) 44, UN Doc. A/2171-1952). Another court in Gaza decided in *YY v UNRWA* (1957) case that UNRWA was not an organ of the UN, that it did not enjoy immunity from jurisdiction and that consequently the court was competent to hear the claim. (*YY v UNRWA*, Court in Gaza, 17 August 1957, Annual Report of the Director of UNRWA, 12 UN GAOR, Supp. (No. 14) 47, note 34, UN Doc. 1/3686-1957). However, Middle Eastern Courts gradually admitted that UNRWA is a subsidiary organ of the UN. (Jan Wouters-Pierre Schmitt, *Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials*, Working Paper 49, April 2010, Leuven Centre for Global Governance Studies).

organization; (2) where an international organization's potential legal personality in a non-member state is concerned.[310]

As regards the first situation, where the constituent instrument of an international organization does not provide the organization with domestic legal personality, recognition of domestic legal personality of the organization is not a customary obligation on states either. *Reinisch* noted, however, that domestic legal personality of the organization could be conferred implicitly in such cases.[311]

As far as the international organization's potential legal personality in a non-member state is concerned, the *res inter alios acta* rule stands as a reason for denying any obligation on the part of a non-member state to recognize or accord domestic legal personality to the organization.[312]

d) Legal Standing of an International Organization Before National Courts: Dualist and Monist Schools at Work

As mentioned above, national legal systems have their own techniques and methods of implementing international obligations. This holds true also when it comes to determining whether an international organization has domestic legal personality. When a case of law is brought before a national court by, or against, an international organization, the court first deals with the question of whether the organization in question has a legal standing to initiate the proceeding, or *vice versa*. In other words, the court should determine whether the organization in question has domestic legal personality before passing judgment on the substance of the dispute. *Reinisch* notes that national courts in such a case would determine the legal status of the organization based on a rule of *domestic* law. He further notes that in case that such a rule is of international origin, it must form part of domestic law to

[310] Reinisch, *International Organizations Before National Courts,* p.45.
[311] *ibid*., p.45.
[312] *ibid*., p.45.

become operative for the purpose of determining the legal status under domestic law of the organization in question.[313]

Techniques and methods applied by national courts for determining the domestic legal personality of international organizations differ mainly based on whether the national legal system subscribes to monist or dualist schools of law, since while in monist systems treaty provisions providing for domestic legal personality become directly applicable in domestic legal systems, in the case of dualist systems it would require legislative action to be taken for incorporation of international law, including treaty provisions granting domestic legal personality to an international organization, into the domestic sphere. While national courts in US and most Western states recognize domestic legal personality of international organizations without incorporation of their constituent instruments in domestic sphere, national courts in UK and most Commonwealth states require that these instruments be incorporated in domestic sphere so that they recognize domestic legal personality of international organizations. Below is an examination of how national courts in two countries of different approaches, the US and the UK, make use of treaty provisions when determining on the legal status of international organizations.

The United States

Brownlie noted that in the US treaties and other international agreements constitute a source of the law of the land[314] and, as such, are on par with federal legislation and prevail over laws enacted by the states[315]. While in the UK, where a strong dualist system prevails, no distinction is made between self-executing and non-self-executing treaties as all treaties require legislative action to become law, the US adopted a modified version

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[313] *ibid*, p.46.
[314] Article VI, 2 of the Constitution (the Supremacy Clause) reads: "(A)ll treaties made or which shall be made with the authority of the United States, shall be the supreme Law of the Land and the Judges in every state shall be bound thereby, anything in the Constitution of Laws of any state to the contrary notwithstanding."
[315] Crawford, *Brownlie's Principles of Public International Law,* p.77.

of the UK's dualist model, and placed the distinction between self-executing and non-self-executing treaties at the center of the question of incorporating treaties into domestic law. The central question within the US jurisprudence on treaties, *Brownlie* underlined, is the process by which a court determines that a treaty or other agreement is self-executing.[316]

For the US, self-executing treaties and other international agreements, to which the US is a party, conferring legal personality upon the organization in question constitute the Supreme Law of the Land[317], and therefore national courts recognize legal personality of such an organization without the need for implementing legislation. *Amerasinghe* refers to a number of cases in which the personality of intentional organizations, of which the US is a member, has been recognized in the course of granting them immunity from jurisdiction.[318] He notes that in these cases the constituent instruments of the organizations in question have been treated as part of the Law of the Land, since they were treaties to which the US was a party. In *Balfour, Guthrie&Co. Ltd et al. v. United States et al.,* a US court affirmed the UN's capacity to bring an action for damages it suffered based on Article 104 of the UN Charter, to which the US was party and which, therefore, constituted part of the law of the land.[319]

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[316] Variety of factors are taken into consideration to determine the self-executing status of treaties. *Brownlie* gave an indicative list: "the purposes of the treaty and the objectives of its creators; the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range consequences of self- or non-self-execution". Crawford, p.78.

[317] Frederic L. Kirgis, *International Organizations in Their Legal Settings*, Second Edition, St.Paul, Minnesota, 1993, p.19.

[318] The Broadbent Case, 628 F. 2nd (1980) p.27 (OAS); Mendaro v. The World Bank [1983] US Court of Appeals No.82-2247, CA 80-01204.

[319] USDC NL Cal., 5 May 1950, in Reinisch, *op. cit.*, p.47. It was alleged "in the case that in the autumn of 1947, the United Nations' International Children's Emergency Fund shipped from the ports of Tacoma and Oakland aboard the SS Abraham Rosenberg a large quantity of powdered milk destined for Italy and Greece. A portion of the shipment was never delivered to the consignee and another portion arrived in a damaged condition. The Abraham Rosenberg was owned by the United States and was operated under a bareboat charter by respondent American Pacific Steamship Company. The United Nations and six other shippers, whose merchandise allegedly suffered a similar fate, have joined in the libel against the United States and the

US national courts can also resort to their conflict of law rules and recognize legal personality of an international organization if it can be established that the organization in question enjoys legal personality under international law. This conclusion is reached through application of the basic rule of conflict of laws, which requires that the legal status and personality of a legal person is determined by its personal law, this being international law in the case of international organizations. Application of the rules of conflict of laws is all the more important in cases where the US is not a member state of the international organization. In *International Tin Council v. Amalgamet Inc.*[320], the Supreme Court of New York County recognized the legal personality of the International Tin Council, an international organization created by the International Tin Agreement, to which the US was not a party, since the personal law of the organization, the Agreement, had provided it with legal personality.

Despite the fact that the US subscribed to the monist tradition, "where treaties are the supreme law of the land and where custom is also regarded as law of the land"[321], the US Congress enacted, in 1945, the International

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American Pacific Steamship Company." Whether the United Nations may maintain these proceedings against respondent American Pacific Steamship Company at a US court has been answered in the positive with reference being made to the Charter of the United Nations to which the US was party (http://law.justia.com/cases/federal/district-courts/FSupp/90/831/1505407, last accessed on August 7, 2017).

[320] 524 NYS 2nd (1988) p. 971, in Amerasinghe, *op. cit.*, p.71. "Petitioner, International Tin Council (ITC), brought an action to stay an American Arbitration Association arbitration that was initiated by respondent, Amalgamet Inc., and that arose out of petitioner's refusal to honor three contracts for the purchase of tin from respondent. Petitioner claimed that it was immune from suit in the United States by virtue of its status as an international organization under British law, and, in the alternative, that the arbitration clause in its contract with respondent was unenforceable. The Supreme Court of New York County dismissed the petition, and held that petitioner lacked any basis under the US law for immunity from legal process and that petitioner had consented to the arbitration clause providing for arbitration in New York." (Steven Ratner, "International Tin Council v. Amalgamet Inc.", *The American Journal of International Law,* Vol.82/4, October 1988, p.837-840.)

[321] Reinisch, *International Organizations Before National Courts,* p.49.

Organizations Immunities Act (IOIA), to provide specific capacities, immunities and privileges under US law for certain organizations to be designated by the President. If an international organization has been designated by the President under IOIA, *Kirgis* notes, it clearly must be considered a legal entity for purposes of capacity to bring suit in federal and (by virtue of the Supremacy Clause) state courts in the US.[322] One may question the need for such a domestic legislation in a country where constituent instruments of international organizations, which provide them with legal personality, are directly applicable. *Reinisch* notes, however, that "in such monist systems, specific legislation might safeguard the possibility of granting personality to international organizations in which the legislating state does not participate or where agreements with international organizations do not address the issue or have not been concluded."[323]

The United Kingdom

In the UK, the conclusion and ratification of treaties are within the prerogative of the Crown, and therefore unimplemented treaties are not given legal effect by the courts. This principle of *no direct effect*[324]*,* as it is called, is stated by the Privy Council in *Thomas v. Babtiste;*

> *Their Lordships recognize the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of treaty…is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty.*[325]

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[322] Kirgis, *International Organizations in Their Legal Settings,* p.20.
[323] Reinisch, *International Organizations Before National Courts,* p.49.
[324] Crawford, *Brownlie's Principles of Public International Law,* p.63.
[325] [2000] 2 AC 1(PC), 23 (Lord Millett), in Crawford, p.63.

It's only after the treaty is implemented by the Parliament that the resulting legislation forms part of the UK law and is applicable by the courts as implemented.[326] Therefore, unlike US and most European continental courts, UK courts require that a legislative act be taken in advance so that they could recognize legal personality of an international organization domestically. Whether an international organization endowed with legal personality in international law would have a legal standing before British courts is a question dealt with in accordance with established practice of the dualist school of law.

This has been the case in various lawsuits brought before courts in the UK. Debates over, and challenges raised against, the personality of the International Tin Council (ITC) are one of them.

ITC was an international organization with 23 members[327] and has been subject of a series of treaties commencing with the First International Tin Agreement (ITA 1), which was signed on 1 March 1954 and became effective on 1 July 1956 for a period of 5 years. Article IV of ITA 1 established an ITC and provided its seat to be in London. The purpose of establishing the ITC was to regulate the tin market, to adjust and balance the world production and consumption of tin, and to maintain the market stable by buying and selling tin on the international markets. The successive agreements[328] aimed to regulate the tin market by virtue of export controls and the establishment of buffer stocks of tin financed by member states.

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[326] *ibid.,* p.64.

[327] 17 producing countries, 5 consuming countries and 1 international organization: Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, Netherlands, Nigeria, Norway, Sweden, Switzerland, Thailand, UK, Zaire and the EEC.

[328] ITA 2 was concluded on 1 September 1960 and entered into force on 1 July 1961 for 5 years, following broadly the same pattern as the previous agreement. ITA 3 came into force on 1 July 1966 and, instead of establishing a new ITC, it provided for the continuation in being of the existing ITC, a feature which was thereafter reproduced in each successive agreement. ITA 4 required conclusion of a Headquarters Agreement relating to the status, privileges and immunities of the Council, of its executive chairman, its staff

The Sixth International Tin Agreement (ITA 6) provided the Council with legal personality and with such legal capacity as may be necessary for the discharge of its functions.[329]

A Headquarters Agreement[330] was concluded in 1972 between ITC and the United Kingdom pursuant to ITA 4, and it continued in force for the purposes of ITA 5 and ITA 6. Article 3 of the Headquarters Agreement, entitled Legal Personality provided for legal personality of the Council.[331]

Legal personality and legal capacity of the ITC were introduced into UK's domestic legal system by the Order in Council[332] of 1972, which provided that ITC should have "the legal capacity of a body corporate."[333]

Due to an unexpected overproduction of tin and financial mistakes, the ITC collapsed in 1985 and left behind numerous unpaid obligations. The

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and experts and of representatives of members while in the territory of the host state for the purpose of exercising their functions. Following the 5 years period set by ITA 5, the last agreement, ITA 6, was signed in New York in 1981 and 1982 following the UN Tin Conference of 1980. Article 3 of ITA 6 provided for the continuation of the ITC established by previous ITAs.

[329] Sixth International Tin Agreement, 1982, *UN Doc.* TD/TIN.6/14/Rev.1, New York, 1982. Article 7 (a) of the Agreement reads: "The Council shall have such Powers and perform such functions as may be necessary for the administration and operation of this Agreement". Article 16 of the Agreement reads: "1. The Council shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of moveable and immoveable property and to institute legal proceedings."

[330] Headquarters Agreement between the United Kingdom of Great Britain and Northern Ireland and the International Tin Council, 9 February 1972, 834 UNTS 288.

[331] Article 3 of the Headquarters Agreement reads: "(1) The Council shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of moveable and immoveable property and to institute legal proceedings…"

[332] The International Organizations Act 1968 provides that any international organization can be declared by Order in Council to have the capacities of a body corporate in English law.

[333] International Tin Council (Immunities and Privileges) Order, 1972 (S.I. 1972 No.120).

creditors resorted to litigation mostly in English courts[334] by bringing, *inter alia*, the claim that there was a subsidiary or complementary liability of member States.[335] That claim required analysis, in the first place, into the existence of the ITC as legal person, in other words, separate legal personality of the ITC, which was conducted mostly on the basis of domestic law thanks to the relevant provisions of the Headquarters Agreement as well as the statutory instrument giving effect to them.

Difference of approach from the monist school as employed by the British courts was clearly marked in *Rayner (JH) (Mincing Lane) Ltd v. Department of Trade and Industry*[336], in which the House of Lords held that enacting implementing legislation is prerequisite for existence of an international organization in UK law.[337]

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[334] On 9 July 1986, one of the brokers, *J.H.Rayner (Mincing Lane) Ltd.,* having obtained an arbitration award against ITC which remained unsatisfied, commenced proceedings in the Commercial Court for recovery of the amount of the award against the Department of Trade and Industry (DTI), representing the UK, and the 23 other members of the ITC.
On 12 December 1986, other brokers, *Maclaine Watson*, issued parallel proceedings in the Chancery Division against DTI alone, representing the UK, claiming the money awarded to them against ITC and for which they had obtained leave to enter judgment. In December 1986, *Arbuthnot Latham Bank Ltd.* and five other banking organizations which had lent money to the ITC, each commenced separate proceedings ("the six banks actions") in the Commercial Court against the 24 members of the ITA 6, claiming repayment of the sums due to them respectively from the ITC.
On 12 November 1986, *Amalgamated Metal Trading Ltd.*, which had obtained an arbitration award, petitioned to wind up the ITC as an unregistered company. That petitioner was struck out by Millet J. on 22 January 1987 and on 3 February 1987 the petitioner and eight other brokers commenced an action ("the multi-brokers action") in the Commercial Court against the 24 members of the ITC and the ITC itself.
(Lord Oliver of Aylmerton, House of Lords Judgment in *Australia & New Zealand Banking Group Ltd., et al. v. Australia, et al.*, October 26, 1989, 29 I.L.M. 670)
[335] Ignaz Seidl-Hohenveldern, Piercing the Corporate Veil of International Organizations: The International Tin Council Case in the English Court of Appeals, *German Yearbook of International Law* 32 (1989),43-54, p.44.
[336] [1990] 2 AC p 418.
[337] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p. 73.

While the High Court conducted its analysis into the legal personality of the ITC on the basis of English law[338], House of Lords too pursued the same route albeit with some references to international law[339].

In the House of Lords in *Australia & New Zealand Banking Group Ltd., et al. v. Australia, et al.*, Lord Oliver of Aylmerton dealt with the question of whether on the true construction of the Order in Council of 1972 ITC is as a matter of English domestic law invested with a separate personality distinct from its constituent members. He confirmed that the legal personality of ITC established in international law had been introduced into the British domestic law, and that as an entity equipped with legal personality ITC had the capacity to institute legal proceedings:

> Article 5 of the Order of 1972 provides in terms that the ITC "shall have the capacities of body corporate" and, speaking for myself and without resort to any extraneous aids, I find difficulty in seeing what possible purpose Parliament could be thought to be serving by conferring in terms the widest capacities available to any artificial legal persona if there was to be no single persona capable of exercising them…The Order in Council was brought into being to give effect to the United Kingdom's treaty obligations…The status of the ITC in international law is clearly established by article 16 (1) of ITA 6, which provides: "The Council shall have legal personality" and goes on in article 16 (4) to provide that (inter alia) the status of the ITC in the territory of the host government shall be governed by a Headquarters Agreement…It is relevant to note that in this article (Article 3 of the Headquarters Agreement) that which is to have legal

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338 Maclaine Watson & Co Ltd v. Department of Trade and Industry, 80 *International Law Reports* 39, 46 (1989)

339 Australia & New Zealand Banking Group Ltd and Others v. Commonwealth of Australia and 23 Others; AmalgamatedMetal Trading Ltd and Others v. Department of Trade and Industry and Others; Maclaine Watson & Co Ltd v. Department of Trade and Industry; Maclaine Watson & Co Ltd v. International Tin Council (England, House of Lords, 1989), 29 ILM 670, e.g. at 672–5 (Lord Templeman).

> personality is also to have 'in particular' capacity to contract, to acquire and dispose of moveable and immoveable property and to institute legal proceedings, which are thus described merely as facets of legal personality.[340]

All the judges in ITC cases were of the view that English law, primarily the Order of 1972, provided sufficient base on which to adjudicate the case. *Portmann* notes that, the "ITC cases put forward two propositions: first, international legal personality of international organizations is a matter of objective criteria[341]; second, the consequence of international legal personality of international organizations is a presumption that liability of member states towards third parties is precluded".[342]

In another case, the right of an international organization, Arab Monetary Fund (AMF)[343], of which the UK was not a member, to file a suit as a legal person was questioned in *Arab Monetary Fund v. Hashim and*

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[340]House of Lords Judgment in *Australia & New Zealand Banking Group Ltd., et al. v. Australia, et al.*, October 26, 1989, 29 I.L.M. 670.

[341] Referring to the ICJ Advisory Opinion in *Reparation of Injuries* Advocate-General Darmon opined that "(…) International Tin Council, when implementing the Sixth Agreement, is charged with pursuing the attainment of the latter's objectives: namely, essentially to ensure the world-wide equilibrium in the market in tin. It s not limited to 'harmonizing' the members' efforts in this respect, but in any event carries out the task itself, using means that are its own. In doing so, the Council exercises its own decision-making power distinct from that of the members who make up the organization…Consequently, it does appear that the ITC is an entity distinct from its members vested with its own decision-making power." Maclaine Watson & Co Ltd v. Council and Commission of the European Communities (Advocate General's Opinion), 1990 ECR I-01 797, paras 134-6.

[342] Portmann, Legal Personality in International Law, p.237. For Hirsch's observations based on ITC cases, see *infra* Note 652.

[343] 20 Arab states and Palestine signed an agreement (AMF Agreement) on 27 April 1976 through which they established AMF for the purpose of laying the monetary foundations of Arab economic integration and accelerating the process of economic development in Arab countries. The AMF Agreement provided the following: "*...there shall be established an Arab organization named 'The Arab Monetary Fund'...the Fund shall have an independent juridical personality and shall have, in particular, the right to own, contract and litigate...*"

Others.[344] The High Court developed two arguments in favour of recognizing personality of the AMF. Referring to a statement of intent by the UK government in favour of recognizing the legal personality of AMF, of which it was not member, the Court first held that the political stance of the UK government enabled it to give a legal standing to the organization in question. The Court also ruled that since a foreign member state (UAE) had accorded AMF legal personality under its law so that AMF was a *persona ficta* under that law, the ordinary conflict rules would be applicable whereby the law of UAE as the law of the place of the corporation could be chosen as the relevant law. *Amerasinghe* notes that "only if the foreign law through its conflict of laws rules applied international law as the law governing the organization, which was the case here, that international law would be applicable in these circumstances. Otherwise the law applied would not be international law but national law."[345]

Although the Court of Appeal overruled the decision of the High Court, the House of Lords agreed with the reasoning of the High Court, resulting in the personality of the organization being recognized in English domestic law.

Based on the UK courts practice, *Amerasinghe* summarizes the features of the status of international organizations in UK law as follows:

(i) If the UK is a member and the required action is taken by the executive under the relevant legislation (the International Organizations Act 1968), the organization has personality; it is a corporation under the national law;

(ii) If the UK is not a member, but the organization is recognized by the executive organ, it will have personality under the UK law;

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[344] [1990] 1 All ER p.685.
[345] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.74.

(iii) If the UK is not a member, but the organization has personality in one or more foreign countries that are members or the host state as a result of legislative measures in any of those countries or for other reasons, then it has personality in UK law;

(iv) If the UK is not a member and the UK has not taken the necessary executive action to recognize the personality of the international organization or any relevant foreign country has not taken action to recognize or does not recognize the personality of the organization, then the organization has no legal existence as such in the UK.[346]

Likewise, *Shaw* lists the methods of how an international organization can be recognized as having personality in UK:

(i) Parliament incorporates by legislation an international treaty establishing such an organization;

(ii) The executive expressly recognizes an international organization;

(iii) An Order in Council under International Organizations Act provides such personality; or

(iv) Courts by virtue of comity recognize an international organization that has personality in one or more of the member states.[347]

Concluding remarks

We have examined above the relationship between domestic and international legal personality of international organizations and modalities of recognizing domestic legal personality of an international organization whose international legal personality has been established in international law. It is up to member states to recognize domestic legal personality of an international organization in accordance with the requirements of its constituent instrument either directly, or, as in the case of dualist legal systems, resorting to legislative acts. The scenario would be different,

[346] *ibid.*, p.75.
[347] Shaw, *International Law,* p.1302.

however, in the case of international organizations lacking a constituent instrument. There would be no international obligation on the respective country, and the national court accordingly, to recognize domestic legal personality of the organizations. In such a case, national courts can make use of the rules of their conflict of law and recognize legal personality of an international organization if it can be established that the organization in question enjoys legal personality under international law. This would, then, require engagement of the theories on legal personality, examined above, into the specific case before the court.

G- Powers of International Organizations

An international organization with international legal personality operates upon the international plane within the boundaries of its competence limited by its founding states, and is governed by the 'principle of speciality' (principle of attribution) as opposed to states that possesses general competence as subjects of international law. International Court of Justice made this point in its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* brought by the World Health Organization (WHO) as follows:

> The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.[348]

Therefore, an international organization having international legal personality is not to be treated as states. As underlined in *Reparation for Injuries* case;

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[348] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, ICJ Reports, 1996, p.66, 78-9.

> The Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State…What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[349]

Principle of speciality governing international organizations brings us to a conclusion that international organizations work on the basis of their legal powers. Whether an organization has legal capacity to perform a specific action determines the validity of the action performed. Where an organization derives its legal powers from is a question that triggered legal debate among legal scholars. With no surprise, the prominent schools of thought feeding debates on legal personality of international organizations (will theory and objective theory of personality) have also shaped debates on legal powers of international organizations. While the theories of *attributed powers* and *implied powers* are driven by the will of states establishing the organization in question, the theory of *inherent powers* is based on the assumption that while some powers require a firm legal basis, in the constitution or otherwise, there are certain powers which are inherent in all international organizations.

a) Attributed Powers

According to the theory of attributed powers international organizations can only work on the basis of powers specifically attributed to them. Competence of international organizations is limited, through constituent instruments, by the will of states, which established it. While states as sovereign subjects of international law are free to act as they wish, provided they abide by the rules of international law, international organizations are only competent to perform acts for which they are

[349] 1949 ICJ Reports, *Reparation for injuries* p.179.

empowered. The Permanent Court of International Justice referred to the principle of attribution in the following terms:

> As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.[350]

With this decision the Court laid down a general rule according to which it should be recognized that the founding states have equipped the international organization in its constituent instrument, with powers (functions) necessary for the fulfilment of its purposes. The rule formulated as such made the abovementioned decision differ from the Court's previous decisions whereby the Court concentrated solely on interpreting the pertinent provisions of the constituent instrument to pass a ruling on questions as to the origin and scope of the powers of international organizations. In 1922, the Court was asked to render its advisory opinion on whether the International Labour Organization was empowered to regulate labour relations in the agricultural sector. It reached an affirmative conclusion through interpretation of the terms used in the Organization's constitution:

> It was much urged in argument that the establishment of the International Labour Organization involved an abandonment of rights derived from national sovereignty, and that the competence of the Organization therefore should not be extended by interpretation. There may be some force in this argument, but the question in every case must resolve itself into what the terms of

[350] *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion [1927] PCIJ, Series B, No. 14, (Dec.8).

> the Treaty actually mean, and it is from this point of view that the Court proposes to examine the question.[351]

In its Advisory Opinion on the *Competence on the International Labour Organization to Regulate Incidentally, the Personal Work of the Employer,* the Court elaborated on the question whether it was within the competence of the International Labour Organization to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself. The Court answered this question in the affirmative, and decided that "…it is within the competence of the International Labour Organization to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself."[352]

The Court reached its conclusion through interpretative analysis of the relevant provisions of the Organization's constituent instrument, Treaty of Versailles:

> It results from the consideration of the provisions of the Treaty that the High Contracting Parties clearly intended to give to the International Labour Organization a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. The Organization, however, would be so prevented if it were incompetent to propose for the protection of wage-earners a regulative measure to the efficacious

[351] *Competence of the International Labour Organization to Regulate the Conditions of Labour of Persons in Agriculture,* Advisory Opinion [1922] Publ. PCIJ, Series B, nos. 2 and 3, p.23.
[352] *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, Advisory Opinion [1926] Publ. PCIJ, no. 13.

> working of which it was found to be essential to include to some extent work done by employers. If such a limitation of the powers of the International Labour Organization, clearly inconsistent with the aim and the scope of Part XIII, had been intended, it would have been expressed in the Treaty itself. On the other hand, it is not strange that the Treaty does not contain a provision expressly conferring upon the Organization power in such a very special case as the present.
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> Not only does the entire framework of Part XIII justify the inference that the International Labour Organization is not excluded from proposing measures for the protection of wage-earners because they may incidentally regulate the personal work of the employers, but there are specific provisions of the Treaty, in the application of which, as they are generally understood, it may be assured that the incidental regulation of the personal work of the employers is potentially involved.[353]

Since international organizations can only work on the basis of powers specifically attributed to them, acts performed by international organizations exceeding their powers granted to them by founding states are rendered *ultra vires*.[354] The International Court of Justice stated the following:

> (W)hen the organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.[355]

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[353] *ibid.*, para.39

[354] See, Ebere Osieke, *Ultra vires acts in international organizations-the experience of the International Labour Organization*, 48 BYIL, 259-280 (1976-1977).

[355] Advisory Opinion, *Certain Expenses of the United Nations*, ICJ Reports, 1962, p. 168.

A prominent feature of the theory of attributed powers, adopted by *Kelsen* [356], is that it is in harmony with positivist mode of thinking. Constituent instruments defining the objectives and functions of the organization determine to what extent and for what purpose the organization is empowered to perform certain acts. There's no need to resort to another source, or seek guidance from the intents of the member states, in order to establish what powers are conferred upon the organization; the constituent instrument would suffice.

Therefore, proper, or maybe extreme, application of this theory would require that powers granted to the organization are explicitly specified in relevant constituent instruments. While defining the competence of the organs of the United Nations, Member States agreed that;

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.[357]

The Treaty on the European Union clearly expresses that by establishing among themselves the Union the High Contracting Parties conferred upon it competences to attain objectives they have in common[358].

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[356] "Kelsen's Viennese colleague Merkl developed, and Kelsen adopted, a model of legal order as dynamic hierarchy, or 'steps and stairs (*Stufenbau*)'. In this model, a positive legal order is conceived as a chain of authorizations addressed to organs of the state. The 'higher' organ cannot foresee all circumstances requiring regulation and must delegate power, with discretion, to a 'lower' organ. The higher organ creates a 'higher' norm authorizing the lower organ to create not a particular 'lower' norm (in which case there would be no point in the delegating) but a lower norm of a certain kind and perhaps also through a certain procedure." See, Ian Stewart, "The Critical Legal Science of Hans Kelsen", (1990) 17 (3) *Journal of Law and Society*, p. 285.

[357] UN Charter, Art.10.

[358] TEU, Art.1.

Competences not conferred upon the Union in the Treaties[359] remain with the Member States[360], and if performed such actions would be *ultra vires* the Union. The Treaty also lays down the limits and use of the competences conferred upon the Union:

> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.
> Competences not conferred upon the Union in the Treaties remain with the Member States.
> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

[359] Treaty on European Union and Treaty on the Functioning of the European Union.
[360] TEU, Art.4, 1; Art. 5, 2.

> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.[361]

Two main arguments have been brought pointing out to the drawbacks of the theory of attribution of powers. The first one questions the very reason why an international organization is called into being if it is to perform acts only as long as it is strictly empowered, in its constituent instrument, by states, which have established it. If international organizations can only work on the basis of powers specifically attributed to them, one would hardly speak of an organization with a distinct will of its own.

The other argument relates to the problem that would surely arise in practice when founders of the organization have not conceived comprehensively all the circumstances that the organization, after having been established, would be surrounded with. On the one hand the founding states should not be expected to prepare a full list of powers to be granted to the organization so that there would be no gap in the constituent instrument when it comes to performing specific acts in the future. On the other hand, it may well be the case that the founders of the organization have deliberately created a flexible entity so that its dynamic internal structure would move the organization forward. These problems gave rise to the emergence of the theory of implied powers, where it is assumes that there are certain powers granted to the organization in the constituent instrument, if not explicitly, then by implication.

b) Implied Powers

The theory of implied powers came to the fore in an effort to demarcate federal powers from those attributed to constituent states.[362] The

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[361] TEU, Art. 5 (ex Art. 5, TEC).

[362] The doctrine's origin is traced back to an old judgment of the US Supreme Court. Ruling on the powers attributed to the Federation and those reserved to the constituent states, the Court recognized that the Federation had the right to

theory then was developed in time to meet the shortcoming of majority of international organizations arising from lack of concrete authorization in their constituent instruments for acts they were to perform. Indeed, the premise that an international organization, in contradistinction to States, can only perform the acts provided for in its constituent instrument, namely the *attributed powers theory*, has encountered practical problems as most of these acts have not been authorized in constitutional provisions.

Since it's not possible to equip an international organization, in its constitution, with comprehensive and exhaustive list of powers which it would need to exercise in order to discharge its functions effectively, and not desirable to do so given the need create a dynamic entity capable of addressing many questions that might arise in future not foreseeable at the time of the drafting of its constitution, it has been argued that legal basis for the organization's activities exists as implied powers to be derived either from explicit powers granted to the organization or from its purposes and functions specified in its constituent instrument.

In *Reparation for Injuries* case, the Court noted that the Charter did not expressly confer upon the Organization the capacity to bring international claims in respect of the damage caused to the victim or to persons entitled through him. It then resorted to the concept of the implied powers since "*under the international law, the Organization must be deemed to have those powers, which though not expressly provided in the Charter, are conferred*

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carry out acts not expressly authorized in the Federal Constitution, on the following condition:
"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional."
(*McCulloch v. State of Maryland* (1819); Henry Wheaton, *Reports of Cases Argued and Adjudged in the supreme Court of the United States* (New York, 1910), vol. IV, 4th ed., p.316, at p.421).
See, also, Joachim Becker, *Die Anwendbarkeit der Theorie von den implied powers im Recht der Europäischen Gemeinschaften* (Münster, 1976), pp 1-43.

upon it by 'necessary implication' as being essential to the performance of its duties."[363]

Having examined the character of the functions entrusted to the Organization and of the nature of the missions of its agents, the Court concluded that capacity of the Organization to exercise a measure of functional protection of its agents arose by *necessary intendment* out of the Charter.[364]

Judge *Hackworth* concurred with the Court's conclusion that the United Nations has the capacity to bring an international claim for its protection against wrongful acts for which Member States are responsible, and noted that the Court's application of the doctrine of implied powers is a proper one. As regards the Organization's capacity to bring a claim for reparation due in respect of damage caused to the victim or to persons entitled through him, however, he dissented from the majority opinion since neither the Charter nor any other agreement provided the Organization with such capacity, on the one hand, and no implied power could be drawn upon for to that effect, on the other. He disagreed with the Court's conclusion that the Organization's power could be conferred by necessary implication and presented the doctrine of *delegated powers*:

> There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to

[363] ICJ Reports, 1949, *Reparation for injuries*, p.182. The Court referred to the Advisory Opinion (No 13 of July 23rd, 1926) of the Permanent Court of International Justice (Series B., No. 13, p.18), where the principle of "necessary implication" was applied to the International Labour Organization, suggesting that it must apply also to the case at hand.

[364] ICJ Reports, 1949, *Reparation for injuries*, p.184.

> those that are 'necessary' to the exercise of powers expressly granted.[365]

The Court resorted to the theory of implied powers also in its advisory opinion on the *Effect of awards of compensation made by the United Nations Administrative Tribunal*[366]. The Court was asked whether the UN General Assembly had the power to establish an administrative tribunal which itself would be capable of taking binding decisions. The first question submitted to the Court was as follows:

> Having regard to the Statute of the United Nations Administrative Tribunal and any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract service has been terminated without his assent?

If the Court had decided in the affirmative, it would have also considered the principal grounds upon which the General Assembly could lawfully exercise such a right. However, the Court answered the question in the negative, by nine votes to three, and therefore did not consider the second question.

Analyzing the question, the Court first noted that the question concerned only awards which were made within the limits of the competence of the Tribunal as determined by the Statute of the Tribunal, and underlined that Article 2, paragraph I of the Statute endowed the Court with competence to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. Examination of the question revealed that the Court was "requested to consider the general and abstract question whether the General Assembly is legally entitled to

[365] ICJ Reports, 1949, *Reparation for injuries*, p.198.
[366] *Effect of awards of compensation made by the United Nations Administrative Tribunal,* ICJ Reports, 1954.

refuse to give effect to an award of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence."[367]

The Court noted that capacity to establish a tribunal, as exercised by the General Assembly, arose by the *necessary intendment* out of the Charter[368]. Having examined the relevant provisions of the Statute of the Tribunal along with amendments made thereto as well as the Staff Regulations and the Rules, the Court concluded that the Tribunal was established as an independent and truly judicial body passing judgments, final and without appeal. Since a judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute, the United Nations becomes legally bound to carry out the Tribunal's judgment and pay the compensation awarded to the staff member. As an organ of the United Nations, this applies to the General Assembly too.

When dealing with some contentions raised against the abovementioned conclusion, the Court considered how the *implied power* theory should be employed. Some arguments were put forward to the effect that notwithstanding the General Assembly's power to establish a tribunal entitled to pass judgments, final and without appeal, the *implied power* theory does not support that the General Assembly is able to establish a tribunal with authority to make decisions binding on the General Assembly itself. It was argued that "an implied power could only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential."[369] This argument was dismissed as the precise nature and scope of the measures by which the power of creating a tribunal was to be exercised could be determined only by the General Assembly.

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[367] ICJ Reports, 1954, *Effect of awards of compensation made by the United Nations Administrative Tribunal,* p.51.
[368] *ibid.*, p.57.
[369] *ibid.*, p.58.

It was also argued that "while an implied power of the General Assembly to establish an administrative tribunal may be both necessary and essential, nevertheless, an implied power to impose legal limitations upon the General Assembly's express Charter powers is not legally admissible."[370] It was contended that since the Charter conferred upon the General Assembly the power to approve the budget[371], the implied power theory could not be exercised so as to authorize establishment of a administrative tribunal passing judgments binding the General Assembly, as it would contravene the Assembly's budgetary power.

However, the Court noted that by empowering the Assembly to approve the budget the Charter did not provide it with absolute power on the function of budgeting. When it relates to obligations already incurred by the Organization, the Assembly has no choice other than fulfilling them. Given the obligatory character of decisions of judicial bodies (authority of *res judicata*) awards of compensation made by the Administrative Tribunal in favour of staff members, therefore, fall within the group of obligations to be met by the General Assembly without prejudice to its budgetary power.

Having dealt with the question of proper application of the principle of implied power on a number of contentious issues raised during deliberations the Court concluded that the General Assembly did not have the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favor of a staff member of the United Nations whose contract of service had been terminated without his assent.[372]

In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* the Court acknowledged that;

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[370] *ibid*, p.59.

[371] Article 17, para. (i) of the Charter reads as follows: "The General Assembly shall consider and approve the budget of the Organization."

[372] *ibid,* p. 62.

> The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers, which are not expressly provided for in the basic instruments, which govern their activities. It is generally accepted that international organizations can exercise such powers, known as *implied powers*.[373]

The Court then noted that under international law, the Organization must be deemed to have those powers, which, though not expressly provided in its constitution, are conferred upon it by necessary implication as being essential to the performance of its duties.

Distinction is drawn between *implied powers* as foundation for the organization's activities, which are explicitly attributed to the organization in its constitution, and *customary powers* as another foundation which are developed in time through the consent of member states after the constitution entered into force.[374]

Another distinction, generally made, is between powers implied from provisions of the constituent document with a view to guaranteeing their fullest effect[375] (*effet utile*), and those powers that are implied as they are

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[373] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* ICJ Reports 1996, p.66.

[374] Schermers & Blokker, *International Institutional Law, op. cit.*, p.232. Noting that implied powers are founded on powers attributed to the organization at its creation, the writers define implied powers, by borrowing quotation from *Skubiszewski,* as "*a term being read into the organization's statute not in order to modify it or add to the members' burdens, but in order to give effect to what they agreed by becoming parties to the constitutional treaty.*" K. Skubiszewski, "Implied Powers of International Organizations", in: Yoram Dinstein (ed.), *International Law at a Time of Perplexity* (Essays in honour of Shabtai Rosenne), 1989, at 856-857.

[375] The principle of *effet utile* was explicitly formulated in 1928 PCIJ *Greco-Turkish Agreement* advisory opinion. The Court held that the Greco-Turkish Commission, established under the agreement of 1 December 1926, may perform judicial functions and possesses the express power to "take the measures necessitated by the execution of the Convention and to decide all

essential to the performance of the organization's duties.[376]The latter, being a wider version, is supported by a number of court decisions. One, often cited, is the decision rendered by the European Court of Justice upon application lodged on 19 May 1970 by the Commission of the European Communities for the annulment of the Council's proceedings of 20 March 1970 relating to the negotiation and conclusion by the member States of the European Community of the European Agreement concerning the work of crews of vehicles engaged in international road transport (*ERTA* case).[377] The issue at hand was whether the EC was empowered to conclude a treaty with Switzerland on road transportation, or whether the power to conclude such agreements rested with the member States.

In the absence of a specific provision of the EC Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy, the Court turned to the general system of the Community law in the sphere of relations with third countries. As was done by the ICJ in *Reparation of Injuries*, the European Court of Justice analyzed the legal personality of the EC, which had been provided for in what used to be Article 201 of the EC Treaty.[378] Moving from the threshold constituted by the grant of legal personality and having given regard to the whole scheme of the EC Treaty did the Court conclude that the powers of the Community extended to relationships arising from international law, and hence involved the need in the sphere in question for agreements with the third countries concerned.

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questions to which it may give rise." *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, PCIJ Publications 1928, Series B., no.16, p.18. Gadkowski notes that the Court's position could be considered as the first time an international court recognized the implied powers of international organizations. The writer argues that actions of an international organization directed at achieving the fulfillment of the purposes of the organization and which would promoted its effectiveness are within the implied powers of the organization. Andrzej Gadkowski, *The doctrine of implied powers of international organizations in the case law of international tribunals*, European Journal of International Law 9 (1998), 437-467, p. 437.

[376] Klabbers, *An Introduction to International Institutional Law,* p.59-64.

[377] ECJ, Case 22/70, Commission v. Council, [1971] ECR 263.

[378] Part Six (General and Final Provisions) Article 281 of the Treaty Establishing the European Community reads: "The Community shall have legal personality".

It should be noted, however, that powers to be implied in accordance with this theory are not new and independent ones, but those derived from existing powers. *Schermers* and *Blokker* note that if there is no explicit power, there can be no implied power.[379]

c) Inherent Powers

In his far-reaching contribution to the debate on legal personality and legal capacity of international organizations, *Seyersted* challenged the prevailing doctrine according to which international organizations, unlike states, do not come into being directly by international law, but must be created by treaty. The writer first compared the delegated (attributed) and implied powers with practice, and noted that it is usually presumed that international organizations[380] only possess international capacities if and to the extent that these follow from their constituent instruments (constitutions) and from the intentions of the drafters of these documents. As for the powers of international organizations, he referred to a number of views maintained by

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[379] Schermers & Blokker, *International Institutional Law,* p.235. According to the writers, essential elements of the implied powers doctrine are contained in Article 235 EC. The provision, now Article 21 TFEU (ex Article 18 EC) reads as follows:
1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in para.1.
3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

[380] The writer uses the term ‘intergovernmental organizations’.

various writers[381] and in particular to discussions held by the International Law Commission[382], and noted that according to the general opinion, only certain international organizations have international personality in certain aspects. Thus, the writer concluded, "the general opinion not merely denies that all intergovernmental organizations have international personality, but also that those organizations which have such personality possess all international capacities."[383]The most restrictive view in this regard, he noted, was taken by *Kelsen*, who maintained that "a community whose constitution does not expressly provide for international personality has only those special capacities as conferred upon it by particular provisions" and that "the United Nations has only the legal power to enter into those international agreements which it is authorized by special provisions of the Charter to conclude."[384] Contrary to the prevailing doctrine, however, *Seyersted* underlined the general

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[381] Reference is made to Bindschedler ("Die Anerkennung im Völkerecht", *Archiv des Völkerrechts*, IX (1961-62), pp.387-8); Schwarzenberger (*International Law,* I, 3rd Edition (London 1957, pp.137-8); Seidl-Hohenveldern (*Österreichische Zeitschrift für öffentliches Recht*, XI (1961), pp.497-500); McMahon *(BYIL*, XXXVII (1961), p.340); Hahn (*Harvard Law Review*, LXXI (1958), pp.1045-6); Reuter (*La Communauté européenne du charbon et de l'acier* (Paris 1953), pp.116-8; *International Institutions* (1955), pp.228-32); Guggenheim (Lehrbuch des Völkerrechts, I (Basel 1948), p.221); Pescatore ("Les relations extérieures des Communautés Européennes, contribution à la doctrine de la personnalité des organisations internationales", *Recueil des Cours*, 1961, II, pp.1-241); Cahier ("Etude des accords de siège conclus entre les organisations internationales et les Etats où elles résident", Milano 1959); Weissberg (The International Status of the United Nations, New York 1961). See, Seyersted, *Objective International Personality of Intergovernmental Organizations,* p.2, Note 3.

[382] Reference is made to Article 3(3) of the ILC's draft articles on the Law of Treaties (OR GA, XVII, Supplement No. 9, p.7), which reads: "In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned" as well as to numerous statements made by members of the Commission (Yearbook of the International Law Commission, 1950, I, pp.74-75 and 78-81, and later). See, Seyersted, *Objective International Personality of Intergovernmental Organizations,* p.3, Note.4

[383] Seyersted, *Objective International Personality of Intergovernmental Organizations,* p.6.

[384] Hans Kelsen, The Law of the United Nations, A Critical Analysis of its Fundamental Problems, New York, 1950, p.330.

fact that international organizations could perform *sovereign* [385] and international acts even when they have not been authorized in their constitutions. He listed the following examples to this end:[386]

(1) All international organizations exercise *organic jurisdiction*[387], in other words, they have exclusive jurisdiction over their organs. They also make administrative decisions on organizational matters and many of them establish tribunals to adjudicate disputes between the staff and the organization itself. The internal jurisdiction thus exercised by international organizations fall out of the legislative, administrative and judicial authority of any state, including the host state.

(2) Rather than giving general authorization to conclude treaties, many of the constitutions authorize the organization to conclude treaties of a certain type.[388] Yet, the UN concluded a great number of other treaties with Member States, non-member States, specialized agencies as well as international organizations, and only a small number of the treaties concluded by the UN fall within the categories authorized by the Charter.

(3) Unlike states, most international organizations do not have a territory, yet some of them have occasionally been granted full or limited powers of territorial jurisdiction, irrespective of whether or not their

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[385] The writer uses the word *sovereign* as meaning legally independent (i.e., not subject to the jurisdiction) of any other organized community except the participating physical or legal persons acting jointly through the organs of the organization, state or other organized community concerned. Sovereign acts, here, include acts of territorial, personal or organic jurisdiction.

[386] Seyersted, *Objective International Personality of Intergovernmental Organizations:Do Their Capacities Really Depend upon Their Constitutions?,* p.6-19.

[387] The writer draws attention to distinction between organic jurisdiction on the one hand, and territorial and personal jurisdiction, on the other, the latter being exercised only by certain international organizations.

[388] The United Nations Charter authorizes the UN to conclude agreements with Member States on the provision of military contingents (Art.43) and with specialized agencies bringing them into relationship with the UN (Art.63).

constitutions authorize them to do so.[389] The reason why the UN and other international organizations have only to a limited extent exercised territorial jurisdiction is not their lack of capacity, but that most if not all territory is under control of states, and the UN and other international organizations cannot assume jurisdiction over such territory, unless states cede their powers.

(4) Despite the lack of specific authorization in their constitutions to send and receive diplomatic representatives, and to convene international conferences, many international organizations have done so. As for participation in international conferences, so far they have been invited only as observers. The reason why international organizations are not invited to international conferences on the same footing as states lies in the fact that practical need has not yet arisen, and not because they lack such inherent capacity or because their constitutions do not confer this capacity on them.

(5) In practice, some international organizations, together with contracting states, have become members of a new international organization, which has a separate legal personality.[390] They have an inherent capacity to be a member of pre-existing international organizations too.

(6) Despite the lack of specific authorization in their constitutions, international organizations have presented international claims and made representations and protests to states, not only on behalf of themselves but also on behalf of their officials and other agents, who remain under the

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[389] Seyersted notes that the League of Nations, which in the Covenant was only authorized to exercise limited territorial powers in respect of mandates, exercised full powers of government in Saar and limited powers in respect of Danzig. Although the United Nations never exercised territorial jurisdiction to that extent, it has, on certain occasions, decided to assume limited governmental functions in disputed territories, despite the fact that the Charter only authorizes the UN to exercise territorial powers in respect of trust territories.

[390] The writer refers to the Agreement between the International Atomic Energy Agency, the United Arab Republic (host state) and eight other Arab states for the establishment in Cairo of a Middle Eastern Regional Radio-isotope Centre for the Arab Countries.

exclusive diplomatic protection of their national states.[391] On the other hand, states have also presented international claims and made representations and protests to international organizations.[392] Such actions of active and passive responsibility have in some cases provoked expressions of regret and payment of reparation.

(7) States and international organizations have concluded a number of agreements according to which disputes among them are to be settled by arbitration or by a binding decision of the International Court of Justice if an amicable solution could not be reached in advance.[393] That practice, too, has arisen in the absence of specific authorization in the constitution of the organization.

Based on such examples and some types of unilateral acts performed by international organizations, *Seyersted* concluded that the practice showed that the powers of international organizations are not confined to the provisions in their constitutions. Therefore, instead of focusing on intention, whether explicitly or implicitly, of the founding states of the organization, *Seyersted* advanced in 1962 the principle of *inherent power* in an article written for use by the International Court of Justice.[394] According to the description offered by the writer, "inherent powers include jurisdiction and international (and legal) capacity, which all States, international organizations and other self-governing communities exercise as a matter of general customary law-i.e. without specific legal basis- unless there is a contrary provision."[395] The writer's principle is based on the premise that there is an important body of customary law common to all international organizations,

[391] Reference is made to the practice reported in BYIL, 1961, pp.423-7, on the UN's protection of the rights of UNEF and ONUC and their members.
[392] The writer refers to the practice reported in BYIL, 1961, pp420-1, on the UN Forces in the Middle East and the Congo.
[393] The writer refers to the conventions on the privileges and immunities of the United Nations and specialized agencies.
[394] "Can the United Nations Establish Military Forces and Perform Other Acts Without Specific Basis in the Charter?" XII Österreichische Zeitschrift für öffentliches Recht, 1962, pp.188, ff.; reprinted in Seyersted, *United Nations Forces in the Law of Peace and War*, Leiden, 1966, Chapter V.
[395] *ibid.*, p.35.

which is not laid down in a treaty, including constituent instruments, but developed in practice as customary law and which covers the aspects not laid down in such instruments.[396] This common law exists in all three levels on which international organizations have legal relations: i) internally, with and between their members and organs (*internal law*); ii) externally, with states and other subjects of public international law (*public international law*); and externally, with private persons and other subjects of national law (*conflict of laws*).[397] The external law and basic parts of the internal law are not normally found in a treaty between member States, but in customary law.

Both *implied* and *inherent powers* depart from the traditional *attributed powers* theory, which suggests that international organizations can do only what is provided in their constituent instruments. Yet, while the theory of *implied powers* does not define the limit and draws it through interpretation of the relevant provisions of the instruments at hand, the theory of *inherent powers* describes what an international organization can do without legal basis and when it needs such a basis, not necessarily in a constituent document, to perform a specific action.

Drawing attention to the firm principles of general customary law, common to all international organizations, which determine what an international organization can and cannot do in the absence of a specific authorization in its constitution or elsewhere, *Seyersted* didn't need to resort to implied powers, which he interpreted as a "fictitious escape".[398] The writer gave the reasoning as follows:

> There's no requirement in international law practice that the legal personality (external legal capacity) of an international organization in national and international law must be laid down in its constitution or other express treaty provision. All intergovernmental organizations have and exercise -inherent capacity to act externally as subjects of

[396] *ibid.*, p.4.
[397] *ibid.*, p.22.
[398] *ibid*, p.67.

national and international law in all relations where they are in a practical position to do so (international personality follows from well established customary international law). Any limitation upon that personality requires legal basis in the national law concerned, or in the constitution of the organization, respectively.

Every intergovernmental organization exercises inherent jurisdiction over its organs and their members as such. This organic jurisdiction is never stated generally in the constitution. It includes legislative, administrative and judicial power, but not power of enforcement, which is an aspect of territorial jurisdiction. The inherent organic jurisdiction includes power to establish new organs…The inherent organic jurisdiction comprises also jurisdiction over the representatives of member States as members of the organs.[399]

According to the writer international organizations become subject to a number of limitations while exercising their inherent powers. These limitations are listed as follows:[400]

(i) The constitutions of international organizations, unlike those of states, define and limit the purposes of the organization. They cannot perform acts to serve for the purposes other than those set by their constitutions.

(ii) Moreover, organizations cannot perform acts which are precluded by their constitutions.

(iii) Act must be decided and/or performed, by the organ which is competent under the constitution and, in accordance with any procedure therein prescribed.

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[399] *ibid*, p.68.
[400] Seyersted, *Objective Legal Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?* p.23-25.

(iv) International organizations have no general inherent jurisdiction over their member states, comparable to that of states over their nationals[401].

The first two groups of these limitations that arise from the constitutions of international organizations show that constitutional provisions only have *negative* effects. In other words, international organizations have the power to perform any sovereign and international act which is not precluded in their constitutions and which does not impose new obligations upon parties who are not subject to their jurisdiction. The writer notes that the only legal difference in this regard between the constitutional capacities of states and international organizations is a question of the fact that constitutions of most organizations, as opposed to those of states, contain provisions which define, and thereby limit, their purposes.[402]

Noting that the concept of *implied powers* is confused by most writers with that of *inherent powers Seyersted* reemphasized that "the term *inherent power* does not start from the common point of departure that an intergovernmental organization has only such powers as follow from its constitution…the terms *implied* and *inherent* are diametrically opposed in their points of departure…*inherent* applies generally to internal (organic) jurisdiction and to external capacity while *implied* may apply exceptionally to extended jurisdiction."[403]

Thus the writer drew attention to the basic distinction between, on the one hand, *inherent* internal[404] *jurisdiction*[405] over organs and their members as

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[401] For the limited inherent jurisdiction that organizations may exercise over their member states, see *ibid*, p.24.
[402] *ibid*, p.27.
[403] Seyersted, *United Nations Forces in the Law of Peace and War*, p.70.
[404] "The internal law is parallel to national (public) law, rather than public international law, and it comprises constitutional and administrative law- and in many organizations procedural law. It governs: i) matters falling under the organic jurisdiction, *i.e.* relations with, between and within the organs of the organization and the members of the organ as such. This includes the constitutional and administrative law relating to the deliberative organs (*e.g.* rules of procedure) and the secretariat (*e.g.* staff regulations and rules); ii) Organizational relations with the members as such, *e.g.* budgetary

such and *inherent* external legal *capacity*[406] to act as an equal partner, and, on the other hand, *extended jurisdiction*[407], which has been conferred upon some organizations, to make decisions binding upon parties which have a legal existence outside the organization (states, other international organizations, individuals and legal persons). Thanks to customary international law international organizations are equipped with inherent internal jurisdiction and inherent legal capacity while they would still need to be authorized by the states concerned (member or non-member) to exercise the extended jurisdiction, not necessarily in a constituent instrument. [408]

Although the concept of 'implied powers' had been employed by the International Court of Justice in its advisory opinions of 1949[409] and 1954[410], the writer contended that the Court abandoned this concept later in favour of 'inherent powers' in its advisory opinion on *Certain expenses of the United Nations* of 20 July 1962[411]. While employing the doctrines of *delegated* and

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contributions; and iii) Substantive matters falling under the extended jurisdiction of some organizations, i.e. relations with and between member States and/or private parties, in case of organizations which have been granted powers in respect of States, territory and/or groups of individuals", Seyersted, *Common Law of International Organizations,* p.26.

405 "Inherent jurisdiction comprises the exclusive organic jurisdiction and a limited jurisdiction over member States in organizational matters". Seyersted, *Common Law of International Organizations*, p. 35.

406 "Inherent capacity includes as general capacity to act as a subject of international, national and internal law". Seyersted, *Common Law of International Organizations,* p.35.

407 "Extended jurisdiction is used for powers which are not inherent but require a special legal basis, but not necessarily in the constitution of the organization concerned as generally assumed. It includes any jurisdiction over territory, persons and states-as well as any supranational jurisdiction- which has been conferred upon, or otherwise specially acquired by the particular organization concerned. The Treaty of Lisbon, 13 December 2007, amending Article 1 of the EU Treaty, must be read in this context to mean conferral of extended competences: 'on which the member States confer competences to attain objectives they have in common.'" Seyersted, *Common Law of International Organizations,* p.35 .

408 Seyersted, *Common Law of International Organizations, p.*65.

409 ICJ Reports, 1949, *Reparation for injuries.*

410 ICJ Reports, 1954, *Effect of awards of compensation made by the United Nations Administrative Tribunal.*

411 ICJ Reports, 1962, *Certain expenses of the United Nations,* p.168. The question of certain expenses of the United Nations was brought before the

implied powers, the writer noted, the Court interpreted the constitution broadly "by deeming it to imply conferment by 'necessary implication' of those powers which are 'essential' to the performance of the duties of the Organization or which arise 'by necessary intendment' out of the Charter".[412] Drawing attention to criticism against this formula for being too restrictive, the writer noted that the Court refrained from employing such restrictive terms as *essential* and *necessary intendment* in its subsequent advisory opinion on *Certain Expenses of the United Nations* when dealing with the question of constitutionality of the UN Forces in the Middle East and Congo, and instead of referring to constitutional provisions, or interpreting the intentions (expressed or implied) of the founding states, or resorting to the practice developed afterwards the Court simply stated:

> When the organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.[413]

Despite the fact that the prevailing doctrines of delegated/implied powers stood as the starting-point of its reasoning, the Court broadened its interpretation of implied powers considerably in 1949, and gave its advisory opinion later in 1962 in a way, *Seyersted* contended, as lending its support to the doctrine of inherent powers.

Court for an advisory opinion by a resolution adopted by the General Assembly of the United Nations of 20 December 1961. The Court was asked whether the expenditures authorized in certain General Assembly resolutions enumerated in the request for opinion, relating to the United Nations operations in Congo and in the Middle East undertaken in pursuance of Security Council and General Assembly resolutions likewise enumerated in the request, were "expenses of the Organization" within the meaning of Article 17, para.2 of the Charter of the United Nations. The Court responded in the positive by nine votes to five.

[412] Seyersted, "*Objective Legal Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?",* p.54

[413] *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, p.21.

Concluding remarks

As we have seen above, the theory of attributed powers seems to stand on a firm basis according to which international organizations, unlike states, are competent to act only within the boundaries drawn by the founding states. The powers of international organizations are subject to functional limitation as prescribed in their constituent instruments. This approach is in harmony with positivist mode of thinking. However, the theory is problematic as it is impossible for the founders to conceive of an exhaustive list of powers to be granted to the organization. Neither is it something that would be desired given the need to bring about an organization flexible enough to accommodate itself to future developments. The implied powers theory addresses these shortcomings while still founded on the powers attributed to the organization by the founding states. In other words, this theory, too, takes as basis the will of the founding states, the main subjects of international law, and therefore is in harmony with the positivist school. However, whether the powers are implied from explicit powers attributed to the organization or from purposes or functions prescribed in the constituent instrument makes some difference in this regard since what could be implied in the latter might owe not much to the wishes of the founders. This said, attractiveness of the implied powers theory has found reflection in various court decisions albeit it has been questioned whether the theory found its proper application in court decisions. It should be underlined that proper application of the theory, as Judge Hackworth warned in *Reparation of Injuries*, would be to imply powers from the explicitly attributed powers and not from purposes and functions of the organization, an approach which would prevent contradiction with the founders' wishes. In the case of an international organization lacking a constituent instrument, however, neither of the theories would help much to ascertain the organization's powers as there is no constitution where the explicit powers have been invested by the founding states.

As for the theory of inherent powers according to which international organizations exercise their powers as a matter of customary law and without need for authorization in their constitutions, it can be submitted that this theory, too, is in line, or at least does not contradict with, the wishes of the founders as it is based on the premise that international organizations cannot perform acts which are precluded by their constitutions, nor can they preform acts to serve for the purposes other than those set by their constitutions. However, it can also be argued that lack of explicit prohibition of an act in the constitution of the organization does not necessarily indicate the founders' approval for its performance. Regarding the case of organizations without constituent instruments, the inherent powers theory works in favour of such entities to the extent that they do not need to be granted powers in their constitutions. However, whether the acts they perform serve for the purposes set by their constitutions would require an examination of their constituent instrument, a mission impossible. Thus, this theory, too, is far from standing as a useful instrument to measure whether or not acts performed by international organizations lacking constituent instruments are *ultra vires*.

H- Manifestations of International Legal Personality-Specific Capacities

Drawing attention to various drawbacks of the prevailing doctrines on legal personality of international organizations, *Gazzini* contends that establishing the will of the founding states of the international organization is only the first step for obtaining such a personality. Once the will of the founding states, whether explicit or implicit, is established, it is necessary that the organization confirms the manifestations of that personality. Generally manifestations of legal personality can be listed as: (i) enjoyment of privileges and immunities; (ii) conclusion of international treaties; and (iii) the capacity to bring and receive claims against and from other subjects of international law.[414] As for the first indication, *Gazzini* finds it the least reliable. While admitting that it would be confirmation of international legal personality of the international organization if it were to claim immunity as a subject distinct from its members through the application to itself the principle *par in parem non habet jurisdictionen*, he warns that the organization does not necessarily

[414] Gazzini, "The relationship between international legal personality and the autonomy of international organizations", p.198.

have legal personality to enjoy immunity from jurisdiction as "a state can 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 jointly perform certain acts."[415] The writer notes that despite the fact that the OSCE is deprived of international legal personality, the organization is entitled to immunity from jurisdiction in the member states. As for the second indication, he holds that conclusion of treaties is not in itself conclusive proof as to the international legal personality of the organization since treaties can be concluded also by international organizations lacking international legal personality.[416] The writer finds the last indication as the most reliable one and holds that active/passive responsibility of international organizations is concrete manifestation, rather than consequence, of the international legal personality of the organization.[417] As *Pellet* described, "responsibility is at one and the same time an indicator and the consequence of international legal personality: only a subject of international law may be internationally responsible; the fact that any given entity can incur responsibility is both a manifestation and the proof of its international legal personality."[418]

It should be noted that Gazzini's list of manifestations of international personality is not conclusive. Some other listings have been offered in literature.[419] Although Gazzini classified the capacity to bring and receive

415 *ibid.*, p.199.
416 The writer refers to the *Agreement on the OSCE Kosovo Verification Mission*, Belgrade, 16 October 1998 (UN Doc. S/1998/978), concluded between the OSCE and the Federal Republic of Yugoslavia.
417 UK, *International Organizations Bill*, available with explanatory note at: https://publications.parliament.uk/pa/cm200405/cmbills/069/2005069.htm (last accessed on 19 September 2017).
418 Alain Pellet, "The Definition of Responsibility in International Law,", James Crawford, Alain Pellet, Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, 2010, p.6
419 Some authors qualify only those entities as international legal persons (subjects) that have certain rights or powers (capacities), e.g. the capacity to enjoy international privileges and immunities, the capacity to conclude treaties, and the capacity to be held liable. See, Dominicé, 'L'émergence de l'indivu et droit international public', 122; Tomuschat 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 160).

claims from other subjects of international law as the third quality of international organizations manifesting their legal personality, we will examine in Part II the passive form of the quality, namely international responsibility of the OSCE to better analyze problems arising from the vague legal status of the Organization. As for *Gazzini*'s list, it should be noted that enjoyment of privileges and immunities is indeed not a reliable manifestation of legal personality since states have exclusive sovereign power to grant immunity and privileges to any entity irrespective of its legal nature. The decision to grant it is generally made on the basis of political, and not legal, assessment of the situation. As *Gazzini* has rightly warned, treaty-making capacity is not a strongly reliable quality either since in practice some types of international agreements (host country/headquarters agreements, cooperation agreements etc) are concluded with organizations despite their lack of international legal personality. However, evolution from a mere conference of states into an international organization with international personality removes any hesitation on the part of the hosting state to conclude a headquarters agreement with the organization concerned. This is the case of the OSCE vis-à-vis the hosting state, Austria, which will be examined in Part II. As regards the third quality, the ICJ's advisory opinion in Reparation of Injuries made it clear that the capacity to bring and receive international claims is a consequence of the organization's having international legal personality.

Below is an examination of the abovementioned manifestations of international legal personality.

a) Privileges and Immunities Accorded to International Organizations

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Brölmann lists the forms of legal capacity traditionally associated with international organizations as: (i) capacity to conclude international agreements; (ii) capacity to bring claims in case of breaches of international law; and (iii) the enjoyment of privileges and immunities from national jurisdictions. See, Brölmann, *The Institutional Veil in Public International Law,* p.134.

International organizations enjoy the right of legation (active and passive), in other words, they receive diplomatic missions from states and maintain permanent representatives accredited to governments of member and even non-member states. They do so without need for a specific provision in their constituent documents. The right to do so derives not from such documents but from the general powers and the tasks of the organization[420]. Effective functioning of these diplomatic missions and permanent representatives require that they enjoy privileges and immunities that address their functional needs.

i. Legal Basis for According Privileges and Immunities

Like states and their representatives, international organizations and their personnel, too, enjoy privileges and immunities accorded to them while carrying out their functions at their headquarters, in host states or in the territory of member/non-member states. Privileges and immunities accorded to international organizations and their personnel are not necessarily analogous, but comparable, to those enjoyed by states and their diplomatic personnel. *Sovereign equality of states* and the *principle of reciprocity* are generally cited as theoretical basis for privileges and immunities enjoyed by states and their representatives[421]. While the theory of *functional necessity* is also cited as a basis underlying the granting of such privileges and immunities, *Klabbers* questions its validity and holds that "state immunity is largely based on the idea that states require a space for the conduct of unencumbered politics without fear of legal ramifications, rather than on functional necessity."[422] Privileges and immunities accorded to states and their representatives have developed as part of customary international law, and largely have been codified in the 1961 Vienna Convention on Diplomatic Relations.[423]

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[420] Schermers & Blokker, *International Institutional Law,* p.1143.
[421] Amerasinghe, *Principles of the Institutional Law of International Organizations, op. cit.*, p. 315; Shaw, International Law, p.1318.
[422] Klabbers, *An Introduction to International Institutional Law,* p. 131
[423] 500 UNTS p.95.

Unlike states, international organizations cannot enjoy protection conferred by territorial sovereignty, and therefore require special treatment so that they freely and effectively operate "on behalf of all their member states".[424] Moreover, they cannot offer benefits to states, on the basis of principle of reciprocity, in exchange for the privileges and immunities accorded to them.[425] Among the reasons why international organizations should be accorded privileges and immunities, precedent[426] and prestige find some support. Indeed, attaining a certain range of privileges and immunities may be taken as an important indication of an international organization's legal personality.[427] As *Dominicé* puts it:

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[424] The fact that international organizations have no territory of their own and "thus necessarily operate within the jurisdiction of other legal systems" has been put forward as a reason why they should receive different treatment from states and consequently enjoy "absolute immunity." Morgenstern, *Legal Problems*, 6., from Reinisch, *International Organizations Before National Courts*, p. 249. Reinisch finds the explanation provided vague, and argues that the argument of lack of territory could be reversed and used against granting immunity to international organizations as it might in the end lead to denial of justice.

[425]UN Document, A/CN.4/424/Corr.1, p.158 (ILC, fourth report on relations between states and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur. The first part of the topic of relations between states and international organizations, dealing with the status, privileges and immunities of representatives of states to international organizations, resulted in draft articles which had formed the basis of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. However, the Convention has not entered into force so far since majority of the states have been reluctant to ratify or adhere to it. It is submitted that the balance stricken by the Convention is not favoured in particular by host states, and that it's not likely that the Convention will enter into force soon. With this in mind, the Commission decided not to pursue further the second part of the topic, dealing with the status, privileges and immunities of international organizations and their personnel, a matter which seemed to a large extent covered by existing agreements. See, also, Shaw, p. 1318.

[426] González notes that "for understandable practical reasons, the privileges granted in the past to a number of similar organizations have been a useful reference point in considering the question of what privileges and immunities to grant to a new organization". See ILC, Fourth Report on Relations Between States and International Organizations-Second Part of the Topic (UN Document, A/CN.4/424/Corr.1, p.158).

[427] Reinisch, *International Organizations Before National Courts,* p.251.

None of the conventions on privileges and immunities of such organizations, the headquarter agreements especially, would make any sense if the organizations lacked international juridical personality. This is not to say, however, that immunities are a necessary attribute of such personality. They derive from the specific rules prescribing them[428]

However, neither precedent nor prestige suffices to bring about a thorough explanation whereas functional necessity stands as a convincing theory underlying the reason why international organizations should be accorded privileges and immunities. *Shaw* notes that "the true basis for the immunities accorded to international organizations is that they are necessitated by the effective exercise of their functions."[429] *Jenks* explains that the rationale underlying privileges and immunities of international organizations is "not concerned with status, dignity or privileges of individuals, but with the elements of functional independence necessary to free international organizations from national control and to enable them to discharge their responsibilities impartially."[430] *Bekker* has indicated that an international organization is entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfillment of its purposes.[431] It is submitted that the doctrine of functional necessity is omnipresent in the area of privileges and immunities of international organizations.[432]*González* has drawn attention to the *raison d'être* of international organizations and notes that:

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[428] Christian Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", Collected Courses of the Hague Academy of International Law, 1984, IV (Dordrecht, Martinus Nijhoff, 1985), vol.187, p. 164 (González, UN Document, A/CN.4/424/Corr.1, p.158).
[429] Shaw, *International Law*, p.1319.
[430] Clarence Wilfred Jenks, *International Immunities,* London and New York, 1961, p.17.
[431] Peter H.F. Bekker, The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities, Dordrecht, Martinus Nijhoff, 1994, p.5.
[432] Schermers & Blokker, *International Institutional Law,* p.266.

> If the raison d'être of an international organization is the functions and purposes for which it was set up, those functional requirements must be one of the main criteria, if not the only one, used in determining the extent and range of the privileges and immunities that are to be accorded to a given organization.[433]

The theory of functional necessity enjoys general acceptance of legal writers and is also reflected in legal practice. Article 105 of the UN Charter reads:

> (1) The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes.
> (2) Representatives of the members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization[434].

The *travaux préparatoires* of the UN Charter explained what should be understood from the principle of functionality:

> The terms privileges and immunities indicate in a general way all that could be considered necessary to the realization of the

[433] ILC, Fourth Report on Relations Between States and International Organizations-Second Part of the Topic (UN Document, A/CN.4/424/Corr.1, p.158.)

[434] General Convention on the Privileges and Immunities of the United Nations (1946), which supplements the UN Charter, refers to Article 105 of the Charter in its second preambular paragraph. Another legal instrument, the Convention on Privileges and Immunities of Specialized Agencies (1947), also aims at according privileges and immunities taking into consideration the functional needs of the organizations and the personnel concerned. Section 16 (on Representatives of Members) of the Convention reads: "Privileges and immunities are accorded to the representatives of members, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the specialized agencies."

> purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials…[I]f there is one certain principle it is that no member state may hinder in any way the working of the Organization.[435]

On the text of the United Nations Charter *Miller* explained that the drafters of a prior version of this text noted that they had "seen fit to avoid the term 'diplomatic' and had preferred to substitute a more appropriate standard, based, for the purposes of the Organization, on the necessity of realizing its purposes and, in the case of…officials of the Organization, on providing for the independent exercise of its functions."[436]

Moreover, the theory of functional necessity is supported also by some court decisions. In *Mendaro v. World Bank*[437], the US Court of Appeals held that immunities are accorded to international organizations in order to enable them to pursue their functions effectively and to ensure that their independence is not hampered by unilateral acts of the host states.[438] In *Beer and Regan v. Germany*[439], the applicants instituted proceedings, separately, before the Darmstadt Labour Court against European Space Agency (ESA), an international organization established under the Convention for the Establishment of a European Space Agency[440] (ESA Convention) of 30 May 1975. Considering that ESA had validly relied on its immunity from jurisdiction arising from the ESA Convention, the Darmstadt Labour Court declared the applicants' actions inadmissible. Relying on Article 6 (1) of the European Convention of Human Rights (ECHR), the applicants applied to the

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[435] Documents of the United Nations Conference on International Organizations, San Francisco, 1945, Vol.13, Doc.933, 12 June 1945, p.705.
[436] Anthony J. Miller, "The Privileges and Immunities of the United Nations", International Organizations Law Review, Vol.6, 2009, p.15.
[437] Mendaro v. The World Bank [1983] US Court of Appeals No.82-2247, CA 80-01204.
[438] See also *Iran-US Claims Tribunal v. AS* (94 ILR, pp.321, 329);
[439] *Beer and Regan v. Germany,* Grand Chamber of ECrtHR, 18.2.1999, Application No. 28934/95
[440] United Nations Treaty Series 1983, vol.1297, I-no.21524

European Commission of Human Rights (the Commission) complaining that they had been denied access to a court for determination of their dispute with ESA in connection with an issue under German labour law. The Court held:

> Like the Commission, the Court points out that the attribution of privileges and immunities to international organizations is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments.
> The immunity from jurisdiction commonly accorded by States to international organizations under the organizations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organizations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society.
>
> Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective.[441]

In the case of *Entico v. UNESCO*[442], the claimant (Entico), an English company carrying on business as a publisher, alleged that it concluded with the defendant (UNESCO), an international organization, which is one of the specialized agencies of the United Nations, a contract pursuant to which Entico was to produce for UNESCO a calendar for 2006. With UNESCO failing in due course and refusing to perform the contract, Entico claimed from UNESCO the amount of the loss and damage it alleged to have suffered.

[441] See also *Waite and Kennedy v. Germany*, Grand Chamber of the ECrtHR, 18.2.1999, Application No.26083/94. In both decisions, the Court sought for a fair balance between immunities of international organizations before national courts on the one hand, and the states' obligation to provide individuals with access to a court. In doing this, the Court employed "an alternative means test" inquiring whether the applicants had means other than access to state courts at their disposal.

[442] *Entico Corp Ltd v. UNESCO* [2008] EWHC 531 (Comm) 18 March 2008.

Against UNESCO's defence of immunity from legal process, bestowed upon it by the UK legislation pursuant to UK's obligation arising from the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, Entico asserted that UNESCO's immunity would deny it the right to access to fair and public judicial processes and therefore violate its rights under Article 6 (1) of ECHR. When introducing the case, *Tomlinson J* referred to *Shaw* and the case of *Mendaro v. World Bank* and noted that:

> Under international law, international organizations are granted immunities and privileges before the courts of their member states to enable them effectively to pursue their functions and to operate free from control by any individual Member State.

Despite its attractiveness, the theory of functional necessity is not immune from critiques. *Klabbers* draws attention to a number of weaknesses of the theory. The writer states that the theory reflects an instrumentalist view of international life and ignores the fact that privileges and immunities are accorded to international organizations as a result of negotiations between the organization and its host state. What's more, definition of functional immunity differs from one to the other, depending on who's determining it[443]. Yet the writer submits that the theory may be useful in describing what's meant by the privileges and immunities to be granted.

It can be argued, in conclusion, that among the explanations why international organizations need to be equipped with immunities, functional necessity stands out as the most convincing one. The strongest critique brought against functional necessity argument is that the boundaries of the necessity are hard to be drawn. One would hardly conceive of a specific immunity that would contradict the functions of an organization. However, what looks like the weakest point of the argument may ironically serve for the best interest of the organizations since grant of immunities, in the end, is the outcome of political negotiations held with states.

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[443] For the drawbacks of the functional necessity thesis, see Klabbers, *An Introduction to International Institutional Law,* p.133-137.

ii. Legal Sources of Privileges and Immunities

In most cases, treaty law governs the privileges and immunities accorded to international organizations. Relevant provisions are often found in constituent instruments, multilateral agreements on privileges and immunities, and international (host country) agreements. Apart from international sources, national laws also play role in many cases.

1) Treaty Law

Privileges and immunities are accorded to international organizations mostly in their constituent instruments. UN Charter, as a standard setting document, grants privileges and immunities to the Organization based on its functional needs, and to representatives of the members of the United Nations and officials of the Organization for the independent exercise of their functions in connection with the Organization.[444] Functional needs approach is reflected in many constituent instruments of international organizations similarly.[445] Different from that, founding treaties of financial organizations stand out as legal instruments having more detailed and restrictive provisions on privileges and immunities.[446]

[444] Article 105 of the UN Charter.

[445] E.g., Article XV of IAEA Statute; Article 40 of ILO Constitution; Article XII of the UNESCO Constitution; Article VIII of the Agreement Establishing the WTO; Article XVI of the FAO Constitution ; Article 139 of the OAS Charter; Article 60 of the ICAO Constitution; Article 67 and 68 of the WHO Constitution; Article 60 of the IMO Constitution; Article XV of the ESA Convention. For further examples, see *Yearbook of the International Law Commission* 1977, vol.II, Part One, 143 (from Reinisch, *International Organizations Before National Courts*, p.140).

[446] Eg., Article IX of the IMF Articles of Agreement; Article VII of the IBRD Articles of the Agreement; Article VIII of the IDA Articles of Agreement; Article VI of the IFC Articles of Agreement; Articles 43-50 of the MIGA Convention; Articles 48-58 of the ADB Constitution; Article XI of the IDB Constitution; Articles 46-55 of the EBRD Constitution (from Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.318)

Some constituent instruments, however, remain silent or do not contain express provisions on privileges and immunities.[447] *Reinisch* notes that in such cases the question arises whether privileges and immunities could be viewed as implied in functional capacity, whether they can be a consequence of the international legal personality of an international organization[448], or whether customary rules form the legal basis for granting privileges and immunities.[449] *Seyersted* drew attention to the inherent powers of international organizations and states that international organizations "exercise an exclusive legislative, administrative and judicial authority over their organs…and this they do despite the fact that no provisions to this effect are included in any convention on privileges and immunities or in any headquarters agreement, and that no constitution contains any general provision in this respect."[450]

Diversity of constituent instruments of international organizations has led to development of conventional law on privileges and immunities. The

[447] E.g., the NATO Constitution, the Warsaw Treaty Pact Organization Charter, the Convention for the Creation of an International Institute of Agriculture; the Convention for the Creation of an International Institute of Refrigeration; the Agreement for the Creation of an International Office for Dealing with Contagious Diseases of Animals; and the Agreement for the Creation of an International Wine Office.

[448] Reinisch notes, in particular, that according to some scholarly writings, supported by some state practice, immunity from jurisdiction of national courts arises as an inherent quality of international personality or that attribution of privileges and immunities is a consequence of possessing such personality. The writer refers also to some national court decisions affirming the concept that international organizations are immune from national jurisdiction because of their legal status. In *Galasso v. Istituto italo-latinamericano* (Corte di Cassazione, 3 February 1986), the writer notes that the Italian Supreme Court found that the customary norm of *par in parem non habet jurisdictionem* applied to the Institute, even in the absence of any conventional norm. However, the writer draws attention also to counter argument according to which international organizations enjoy immunities in so far as these are attributed to them by a rule of international law. See Reinisch, *International Organizations Before National Courts,* p.248.

[449] Reinisch, *International Organizations Before National Courts,* p.141.

[450] Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities really Depend on the Conventions Establishing Them,* p.7-8.

Convention on the Privileges and Immunities of the United Nations[451] of 1946 (General Convention), which implements Article 105 of the UN Charter, is the most important multilateral treaty on privileges and immunities as it stands as a model for many other similar documents. Another important legal instrument is the Convention on Privileges and Immunities of Specialized Agencies[452] of 1947 (Specialized Agencies Convention), which is applicable in the case of Specialized Agencies of the UN[453].

In addition to that, a number of international organizations whose constituent instruments provide for privileges and immunities enjoy a regime supplemented in multilateral agreements similar to those in the General Convention and the Specialized Agencies Convention.[454] Differences in the privileges and immunities accorded to the organizations are a question of detail rather than of principle.[455] *Reinisch* draws attention to the legal position of international organizations and the assessment of their rights *vis-à-vis* the member states given the fact that such multilateral agreements are regularly concluded between the member states without participation of the organization in question. While the rights and obligations arising from such instruments are legally binding upon the member states, their binding nature *vis-à-vis* the organization remains questionable.[456] Should international organizations be treated as parties or merely beneficiaries of such agreements? The writer notes that the ICJ did not solve the question when it stated that the

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[451] United Nations Treaty Series 15, 13 February 1946.
[452] United Nations Treaty Series 33, 21 November 1947.
[453] The Convention is applicable, subject to variations set forth in a special annex for each agency, to nine designated agencies (ILO, FAO, UNESCO, ICAO, IMF, IBRD, WHO, UPU and ITU) and any further agency subsequently brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter. Accordingly the Convention has been applied to WMO, IMCO, IFC and IDA. Since International Atomic Energy Agency (IAEA) is not a specialized agency but stands as an autonomous organization within the UN, a separate agreement was concluded for that Organization (IAEA Privileges and Immunities Agreement).
[454] E.g., Council of Europe (CoE), International Criminal Court (ICC), Organization of American States (OAS), International Seabed Authority (ISA), International Tribunal for the Law of the Sea (ITLS).
[455] Klabbers, *An Introduction to International Institutional Law,* p.147.
[456] Reinisch, *International Organizations Before National Courts,* p.142.

General Convention "creates rights and duties between each of the signatories and the Organization"[457] since it still is not clear whether the rights and duties were created as a consequence of the Organization's status as a party or a beneficiary. Though *Reinisch* notes that majority of writers support the idea that the UN somehow gained party status to the General Convention, he suggests that the beneficiary approach – as opposed to the party approach- seems to be more compatible with principles of treaty law.

Apart from constituent instruments and general multilateral agreements on privileges and immunities, there are a number of bilateral headquarters/host agreements supplementing such instruments, concluded between international organizations and the states in whose territory these organizations maintain headquarters or one of their seats.[458] International organizations have headquarters agreements with their host states[459], and if concluded with non-seat states, such special agreements are enumerated under four categories: (i) host agreements; (ii) agreements relating to special political tasks; (iii) technical assistance and supply agreements; (iv) agreements concerning particular meetings.[460] Such agreements reflect the special relationship between the organization and the host state[461], and address in detail those issues, which are not covered or are not sufficiently dealt with

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[457] ICJ Reports, 1949, *Reparation for injuries,* p.179.
[458] See, Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship,* p.25-69.
[459] The seat of the United Nations is the Headquarters District in the New York City, as defined in the Headquarters Agreement, signed by UN Secretary-General Trygve Lie and US Secretary of State George Marshall at Lake Success on 26 June 1947. The Headquarters District is under the control and authority of the UN as provided in the Agreement. The three other subsidiary, regional headquarters of the United Nations are located in Geneva, Vienna and Nairobi.
[460] Abdullah El-Erian (Special Rapporteur), 'Preliminary Report on the Second Part of the Topic of Relations between States and International Organizations' (UN Doc.A/CN.4/304) [1977] *Yearbook of International Law Commission*, Vol.II, Part One, 140-55, at 145.
[461] This relationship is designed in accordance with the purposes of the organization in question. For the basic principles governing the Headquarters Agreement between the International Criminal Court and the Host State (Kingdom of Netherlands) concluded at The Hague on 7th June 2007, see <legal.un.org/icc/asp/1stsessi> (last visited on 29 December 2017).

in the constituent instrument of the organization. Hosting several international organizations including the United Nations and one of its Specialized Agencies (UNIDO)[462], Austria for example has concluded a number of agreements on the establishment of headquarters[463] or liaison offices[464] with

[462] For the list of 45 international entities see the Austrian Foreign Ministry's web site:
https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Plakat_Amtssitz_Wien_EN_small.pdf (last visited on 6 January 2018)

[463] Ten headquarters agreements concluded between Austria and international organizations are currently in force, regulating directly or by reference the privileges and immunities of the relevant organization:
(1) *Agreement between the International Atomic Energy Agency ('IAEA') and the Republic of Austria regarding the Headquarters of the IAEA*, 11 December 1957, 229 UNTS p. 110;
(2) *Agreement between the Republic of Austria and the United Nations regarding the seat of the United Nations in Vienna*, 29 November 1995, 2023 UNTS p. 254;
(3) *Headquarters Agreement with the United Nations Industrial Development Organization*, of 26 May 1998, Austrian Law Gazette BGBL. iii Nr. 100/1998 (identical in wording *mutatis mutandis* to (2));
(4) *Agreement between the International Commission for the Protection of the Danube River and the Republic of Austria regarding the Headquarters of the Commission*, 14 December 2000, 2197 UNTS p. 104;
(5) *Agreement regarding the Headquarters of the Joint Vienna Institute*, 6 March 1997, 1997 UNTS p. 433;
(6) *Agreement regarding the Headquarters of the International Anti-Corruption Academy*, of 10 October 2011;
(7) *Agreement regarding Headquarters of the Organization of the Petroleum Exporting Countries* ('OPEC'), 18 February 1974, 2098 UNTS p. 416;
(8) *Agreement regarding the Headquarters of the OPEC Fund for International Development*, 21 April 1981, 1291 UNTS p. 210;
(9) *Agreement regarding the Headquarters and the European Monitoring Centre on Racism and Xenophobia* (no longer in force), replaced by *Headquarters Agreement between the Republic of Austria and the European Union Agency for Fundamental Rights*, 16 June 2010, UNTS ip-49226, available at:
<www.parlament.gv.at/pakt/vhg/xxiv/i/i_00788/ imfname_189632.pdf>.
(10) *Agreement between the Republic of Austria and the European Patent Organization ('EPO') Concerning the Headquarters of the Vienna Sub-office of the European Patent Organizations*, 2 July 1990, 1655 UNTS p. 129."
(Kirsten Schmalenbach, "Austrian Courts and the Immunity of International Organizations", *International Organizations Law Review* 10 (2013) 446-463, at 448).

[464] See e.g. *Agreement between the Republic of Austria and the International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency ('IBRD', 'IFC' and 'MIGA' of the World Bank Group) regarding the establishment of*

various international organizations. It should be noted that these organizations have been established by, and conduct their activities based on, a legal instrument. Therefore no legal problem has arisen on the part of the host country to conclude an international agreement. However, the situation was different in the case of the OSCE, which lacks a constituent instrument, and remained the same until a time when Austria recognized its international legal personality. This will be examined in Part II.

2) Customary Law

While privileges and immunities of international organizations are primarily regulated and governed by conventional law, it's still important to determine whether customary international law plays a role in this subject. A number of possible instances are listed where customary international law may become relevant. For example, it may be claimed that the terms of the existing agreements are not exhaustive of privileges and immunities and that other privileges and immunities may be claimed which flow from international customary law. Further, in countries of dualist school courts give effect to the terms of an agreement only if it has been incorporated in domestic law. If an incorporation law has not been enacted, or its terms do not match those of the agreement, it may well be the case that privileges and immunities are granted by virtue of the requirements of customary international law.[465] In addition, there may exist no treaty relation between the organization and the host state or a member state, and in particular in the case of the organization vis-à-vis non-member states. Customary international law might serve as a "gap-filler" in such situations.[466]

It has been argued that privileges and immunities of international organizations are almost exclusively created by treaty law, and no customary

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liaison offices in Vienna, 21 July 2010, United Nations Juridical Yearbook (2010) p. 5. (Schmalenbach, "Austrian Courts and the Immunity of International Organizations", at 449).

[465] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.344.

[466] Reinisch, *International Organizations Before National Courts,* p.145.

law has developed out of treaty law in the area so far.[467] However, proliferation of treaties in the field, similarity of treaty provisions granting privileges and immunities to international organizations and widespread accession of states to relevant treaties since the conclusion of UN General Convention and Specialized Agencies Convention have been regarded as evidences of both state practice and the required *opinion iuris*[468]. *Reinisch* notes that while majority of the writers hold that international organizations enjoy absolute immunity from legal proceedings even if no express treaty provision is applicable[469], some writers question the existence of such immunity arising from customary law[470]. Supportive of the majority view, *Reinisch* maintains that content of treaty law[471] and domestic legislation[472]

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467 Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.344. See also Abdullah El-Erian, p. 151.

468 Klabbers, *An Introduction to International Institutional Law,* p.149. The writer warned, however, that while it may be the case that there is a customary rule to grant privileges and immunities to international organizations, the question is not so much privileges and immunities *per se*, but rather their precise scope.

469 Reinisch refers to Werner Gloor, "Employeurs titulaires de l'immunité de juridiction" in Universités de Berne, Freibourg, Geneva, Lausanne et Neuchatel, Ensèignement de 3e cycle droit 1987 (eds.), *Le juriste suisse face au droit et aux jugements étrangers, ouverture ou repli?* (1988), 263-89 at 278; Harders, "Haftung und Verantwortlichkeit Internationaler Organisationen", 250; and Ignaz Seidl-Hohenveldern, "L'immunité de juridiction des Communautés européennes" (1990) *Revue du March Commun* No.338, 475-9 at 479. See, Reinisch, *International Organizations Before National Courts,* p.146.

470 For those skeptical concerning the existence of non-treaty-based judicial immunity of international organizations, Reinisch refers to Beitzke ("Zivilrechtsfähigkeit", 115), Reuter (Yearbook of International Law Commission (1985), Vol.I, 288) and Ress (ILA, Report of the 66th Conference, Buenos Aires (1994), 474. See, Reinisch, *International Organizations Before National Courts*, p.146.

471 Article III (3) of the WHO-Egypt Agreement reads as follows: "The Organization and its principal or subsidiary organs shall have in Egypt the independence and freedom of action belonging to an international organization according to international practice." In his preliminary report on the second part of the topic of relations between States and international organizations, Special Rapporteur Abdullah El-Erian interpreted this Article as acknowledgement of the existence of customary law on the subject. See Abdullah El-Erian, *op.cit*, p.152.

472 The writer refers to the Austrian Federal Act of 14 December 1977 on the Granting of Privileges and Immunities to International Organizations, which enables the Austrian government to bestow privileges and immunities- in

could be regarded as evidencing custom in this field. The same can be argued for some national court decisions.[473] However, the Austrian Supreme Court remained doubtful on the existence of customary rules governing the immunity of international organizations, "given that international organizations are a twentieth-century phenomenon and therefore a rather decent development."[474]

While acknowledging that generally international privileges and immunities have been accorded by states only under conventional law, *Amerasinghe* holds that thanks to the acceptance of the conventional law, in particular the General Convention and the Specialized Agencies Convention, it may be argued that there emerged at least *incipient customary law* of international privileges and immunities; and as for the coverage of that customary law, the writer employs the theory of functional necessity in the absence of applicable conventional law and suggests that customary law recognizes the same privileges and immunities as are granted under conventional law so that international organizations could discharge their

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addition to those rights as contained in the Act- to an international organization in accordance with relevant treaties, or as provided, for the fulfillment of its functions, by the generally recognized rules of international law (Article 1, para.2 of the Act).

[473] In its Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 (ICTY, *Prosecutor v. Simic et al.*, Case No. IT-95-9) the Trial Chamber ruled that "The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio iuris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC as described above, leads the Trial Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of the Information" (ICTY, *Prosecutor v. Simic et al.*, para.74). Customary law is recognized as applicable by Italian courts for granting immunity to international organizations in particular in employment disputes. See, for instance, *Cristiani* v. *Istituto italo-latino-americano* (Tribunale Roma, 17 September 1981; Corte di Cassazione, 23 November 1985) and *Galasso* v. *Istituto italo-latino-americano* (Corte di Cassazione, 3 February 1986) (Reinisch, *International Organizations Before National Courts,* p.152).

[474] Austrian Supreme Court, 1 December 2005, Case 6 Ob 150/05k, para. 2 (Kirsten Schmalenbach, Austrian Courts and the Immunity of International Organizations, *International Organizations Law Review* 10 (2013) 446-463, at 452).

responsibilities independently and without interference[475]. That view is supported also by some national court decisions, which favour immunities of international organizations even in the absence of treaty provisions. The Swiss Court in *ZM* v. *Permanent Delegation of the League of Arab States to the UN* held that:

> Customary international law recognized that international organizations, whether universal or regional, enjoy absolute jurisdictional immunity…This privilege of international organizations arises from the purposes and functions assigned to them. They can only carry out their tasks if they are beyond the censure of the courts of member states or their headquarters.[476]

In the case involving the *Iran-US Clams Tribunal*, the Dutch Supreme Court held that:

> *In the absence of a specific treaty providing for the immunity of an international organization in its host state, it could be assumed that customary international law conferred the same level of immunity as that provided for under treaty law.*[477]

As for non-member states, however, *Amerasinghe* refers to *International Tin Council v. Amalgamet Inc.* case[478] in which the US court implied that an international organization is not entitled to privileges and immunities in the territory of a non-member state, and concludes that acceptance of that argument would necessarily require that a distinction

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[475] Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.345-346. The writer notes that while it is difficult to identify exactly which privileges and immunities covered by the conventional law are required to meet the functional needs, the inviolability of archives and the freedom of communication could be two of them.

[476] 116 International Law Reports, pp.643, 647 (Shaw, *International Law,* p.1321).

[477] 94 International Law Reports, 1994, p.323 (Schermers & Blokker, *International Institutional Law*, p.1007).

[478] *International Tin Council v. Amalgamet Inc.,* 524 NYS 2 nd (1988), p.97.

should be made in the application of customary law in the case of non-member states.[479]

Indeed, widespread accession of states to treaties governing immunities and privileges of international organizations, in particular to the UN General Convention and the Specialized Agencies Convention, which stand as instruments of reference in this field, may be regarded as evidence of both state practice and *opinio iuris*, which together constitute customary international law. If accepted, this view would serve as a gap-filler as expressed above. However, general adherence of states to the UN General Convention and the Specialized Agencies Convention maybe misleading given the differences between, for example, the functions, purposes and membership status of these instruments with those of other organizations. A state's adherence to these two instruments does not necessarily imply its consent to grant privileges and immunities to other organizations. What's more, grant of immunities and privileges to international organizations are mostly outcome of lengthy negotiations, driven by political motives. The functional necessity principle is therefore largely shaped by political considerations, which does not support the idea that international organizations enjoy privileges and immunities arising from customary international law in the absence of treaty provisions.

If it were to be accepted that immunities and privileges are granted based on customary international law, then the application would be binding upon non-member states too. In that case, it can be argued that the state concerned would be excluded from the legal obligation to bestow upon the organization the relevant privileges and immunities only if it had manifested persistent objection to such an obligation. The effect of raising persistent objection will be discussed in Part II in the context of some participating States objecting to international legal personality of the OSCE due to its lack of constituent instrument.

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479 Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.348.

3) National Laws

In a number of countries, where treaties are not automatically incorporated into domestic legal order, privileges and immunities accorded to international organizations in their constituent instruments or in relevant multilateral or bilateral agreements are implemented through relevant domestic legislation.[480] Generally, empowering provisions contained in such legislation are applied to the organization in question through secondary acts.[481] Content of implementing legislation and its interpretation and application by national courts may vary from state to state.

In addition to passing implementing legislation, general or specific, so that international organizations enjoy privileges and immunities accorded to them in their constituent instruments or in relevant multilateral or bilateral agreements, states enact specific laws to confer privileges and immunities to international entities which are not regarded eligible to enter into a treaty based relation with. For instance, three types of international organizations are granted privileges and immunities in Switzerland in accordance with *RS 192.12 Federal Law of June 22, 2007 on the Privileges, Immunities and Facilities, as well as the Financial Aid Granted by Switzerland as Host State*[482]: (i) intergovernmental organizations (such as the UN its specialized agencies or the World Trade Organization); (ii) international institutions; (such as the International Committee of the Red Cross-ICRC[483]); (iii) quasi

[480] Oft-cited examples are the US International Organizations Immunities Act of 1945 and the UK International Organization (Privileges and Immunities) Act of 1968.

[481] In the case of the US International Organizations Immunity Act, privileges and immunities are conferred upon international organizations by Executive Orders, while in the case of the UK International Organization Act Order, administrative action is taken through Order in Council.

[482] Original language title: *RS 192.12 Loi fédérale du 22 juin 2007 sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu'Etat hôte*.

[483] ICRC is an atypical international organization and enjoys privileges and immunities under both international and national law. Established as a private association under Swiss law in 1863, IRCR was mandated by international community through 1949 Geneva Conventions, their Additional Protocols and

governmental organizations.[484] In Austria, international organizations are granted privileges and immunities under a *Federal Act of 1977* [485]. Furthermore, a specific legislative act (*Federal Act of 1993*)[486] has been adopted to regulate the status of the OSCE in Vienna since the Organization in question, lacking a constituent instrument and *therefore* international legal personality, did not fit in the *Federal Act of 1977.* The *Federal Act of 1993* granted legal capacity to the CSCE (OSCE) institutions headquartered in Austria[487] and conferred privileges and immunities on the CSCE (OSCE) institutions and all CSCE (OSCE) officials present in Austria on official business.[488] The Federal Act also conferred privileges and immunities on the permanent foreign representations and delegations of the CSCE (OSCE)

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the Statutes of the International Red Cross and Red Crescent Movement, which earned the institution observer status to the UN General Assembly in 1990 (UN General Assembly Resolution 45/6).

[484] In addition, the Swiss Confederation may grant privileges, immunities and facilities to diplomatic missions, consular posts, the permanent missions or other representations to intergovernmental organizations, special missions, conferences, secretariats or other bodies created by international treaty, independent commissions, arbitral tribunals and other international agencies.

[485] Federal Act of 14 December 1977 on the Granting of Privileges and Immunities to International Organizations *(Bundesgesetz vom 14. Dezember 1977 über die Einräumung von Privilegien und Immunitäten an internationale Organisationen),* Austrian Law Gazette BGBI. Nr.677/1977. The Federal Act empowers the Austrian government to grant immunities by governmental agreement within the limits set out in the 1977 Federal Immunity Act.

[486] Federal Act on the legal status of the OSCE institutions in Vienna (*Bundesgesetz über die Rechtsstellung von Einrichtungen der OSZE in Österreich*) 30 July 1993 as amended in 1995 and 2002, Federal Law Gazette (Bundesgesetzblatt) BGBI. Nr.511/1993, BGBI. Nr. 735/1995, BGBI. Nr. 157/2002.

[487] Article 1(1) of the Federal Act of 1993 reads: "Institutions of the Conference on Security and Co-operation in Europe based in Austria shall have legal status in Austria."

[488] Article 3 of the Federal Act of 1993 reads: "(1) CSCE institutions based in Austria and their staff members shall enjoy the same privileges and immunities as accorded to their counterparts at the United Nations in Vienna on the basis of international treaty or other legal provisions. (2) Staff of CSCE institutions not based in Austria who are in Austria on official duty shall enjoy the same privileges and immunities as those accorded to experts employed by the United Nations on the basis of international treaty or other legal provisions."

participating States and their members.[489] It is settled case law that international organizations enjoy absolute immunity before Austrian courts as long as they act within their assigned functions, while immunity of their officials depends on the applicable legal basis, which is generally the headquarters agreement.[490]

iii. United Nations Convention on Privileges and Immunities in General

The UN General Convention supplements the UN Charter and stands as a model for many legal instruments on privileges and immunities of international organization. In the preambular part the Convention refers to relevant provisions of the Charter regarding the legal capacity that the UN enjoys in the territory of Member States[491] as well as the privileges and immunities to be accorded to the Organization, representatives of the Member States and the UN officials[492]. Accordingly, the Convention starts by defining the Organization's legal capacity while it also provides the Organization with juridical personality, an issue that was not addressed in the UN Charter.

Privileges and immunities contained in the Convention are bestowed upon the Organization itself,[493] representatives of the UN's Member States[494], UN officials[495], and experts on mission for the UN[496] as the following:

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[489] Article 4 of the Federal Act of 1993 reads: "The permanent foreign representations and delegations of the CSCE participating States to the institutions mentioned in Article 1 above and their members shall enjoy the same privileges and immunities as those accorded to the permanent representations and their members at the United Nations in Vienna on the basis of international treaty or other legal provisions."

[490] See, Schmalenbach, "Austrian Courts and the Immunity of International Organizations", p. 457-461.

[491] Article 104 of the UN Charter.

[492] Article 105 of the UN Charter.

[493] Article II and III of the UN General Convention.

[494] Article IV of the UN General Convention.

[495] Article V of the UN General Convention.

[496] Article VI of the UN General Convention.

(i) The Organization, its property and assets enjoy immunity from jurisdiction. Such a general immunity invites a question whether a distinction should be made, as in the case of state immunity, between sovereign acts (*jure imperii*) and private acts (*jure gestionis*) of organizations. It's submitted that analogy with state immunity is not appropriate since the basis of immunity for international organizations is not the same as for states. Conventional law does not support distinction between such acts[497]. Protection of immunity from jurisdiction comes to end if the UN expressly waives in any particular case. Even in such a case, however, the UN continues to benefit from any form of execution or enforcement.

In addition to grant immunity from jurisdiction and execution, the Convention provides that the premises, archives and documents of the UN are inviolable, and that the UN, its assets, income and other property shall be exempt from all direct taxes as well as custom duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the UN for its official use.

Moreover, the UN is granted facilities in respect of communications. It enjoys freedom of official communications, at a level not less favourable than that accorded to foreign governments, and freedom from censorship. It is also provided that the UN is entitled to use codes, and dispatch and receive correspondence by courier or in bags, on the same basis as diplomatic couriers and bags.

(ii) Representatives of the UN's Member States[498] enjoy a number of privileges and immunities. They enjoy immunity from personal arrest and detention and from seizure of their personal baggage as well as immunity from jurisdiction in respect of their official words, and they are exempt from immigration restrictions, aliens registration and national service obligation.

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[497] See, Amerasinhge, *Principles of the Institutional Law of International Organizations, op. cit.*, p. 322; Shaw, *International Law,* p.1326.

[498] The expression "representatives" includes all delegates, deputy delegates, advisers, technical experts and secretaries of delegations (Article IV, Section 16 of the UN General Convention).

Their papers and documents are inviolable, and they are entitled to use codes and receive correspondence by courier or in sealed bags. They are also accorded the same facilities in respect of currency or exchange restrictions as are accorded to foreign governments on temporary official missions. Moreover, they are granted the same immunities, privileges and facilities, including in respect of their personal baggage, as diplomatic envoys usually enjoy except for custom duties, excise duties or sales taxes.

Privileges and immunities are accorded to representatives of the UN Member States not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the UN. Therefore, Member States are under obligation to waive immunity if they feel that impunity would impede the course of justice, and immunity can be waived without prejudice to the purpose for which it is accorded.

In case of a representative of a Member State having nationality of the host state, no privileges and immunities apply.

(iii) Officials of the UN are granted immunity from jurisdiction for acts performed in an official capacity, exemption from national service obligations, immigration restrictions and alien registration, and exemption from direct taxes on their salaries and emoluments. They are accorded the same privileges in respect of facilities as are accorded to diplomatic envoys of the same level as well as the same repatriation facilities in times of international crisis. They are also entitled to import free of duty their furniture and personal effects at the time of first taking up their post. In addition, the Secretary General and all Assistant Secretaries-General and their families are granted the same privileges, immunities, exemptions and facilities as are accorded to diplomatic envoys, in accordance with international law.

The principle that privileges and immunities are accorded to beneficiaries not for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the UN is valid also for officials of the UN. That principle equips the Secretary-General with the right and the duty to waive the immunity of any official when needed. In the case of the Secretary-General, it's the Security Council's right to do so.

(iv) Experts on mission for the UN are also granted privileges and immunities, which are necessary for the independent exercise of their functions during the period of their missions. Though no definition was provided for experts on mission for the UN, the ICJ ruled in *Mazilu* case that "The Court takes the view that Section 22 of the General Convention is applicable to persons (other than UN officials) to whom a mission has been entrusted by the organization."[499] In reaching such a broad definition, the Court based itself on the practice of the UN in which members of peacekeeping forces, technical assistants, members of committees and commissions had all consistently been treated as experts on mission for the United Nations.[500]

Privileges, immunities and facilities accorded to experts on mission for the UN include immunity from personal arrest or detention and from seizure of their personal baggage, immunity from legal process in respect of words spoken or written and acts done by them in the course of the performance of their mission, inviolability for papers and documents, the right to use codes and receive papers or correspondence by courier or in sealed bags, the same facilities in respect of currency or exchange restrictions and the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Privileges and immunities are granted to experts not for their personal benefit but for the interest or the UN. The right and the duty to waive the immunity of an expert when needed rests with the Secretary-General.

[499] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Mazilu)*, Advisory Opinion, [1989] ICJ Reports 177, para. 52.
[500] Klabbers, *An Introduction to International Institutional Law,* p.144.

As noted above, the UN General Convention supplements the United Nations Charter. Although Article 104 of the Charter provided the Organization with domestic legal capacity[501], its formulation required more detailed provision, which later has been ensured by the UN General Convention. In similar vein, privileges and immunities provided for the Organization in Article 105 of the UN Charter[502] has been detailed by the UN General Convention to read as a workable text. The functional necessity principle, which governs the UN Charter, has been reflected in the UN General Convention accordingly.

As for many ensuing treaties, the UN General Convention played a model role for the draft Convention on the International Personality, Legal Capacity and Privileges and Immunities of the OSCE. As in the former, the principle of functional necessity was taken as basis in the latter. The main difference was that as opposed to the UN General Convention, which referred to, and was based on, the constituent instrument of the United Nations, the UN Charter, there was not such a legal document of the OSCE in place at the time of drafting the Convention governing its legal status as well as privileges and immunities. References to the non-existent instrument made it impossible for majority of the participating States to adopt the draft Convention. The ongoing debates to resolve the disputes will be addressed in Part II below.

b) Treaty-Making Capacity of International Organizations

It is widely recognized by legal writers and it stands as an established practice that international organizations have the capacity to conclude treaties. Although the capacity of international organizations to conclude treaties has been confirmed in practice, examples in this regard were not abundant prior to the Second World War. *Chiu* stated that the earliest precedent for an international organization to conclude a treaty might be traced back to the

[501] *Supra* Note 220.
[502] *Supra* Note 434.

nineteenth century.[503] Except for that agreement, reference is generally made to the practice of the League of Nations for examining the earliest agreements concluded by international organizations, despite the fact that the League of Nations Covenant did not contain specific provisions governing the treaty-making capacity of the organization. While lack of such a provision in its constitution did not prevent the organization from entering into treaty relations[504], Judges *Spender* and *Fitzmaurice* expressed, in their joint dissenting opinion in *South West Africa Cases*[505], their doubts as to whether the League of Nations would be recognized in 1920s as a subject of international law with legal personality distinct from its members and with distinct treaty-making capacity. As opposed to the Covenant of the League of Nations, the UN Charter does contain provisions regarding the treaty-making capacity of the organization. With a view to taking action with respect to threats to, and breaches of, peace as well as acts of aggression, the Charter authorizes the Security Council to conclude agreements with Member States.[506] The UN Charter also provides the Economic and Social Council

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[503] Referring to the information supplied by a representative of the International Committee for Weights and Measures (ICWM), an international organization established in accordance with *Convention du Mètre* signed in Paris on 20 May 1875, Chiu advises that ICWM concluded a headquarters agreement with France on 4 October 1875. For the treaty-making capacity of international organizations, see, Chiu Hungdah, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded,* The Hague, Kluwer Academic Publishers, 1966.

[504] For a list of agreements concluded by the League of Nations, see Chiu, p. 8-15.

[505] *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa) preliminary objections, [1962] ICJ Rep 465, 475 (Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice).

[506] Article 43 of the UN Charter reads:

"1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

2. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the

with authority to conclude agreements with specialized agencies in order to engage them into relationship with the United Nations.[507] Moreover, Article 105 of the UN Charter accords functional privileges and immunities to the United Nations as well as to the representatives of its Members and its officials[508], without indicating, however, whether the United Nations would be party to agreements to be concluded in this regard.[509] Accordingly, the UN's capacity to conclude treaties was expressly recognized in the Regulations adopted on 14 December 1946 by the general Assembly, concerning the Registration and Publication of Treaties and Agreements.[510]

Constitutional provisions of international organizations, like those of the United Nations as cited above, stand as an important legal source to determine the capacity of an international organization to conclude treaties.[511] Yet the treaty-making capacity of international organizations has led to conflicting views including on whether international organizations would

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Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."

[507] Articles 57 and 63 of the UN Charter.

[508] Article 105 of the UN Charter reads:

"1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

[509] Although the ICJ stated in the *Reparation* case that the General Convention "creates rights and duties between each of the signatories and the Organization", it did not decide, as a consequence, on whether the UN gained party status to the Convention or should it be treated merely as a beneficiary (ICJ Reports, 1949, *Reparation for injuries*, 174 at 179). While *Reinisch* notes that majority of writers seems to support the "party approach", he finds the "beneficiary approach" more compatible with principles of treaty law. See, Reinisch, *International Organizations Before National Courts,* p.144

[510] UN General Assembly Resolution 97/1.

[511] Shaw notes that the existence of legal personality is on its own probably insufficient to ground the competence to enter into international agreements. Shaw, *International Law,* p.1309.

have such a capacity in the absence of constitutional provisions. It is submitted that agreements relating to the organization's headquarters and to the privileges and immunities of its staff can probably be seen as inherent to any public organization.[512]

i. International Law Commission's Work on the Law of Treaties

Treaty-making capacity of international organizations was discussed by the ILC during the codification process of the law of treaties, which culminated first in the draft articles that later became the 1969 Vienna Convention on the Law of Treaties (VCLT). In their reports the Special Rapporteurs *Brierly, Lauterpacht, Fitzmaurice* and *Waldock* all addressed the treaty-making capacity of international organizations.[513]

The first report, prepared by Rapporteur *Brierly*, contained an article governing the treaty-making capacity of international organizations as the following:

> Article 3 (on 'Capacity in general'): All states and international organizations have the capacity to make treaties, but the capacity of some states or organizations to enter into certain treaties may be limited.[514]

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[512] It is noted, however, that "international organizations, as yet, do not participate on an equal footing with states in wide, multilateral, law-making treaties, such as the Vienna conventions on the law of treaties and on diplomatic and consular law." Schermers & Blokker, *International Institutional Law,* p.1101.

[513] For a detailed analysis of the codification process of the law of treaties as applicable to international organizations, see Brölmann, op. cit., The Institutional Veil in Public International Law, p.141-249.

[514] [1950] *Yearbook of International Law Commission* Vol. II, p. 223. Apart from the article on 'capacity in general', the draft contained articles on 'Use of the term treaty', 'Definition of international organization', 'Constitutional provisions as to the exercise of capacity to make treaties', and on 'Exercise of capacity to make treaties'. The Commission decided in 1951 to "leave aside […] the question of the capacity of international organizations to make treaties" and amended the Article to read as follows: "Capacity to enter treaties is possessed by all States, but the capacity of a State to enter into

Although the report prepared by Rapporteur *Lauterpacht* did not contain any provision on treaty-making capacity of either states or international organizations, reference to international organizations was maintained in the definition of *treaty*.[515]

In his introductory statement to the Commission in 1956 Rapporteur *Fitzmaurice* emphasized that "in a modern code of treaty law (…) many international organizations existed and most of them had a treaty-making capacity."[516] Discussions took place at the Commission on whether treaties concluded by international organizations should be covered by the study, and the Commission, in its annual report, "reaffirmed the view that it would be preferable to defer the matter [of treaties concluded with or between international organizations] to a later state".[517]

The next Special Rapporteur Waldock's first report, however, proposed a chapter, entitled "The treaties of international organizations".[518] Draft Article 3 governed the capacity to become a party to treaties[519], and paragraph 4 of the Article relegated the treaty-making capacity of international organizations to their constituent instruments:

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certain treaties may be limited"; draft articles (UN Doc A/CN.4/L.28) in [1951] *Yearbook of International Law Commission*, Vol.II, p. 74.

[515] "Article 1: Treaties are agreements between States, including international organizations of States, intended to create legal rights and obligations of the parties." [1953] *Yearbook of International Law Commission*, Vol.II, p.90.

[516] [1956] *Yearbook of International Law Commission* Vol. I, p. 56

[517] [1959] *Yearbook of International Law Commission* Vol. II, p. 96

[518] [1962] *Yearbook of International Law Commission* Vol. II, p. 30. In the definition of *international agreement* the draft Article 1 maintained a reference to subjects of law other than states. Draft Article 1 reads: "*International agreement* means an agreement intended to be governed by international law and concluded between two or more States or other subjects of international law possessing international personality and having capacity to enter into treaties under the rules set out in article 3 below."

[519] Paragraph 1 of the Article reads: "Capacity in international law (...) to become a party to treaties is possessed by every independent State (...), and other subjects of international law invested with such capacity by treaty or by international custom". *ibid*, p.35.

> Article 3 (4): International capacity to become a party to treaties is also possessed by international organizations and agencies which have a separate legal personality under international law if, and to the extent that, such treaty-making capacity is expressly created, or necessarily implied, in the instrument or instruments prescribing the constitution and functions of the organization or agency in question.[520]

Special Rapporteur *Waldock* wrote that the general rule, to be formulated as such, was based upon principles analogous to those laid down by the ICJ in *Reparation* case.[521]

Although the ILC recognized the capacity of international organizations to conclude treaties, it did not include international organizations in the final draft. The main reason for that was the concern that including international organizations in the draft "would both unduly complicate and delay the drafting of the present [1969] articles if it were to attempt to include in them satisfactory provisions concerning treaties of international organizations."[522] However, legal writers have continued to address the question and the practice of international organizations has developed since then. *Institut de Droit International* adopted a resolution in its 1973 session and recognized that the provisions of VCLT are in principle applicable to treaties concluded by international organizations.[523] Moreover, the ILC addressed the issue later in its draft articles, which became 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT).[524] While

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[520] *ibid,* p.35
[521] *ibid*, p. 37 (UN Doc. A/CN.4/144). Waldock refers in particular to the statement of the court that "Under international law, the Organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." I.C.J. Reports, 1949, *Reparation for injuries,* p. 182.
[522] [1966] *Yearbook of International Law Commission* Vol. II, p.198.
[523] Annuaire de l'Institut de Droit International 55 (1973), 797.
[524] Upon recommendation of the United Nations Conference on the Law of

the Convention is yet to enter into force[525], its provisions are generally accepted as the applicable international law.[526]

Preambular part of 1986 VCLT refers to the capacity and practice of international organizations to conclude treaties as follows:

> *Noting* that international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purpose,
>
> *Recognizing* that the practice of international organizations in concluding treaties with States or between themselves should be in accordance with their constituent instruments.[527]

When interpreting the preambular part of the Convention, *David* notes that the eleventh preambular paragraph recalled a twofold fundamental rule of the law of international organizations; that international organizations have a distinct legal personality, and that this personality implies a *jus tractati*. He explains that although the treaty-making power of international organizations may not have been expressly provided for in their constituent instruments, it follows from the theory of implicit powers.[528] It's noteworthy that the

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Treaties, the UN General Assembly entrusted the ILC with the preparation of a separate set of draft articles on the question of treaties concluded between states and international organizations or between international organizations (UNGA Res. 2501 (XXIV) of 12 November 1969). At its twenty-second session, in 1970, the Commission included the question in its working programme, and adopted the draft articles, on the basis of Special Rapporteur Reuters, at its thirty-fourth session in 1982. The Convention prepared by the ILC was adopted later at a conference in 1986.

[525] Approval of thirty-five states is needed for the entry into force of the Convention. At the time of writing, thirty-one states have presented their instruments of approval leaving the number required for entry into force at four.

[526] Elias Olufemi, "Who Can Make Treaties? International organizations", The Oxford Guide to Treaties, (Edited by Duncan B. Hollis), 2012, p.77.

[527] Eleventh and twelfth preambular paragraphs of 1986 VCLT.

[528] Eric David, "1986 Vienna Convention Preamble", The Vienna Conventions on the Law of Treaties-A Commentary, (Edited by Olivier Corten and Pierre Klein), vol.I, 2011, p.15.

Convention sticks to functional necessity approach when addressing the treaty-making capacity of international organizations.

As regards the twelfth preambular paragraph, *David* notes that the text as it stands is not as rigid as it was first proposed[529], and that while the organization should respect its constituent instrument when concluding a treaty, the Convention recognized the *implied capacity* of the organization in generating the development of its constitution since the *rules of the organization*[530] includes not only the constituent instrument and the derived law based on it, but also the well established practice of the organization.[531] *David* notes that the ICJ had already recognized in *Reparation* case that the international organization could generate the development of the constituent instrument, rather than simply apply it:

> The rights and duties of an entity such as the Organization [of the United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.[532]

1986 VCLT defines treaty-making capacity of international organizations in general terms, while taking into consideration the specificities of each organization. Article 6 of 1986 VCLT reads:

> The capacity of an international organization to conclude treaties is governed by the rules of that organization.

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[529] The initial paragraph presented by the German Democratic Republic, Ukraine and Czechoslovakia stated that "practice of international organizations shall be in full accordance with their constituent instruments." (Official Records, vol. II, p.80) (David, "1986 Vienna Convention Preamble", p.16).

[530] According to Article 2(1)(j) of 1986 VCLT "rules of the organization means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization."

[531] David, "1986 Vienna Convention Preamble", p.16.

[532] ICJ Reports, 1949, *Reparation for injuries*, p.180.

Since the Article refers to the *rules of the organization*, the capacity of an international organization to conclude treaties is governed by, in particular, its constituent instrument, decisions and resolutions that the organization has adopted in accordance with its constituent instrument, and established practice of the organization. Referring to the 11th recital of 1986 VCTL[533], *Schmalenbach* states that rules of the organization comprise not only written provisions and established practice of the organization (Article 2(1)(j) of 1986 VCLT) but also unwritten rules implied in the constituent instrument due to functional necessities of its existence.[534]

Article 6 of 1986 VCLT is a formulation of compromise on debates regarding the source of the treaty-making capacity of international organizations. The text of the Article, as Special Rapporteur noted, is "the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations in international law; that question remained open, and the proposed wording is compatible both with the concept of general international law as the basis of international organizations' capacity and with the opposite concept."[535]

The debate was fueled by the fact that, as opposed to states, which are, as the Special Rapporteur noted, "equal from the point of view of international law and all, without exception, had the same capacity to conclude treaties, the same was not true of international organizations, which were creations resulting from a discretionary act by states and, consequently, were highly individual entities characterized by a fundamental inequality…"[536] Therefore, the treaty-making capacity of international organizations differed not only from states, but also from one another. This

[533] The preambular paragraph reads: "*Noting* that international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes".
[534] Kirsten Schmalenbach & Oliver Dörr (eds), Vienna Convention on the Law of Treaties- A Commentary, second edition, 2018, p.124.
[535] [1981] *Yearbook of International Law Commission*, Vol.II, Part Two, p.127.
[536] [1974] *Yearbook of International Law Commission*, Vol.I, p.134.

being the case, mainly two conflicting views were expressed within the ILC as well as during the diplomatic Conference.[537] The first group argued that international organizations had inherent capacity to conclude treaties. *Seyersted* stated famously that the treaty-making capacity of international organizations derived from customary law and that all intergovernmental organizations have inherent general treaty-making capacity. Emphasizing the negative effects of constitutional provisions the writer stated: "it has never been claimed in a concrete case that any of these treaties are invalid because the organization did not have the power under any provision of its constitution to conclude them, provided that no constitutional provision precluded it from so doing."[538] The other view was that the capacity proceeded from a delegation by member states, either through the constitutive instrument or through later acts.[539] Effects of absence of a specific rule on treaty-making capacity of international organizations was a point of divergence of opinions. Delegates who supported the idea that the capacity of international organizations is a rule of international law underlined that in the absence of a specific rule on treaty-making capacity of international organizations reference should be made to general international law, and that capacity to conclude treaties derives from powers implicitly possessed under international law.[540] In contrast to that view, however, it was argued that an international organization's capacity to conclude treaties depended solely on the organization's rule. With the compromised text of the Article it was agreed

[537] For the summary of the debate, see the Report of the ILC on its 34th session ([1982] *Yearbook of International Law Commission*, Vol.II, Part Two, p.13, paras. 42-3).

[538] Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities really Depend on the Conventions Establishing Them,* p.9-10.

[539] Nicolas Levrat, "1986 Vienna Convention Article 6-Capacity of international organizations to conclude treaties", The Vienna Conventions on the Law of Treaties-A Commentary, (Edited by Olivier Corten and Pierre Klein), Vol.I, 2011, p.118.

[540] Vienne Conference 1986, UN Doc.A/Conf.129/c.1/SR 6. (from, G.E.do Nascimento e Silva, "The 1986 Vienna Convention and the Treaty-Making Power of International Organizations", GYIL, vol.29, 1986, Berlin, p.74). Accordingly Aust submitted that "an international organization has the capacity to conclude treaties if this is provided in its constituent instrument or if it is indispensible for the fulfillment of its purposes." See, Anthony Aust, Modern Treaty and Practice, 2004, Cambridge University Press, p. 54.

that general international law defines the treaty-making capacity of international organizations and that such definition proceeds from reference to the specific rules of each international organization.[541]

ii. Relationship Between International Legal Personality and the Treaty-Making Capacity

As regards the relationship between international legal personality of international organizations and their treaty-making capacity, it's safe to note that international organizations' capacity to conclude treaties is generally accepted among the manifestations of their international legal personality. *Alvarez* stated that notwithstanding the vagueness of its meaning and origin, legal personality of an international organization is essential to its ability to act externally on the international plane vis-à-vis other international persons, and that "an entity that is not a 'subject of international law' or an 'international organization' is not able to be a party to treaties, present claims against other international persons, possess other international rights and duties, or otherwise exist with relative autonomy in the legal sphere."[542]

In his report on the Law of Treaties, Judge *Lauterpacht* wrote that "international personality of organizations…is becoming generally recognized. The capacity to conclude treaties is both corollary of international personality and a condition of effective fulfillment of their functions on the part of the international organizations…such capacity (capacity of international organizations to conclude treaties) is the consequence of their international personality."[543] Along the same lines, Judge *Fitzmaurice* wrote that "the necessary attribute of international personality, is the power to enter,

[541] Levrat, "1986 Vienna Convention Article 6-Capacity of international organizations to conclude treaties", p.119.
[542] Alvarez, *International Organizations as Law-makers*, p.129-139.
[543] [1953] 2 *Yearbook of International Law Commission*, 90, 100, UN.Doc. A/CN.4/63 (1953).

directly or mediately, into relationship (by treaty or otherwise) with other international persons."[544]

However, the perception that international legal personality is a prerequisite of the treaty-making capacity of international organization has not remained unchallenged. In his detailed work, which contains an impressive array of materials concerning the treaty-making practice of international organizations, *Chiu* stated that there's no necessary connection between treaty-making capacity and international personality.[545] The writer disagreed with *Kelsen*'s view that "once an international personality is expressly conferred upon an international organization, than the latter possesses unrestricted legal capacity under international law."[546] According to *Chiu, Kelsen*'s theory does or may equate international organizations with states ('super-State'), a conclusion rejected by the ICJ in the *Reparation* case.[547] *Chiu* also held that neither constitutional provisions nor the implied power theory constitutes a sufficient basis for the capacity of international organization to conclude treaties. He defended that treaty-making capacity is conferred upon all international organizations by a rule of customary international law as far as the conclusion of the treaty falls into the sphere of

[544] Gerald Fitzmaurice, The Law and the Procedure of the International Court of Justice, 1951-1954; General Principles, and Sources of Law, 30 Brit.Yb. Int'l L. 1, 2 (1953).

[545] Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded*, p.29.

[546] According to Kelsen, however, if the constituent treaty does not contain a provision conferring expressly upon the community international juridical (legal) personality (unrestricted legal capacity under international law), the community has only those special capacities as are conferred upon it by particular provisions. This argument lead him to conclude that the United Nations has legally only the power to conclude agreements which it is authorized by the Charter to do so, a conclusion that contradicts the established practice of the United Nations. Chiu finds "Kelsen's theory either too narrow (when the international personality is not expressly conferred) or too broad (when such personality is expressly conferred)". Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded,* p.28.

[547] ICJ Reports, 1949, *Reparation for injuries,* p.179.

the organization's functions.[548] However, having agreed with *Chiu*'s conclusion that treaty-making capacity can be deduced not from legal personality of international organizations but from a rule of customary law giving all international organizations this power as far as the conclusion of the treaty falls into the sphere of the organization's functions, Prof *Seidl-Hohenveldern* noted that he would rather base it on implied powers held by international organizations.[549]

In practice, international organizations conclude treaties within the domain of their functions as long as their international legal personality is recognized by the states, which they engage in such a contractual relation with. However, there are some entities that do not demonstrate the legal features of a typical international organization yet do conclude treaties. ICRC is one of them. Although the ICRC is not founded by states through a constitutive treaty, it is submitted that the organization enjoys international legal personality. The ICRC has evolved from a private association under Swiss law to an international organization with legal personality and this evolution is illustrated on the one hand by the upgrade of its status at the United Nations[550] and the treatment it receives from the states in practice. Due to this evolution, the ICRC is either *de jure* or *de facto* treated by states as an international organization enabling it to conclude treaties with states. That specific legal status has enabled the ICRC to conclude bilateral status agreements granting it legal status and privileges and immunities similar to other international organizations with night-five countries.[551]

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[548] Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded,* p.34.
[549] Ignaz Seidl-Hohenveldern, Review (Chiu's work), The American Journal of Comparative Law, Vol.15, No.3 (1966-1967), p.594-595.
[550] The UN General Assembly Resolution 45/6, adopted on 16 October 1990, granted the ICRC observer status to the UN General Assembly. With this upgrade in its position from consultative status as an NGO with the ECOSOC, which the organization enjoyed initially, the ICRC is effectively put on the same footing as international organizations with UN observer status.
[551] See, https://www.icrc.org/en/document/history-icrc (last accessed on 15 April 2018). For more information about the legal status of the ICRC, see Els Debuf, "Tools to do the job: The ICRC's legal status, privileges and

Legal status of the OSCE is another example manifesting the relevance of the international legal personality of an international organization with its treaty-making capacity. Initially established as a political conference by the 1975 *Helsinki Accords* rather than a treaty-based international organization, the OSCE has evolved structurally and legally over the past 43 years into "a *de facto* fully-fledged international organization that operates on a level equal to the other treaty-based international organizations whose mandates overlap with the OSCE in the security field."[552] That evolution did certainly have impact on the legal nature of agreements concluded by the OSCE with participating States and other international organizations. In addition to various exchanges of letters and memoranda of understanding, the OSCE has concluded various agreements and arrangements with participating States on its status/capacity, privileges and immunities, which created a patchwork of different statuses, treatment and levels of privileges and immunities enshrined in these instruments. Besides, the OSCE regularly collaborates with other international organizations as implementing partners or in cost sharing agreements. So far, due to the lack of universally recognized international legal personality the OSCE, the agreements (irrespective of their particular designation) entered by the Organization have not been considered as constituting international treaty in the sense of international law. In his famous essay on the legal nature of the *Agreement on the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe*[553] (Agreement) *Hafner* offered a thorough analysis in which he assessed whether the legal status of the OSCE exercised a feedback effect on the Agreement.[554]

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immunities", International Review of the Red Cross (2016), 97 (897/898), p. 319-344.

[552] Jasna Arsić-Đapo, "Another Brick in the Wall, Building up the OSCE as an International Organization One Agreement at a Time", International Organizations Law Review, 2017, Volume 14, Issue 2, p.414.

[553] Text reproduced in UN Doc. S/1998/978 of 20 October 1998; UN Doc. S/1998/962 of 16 October 1998.

[554] Gerhard Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday, edited by Benedek, Isak, Kicker, Frankfurt am Main: P. Lang, 1999, p.42.

The writer concluded that since the OSCE did not enjoy the status of an international organization *stricto sensu*, "it is therefore hardly conceivable that such an entity or one of its organs could conclude international treaty *stricto sensu* unless this power is explicitly conferred upon this organization (OSCE). The various instruments which elaborate the functions of the organs of the OSCE contain no reference to any kind of treaty-making power."[555] In reaching this conclusion, *Hafner* drew attention to the fact that host States of the OSCE institutions like Austria[556], Poland[557] and the Czech and Slovak Republic[558] could confer legal capacity (as a subject under national law) on OSCE institutions as well as relevant privileges and immunities by means of domestic legislative acts and not through international treaties.[559] However, recent agreements concluded with two host countries, Austria[560] and Poland[561], shed a new light not only into the treaty-making capacity of the OSCE but also to its recognition as a fully-fledged international organization by these Participating States. Poland requested that the agreement be registered with the Secretariat of the United Nations in accordance with Article 77/1 (g) of the Vienna Convention on the Law of Treaties. Conclusion of the two agreements clearly shows that both countries have recognized the international legal personality of the OSCE. The recent change in the treatment of the OSCE by the two host states has enabled them to conclude with the organization an agreement governed by international law, manifesting the relevance of recognition of international legal personality of an international organization with its treaty-making capacity.

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555 *ibid*, p.48.

556 See, *supra* Note 486.

557 Decision 62 of the Council of Ministers of 5 June 1992.

558 Law No.125 adopted on 5 March 1992.

559 Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", p.46.

560 *Agreement between the Republic of Austria and the OSCE Regarding the Headquarters of the OSCE* was signed on 14 June 2017 and entered into force in June 2018 replacing the Austrian Federal Law on the Legal Status of the Institutions of the OSCE in Austria of 1993. Federal Law Gazette (Bundesgesetzblatt) BGBl. III No.84/2018, 4 June 2018.

561 *Arrangement between the OSCE and the Republic of Poland on the Status of the OSCE in the Republic of Poland* was signed on 28 June 2017 and entered into force in 2018. Dziennik Ustaw Rzeczypospolitej Polskiej, dnia 16 marca 2018 r., Poz. 560.

c) International Responsibility of International Organizations

International organizations, as seen above, can perform actions within the limits of their powers. In order to be able to operate, international organizations are authorized to have legal powers to perform certain functions with legal consequences. While performing these functions, an international organization may incur responsibilities[562] to third parties. That responsibility arises from a principle of international law according to which "the breach of an engagement involves an obligation to make reparation in an adequate form".[563]

The topic of responsibility of international organizations requires distinction being drawn between responsibility under domestic law and responsibility under international law. While the former depends first and foremost on domestic law, falling out of the scope of our study, the latter depends on international law. *Amerasinghe* draws attention also to the distinction between international responsibility of international organizations and responsibility of organizations to their staff under their internal law. The writer notes that responsibility of organizations to their staff is also governed by international law, as a species of responsibility under international law, but that it does not involve the relations of organizations with states as such or between organizations[564].

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[562] The notion of "responsibility" is often confused with that of "liability". By *responsibility*, it is usually meant the consequences arising from the breach of an international obligation while *liability* means the duty to compensate damage in the absence of a violation of international law (See Pisillo Mazzeschi, Riccardo, "Forms of International Responsibility for Environmental Harm" in *International responsibility for environmental harm*, 1991, London, p.15). On distinction between 'liability' and 'responsibility', see also Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.387.

[563] *Case Concerning the Factory at Chorzow* (Claim for Indemnity), jurisdiction, [1927] Publ. PCIJ, Series A, judgment no. 8, p.21.

[564] Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.385

Hirsch notes that "principal aims of the law of international responsibility are similar both to the principal aims of the law of 'responsabilité civile' in civil law systems[565] and to those of the 'law of torts' in both common law and civil law systems. These aims are: (1) to prevent or minimize (by deterrence) breaches of obligations prescribed by law; (2) to provide remedies for those subjects whose legal right have been infringed due to such violations."[566]

As for the rationale for attribution of responsibility to international organizations, *Hirsch* first points to "the major role of international organizations in international relations, which leads inevitably to holding them responsible for unlawful acts, which they have committed".[567]Indeed, there is no sense in expecting international community to tolerate a situation in which an international organization violates binding international norms without bearing the consequences in the sphere of international responsibility.

The writer also maintains that possession of international legal personality is another reason and also a precondition for attribution of international responsibility to international organizations.[568] Indeed, it is generally recognized that the legal personality of international organizations entails a responsibility for their conduct. Referring to the Advisory Opinion of the ICJ in the *Reparation case, Hirsch* holds that capacity to bear international responsibility derives from being capable of possessing rights and obligations under international law.[569] Responsibility of an international organization is thus generally presented as the corollary of the ability of the organization to

[565] The writer notes that "responsabilité civile" in civil law systems, like the law of responsibility in international law, deals with the effects of non-performance of obligation, either contractual or non-contractual.
[566] Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties*, Dordrecht, 1995, p.7-8.
[567] *ibid.*, p.8.
[568] "An organization that does not have an international legal personality with regards to third parties will not incur any responsibility toward such parties on the international plane" 1975 (Vol.II) ILC Yearbook 89 (Hirsch, *The Responsibility of International Organizations Toward Third Parties,* p.10, footnote 50).
[569] *ibid*, p.9.

bring claims to enforce its rights under international law.[570] Bearing international responsibility is actually the logical consequence, it is argued, of possessing international legal personality; otherwise the separate legal personality of the organization, distinct from its member States, would be little more than a fiction.[571] As *Amerasinghe* noted, where international organizations have legal personality, they can be held responsible to other international persons because they have obligations at international law, just as organizations can demand responsibility of other international persons because they have rights at international level.[572]

Since *general principles of law*[573] constitute a ground for attribution of international responsibility to states, similarly, it is argued, that branch of international law constitutes a ground for attribution of international responsibility to international organizations, which are governed by the principles of international law.

In addition to general principles of law, it is further argued that *international customary law* requires that international organizations should be held responsible for violation of international law.[574] While the practice of international organizations and states satisfies the first element, namely *practice*, of international customary law, the second element, *opinio iuris*, is

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[570] Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions, op. cit.,* p.513. See, also, Andrew Stumer, "Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections", *Harvard International Law Journal*, Vol. 48, p.572.

[571] Schermers & Blokker, *International Institutional Law*, p.1583.

[572] Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.399.

[573] "The prevailing view today is that 'general principles of law' consists of rules common to the principal domestic legal system of the world which are appropriate for application in the international community" Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.9, footnote 42.

[574] ICJ, Advisory Opinion, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law."

evidenced by the overwhelming opinions of writers and the decisions of international institutions.[575]

i. Relevance of Principles of State Responsibility

As the notion of international responsibility of international organizations encompasses the responsibility they incur for their wrongful acts under international law, it accordingly corresponds in principle to the responsibility of states for internationally wrongful acts. As *Aréchaga* stated:

> *There is a general presumption that the principles concerning international responsibility in inter-state relations apply mutadis mutandis, though certain modifications are a necessary consequence of the inherent character of such institutions.*[576]

In other words, the principles governing the responsibility of international organizations are, so far as practical, the same as the principles governing the responsibility of states.[577] As *Shaw* notes, the precise nature of responsibility depends upon the circumstances of the case and, no doubt, analogies drawn from the state responsibility with regard to the conditions under which responsibility will be imposed.[578]

However, attention was drawn to the differences in attributing responsibility to international organizations. Unlike international organizations, states have international responsibility generally because of their duties flowing from the jurisdiction they exercise over their territory and personnel, or from their relations with other international persons governed by

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575 For the references evidencing the elements of practice and *opinio iuris*, see Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.9-10, footnotes 46-48.
576 Jimenez de Aréchaga E., "International Responsibility", Manual of Public International Law, (M.Sørensen ed., London,1968), p.595.
577 ILC, Special Rapporteur, *First Report on Responsibility of International Organizations*, UN Doc. A/CN.4/532 (Mar.26, 2003) (prepared by Giorgio Gaja).
578 Shaw, *International Law,* p.1311.

international law. As for international organizations, however, they have only a very limited sphere of jurisdiction (almost none to exercise over territory) when compared with states[579]. Yet this limited jurisdiction that they exercise, together with their relations with other subjects of international law could give rise to international obligations generating responsibility in the appropriate circumstances.[580]

Differences between states and international organizations gave rise to legal debate on whether the unique characteristics of international organizations called for or prevented the application of the rules designed to regulate state responsibility. Given the vacuum in that field, the International Law Commission, at its fifty-forth session (2002), decided to include the topic of *Responsibility of international organizations* in its program of work, and at the sixty-third session in 2011 adopted a set of 67 draft articles on the responsibility of international organizations (DARIO) on second reading, together with commentaries thereto.[581] While recognizing the responsibility of international organizations, the International Law Commission stated that "…the responsibility of international organizations is governed by rules which are not necessarily the same as those governing the responsibility of States."[582] However, it's noteworthy that the draft articles on responsibility of international organizations follow the articles on State responsibility very closely.[583] This has been one of the critiques brought against the work of the

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[579] Seyersted holds that this is a matter of fact, not of inherent legal capacity. For difference between states and international organizations with regard to organic, territorial and personal jurisdiction, see Seyersted, "Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?", p.20.

[580] Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.399.

[581] UN, International Law Commission, Draft Articles on the Responsibility of International Organizations, A/CN.4/L.778, 31 May 2011. See, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10) para. 87-88.

[582] [1975] *Yearbook of International Law Commission,* Vol. II, Part Two, at 89-90.

[583] "The draft articles are certainly close with regard to various issues on which there is no reason to make a distinction between States and international organizations… On the other hand, several draft articles contain

Commission, as it did not recognize sufficiently the difference between states and international organizations.[584] However, it has been held against that argument that it is quite reasonable to establish a similar legal regime dealing with breaches of international regime as it would lead to fragmentation of international law in that field if international organizations were to be treated completely different, and that importance of international organizations could decrease if that treatment were more encompassing than that foreseen for states.[585]

ii. Work of the International Law Commission on Responsibility of International Organizations

The International Law Commission included the topic of *Responsibility of international organizations* in its program of work in 2002, and adopted the draft articles on the responsibility of international organizations on first reading in 2009 and then on second reading in 2011. Given the similarities between the topics, ILC structured its work on responsibility of international organizations almost as identical with its work on state responsibility. It consists of five parts: Part I (Introduction); Part II (The Internationally Wrongful Act of an International Organization); Part III (Content of the International Responsibility of an International Organization); Part IV (The Implementation of the International Responsibility of an International Organization); Part V (Responsibility of a State in Connection with the Act of an International Organization); Part VI (General Provisions).

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significant changes in order to reflect the particular situation of international organizations. Moreover, various draft articles consider issues that were not dealt with in the articles on State responsibility." ILC, Special Rapporteur, *Eight Report on Responsibility of International Organizations*, UN Doc. A/CN.4/640 (Mar.26, 2011) (prepared by Giorgio Gaja).

[584] Jan Wouters/Jed Odermatt, "Are All International Organizations Created Equal? Reflections on the ILC's Draft Articles of Responsibility of International Organizations", Global Governance Opinions, March 2012. <www.globalgovernancestudies.eu>

[585] Milka Möldner, Responsibility of International Organizations-Introducing the ILC's , Max Planck Yearbook of United Nations Law, Volume 16, 2012, p.323

When addressing the issue of responsibility of international organizations ILC followed the same approach that it had adopted with regard to state responsibility. Therefore, like articles on state responsibility, the draft articles of responsibility of international organizations codifies the ‘secondary rules’ of international law, which consider the existence of a breach of an international obligation and its consequences, Thus, the ‘primary rules’ of international law, which establish obligations for international organization, remain out of the scope of the draft articles.[586]

The reason why international organizations should be held responsible for their wrongful acts have been explained in Article 3, which reads “Every international wrongful act of an international organization entails the international responsibility of that organization.”

The general principle stated above reflects the rule of international law. In addition to some writers regarding it as a general principle of law and some calling it as a rule of international customary law, some writers attribute responsibility to international organizations as a logical consequence of their having legal personality. ILC draws upon two references in this regard: it first refers to a report on UN peacekeeping operations, in which the United Nations Secretary-General stated:

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[586] Primary and secondary rules were first substantially utilized by ILC in its work on state responsibility in 1970. Primary norms are those “which in one sector of inter-State relations or another, impose particular obligations on States”, while secondary norms are those that are “concerned with determining the consequences of failure to fulfill obligations established by primary rules” (ILC, Second Report of State Responsibility, by Roberto Ago, Special Rapporteur-the Origin of International Responsibility, [1970] II, 179). The distinction in ILC’s work between primary and secondary rules of international law is generally attributed to Hart’s theory on these norms, which is said to have emerged from his criticisms of the Augustinian conception of law. In his thesis, Hart attaches crucial importance in jurisprudence to the difference between (primary) rules which impose obligations and duties, and (secondary) rules which confer powers. (Jonathan Cohen, Critical Notice: The Concept of Law by H.L.A.Hart, 71 MIND (1962), Issue 283, p.395-412)

"[T]he principle of responsibility-widely accepted to be applicable to international organizations- that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization)."[587]

The Commission also refers to the advisory opinion of the International Court of Justice on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, in which the Court said:

"[T]he Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

"The United Nations may be required to bear responsibility for the damage arising from such acts."[588]

It has been maintained that ILC's rationale for attribution responsibility to international organizations is driven by customary international law as it relied on abovementioned references that can be interpreted as a proof for *practice* on the one hand and *opinio iuris* on the other hand.[589]

It should be noted that the ILC's work on the responsibility of international organizations covers only organizations established by a treaty or other instrument governed by international law. Organizations without such legal instruments have been excluded from the work. Since most international

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[587] UN. Doc. A/51/389, p.4, para.6.
[588] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights,* Advisory Opinion, [1999] ICJ Reports, 88-89, para.66.
[589] Möldner, Responsibility of International Organizations-Introducing the ILC's DARIO, p.286.

organizations are established by treaties[590], it is in accordance with international practice to refer in the definition to treaties as constituent instruments[591]. In order to cover organizations established by states on the international plane without a treaty, ILC's work on the responsibility of international organizations refers, as an alternative to *treaties*, to *any other instrument governed by international law*. The wording is intended to include instruments, such as resolutions adopted by an international organization or by a conference of States. Therefore, inclusion of other instruments (those other than treaties) aims to cover international organizations established by States on the international plane without a treaty, such as Pan American Institute of Geography and History (PAIGH), the Organization of the Petroleum Exporting Countries (OPEC).[592]

Below are the main pillars of the ILC's work relevant to our topic:

1) Elements of an Internationally Wrongful Act

While Article 3 of ILC's work on responsibility of international organizations states the basic principle that "[E]very internationally wrongful act of an international organization entails the international responsibility of the international organization", Article 4 specifies the conditions required to establish the existence of an internationally wrongful act of international organizations as follows:

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[590] According to Article 2 (1) (a) of the *Vienna Convention on the Law of Treaties*, treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[591] Brölmann notes that "the constituent instrument is seen either as a treaty (with which the organization is created), or as a constitution underlying the independent existence of the organization". Thus, the organization's constitutional order has dual image: an open, inter-state regime as well as an independent constitutional order, which is to some extent 'internal' and 'distinct from international law'. Brölmann, *The Institutional Veil in Public International Law*, p.113-115.

[592] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 2, Commentary 4).

> There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
>
> (a) Is attributable to the international organization under international law; and
>
> (b) Constitutes a breach of international obligation of that organization.

The principle stated above is identical with the principle applicable to States. As in the case of States, the first element of an internationally wrongful act of an international organization is the attribution of conduct to an international organization. Conduct attributable to international organizations is intended to cover both act and omissions of the organization.

The second condition for the existence of an internationally wrongful act of an international organization is that the conduct attributable to an international organization should constitute a breach of an international obligation of that organization. This obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization.[593]

Neither Article 4 of ILC's work on responsibility of international organizations nor the corresponding article on State responsibility includes *damage* among the essential elements of responsibility. However, as *Hirsch* noted, ILC took the view that "any breach of an international obligation…involves some kind of 'injury' to that other state."[594] Thus, the writer noted, "the Commission did not wholly exclude the role of the element of damage in State responsibility but preferred the opinion according to which damage is not a *distinct* element for the establishment of such responsibility:

[593] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 4, Commentary 2).
[594] [1973] *Yearbook of International Law Commission,* Vol. II, 183.

damage (both moral and legal) is inherent in any violation of international law and becomes part of the breach of obligation."[595]

2) Rules of Attribution of Conduct to an International Organization

The general rule is that the only conduct attributable to an international organization at the international level is that of its organ or agent irrespective of the position they hold. Article 6 lays down the general rule as follows:

> 1.The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.
>
> 2. Rules of the organization shall apply to the determination of the functions of its organs or agents.

The term *organ of an international organization* is defined as "any person or entity which has that status in accordance with the rules of the organization", while *agent of an international organization* is defined as "an official or other persons or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom organization acts.[596]

Conduct is attributable to an international organization only when an organ or agent exercises functions that have been given to him/her. In other words, conduct is not attributable to an international organization if an organ or agent acts in a private capacity. The position of the organ or agent is irrelevant in attribution of the conduct to the organization.

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[595] Hirch, *The Responsibility of International Organizations Toward Third Parties*, p.12.

[596] ILC Draft Article 2 (c) and (d).

Ultra vires conduct of organs or agents of an international organization is dealt with in Article 8 as follows:

> The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

Whether an organ or agent has undertaken a certain conduct within, or exceeding, his/her authority is to be decided in accordance with the rules of the organization. However, application of the rules of the organization is not the only criterion. In exceptional cases, functions may be considered as given to an organ or agent even if this was not pursuant to the rules of the organization.[597]

It is only when an international organization exercises 'effective control' over the conduct of an organ of a state or an organ or agent of an international organization that is placed at its disposal that such a conduct is considered under international law an act of the former organization.[598] For the conduct to be attributed to the receiving state, it must be under its exclusive direction and control, rather than on instructions from the sending state. The United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force.[599]

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[597] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 8, Commentary 2).

[598] Article 7 governing such a conduct reads as follows: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct". See *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, where the EcrtHR referred to the Commission's work.

[599] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 7 Commentary 6).

If an international organization acknowledges and adopts as its own a certain conduct which otherwise would not be attributable to that organization, attribution then is based on the attitude taken by the organization with regard to a certain conduct. In such a case the conduct is attributed to the organization to the extent acknowledged and adopted by it.[600]

3) Breach of an International Obligation

There is a breach of an international obligation when conduct attributed to an international organization as a subject of international law amounts to a failure by that organization to comply with an international obligation incumbent upon it. This principle is stated in Article 10 as follows:

> 1. There is a breach of an international obligation by an international organization when an act of that organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.
> 2. Paragraph 1 includes the breach of an international obligation that may arise for an international organization towards its members under the rules of the organization.

For an international organization, as in the case of states, international obligations may arise from a customary rule of international law, a treaty or a general principle applicable within the international legal order. If an act of the organization conflicts with its international obligation, regardless of the origin or character of the obligation concerned, then there is a breach of an international organization.

[600] Conduct acknowledged and adopted by an international organization as its own is governed by Article 9 as follows: "Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own."

In addition, rules of the organization[601] are a source of law where many of its obligations are likely to arise from. It has been questioned whether all the obligations arising from the rules of the organization are to be treated as international obligations. While many authors subscribe to the view that the rules of treaty-based organizations constitute part of international law[602]some authors have drawn attention to the distinction between internal law of the organization and international law.[603]

Holding international organizations subject to national laws would be detrimental to the interests of international community. Moreover, given the composition of their staff, who are mostly not from the hosting state, it makes sense that the internal law of international organizations is treated as distinct from national law. However, one should be cautious to draw a similar distinction between international law and internal law of international organizations. *Sui generis* as the internal law of international organizations may be called, it would be logical to treat it as part of international law since

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[601] Article 2 (b) reads: "Rules of the organization means, in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization."

[602] Reference has been made to M. Decleva, *Il diritto interno delle Unioni internazionali* (Padova: Cedam, 1962); G. Balladore Pallieri, "Le droit interne des organisations internationales", *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol.127 (1969-II), p.1.; and P. Daillier and A. Pellet, *Droit international public* (Nguyen Quoc Dinh), 7th ed. (Paris: L.G.D.J., 2002), pp.576-577. See, [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 10, Commentary 5).

[603] Reference has been made to L. Focsaneanu, "Le droit interne de l'Organisation des Nations Unies", *Annuaire Français de Droit International,* vol. 3 (1957), p. 315 ff.; P. Cahier, "Le droit interne des organisations internationales", Revue Générale de Droit International Public*,* vol. 67 (1963), p. 563 ff. and J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", Recueil des Cours..., vol. 179 (1983-I), p. 145 at pp. 222–225; Ch. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", ACIL Research Paper No. 2011-03 (SHARES Series), www.sharesproject.nl; R. Bernhardt, "Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen", Berichte der Deutschen Gesellschaft für Völkerrecht, vol. 12 (1973), p. 7. See [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 10, Commentary 5). See also V.I. Margiev, "On Legal Nature of Internal Law of International Organizations", 15 Soviet YBIL (1980), pp.99.

the basis of the internal law arises from will of the states as reflected in the constituent document of the organization concerned. The rules established in the course of the activities carried out by the organization are exercised by the organs whose powers are traced back to the will of the founding states. Moreover, in most cases member states join not only in establishing the rules but also in enforcing them. In any case, the legal nature of the rules of international organizations is controversial, and breaches of obligations under the rules of the organization are not necessarily breaches of obligations under international law.[604]

As regards an organization's obligations towards its members, the ILC underlined that a specific reference has been made in Article 10 to the "breach of an international obligation that may arise for an international organization towards its members under the rules of the organization" since they constitute the largest category of international obligations flowing from such rules, and noted that the possibility that other rules of the organization may form part of international law is not excluded.[605]

4) Responsibility of an International Organization in Connection with the Act of a State or Another International Organization

An international organization may be held responsible in cases where it aids or assists[606], directs or controls[607], or coerces[608] a state or another

[604] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 10, Commentary 5).
[605] *ibid,* (Article 10, Commentary 8).
[606] Article 14 reads: "An international organization which aids or assists a state or another international organization in the commission of an internationally wrongful act by the state or the latter organization is internationally responsible for doing so if: (a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization."
[607] Article 15 reads: "An international organization which directs and controls a state or another international organization in the commission of an internationally wrongful act by the state or the latter organization is internationally responsible for that act if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

international organization in the commission of an internationally wrongful act. Draft articles governing responsibility of international organizations in such cases correspond, with a few changes, to the pertinent provisions of ILC's work on state responsibility.

International responsibility of an aiding or assisting international organization arises only if it knew the circumstances of the internationally wrongful act committed and provided that the act would be internationally wrongful if committed by the organization. The Commission also required that aid or assistance should contribute significantly to the commission of the act for international responsibility of the organization in question to arise.[609]

The same conditions apply for international responsibility to arise of an international organization exercising direction and control over the commission of an internationally wrongful act. Therefore, the organization in question must be aware of the circumstances and the act would need to be internationally wrongful if committed by the organization itself. The words *direct* and *control* are to be interpreted narrowly. The Commission noted that "the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern", while "the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind."[610]

In addition to circumstances described above, an international organization may be held responsible if it coerces a state or another

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(b) the act would be internationally wrongful if committed by that organization."

[608] Article 16 reads: "An international organization which coerces a state or another international organization to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced state or international organization; and (b) the coercing international organization does so with knowledge of the circumstances of the act."

[609] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 14, Commentary 4).

[610] *ibid,* Article 15, Commentary 4.

international organization to commit an internationally wrongful act. However, unlike in the case of these circumstances, "act of coercion need not be wrongful *per se* for international responsibility to arise for a coercing international organization" but the act of the coerced entity.[611] Another condition for international responsibility of a coercing international organization to arise, as in the case of abovementioned circumstances, is that that organization does so with knowledge of the circumstances of the act. Given that Article 16 corresponds to Article 18 on responsibility of states for internationally wrongful acts, the term *coercion* needs to be given a narrow interpretation as in the case of responsibility of states.[612] Therefore, "a binding decision by an international organization could give rise to coercion only under exceptional circumstances."[613]

Furthermore, ILC's work addresses the possibility of an international organization circumventing its international obligations both through its decisions and authorizations, an issue that has not been covered in its work on state responsibility.[614] Circumvention is defined as implying "an intention on

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[611] *ibid,* Article 16, Commentary 3.

[612] The Commission noted that "coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less then conduct which forces the will of the coerced state will suffice, giving it no effective choice but to comply with the wishes of the coercing State." See the Commentary for responsibility of States, Article 18 (2).

[613] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 16, Commentary 4).

[614] Article 17 reads: "1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed."

the part of the international organization to take advantage of the separate legal personality of its members."[615]

As stated above, the rules applicable to inter-state relations apply, with relevant modifications, to govern responsibility of international organizations in connection with an act of a state or other international organization, which arises from customary international law. Questions of responsibility emerge in particular when an act of the state or the international organization concerned conflict with international law. It is against this background that in his letter concerning the support given by the United Nations Mission in the Democratic Republic of the Congo (MONUC) to the Armed Forces of the Democratic Republic of Congo (AFDRC), the UN Legal Counsel drew attention to the risk of violations by the latter of international humanitarian law, human rights law and refuge law, and recommended that the United Nations should cease providing support to any AFDRC operation if it had the reasons to believe that the risk is likely to materialize.[616] The warning to cease providing support to AFDRC should be read in conjunction with the UN's refusal to assume responsibility for acts not committed under its authority in Congo.

5) Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations Toward Third Parties

Apart from responsibility of a state in connection with an act of an international organization as stated in Articles 58 to 61[617], a state member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act; or (b) it has led the injured party to rely on its responsibility.[618] The international

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[615] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 17, Commentary 4).
[616] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 14, Commentary 6).
[617] Aid or assistance (Article 58), direction and control (Article 59), coercion (Article 60), and circumvention of international obligations (Article 61).
[618] ILC Draft Article 62 (1).

responsibility of a state, which is thus entailed, is presumed to be subsidiary.[619]

The ILC noted that "acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the organization"[620]. As long as the state has not accepted its responsibility for the act, nor has it led the injured party to rely on its responsibility, the state would not be held responsible for an international wrongful act committed by the organization merely due to its membership status.

Whether there may be circumstances where the institutional veil of international organizations should be pierced is a contentious issue and the writers are divided on that. One such circumstance would be, as *Klabbers* suggests, violation by the organization of the most fundamental principles of international law, for instance by committing genocide or aggression.[621]

The Institute of International Law, on the other hand, adopted a Resolution on "The legal Consequences for Member States of the Non-fulfillment by International Organizations of Their Obligations toward Third Parties" in 1995.[622] The resolution deals with issues arising in the case of an international organization possessing international legal personality distinct

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[619] ILC Draft Article 62 (2). However, "international responsibility of the international organization of which the State is a member remains unaffected. Acceptance of responsibility by a State could entail either subsidiary responsibility or joint and several responsibility." [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 62, Commentary 13).

[620] [2011] *Yearbook of International Law Commission,* Vol. II, Part Two (Article 62, Commentary 6).

[621] Klabbers, *An Introduction to International Institutional Law*, *op. cit.* p.291. Klabbers, also mentions of a circumstance where the organization clearly abuses its separate legal personality and hides behind the corporate veil as well as a situation where an organization is dominated to such an extent by a single state that it becomes virtually that single state's alter ego (USSR *vis-à-vis* the Warsaw Pact; USA *vis-à-vis* the NATO).

[622] *Annuaire de l'Institut de Droit International,* Vol. 66-II (1996)

from that of its members, and describes liability as including both concurrent[623] and subsidiary[624] liability.

According to the Resolution, "the obligations that an international organization has to third parties may arise under international law (including the Rules of the organization) or under the law of a particular State. Whether States have concurrent or subsidiary liability for the fulfillment of obligations of an international organization due solely to their membership in that organization is a matter of international law, whether a claim by a third party is made in an international court or tribunal or a national court."[625]

The Resolution provides that, except for what is provided for in Article 5[626], "there is no general rule of international law whereby states members have, due solely to their membership, concurrent or subsidiary liability, for the obligations of an international organization of which they are members."[627]

The Resolution also provides that "no liability of a state arises by virtue of having participated in the establishment of an international organization to serve the state's own purposes, or the fact that the act of the

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[623] For the purposes of the Resolution, *concurrent liability* means a liability that allows third parties having a legal claim against the international organization to bring their claim, at their choice, against either the organization or its members. (Resolution, Article 2 (b) (i)).
[624] For the purposes of the Resolution, *subsidiary liability* means a liability by which third parties having a legal claim against the international organization will have a remedy against States members only and if when the organization defaults. (Resolution, Article 2 (b) (ii)).
[625] Resolution, Article 4 (a) and (b).
[626] Article 5 reads: "(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization; (b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights; (c) In addition, a member state may incur liability to a third party (i) through undertakings by the state or (ii) if the international organization has acted as the agent of the state, in law or in fact."
[627] Article 6 (a).

organization giving rise to its liability to a third party is claimed to be *ultra vires*."[628]

Responsibility of member states for the non-fulfilment by international organizations of their international obligations toward third parties has also become a subject of judicial review. The arbitral award rendered by the International Chamber of Commerce (ICC) in 1984 on the *Westland Helicopters v. Arab Organization for Industrialization (AOI) and Others* case [629] is the first judicial decision dealing with the issue[630]. The arbitral award was referred by ILC in its work on international responsibility of international organizations as an example of member states based on reliance engendered by member states.[631] While the ruling of ICC Arbitral Tribunal was based on

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[628] Article 6 (c).

[629] *Westland Helicopters v. Arab Organization for Industrialization and Others* (International Chamber of Commerce, Arbitral Award, ICC Case No. 3879), XI Y.B. Com.Arb. 127 (1986); 80 International Law Reports (1989) ("Westland Case ICC" 1984). See also International Law Materials, 23 (1984) p.1071.

[630] "Arab Organization for Industrialization (AOI), was established by a treaty concluded between the United Arab Emirates, Saudi Arabia, Qatar and the Arab Republic of Egypt, in April 1975. The object of the AOI was to develop an arms industry for the benefit of the four member States. On 27 February 1978, the AOI and Westland Helicopters Ltd. (Westland), a company subject to English Law, which manufactures helicopters, concluded a contract called the "Shareholders Agreement". The aim of the Agreement was to create a "joint stock company" of which the AOI was to have %70 and Westland %30 of the shares. The parties intended that this company, "The Arab British Helicopter Company" (ABH) should serve as the legal base for the creation of a business which would manufacture, overhaul, carry out quality control on and sell the "Lynx" helicopters developed by Westland. The Shareholders Agreement provided for an arbitration clause according to which any controversy or dispute that might arise between the parties in connection with the interpretation, application or effect of the Agreement would be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Due to some political developments, Arab Emirates, Saudi Arab and Qatar declared, in May 1979, that they wished to liquidate the AOI, that a liquidation committee would be set up, and that all investments in the armaments business in question would be discontinued. Egypt held that the AOI was still in existence as a legal person". (Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.107-108)

[631] ILC Draft Article 62, Commentary 9. The Commission noted that when ruling on the Westland Case the panel had found that special circumstances of the case invited "the trust of third parties contracting with the organization as

the rules of international law (mainly *general principles of law* and *good faith*), subsequent decisions given by Swiss Courts[632] were based on the domestic law of Switzerland.

After AOI was dissolved for political reasons by the three Member States (UAE, Saudi Arabia and Qatar), Westland started arbitral proceedings against AOI, the Arab British Helicopter Company (ABH), a joint stock company created by AOI and Westland, and all four Member States, including Egypt, based on an arbitration clause, provided for in the Shareholders Agreement concluded between AOI and Westland in 1978, claiming that the organization and its members were under a joint and several liability to make payment to the claimant.[633] Egypt and ABH participated in the proceedings while other respondents did not appear. Egypt objected to the competence of the arbitral tribunal claiming that there was no valid arbitration clause binding it to arbitrate with Westland, and contended that the organization was a legal entity separate from its members, which were no more than third parties. The Tribunal dismissed this argument in its interim award and upheld its jurisdiction stating as follows:

> These observations show that the designation of an organization as 'legal person' and the attribution of an independent existence do not provide any basis for the conclusion as to whether or not

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to its ability to cope with its commitments because of the constant support of the member States." However, when upholding the decision rendered by the Geneva Court of Justice, the Federal Supreme Court stated that "the strict control of a juridical person by the State, or a close link between the two, is not sufficient to reverse the presumption arising from the absence of the State's signature to the arbitration clause..."

[632] *Arab Organization for Industrialization and Others v. Westland Helicopters*, (Court of Justice, Geneva, 23 October 1987) 80 International Law Reports (1988) ("Westland Case, Geneva Court") and *Westland Helicopters v. Arab Organization for Industrialization and Others* (Federal Supreme Court, Switzerland, 19 July 1988) 80 International Law Reports (1988) ("Westland Case, Federal Court").

[633] Westland Case, ICC, *supra* Note 629.

> those who compose it are bound by obligations undertaken by it.[634]

The Tribunal also held that attribution of legal personality to AOI would not affect the liability of the member states since the structure of the organization was similar not to a limited liability company but to a general partnership. The reasoning was stated as follows: "A partner is bound by the arbitration clause entered into by a general partnership (*société en nom collectif*) of which he is a partner, and the co-contracting party may rely upon the arbitration clause if he brings his action against the partner instead of bringing it against the partnership."[635]

Having dismissed the respondents' objection to its competence the Tribunal examined the constituent documents of AOI, which it described as an entity similar to general partnership, and held the member states responsible for the debts of the organization, as there was no specific provision in those documents suggesting otherwise. The Tribunal stated its reasoning as follows:

> In the absence of any provision expressly or impliedly excluding the liability of the four states, this liability subsists since, those who engage in transactions of an economic nature are deemed liable for the obligations which flow therefrom. In default by the four states of formal exclusion of their liability, third states could legitimately count on their liability. This rule flows from general principles of law and from good faith.[636]

Egypt applied to the Court of Justice of Geneva for the annulment of the arbitral award contending that the ICC Tribunal did not have jurisdiction over Egypt since it hadn't signed the arbitration agreement, and the Court

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[634] *ibid.* p.613.
[635] Westland Case, ICC, *supra* Note 629, XI Y.B. Com. Arb. 127 (1986) at 129.
[636] *ibid.*

annulled the award in relation to Egypt (the award remained valid vis-à-vis the defaulting states: UAE, Saudi Arabia and Qatar) for lack of jurisdiction. The Court held that "an arbitration clause cannot be opposed to a party which did not sign it unless this party is nevertheless bound by the signature of an entity or a third party, on the basis of an act granting to that entity or third party the power to refer a dispute to arbitration." The Court also held that "AOI's legal personality, together with its juridical, financial and procedural autonomy, including specific power to conclude arbitration clauses or agreements…are the evident and unequivocal indications that AOI was totally independent from the founding states." The Court also did not agree with the arbitrators' observation that AOI was similar to a general partnership[637].

Westland lodged an appeal against the decision rendered by the Geneva Court of Justice, and the Federal Supreme Court upheld the decision according crucial importance to the constituent instruments of the AOI and noting that the organization enjoys total legal independence[638].

In his analysis of the arbitral award, *Hirsch* drew attention to two conclusions: (1) The doctrine of *limited responsibility* was clearly rejected by the ICC Tribunal. Recognition of an international organization as having a separate personality does not relieve the members of that organization of their responsibility. (2) While the Tribunal does not clearly establish the nature of the responsibility under which the members are held responsible, its reasoning, however, suggests a *secondary responsibility* for the member States of international organizations.[639]

As for the decisions of the Swiss Courts, *Hirsch* underlines the role of the constituent instruments that has been taken into consideration especially in the decision of the Federal Supreme Court. According to the judgments of the Swiss Courts, the responsibility of member States towards third parties should

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[637] *ibid*., p. 643.
[638] Westland Case, Federal Court, *supra* Note 632.
[639] Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.111-112.

be determined almost exclusively in accordance with the constituent instruments. The second principle emerging from these judgments is that when the constituent instruments show that the organization is a legal entity distinct from its member States, this separation exempts the members from their liability toward third parties. This rule holds even in cases where the latter exercise *strict control* over the organization.[640]

As seen above, responsibility of the members of an international organization for the obligations undertaken by the organization itself has been a subject of judicial review also in a series of court decisions in several states in *International Tin Council Case.*[641] Unexpected overproduction of tin and financial mistakes brought ITC to collapse in 1985 and the organization failed to pay its obligations. The creditors filed lawsuits mostly at English courts where they claimed that there was direct, or alternatively, subsidiary or complementary liability of member States. The claim of direct responsibility was built upon the assumption that ITC had no legal personality distinct from its members. Therefore members of ITC were jointly and severally responsible from the contracts concluded with the organization. The plaintiffs submitted, alternatively, that ITC's legal personality, if it were to be acknowledged, was similar to that of quasi-partnership, in which case the members would be held responsible for the debts of the organization either concurrently or secondarily. The plaintiffs also resorted to the claim of agency, mainly according to English law, and submitted that member states were responsible for the debts of the organization since ITC had contracted as an agent of its members.

The submission of direct responsibility and the claim of agency were dismissed in two legal proceedings conducted in High Courts, where it was acknowledged that ITC had legal personality under international law. Both judges also examined the responsibility of member states in English law and

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[640] *ibid.*
[641] See *supra* Notes 327-341.

concluded with some differences in reasoning that membership alone would not suffice to hold member states responsible for the debts of ITC.[642]

When the case was brought before the Court of Appeal, the three judges concurred with the judgments of the High Courts as regards the first (direct responsibility) and the third (agency) submissions, however, their opinions differed on whether ITC member states would bear concurrent or secondary responsibility.

Having noted that the constituent documents (ITA 6) of the organization did not contain any provision on member states' responsibility of the ITC, judge *Nourse L.J.* examined the intentions of the founding States paying attention in particular to the extensive control retained by ITC members in the organization of ITC's work. His examination of the intentions of the members and his observation of the facts on the conduct of business drove him to conclude that ITC's members were jointly and severally responsible for the obligations of the organization.[643]

Judge *Gibson L.J.*, likewise, dismissed the submission concerning the direct responsibility of the ITC's member States toward third parties under *English* law, and he also ruled that "under international law, where a legal personality existed, the primary responsibility of the members was excluded irrespective of the existence of any express statement of non-liability."[644]

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642 Maclaine Watson v. Department of Trade and Industry (High Court), 80 *International Law Reports* 39, 46 (1989) (International Tin Council Case, High Court); Rayner v. Department of Trade and Industry (High Court), 77 *International Law Reports* 56, 74 (1988) (International Tin Council Case, High Court) (Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.115-116).
643 Maclaine Watson v. Department of Trade and Industry, 80 *International Law Reports* 47, 147 (1989) (International Tin Council Case, Court of Appeal), Nourse L.J., at 145 (Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p. 117).
644 *ibid*, at 163-173 (Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.118).

Judge *Kerr L.J*, dismissed the responsibility of the ITC's members basing his conclusion on English law. As to secondary responsibility of ITC's members under international law, he was of the opinion that international law did not provide any principle concerning secondary responsibility of the members of an international organization. He said that he could not: "find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable-let alone jointly and severally- in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name[645]". With *Kerr L.J.* concurring with the opinion of *Gibson L.J.*, the Court of Appeal dismissed the appeals.

The Court of Appeal's decision was upheld by the House of Lords, which took a strict dualist approach in assessing the submissions advocated by the plaintiffs and therefore based its judgment mainly on English law[646]. The non-justiciability principle also played a role for adopting that approach. It was suggested that the House of Lords relied primarily on domestic law, rather than international law, because of the uncertainties as to the content of the international rule governing the question of the responsibility of the members of an organization.[647]

The Lords noted that the Order of 1972 created in English law a separate legal person independent from its members and thus ruled that the first decision (direct responsibility) was to be rejected. They also dismissed the third submission (of agency) since ITA 6, not being incorporated into English law, could not be relied upon for altering the provisions of the

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[645] *ibid*, at 109; Commentary, Article 62 (4).
[646] Rayner v. Department of Trade and Industry (House of Lords), 81 *International Law Reports* 671 (1990) (International Tin Council Case, House of Lords).
[647] Paolo Palchetti, "Maclaine Watson & Co. Ltd v. International Tin Council", 26 October 1989, UK House of Lords, 81 ILR 670, *Judicial Decisions on the Law of International Organizations*, Edited by Cedric Ryngaert, Ige F. Dekker, Ramses A. Wessel, Jan Wouters, 2016, p.36 (28-37).

Order.[648] The second submission (*of concurrent or secondary responsibility*) was also dismissed since English law, mainly the Order of 1972, clearly rejected the responsibility of the members for contractual debts incurred by the ITC. As regards the international law aspect of the question, *Lord Oliver* stated that he was not convinced that there existed a rule in international law obliging members of an international organization to discharge the debts of the latter.[649] Likewise, *Lord Tempelman* stated: "No plausible evidence was produced of the existence of such a rule of international law before or at the time of ITA 6 in 1982 or afterwards."[650]

Importance of the judgment of the House of Lords, for the study at hand, comes not only from the fact that the court examined whether members of an international organization could be held responsible for the organization's debts taking into consideration the legal consequences that the organization in question had legal personality distinct from its members, but also from the fact the principle of non-responsibility of members from acts of the organization was registered in case law, later to be weakened by ILC's work in exceptional situations.

Several of the ITC's creditors brought two actions against the Council and the Commission of the European Community in the EC Court of Justice.[651] Upon objection of inadmissibility put forward by the Community's institutions and the UK, the Court decided to examine the admissibility of the cases first; but the cases were withdrawn before the judgment was rendered.

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[648] *ibid*, at 681-717 (Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.120).
[649] *ibid*, at 715 (Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.121).
[650] *ibid*, at 675.
[651] Case 241/87, MacLaine Watson v. Council and Commission or the European Communities, 30 *Official Journal of the European Communities* (No.C 262) 5 (1987); Case 19/89, AMT (Tin Recoveries) v. Council and Commission or the European Communities, 32 *Official Journal of the European Communities* (No. C 62) 7 (1989).

Following observations were made by *Hirsch*, based on the judicial decisions rendered in the Westland and the International Tin Council cases:[652]

(1) Judicial decisions do not provide a unified attitude on the question of the members' responsibility under international law. Thus, the existing judicial decisions have not created a customary norm in international law.

(2) While most national judges are influenced mainly by domestic law, international arbitrators based their decision on sources of international law.

(3) All the judicial decisions dealt with the responsibility of member states for *contractual* obligations of the international organization. The topic of non-contractual obligation is yet to be discussed.[653]

As we have seen international law does not provide a principle where responsibility of member states would arise for international wrongful act of international organizations unless it can be established from their constituent instruments. Neither does international customary law place such a responsibility on member states. However, general principles of law and good faith may help justice being served in particular where denying any form of relief to injured third parties, in the name of separate legal personality of the organization, would be too unfair. This is true, for example, when the organization led the injured party to rely on its responsibility, as formulated by the ILC. It should be noted here, however, that the discussion revolves around responsibility of member states towards third parties arising from failure on the part of international organizations, which are legal persons, in

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[652] Hirsch, *The Responsibility of International Organizations Toward Third Parties*, p.124-125.
[653] For responsibility of member states arising from non-contractual obligation of an organization, see also Behrami and Behrami v. France, Grand Chamber of the ECrtHR, 28 September 2000, Application, No. 71412/01; Saramati v. France, Germany and Norway, Grand Chamber of the ECrtHR, No., 28 September 2001, Application No. 78166/01; Banković and Others v. Belgium and 16 Other Contracting States, Grand Chamber of the ECrtHR, 12 December 2001, Application No. 52207/99.

honoring their obligations. The question of responsibility of member states in the case of organizations without legal personality will be discussed in Part II.

iii. Work of the International Law Association on Accountability of International Organizations

Apart from the ILC's work, a broader work has been carried out by the International Law Association (ILA) on "accountability of international organizations".[654] The final report of the Committee of Accountability of International Organizations was adopted by ILA, at a conference held in Berlin, 16-21 August 2004.[655] ILA's focus *ratione personae* was on intergovernmental organizations, which were created under international law by an international agreement amongst States, possessing a constitution and organs separate from its Member States. The Committee's work did not cover intergovernmental organizations which do not possess a legal personality of their own in international law.

Accountability in the report "refers to the various forms, practices, and institutions whose purpose is to hold public officials (and other bodies) responsible for their actions and for the outcomes of these actions."[656] A distinction exists between the concept of *responsibility* of international organizations and that of *accountability* of international organizations, the latter borrowing notions from broad administrative law. Rather than insisting solely on the principles of responsibility and liability for internationally wrongful acts, the principle of accountability rests upon the notion that the

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[654] International Law Association, *Committee on Accountability of International Organizations*, Final Report, (Berlin Conference).
[655] ILA Resolution 1/2004. The Committee was established in May 2016, with the mandate: "to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international organizations to their members and to third parties, and of members and third parties to such organizations."
[656] Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction*, Oxford University Press, 2005, p. 197.

lawful application of power, too, imports accountability for its exercise.[657] For that reason, while ILC's work on responsibility of international organizations excludes liability for harm resulting from lawful acts and is strictly limited to responsibility for a breach of an international obligation, ILA's broader approach addresses various forms of accountability (legal, political, administrative and financial) through three interrelated and mutually supportive levels as the following:

"[First level] the extent to which international organizations, in the fulfillment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility;

[Second level] tortuous liability for injurious consequences arising out of acts or commissions not involving a breach of any rule of international and/or institutional law (e.g. environmental damage as a result of lawful nuclear or space activities);

[Third level] responsibility arising out of acts or omissions, which do constitute a breach of a rule or international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are *ultra vires* or violate the law of employment relations)."[658]

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[657] Shaw, *International Law, op. cit.*, p.1317. It is noted in the report of the ILA that "as a matter of principle, accountability is linked to the authority and power of an IO. Power entails accountability, that is the duty to account for its exercise". International Law Association, *Committee on Accountability of International Organizations*, Final Report, (Berlin Conference) at 5.

[658] International Law Association, *Committee on Accountability of International Organizations*, Final Report, (Berlin Conference) at 5.

ILA's Recommended Rules and Practices (RRPs) based upon principles, objectives and concepts common to all intergovernmental organizations are listed as the following[659]:

i) the principle of good governance;

ii) the principle of good faith;

iii) the principles of constitutionality and institutional balance;

iv) the principle of supervision and control;

v) the principle of stating the reasons for decisions or a particular course of action;

vi) the principle of procedural regularity;

vii) the principle of objectivity and impartiality; and

viii) the principle of due diligence.

Promising as the abovementioned principles may be for holding international organizations accountable for their acts or omissions, warning comes from *Klabbers* that "even such neutral-looking devices as administrative law principles may still give rise to profound political disagreement and widely differing interpretations."[660]

H. Conclusions

As explained above, discussions relating to legal attributes of international organizations have been heavily influenced by the progressive development of such organizations aiming to address various needs of societies that have emerged due to ever-increasing relations among themselves. Whether international organizations are subjects of international law, in addition to the traditional subjects -states- is a question already answered in the affirmative. While states remain as the primary subjects of international law with the most extensive legal capacities, other entities, including international organizations, are widely recognized as subjects of

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[659] *ibid*., p.8-15.

[660] Jan Klabbers, *International Law*, Second Edition, Cambridge, 2017, p.149. The writer notes that many of the administrative law principles originated in Western countries and are thus not beyond political suspicion.

international law with, however, limited legal capacities, when compared with those of states, granted under international law.

As subjects of international law, international organizations are capable of possessing international rights and duties and have the capacity to maintain their rights by bringing international claims. This has been endorsed by the landmark decision of the ICJ in *Reparation* case, which invalidated the state-centric arguments that only states are subjects of international law and therefore only states have international legal personality, an argument defended in the past mostly by Soviet writers.

The Court's advisory opinion was rendered in the absence of an express provision of the Charter that equips the United Nations with international legal personality. In other words, the decision was reached in the absence of such an express provision, but at the presence of a constituent instrument. Therefore, the Court's advisory opinion does not shed light to the question of international organizations devoid of a constituent instrument.

We have seen above how theories on legal personality of international organizations apply both when there are express or implied provisions on legal personality of an international organization in its constituent instrument and when there's no such provision. We have also seen the application of objective criteria to determine an organization's legal status without resorting to the founders' will, albeit that practice would also require examination of the constituent instrument to determine whether the organization possesses its own will distinct from that of the founders. The question remains, however, whether an international organization devoid of a constituent instrument can possess international legal personality or acquire it in the course of time. This question will be dealt with in the second part of the thesis, which will exclusively examine legal attributes of an international organization, the OSCE, founded not by a treaty but a serious of non-legally binding instruments, including the *Helsinki Final Act* of 1975.

PART II: THE ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE

A- A Brief History of the OSCE

With 57 participating States[661] from Europe, Central Asia and America, the OSCE is the world's largest regional security organization, bringing comprehensive and co-operative security to a region that stretches from Vancouver to Vladivostok. It constitutes a forum for cross-border cooperation, political negotiations, standard-setting and decision-making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation, and puts the political will of the participating States into practice through its unique network of field missions.[662]

Originally created as Conference on Security and Co-operation (CSCE) in Europe two years after coming together of representatives of 35 Eastern, Western and non-aligned countries in Helsinki in 1973, in the midst of the Cold War, the OSCE stands as a *regional arrangement* dealing with such matters relating to the maintenance of international peace and security, as stated in the UN Charter.[663]

History of the OSCE bears similarity to the history of international organizations in particular in terms of various needs arising from international relations that required cooperation between States, efforts for institutionalizing the entities thus created as well as the dynamic process of transformation of loose gatherings into fully-fledged international

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[661] Since the Helsinki process began with States *participating* in the Conference on Security and Co-operation in Europe, which opened at Helsinki on 3 July 1973, the States that have done so have since been denominated as such. Preference of participating States to Member States indicates how participating States intended to treat what years later turned out to be Organization of Security and Co-operation in Europe. See the more detailed discussion below (Part II-B).
[662] Visit the OSCE's official home page: www.osce.org
[663] UN Charter, Chapter VIII. See, *supra* Note 690.

organizations.[664] The question remains, however, whether the OSCE, which started its journey as an improbable gathering of 35 countries and whose *modus operandi* has since focused on the political side of international relations has reached that final stage despite the fact that it possesses many of the traits one would expect of an international organization.

Emergence of the CSCE is generally explained in the context of Cold War conditions. Post-War world was divided into two political and ideological camps with the conflict between the rival blocs focusing on Europe. The two global crises concerning Berlin (1961) and Cuba (1962) manifested that balance of threat was even and that neither of the superpowers was able to impose its political and military ambitions upon the other without the risk of turning the world into a nuclear inferno. Yet the status quo was not sustainable, as it did not benefit either side. Conflicting interests of the rival blocs triggered a new approach on the policy pursued, a shift to détente, during which time "interests are represented in a given conflict situation by co-operative rather that confrontational strategies and instruments."[665] The change did not come out of the blue though. Back in 1954, the Soviet Union proposed a 50-year treaty on collective security, which was declined later by the US and the European powers for the reason that the Soviet intention was to confirm that the division of Germany and the occupation of the Baltics by the USSR is recognized. Following the Cuban crisis, which brought the two superpowers to the brink of nuclear war, the Warsaw Pact countries proposed in the 1966 Bucharest Declaration the simultaneous dissolution of the two military blocs, the recognition of the existence of two German States the development of agreements on disarmament in Germany and convening of a

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[664] For an analysis of the origin, development and basic features of the OSCE, see, Arie Bloed (ed) *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, 1972-1993*, Dordrecht, 1993; Marcus Wenig, "The Status of the OSCE under International Law-Current Status and Outlook", in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed), *OSCE Yearbook 1997*, Baden-Baden, 1998.

[665] Reinhard Mutz, The CSCE up to the End of the Cold War: What It Achieved and What It Failed, OSCE Yearbook 2015, Baden-Baden 2016, p.37.

pan-European conference on security, without the USA and Canada, and of establishing general European cooperation.[666] Response to the Bucharest Declaration came in 1969 with a cautiously drafted NATO Declaration on European Security in which Western States agreed to participate provided, in particular, that questions relating to arms control and disarmament as well as human rights are discussed, legal status of Berlin is reconfirmed, and Canada and the USA participate in the conference.[667] In the abovementioned Declaration, Western countries also offered perspectives for negotiations to the USSR and other Eastern European countries, noting however that such negotiations in the form of a general conference or conferences should not serve to recognize the division of Europe. Efforts of the both blocs to discuss measures to reduce tension and tackle the problems which separated them opened the way for what is called the Helsinki process.

a) The Helsinki Process

The response of Western States together with the conditions set forth in the NATO Declaration received welcome from the Eastern bloc. Thanks to the gradual easing of the tensions positive steps could be taken in the field of arms control. The long-debated Non-Proliferation Treaty[668] was prepared for signing in July 1968, talks between the USA and the USSR on the Strategic Arms Limitation Treaty commenced in November 1969, and the leaders of the two countries signed the Anti-Ballistic Missile Treaty in May 1972.[669]

Finland had already sent a memorandum to 32 European countries and the USA and Canada reminding them of the Warsaw Pact proposal, "aiming

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[666] Declaration of the Political Consultative Committee of the Warsaw Pact on the strengthening of peace and security in Europe (Bucharest, 5 July 1966).
[667] Declaration of the North Atlantic Council (Brussels, 4-5 December 1969)
[668] The Treaty on the Non-Proliferation of Nuclear Weapons, IAEA, INFCIRC/140, 22 April 1970.
[669] The negotiations known as Strategic Arms Limitation Talks began in November 1969 and ended in January 1972, with agreement on two documents: the Anti-Ballistic Missile Treaty (ABM Treaty) and the Interim Agreement on the Limitation of Strategic Offensive Arms. Both were signed on May 26, 1972.

at gaining profile as a key promoter of détente and using its 'special position' in the Cold War to mediate between East and West".[670] Like other neutral countries (Austria, Switzerland and Sweden) Finland continued to play a crucial role in formulating compromises between the two blocs, and availing itself of the positive momentum gained through bilateral negotiations between the two superpowers invited the members of the rival blocs to participate in multilateral discussions preparatory to the Conference on Security and Co-operation in Europe.

The multilateral preparatory talks started on 22 November 1972 with the participation of 32 European states and the USA and Canada, on the outskirts of Helsinki, in the suburb of Dipoli, and lasted until 8 June 1973, concluding with a document entitled *Final Recommendations of the Helsinki Consultations*, also known as the Blue Book.[671] The Blue Book contained a detailed agenda of the Conference and laid down fundamental procedural rules for the negotiations. Five fundamental rules[672] of the Helsinki process as set forth in the Blue Book are the following:

(i) The right of all European states, as well as the USA and Canada to become participating states or observers (para.54);

(ii) Participation on the basis of equality, 'outside military alliances', 'as sovereign independent states', that is non-recognition of alliances as participating officially *en bloc* in the conference (para 65);

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[670] Christian Nuenlist, "Expanding the East-West dialog beyond the bloc division-The Neutrals as negotiators and mediators, 1969-75", Origins of the European Security System: The Helsinki Process Revisited, 1965-75, edited by Andreas Wenger, Vojtech Mastny, and Christian Nuenist, London and New York, 2008, p.202.

[671] *Final Recommendations of the Helsinki Consultations* (the Blue Book) was agreed on 8 June 1973, and officially adopted by the foreign ministers of the participating States at the official opening of the Conference on Security and Co-operation in Europe, from 3 to 7 July 1973. The Blue Book's rules for conducting negotiations continued to guide the work of the CSCE/OSCE until new Rules of Procedure were adopted at the Ministerial Council meeting in Brussels in 2006.

[672] Alexis Heraclides, Security and Co-operation in Europe-The Human Dimension 1972-1992, London, 1993, p.10.

(iii) The consensus principle, defined as 'the absence of any objection' (para. 69) -that is, the adoption of documents, mandates, agendas and other decisions as long as all agree;

(iv) The presidency to be on a rotational basis (para.70);

(v) The possibility to ask for formal reservations or interpretative statements concerning given decisions to be duly registered by the Executive Secretary and circulated to the participating States" (para.79).

These fundamental rules paved the way for a co-operative approach that has became a characteristic feature, and one of the greatest assets, of the CSCE (OSCE). The issues discussed during the talks were grouped under four main headings, or 'baskets' as they were called in the CSCE (OSCE) jargon:

(i) Questions relating to Security in Europe;

(ii) Co-operation in the Fields of Economics, of Science and Technology and of the Environment;

(iii) Co-operation in Humanitarian and Other Fields;

(iv) Follow-up to the Conference.

Adoption of the *Final Recommendations* by the foreign ministers of the participating States at their meeting held in Helsinki from 3 to 7 July 1973 marked the opening of the first stage of the conference called the *Helsinki Process*. The second stage was conducted in Geneva from 18 September 1973 until 21 July 1975, resulting with the *Final Act of the Conference on Security and Co-operation in Europe*, or the *Helsinki Final Act*, which was signed at the third stage by the Heads of State or Government of the 35 participating States as a ceremony held in Helsinki on 1 August 1975.

b) The Helsinki Final Act

The *Helsinki Final Act*, also called Helsinki Accords, is a product of lengthy discussions among various actors aiming to realize conflicting interests. Despite deep ideological differences between the competing bloc members as well as neutral States, the signature came with consensus on a wide array of political (and moral) commitments that have come to be known as common (co-operative) and comprehensive security concept [673], a distinctive feature of the CSCE (OSCE).

As noted above, the *Helsinki Final Act* consists of political commitments of participating States grouped under abovementioned *baskets*. Commitments in the first basket (questions relating to security in Europe) include the *Declaration on Principles Guiding Relations between Participating States*, also known as the *Decalogue*. The Declaration consists of the following interconnected principles that are to be applied equally and unreservedly:

1. Sovereign equality, respect for the rights inherent in sovereignty
2. Refraining from the threat or use of force
3. Inviolability of frontiers
4. Territorial integrity of States
5. Peaceful settlement of disputes
6. Non-intervention in internal affairs
7. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief
8. Equal rights and self-determination of peoples
9. Co-operation among States
10. Fulfillment in good faith of obligations under international law

Paramount importance is attached to the Declaration since, together with commitments under the third basket, it represents the first acknowledgement in an international document of a direct link between human rights and security. The first basket also includes a series of voluntary

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[673] David Galbreath, The Organization for Security and Co-operation in Europe, New York, 2007, p.66. Wohlfeld noted that "in contrast to traditional conceptualizations of security at the time, which were largely defined in military terms, the OSCE's comprehensive security concept shifted security further outside of the state, focusing on the external community-at-large, to combat salient globalized and transnational challenges." See, Monika Wohlfeld, "Reconceptualization of Security in the CSCE and OSCE," *Globalization and Environmental Challenges Hexagon Series on Human and Environmental Security and Peace* 3 (7), 2008, p. 643.

confidence- and security- building measures concerning prior notification and mutual observation of major military manoeuvres as well as questions relating to disarmament.

Commitments in the second basket address issues relating to co-operation in the fields of economics, science, technology and environment, followed by a set of recommendations on Mediterranean issues.

The third basket consists of commitments on human contacts, co-operation in the field of information, co-operation and exchanges in the field of culture, and co-operation and exchanges in the field of education.

Apart from the commitments in the three baskets, the *Final Act* set for the modalities for following up on the Conference. In line with these modalities, a series of follow-up meetings took place in Belgrade (1977), Madrid (1980) and Vienna (1986), during which implementation of the political commitments entered by participating States were reviewed.

Though some criticism came from some Western activists against the concession given to the Warsaw bloc countries on boundaries that resulted in a formal acceptance of the Soviet annexation of the Baltic countries (Estonia, Latvia and Lithuania) thanks to the clauses on inviolability of frontiers, along with a clause on non-interference in internal affairs, the *Final Act* served to the interests of both sides so that it could be called a success story for all. This was because the Warsaw bloc gains were attained at the expense of the Western bloc countries having been authorized to raise violations of commitments relating to human rights or humanitarian issues, which otherwise would have been impossible.

c) Institutionalization of the OSCE

The Helsinki process that culminated in the signing of the *Helsinki Final Act* in 1975 possesses specific features distinguishing it from other security organizations. The first feature relates to its composition.

Geopolitical (Eurasian and Transatlantic) nature of the process was reflected by the participation of all the member states of NATO, the European Community, the Council of Europe and the ex-Warsaw Pact. In addition, the comprehensive mandate embraced the political, economic, scientific, technological, ecological, social, humanitarian, cultural and economic spheres. Another distinctive feature of the process is the CSCE's flexibility and pragmatism at the institutional level.[674] That being the case, the need for institutionalization emerged in parallel with rapid changes in political climate, on the one hand, and a common understanding that effective implementation of the political commitments (and thus monitoring thereof) entered by the participating States would benefit them all, on the other.

A series of follow-up meetings took place after the Final Act had been signed[675], during which time relations between the rival blocs were tense at times in particular during the Soviet invasion of Afghanistan in December 1980 and after the declaration of martial-law in Poland in late 1981. However, channel of communication and spirit of co-operation between the participating States proved useful so that major steps could be taken to reduce military tension[676], engage in economic co-operation[677] and agree on commitments relating to human rights[678].

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[674] Victor-Yves Ghebali, "The CSCE in the Post-Cold War Europe", NATO Review, April 1991, No.2, Vol.39, Brussels, p.4.

[675] Belgrade in 1977-1978; Madrid in 1980-1983; Vienna in 1986-1989.

[676] Upon a decision taken at the Madrid follow-up meeting, a Conference on Confidence- and Security- Building Measures and Disarmament was held in Stockholm from 17 January to 19 September 1986. During the Vienna follow-up meeting, participating States called for the start of a new round of negotiations on the same subject, a process which led to the conclusion of the *Treaty on Conventional Armed Forces in Europe* (CFE Treaty). Not an OSCE document and legally binding on the States Parties, the CFE Treaty was signed in Paris on 19 November 1990 and entered into force on 9 November 1992. Conscious of the fundamental changes that have occurred in Europe since the CFE was signed in 1990, the participating States incorporated in the concluding document of the 1999 Istanbul Summit the *Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe* (not entered into force yet) and the accompanying *Final Act of the Conference of the States Parties to the CFE Treaty*. On 14 January 2007, Russia announced that it would suspend implementation of its CFE obligations, effective after 150 days. Another OSCE related legal instrument, the *Treaty on Open Skies*

These positive developments were followed by the first steps towards institutionalization of the Conference thanks to decisions taken during a special Summit held in Paris, when the era of confrontation and division of Europe had come to an end following the fall on November 9, 1989 of the Berlin Wall, which marked the falling of the Iron Curtain. Pointing to the military balance between the rival blocs following the demise of Communism, *Ghebali* argues that "institutionalization was inevitable, since it was imposed by the triple need to offer the Soviets a (politically significant) counterweight to the presence within NATO of a unified Germany, to dissuade certain Warsaw Pact countries from seeking to safeguard their security by a direct rapprochement with the Atlantic Alliance, and to synchronize the Helsinki process with post-communist Europe."[679]

Participating States that convened the Paris Summit from 19 to 21 November 1990 drew up the *Charter of Paris for a New Europe*, which introduced additional and comprehensive commitments relating to the human

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was signed in Helsinki on 24 March 1992 and entered into force on 1 January 2002. The OSCE participating States welcomed the signing of the Treaty in a special Declaration of the Helsinki Ministerial Council on 24 March 1992. Containing detailed provisions for conducting observation flights, the Treaty set up an Open Skies Consultative Commission in Vienna, serviced by the OSCE Secretariat.

[677] Upon a decision taken at the Vienna follow-up meeting, a Conference on Economic Co-operation was held in Bonn from 19 March to 11 April 1990. The participating States expressed their commitment to democracy, pluralism and the market economy in the concluding document (Bonn Document), which continued to be the principal guide for economic co-operation in the OSCE until the Maastricht Ministerial Council adopted in 2003 the "OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century", the OSCE's first comprehensive approach to transnational threats and challenges (Eleventh Meeting of the Ministerial Council, 1 and 2 December 2003, MC.DOC/1/03, Maastricht, 2 December 2003, pp.1-10).

[678] Substantial commitments were made at the Vienna follow-up meeting including the creation of a supervisory mechanism for the exchange of information pertaining to human rights (Vienna Mechanism) as well as holding a Conference on the Human Dimension of the CSCE. The Conference on the Human Dimension was held at three annual sessions, in Paris in 1989, in Copenhagen in 1990, and in Moscow in 1991.

[679] Ghebali, "The CSCE in the Post-Cold War Europe", p. 4.

dimension (previously *basket*[680]), security, economic co-operation, environment, culture and migrant workers. The Charter also addressed the need to strengthen security and co-operation in the Mediterranean region, and recalled the major role that non-governmental organizations played in the achievement of the objectives of the CSCE.

Furthermore, based on the understanding that consolidating respect for human rights, democracy and the rule of law, and strengthening peace and promoting unity in Europe required a new quality of political dialogue and co-operation, the participating States decided to develop the structures of the CSCE. In this regard, they decided (i) that the Heads of State or Government would meet regularly, the first meeting (Summit Meeting[681]) to be held in Vienna in 1992, (ii) to establish a CSCE Council composed of Ministers of Foreign Affairs to function as a central forum for political consultations within the CSCE, which would meet regularly and at least once a year, (iii) to establish a Committee of Senior Officials to prepare the meetings of the Council and to carry out its decisions, (iv) to hold additional meetings, when needed, to discuss questions of urgent concern, (v) to establish a Secretariat in Prague, (vi) to create a Conflict Prevention Centre in Vienna to assist the Council in reducing the risk of conflict, (vii) to establish an Office for Free Elections in Warsaw to facilitate contacts and the exchange of information on elections held in the CSCE region. The participating States also called for a greater parliamentary involvement in the CSCE, which resulted in

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[680] Corresponding to a shift in emphasis in the work of the CSCE the term 'basket' was replaced with 'dimension'. While the former "had served to sort issues during long discussions in which participating States strove to agree on common recommendations", the latter "gave structure to the operational measures that began to be developed for them to be realized." The term 'human dimension' was employed for the first time at the Vienna follow-up meeting (1989). Since 1990s, it became common to speak of a politico-military, an economic and environmental and a human "dimension" of security. See, OSCE Handbook, Vienna, 2007, p.6.

[681] The OSCE Summits and the documents adopted thereby: Helsinki Summit, *Helsinki Final Act* (1975); Paris Summit, *Charter of Paris for a New Europe* (1990); Helsinki Summit, *The Challenges of Change* (1992); Budapest Summit, *Towards a Genuine Partnership in a New Era* (1994); Lisbon Summit, *Lisbon Document* (1996); Istanbul Summit, *Charter for European Security* (1999); Astana Summit, *Towards a Security Community* (2010).

establishment of the CSCE (later OSCE) Parliamentary Assembly (OSCE PA)[682] in Madrid Conference on 2 and 3 April 1991, with an International Secretariat set up in Copenhagen a year later.

Steps taken towards institutionalization continued after the Paris Summit, including the establishment of the first field operations in 1992[683]. Since then numerous field operations have been established to bring security and stability to many regions. Efforts to create a mechanism that would promote peaceful settlement of disputes, the fifth principle of the Decalogue, resulted in adoption by the Ministerial Council on 15 December 1992 in Stockholm of the *Convention on Conciliation and Arbitration*, a instrument that is legally binding only for those participating States that have legally become parties to it.[684] The participating States have also adopted at the 1991 Ministerial Council a mechanism for early warning, called *Berlin Mechanism*.[685]

Further steps towards institutionalization were taken through implementation of the *Prague Document on Further Development of CSCE*

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[682] The first meeting of the Parliamentary Assembly was held in July 1992 and consisted of 317 members of parliament from the States signatory to the Helsinki Final Act (1975) and the Charter of Paris (1990). As the parliamentary dimension of the OSCE, the 323-member Assembly facilitates parliamentary dialogue to meet the challenges of democracy throughout the OSCE area. The OSCE PA holds three regular meetings throughout the calendar year.

[683] The three Missions of Long Duration in Kosovo, Sandjak and Vojvodina, the first of the OSCE's field operations, were established by a decision of the 15th Meeting of the Committee of Senior Officials, held in Prague on 14 August 1992.

[684] The Convention established a Court on Conciliation and Arbitration, based in Geneva, which is not a permanent body but a roaster of conciliators and arbitrators. The Convention was adopted within the OSCE by the Council of Ministers on 15 December 1992 and entered into force on 5 December 1994. As of April 2020 the number of States that have ratified/acceded to the Convention is 34.

[685] Endorsed at the 1992 Helsinki Summit, Berlin Mechanism introduces measures to be applied in case of serious emergency situations that may arise from a violation of one of the principles of the Helsinki Final Act or as the result of major disruptions, providing for any participating State to seek clarification.

Institutions and Structures, adopted at the second CSCE Council in January 1992. The Committee of Senior Officials (CSO) was held responsible for overview, management and co-ordination between the meetings of the CSCE Council and, acting as the Council's agent, was invested with authority to take decisions. The Committee was to meet more regularly, at least every three months.[686] Additional functions were given to the Office for Free Elections, which would be called thereafter the *Office for Democratic Institutions and Human Rights* (ODIHR). In order to strengthen the focus of CSCE on the transition to and development of the free-market economies as an essential contribution to the building of democracy, it was agreed to establish an Economic Forum within the framework of the CSO. The functions and working methods of the Conflict Prevention Centre[687] (CPC) were enhanced. Serving as a forum for consultation and co-operation in conflict prevention and for co-operation in the implementation of decisions on crisis management taken by the Council/CSO, the CPC was invested with authority to initiate and, with the assistance of the CPC, execute fact-finding and monitor missions in connection with the *Vienna Document 1990.*[688]

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[686] The CSO held its meetings in Prague as the CSCE's regular consultative body since 1990 and assumed decision-making role since 1992. The Ministers institutionalized the Vienna Group of the CSO as the Permanent Committee at their 1993 Council Meeting in Rome. In 1994 the Permanent Committee was renamed the Permanent Council.

[687] Originally consisting of a Consultative Committee- composed of representatives from all participating States- and a Secretariat, the CPC was created at the 1990 Paris Summit and started functioning as an independent Office in Vienna on 18 March 1991. When the CSCE Secretariat moved to Vienna in 1994, the Consultative Committee was dissolved and the CPC became a unit within the larger Secretariat. As the focal point within the Secretariat for the politico-military dimension of security, the CPC provides the Chairmanship, the Troika, the Permanent Council and the Forum for Security Co-operation with policy and analytical support and provides early warning on regional developments. OSCE Handbook, p.26

[688] The *Vienna Document 1990* introduced Annual Implementation Assessment Meetings (AIAM), an obligatory annual exchange of military information and obligatory hosting of evaluation visits to military formations or units reported under the information regime and air bases. AIAM have been held annually in Vienna since 1991 by the Forum for Security Co-operation to discuss the implementation of confidence- and security- building measures and other politico-military commitments. More detailed provisions and new thresholds for notification and observation were introduced first with the *Vienna Document 1992* and than the *Vienna Document 1994*. On the eve of

At its meeting in Helsinki in 1992, the CSCE Council requested the Chairman-in-Office (CiO) to convene as soon as possible a conference (in Minsk) on the Nagorno-Karabakh conflict involving Armenia and Azerbaijan. Although the conference has not yet been convened, the OSCE Budapest Summit established in 1994 the so-called Minsk Group[689], which continues to work for the creation of conditions in which such a conference can take place.

Reaffirming the commitments to the Charter of the United Nations, the participating States declared in the Helsinki Document 1992 (*The Challenges of Change*) their understanding that the CSCE (OSCE) was a 'regional arrangement' in the sense of the Chapter VIII of the Charter of the United Unions[690], providing an important link between European and global security.[691] With a view to enhancing co-operation with the United Nations

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the 1999 Istanbul Summit the Forum for Security Co-operation adopted the *Vienna Document 1999*, containing a specific chapter addressing the regional aspects of security within the OSCE. OSCE Handbook, p. 81

689 The Minsk Group is co-chaired by the France, Russian Federation and the United States of America. The Group's permanent members are Belarus, Germany, Italy, Sweden, Finland and Turkey, as well as Armenia and Azerbaijan. On a rotating basis, also the OSCE Troika is a permanent member. The mandate of the Co-Chairmen of the Minsk Process was circulated by the Hungarian OSCE Chairmanship to the OSCE Delegations on 23 March 1995 (DOC.525/95).

690 Article 52 of the UN Charter (Chapter VIII) reads as the following:
"1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
4. This article in no way impairs the application of Articles 34 and 35."

691 It is important to note, however, that the UN recognized the OSCE as a regional arrangement but not as a regional agency. Hafner draws attention to the fact that the designation employed by the UN addresses entities which are

especially in preventing and settling conflicts, the participating States agreed upon the *Framework for Co-operation and Co-ordination between the United Nations Secretariat and the CSCE* in 1993, the year the CSCE was granted observer status by the United Nations. The co-operation between the two organizations was further strengthened by a *Declaration on Co-operation with the United Nations* adopted by the Permanent Council in 2006. The Forum for Security Co-operation (FSC) was created for weekly negotiations and consultations in Vienna.

At the 1992 Helsinki Summit the participating States also decided to establish the post of a *High Commissioner on National Minorities* (HCNM), who would act under the aegis of the CSO and would thus be an instrument of conflict prevention at the earliest possible stage. The High Commissioner would provide *early warning*[692] and, as appropriate, *early action* at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but, in the judgment of the High Commissioner, have the potential to develop into a conflict within the CSCE area, affecting peace, stability or relations between participating States, requiring the attention of and action by the Council or the CSO. In addition to the HCNM, the youngest of the OSCE institutions, *OSCE Representative on Freedom of the Media* (RFOM), located in Vienna, was established in 1997 following a decision taken at the 1996 Lisbon Summit.

The Post of the Secretary-General was created at the third CSCE Council meeting held in Stockholm in December 1992, and participating States decided to move the Secretariat to Vienna at the Rome Council meeting held in December 1993.

The institutionalization process was crowned by the decision of the participating States, taken at the 1994 Budapest Summit, to rename the CSCE

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not international organizations, but some form of cooperation. Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", p.47

[692] So far, two early warnings, as defined in the mandate, have been issued: one on the former Yugoslav Republic of Macedonia in 1999 and on Kyrgyzstan in 2010.

the Organization for Security and Co-operation in Europe.[693] The decision took effect on 1 January 1995, and the structural name changes were made accordingly.[694] As foreseen in the Declaration, however, the name change did not alter either the politically binding nature of the CSCE commitments, or the status of the CSCE and its institutions.[695]

As a unitary institution, the OSCE's fragmented structure is currently composed of the following:[696]

(i) Political structure: The OSCE Chairperson-in-Office[697], the Troika[698], Personal Representatives of the Chairperson-in-Office[699], and the Secretary General.[700]

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[693] See the Budapest Summit Declaration-*Towards a Genuine Partnership in a New Era*, para.3: "The CSCE is the security structure embracing States from Vancouver to Vladivostok. We are determined to give a new political impetus to the CSCE, thus enabling it to play a cardinal role in meeting the challenges of the twenty-first century. To reflect this determination, the CSCE will henceforth be known as the Organization for Security and Co-operation in Europe (OSCE)."

[694] The CSCE Council was renamed the Ministerial Council, the Council of Senior Officials became Senior Council, and the Permanent Committee since than is called the Permanent Council.

[695] See the Budapest Summit Declaration-*Towards a Genuine Partnership in a New Era*, para.29: "The change in name from CSCE to OSCE alters neither the character of our CSCE commitments nor the status of the CSCE and its institutions. In its organizational development the CSCE will remain flexible and dynamic. Work will be continued on issues relating to further institutional development of the CSCE, including strengthening and rationalization of its instruments and mechanisms. The CSCE will regularly review its goals, operations and structural arrangements. The CSCE will review implementation of the Rome Decision on Legal Capacity and Privileges and Immunities and explore if necessary the possibility of further arrangements of a legal nature. Participating States will, furthermore, examine possible ways of incorporating their commitments into national legislation and, where appropriate, of concluding treaties."

[696] For evolving institutionalization of the formally undefined OSCE, see Lisa Tabassi, "The Role of the Organization in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds), *The Legal Framework of the OSCE*, Cambridge University Press, Cambridge, 2019.

[697] The OSCE Chairmanship is held for one calendar year by a participating State designated as such by a decision taken at a Summit or Ministerial Council as a rule two years prior to the beginning of the term. Activities of the Chairmanship are carried out in accordance with the guidelines adopted by participating States at the 2002 Porto Ministerial Council. The Chairmanship

(ii) Executive structures: The Secretariat[701], the three permanent Institutions (Office for Democratic Institutions and Human Rights (ODIHR[702]) in Warsaw, High Commissioner on National Minorities

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is headed by the Chairman-in-Office, the Foreign Minister of the State concerned. The Chairperson-in-Office takes a lead in conflict prevention, resolution and rehabilitation in the OSCE region, taking up direct contact with parties concerned and arranging or conducting settlement negotiations.

[698] Invented at the Helsinki Summit in 1992 to bring an element of continuity to the OSCE's leadership, the OSCE Troika is a format of co-operation between the present, previous and succeeding Chairmanships.

[699] In order to deal with crises or ensure better co-ordination of participating States' efforts in specific areas, the Chairperson-in-Office may appoint personal or special representatives. Personal representatives have a clear and precise mandate which outlines the tasks they are expected to undertake.

[700] The Secretary General heads the OSCE Secretariat in Vienna, acting under the guidance of the Chairperson-in-Office. On 18 July 2017 Ambassador Thomas Greminger (Switzerland) was appointed Secretary General of the OSCE.

[701] Established by the Charter of Paris for a New Europe in 1990, the Secretariat is administered under the direction of the Secretary General and provides operational support to the OSCE. Based in Vienna and comprising the OSCE Documentation Centre in Prague, the Secretariat consists of administrative and programmatic departments and units focused on conflict prevention, economic and environmental activities, co-operation with Partner countries (Asian Partners for Co-operation: Afghanistan, Australia, Japan, Republic of Korea and Thailand; Mediterranean Partners for Co-operation: Algeria, Egypt, Israel, Jordan, Morocco and Tunisia) and organizations, gender equality, anti-trafficking, as well as transnational threats, including anti-terrorism, border management and policing reform. In addition to the Secretariat in Vienna, most of the OSCE's staff and resources are deployed in the OSCE's field operations in South-Eastern Europe, Eastern Europe, the South Caucasus and Central Asia, which are established with the agreement of the host country. For more information visit the OSCE website.

[702] Established in 1991 and based in Warsaw, ODIHR is the largest of the OSCE institutions and one of the world's principal regional human rights bodies, active throughout Europe, the Caucasus, Central Asia and North America. The Office promotes democratic elections, respect for human rights, tolerance and non-discrimination, and the rule of law. The Office organizes yearly OSCE Human Dimension Implementation Meeting, three supplementary meetings and a seminar, which reviews governments' progress.

(HCNM[703]) in The Hague, Representative on Freedom of the Media (RFOM[704]) in Vienna), and the field operations.[705]

(iii) Decision making bodies: Meetings of Heads of State or Government (Summit[706]), Ministerial Council (MC)[707], Permanent Council (PC)[708], and the Forum for Security Co-operation (FSC).[709]

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[703] Established at the 1992 Helsinki Summit, HCNM gets involved in a situation if, in his judgment, there are tensions involving national minorities which could develop into a conflict.

[704] Established in 1997 following a decision taken at the 1996 Lisbon Summit RFOM has an early warning function and provides rapid response to serious non-compliance with regard to free media and freedom of expression. For the mandate of the RFOM, see Permanent Council Decision No.193 (PC.DEC/193, 5 November 1997).

[705] There are currently 16 such field operations, which are as follows:

Eastern Europe: Mission to Moldova; Project Co-ordinator in Ukraine; Special Monitoring Mission to Ukraine; Observer Mission at the Russian Checkpoints Gukovo and Donetsk.

South-Eastern Europe: Presence in Albania; Mission to Bosnia and Herzegovina; Mission in Kosovo; Mission to Montenegro; Mission to Serbia; Mission to Skopje.

South Caucasus: Personal Representative of the Chairperson-in-Office on the Conflict Dealt with by the OSCE Minsk Conference.

Central Asia: Centre in Ashgabat; Programme Office in Astana; Programme Office in Bishkek; Programme Office in Dushanbe; Project Co-ordinator in Uzbekistan.

[706] Summit is the highest decision-making body of the OSCE during which priorities are set at the highest political level. The first Summit was convened in 1975 in Helsinki, to be followed fifteen years later with the second in Paris. Summits have consequently been held in Helsinki (1992), Budapest (1994), Lisbon (1996), Istanbul (1999), and the last in Astana (2010).

[707] Ministerial Council is the central decision-making and governing body between Summits, consisting of Ministers of Foreign Affairs of participating States. The Council meets annually, except in years in which Summit takes place, usually in the capital city of the State holding the Chairmanship.

[708] As the OSCE's regular body for political consultation and decision-making since 1995, the Permanent Council convenes weekly in Vienna and governs the day-to-day operational work of the Organization. The Permanent Council is chaired by the Permanent Representative of the State holding the Chairmanship of the OSCE.

[709] Created at the 1992 Helsinki Summit, the FSC functions as an autonomous decision-making body in which representatives of participating States meet weekly o consult on military security and stability in the OSCE area. The main objectives of the FSC are to negotiate agreements on arms control, disagreement and confidence- and security- building measures; to hold regular consultations and strengthen co-operation on matters related to security; to reduce the risk of conflict; and to implement agreed measures. The mandate of the FSC was reviewed and expanded at the 1994 Budapest Summit.

In addition, there is:

- The OSCE Parliamentary Assembly[710].
- Three entities established by the OSCE related treaties: OSCE Court of Conciliation and Arbitration[711], the Joint Consultative Group[712], and the Open Skies Consultative Commission.[713]

B- Legal Nature of the Founding Documents of the OSCE and of the OSCE Commitments

That the OSCE was not established by a constituent treaty does not necessarily mean that there is no room to make mention of constituent instrument, a constitution of the Organization. According to the OSCE Secretariat, "the accumulation of the OSCE Summit, Ministerial and Permanent Council decisions together comprise the OSCE's constitution as a living instrument in the most dynamic sense."[714]

a) Politically Binding Commitments as Opposed to Legally Binding Obligations

Despite a wide range of commitments formally entered by 35 participating States, however, the *Helsinki Final Act* does not stand as a legal

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710 Established by the 1990 Paris Summit, the OSCE Parliamentary Assembly promotes greater involvement in the OSCE region by national parliaments in the participating States.

711 Established by the 1992 Stockholm Convention on Conciliation and Arbitration, this Geneva based Court serves as a mechanism for the peaceful settlement of disputes in accordance with international law and OSCE commitments.

712 Established by the 1990 Treaty on Conventional Armed Forces in Europe, this Vienna based body deals with questions relating to compliance with the provisions of 1990 Treaty.

713 Established by the 1992 Open Skies Treaty, this body regularly meets in Vienna and consists of representatives from each of the States that have signed the 1992 Treaty.

714 Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.23.

document.[715] It is not a treaty in the proper sense as defined in the Vienna Convention on the Law of Treaties. For that reason the commitments contained therein are not binding legally but politically (and morally).[716] This stands true also for the *Charter of Paris for a New Europe* and what followed afterwards. The OSCE itself brought this to the attention of the UN International Law Commission when it commented on the definition of *international organization* contained in ILC 2011 Draft Articles on Responsibility of International Organizations.[717] In its comment presented to the ILC, the OSCE underlined that the questions regarding its legal personality and legal nature of its founding instruments were under discussion.[718] Under this definition, the OSCE would not be an international organization, since it was not established by a treaty or other instrument governed by international law, and there has not been agreement on its international legal personality.[719]

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[715] See Christine Bertrand, "La nature juridique de l'Organisation pour la Sécurité et de la Coopération en Europe (OSCE)", 98 Revue Générale de Droit International Public, 1998, 365-406.

[716] Harold S. Russel, "The Helsinki Declaration: Brobdingnag or Lilliput?" A.J.I.L., Vol.70, Issue 2, 1976, p.248.

[717] ILC 2011 Articles on Responsibility of International Organizations: an international organization is 'an organization *established by a treaty or other instrument governed by international law* (emphasis added) and possessing its own international legal personality'.

[718] "In paragraph (4) of the commentary to draft article 2, the Commission appears to consider that OSCE, though not established by treaty, fulfills the two criteria provided for in draft article 2, subparagraph (a), defining international organizations. *For the time being, there is no consensus among the OSCE participating States that OSCE should fulfill either of the two listed conditions: whether OSCE possesses its own legal personality, or whether the founding documents of OSCE (in the first place the Helsinki Final Act and the Charter of Paris for a New Europe) are governed by international law*. These issues are currently under discussion by the deliberative and decision-making bodies of OSCE, and the OSCE secretariat stands ready to inform the International Law Commission on the progress or finalization of these deliberations." ILC 63rd Session, Responsibility of International Organizations, UN General Assembly Doc. A/CN.4/637, 14 February 2011

[719] Niels M. Blokker and Ramses A. Wessel, "Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice", Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds), *The Legal Framework of the OSCE*, Cambridge University Press, Cambridge, 2019, p.135-164.

The drafters of the *Helsinki Final Act* did not intend to bind themselves legally through the commitments they voluntarily entered; they rather wanted to keep their workings outside the realm of law. One reason often raised is that, given the tension between the two competing (or maybe conflicting) ideological blocs, it was thought that it would be easier to convince the negotiating states, in particular the Soviet Union, to enter into commitments that have *merely* political binding force. Another reason was the presumption that keeping the commitments valid only in political sphere, and not in legal sphere, would increase the efficiency and effectiveness of the process. There was a mutual agreement during the negotiations that the outcome (*Final Act*) of the Conference would not be a legal instrument but a common declaration. That agreement was commented by European scholars at a committee meeting of the International Law Association on the Helsinki Final Act as the following:

> The Helsinki Final Act…does not intend to create new legal obligations. Mutual agreement existed during the whole negotiations that the result of the Conference should…be a common declaration but not a legal instrument.[720]

This understanding that the *Helsinki Final Act* has no legally binding effect was reflected by the specific terms used in its text and the documents that followed. The signatories to the *Helsinki Final Act* are called participating States and not Member States. Commitments entered by the signatories are formulated by the modal verb *will*, not *shall*. The text is divided into baskets (dimensions) and not *parts*. It is stated that the Declaration does not affect the participating States' rights and obligations, nor the corresponding treaties and other agreements and arrangements (Declaration on Principles Guiding Relations between participating States, X: Fulfillment in good faith of obligations under international law). The text did not require a ratification

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[720] The First Preliminary Report of the International Law Association on the Helsinki Declaration and the Equal Application of Human Rights, 1978, p.130 (from Jordan Paust, "Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act", 45 Law & Contemporary Problems 53-70 (Winter 1982), p.56).

procedure and it sufficed that the representatives of the participating States subscribed their signatures to the document. To reflect the understanding of the participating States, it was made clear that the documents, both the *Final Act* and the *Charter of Paris for a New Europe,* were "not eligible for registration under Article 102 of the Charter of the United Nations".[721] In transmitting the *Final Act* to the Secretary-General of the United Nations, as requested by the participating States, the Government of Finland declared that the participating States had drawn attention, "to the fact that this Final Act is not eligible, in whole or in part, for registration with the Secretariat under Article 102 of the Charter of the United Nations, as would be the case were it a matter of a treaty or international agreement, under the aforesaid Article."[722]

Moving from the form and content of the document, *Aust* classified the *Helsinki Final Act* not as a treaty but as a memorandum of understanding (MoU).[723] That classification stands correct also for the subsequent OSCE documents. As *Tabassi* put it, "[T]he core documents adopted by the CSCE-OSCE over a forty year period reflect the consistent intention of OSCE participating States that the Organization will have a political constitution in international relations, not a legal constitution under international law".[724]

While political nature of the OSCE documents and commitments is not much challenged, *Odello* questions whether the initial purpose of participating States to draft a political document is sufficient to exclude the constitutional nature of the *Helsinki Final Act*, and its present legally binding

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[721] It should be noted however that registration of treaties as foreseen by Article 80 of the Vienna Convention on Law of Treaties is not a precondition for rendering treaties valid, and non-registration therefore does not invalidate treaties. However, treaties that have not been registered in accordance with paragraph 1 of Article 102 of the UN Charter cannot be invoked before any organ of the United Nations.
[722] Conference on Security and Cooperation in Europe: Final Act, Aug.1, 1975, Dept St. Bull., Sept.1975, at 349 n.2, 14 I.L.M. at 1325.
[723] Anthony Aust, Modern Treaty Law and Practice, Third Edition, 2017, p.357.
[724] Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.2.

nature.[725] The writer refers to *Klabbers*, who, in contrast to *Aust*, considers that any agreement between states, with some form of normative nature, not subject to another system of law is a treaty, adding however that the agreement must be under international law.[726] *Odello* also questions whether the *Helsinki Final Act* and the following main documents adopted by Summits could have legal effect despite the fact that intention of participating States was not to be legally bound by them. When giving an answer in the affirmative the writer resorts to the concepts of soft-law[727] and customary law.[728] Since soft-law usually refers to non-legal instruments containing principles, norms, standards, or statements of expected behavior, documents adopted by Summits and Conferences developed within the OSCE may have the status of soft-law contributing to the *constitutional* element of the Organization.[729] Moreover, documents and decisions taken by organs of the

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[725] Odello, "The Developing Legal Status of the Organization for Security and Co-operation in Europe", p. 366. For legal significance of the OSCE documents, see, Ulrich Fastenrath, "The Legal Significance of the CSCE/OSCE Documents", in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1995/1996*, Baden-Baden 1997, p.411-427.

[726] *ibid*, p. 367; Klabbers, *The Concept of Treaty in International Law*, The Hague, 1996, p.249. See also Ameraginghe, *Principles of the Institutional Law of International Organizations*, *op. cit.*, p.5.

[727] Soft law is considered a catch-all category of non-legally binding instruments. See, Christine Chinkin, "Normative Development in the International Legal System", in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2000, p.21-42.

[728] While the term soft-law is used to define non-legally binding international commitments entered by international actors, legally binding commitments entered as such constitute hard-law. One of the two forms of hard international law is custom, the other being treaties. Non-legally binding as they may be, soft law may translate into international customary law if supported by state practice out of a sense of legal obligation (*opinio iuris*). While soft-law (and treaties) are formed out of negotiations between states driven by their interests, custom is established through a decentralized and largely non-negotiated process. For the differences and why non-binding soft-law is rapidly supplanting the traditional hard binding norms of law, see Laurence R. Helfer & Ingrid B. Wuerth, *Custom in the Age of Soft Law* (working paper).
(http://www.iilj.org/wp-content/uploads/2016/07/WuerthIILJColloq2014.pdf;) (last accesed on 20 November 2019).

[729] *ibid,* p. 371. For OSCE's soft-law basis, see Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", p.42.

OSCE, reflecting the autonomous legal capacity of the Organization, develop new rules among participating States, contributing as well to development of soft-law and customary rules. On the other hand, the writer argues, repetitive statements and decisions adopted by the representatives of participating States may contribute to the creation of customary rules. Referring to *Cassese*, the writer states that economic, political or military demands driven by social and political needs (*opinio necessitatis*) trigger development of state practice, and if the practice imposed by these needs "does not encounter strong and consistent opposition from other states but is increasingly accepted, or acquiesced in, a customary rule gradually crystallizes. At this later stage it may be held that the practice is dictated by international law (*opinio iuris*)"[730]. Indeed it is generally accepted that international custom[731] emerges only if there is a widespread repetition by States of similar international acts over time (state practice), and if that state practice takes place out of a sense of obligation (*opinio iuris*).[732] As for the OSCE documents and decisions, the writer argues that there exists "regional or local evolution of customary rules

[730] *ibid*, p.373. See Cassese, *International Law,* p.157

[731] "Official definition" of customary international law is provided for in Art. 38 (1)(b) of the Statute of the International Court of Justice. When deciding such disputes as are submitted to it, the Court applies, in addition to other sources of international law, "international custom, as evidence of a general practice accepted as law."

[732] As expressed in the report of the International Law Commission on identification of customary international law, "A general practice and acceptance of that practice as law (*opinio iuris*) are the two constituent elements of customary international law: together they are the essential conditions for the existence of a rule of customary international law. The identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case. This has been confirmed, *inter alia*, in the case law of the International Court of Justice, which refers to 'two conditions [that] must be fulfilled' (*North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p.3, at p.44, para.77) and has repeatedly laid down that the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio iuris*". See, UN General Assembly Doc. A/CN.4/L.872 (ILC 68. Session, Geneva, 2016); ILC Report (A/73/10), *Yearbook of the International Law Commission*, 2018, Vol.2, Part Two. As opposed to this "two-element approach" it is argued that international customary law has in reality only one constitutive element, the *opinio iuris*. See Bin Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law? 5 *Indian Journal of International Law* 23, 36 (1965).

which created an international organization".[733] Development of a regional customary rule, according to the writer, is if not crystalized, than under formation[734]. In support of the idea that rules developed by the OSCE have acquired legal status, the writer gives the example of Yugoslavia having been suspended from participation of the CSCE/OSCE meetings, from 1992 to 2000, due to its violation of the fundamental rules of the Organization[735]. Another example given to this end relates to the voting procedure together with its exceptions. While the *consensus* rule applies as the fundamental decision-making principle of the OSCE, *consensus minus one* and *consensus minus two* apply to exclude states involved in international conflict from participating in voting. According to *Odello*, that rule has acquired customary law within the OSCE since no rejection was raised against it so far. Moving from this argumentation *Odello* concludes that "with the repetition of their mandatory nature as the foundation of the work of the Organization, a significant set of OSCE rules have reached the status of at least soft-law and in several cases of constitutional customary law", which therefore he defines as an "evolving constitution".[736]

While acknowledging that the *Helsinki Final Act* is not a treaty or other international agreement establishing legal rights and obligations, *Buergenthal* notes that it contains a number of provisions that invoke or refer

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[733] It is argued that because of the level of the Conference, the Helsinki Final Act had all the features of customary international law. See, Jean-François Prévost, "Observations sur la nature juridique de l'Acte final de la Conférence sur la sécurité et la coopération en Europe", *Annuaire français de droit international*, 21, 1975.

[734] *ibid*, p.374.

[735] Governmental officials were suspended from participating in the OSCE meetings while the State was still considered as part of the Organizations. See Valery Perry, "The OSCE Suspension of the Federal Republic of Yugoslavia" (1998) 4 *Helsinki Monitor*, p.44-54; CSCE, Committee of Senior Officials, Second Emergency Meeting, *Journal Proceedings Annex*, 12 May 1992 (Odello, "The Developing Legal Status of the Organization for Security and Co-operation in Europe", p.371).

[736] As for the content of the OSCE constitution, the writer first refers to the ten fundamental principles enshrined in the Helsinki Final Act, the so-called Decalogue. For the content of the constitution, see Odello, "The Developing Legal Status of the Organization for Security and Co-operation in Europe", p. 375-377.

to “established or emerging principles of international law”.[737] He adds, however, that the effect of such norms on legal character of a legally non-binding instrument is not clear. The writer admits that political commitments by States can acquire, in time, the character of legally binding rules. However, given the participating States’ determination to prevent the CSCE/OSCE standards from becoming legally binding, the writer argues that this is not the case with the *Helsinki Final Act* and the subsequent CSCE/OSCE commitments.[738]

When analyzing the non-legal nature of the OSCE, as the leading example of a soft organization as well as the non-legally binding nature of the *Helsinki Final Act* and the subsequent OSCE commitments *Klabbers* first questions whether it is possible to create a meaningful entity the activities of which would fall outside the realm of law.[739] An answer in the affirmative can be justified, according to the writer, only if the intent of the founders of the organization is acknowledged as decisive of the issue. Such an approach would also be in accord with the positivist mode of international law. If it is the intention of the founding states to establish the organization based not on a legally but politically or morally binding agreement, so be it. Referring to the *Qatar v. Bahrain* case[740] however, *Klabbers* questions the usefulness of

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[737]Buergental refers in particular to the Guiding Principles which deal with the “threat or use of force, sovereign equality, non-intervention in internal affairs, and territorial integrity”. Thomas Buergenthal, “The CSCE Rights System”, The George Washington Journal of International Law and Economics, Washington, Vol.25, Issue 2, 1991, p.377. The Decalogue is binding upon participating States as fundamental principles of customary international law. See, Bloed, *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, op. cit.*, p.23; Christian Berger, OSCE and International Law, 24 Int’l. J. Legal Info. 36 (1996), p. 38-39.

[738] For normative relevance and significance of the OSCE commitments see Buergenthal, “The CSCE Rights System”, *op. cit.*, p.378-381. Buergenthal argues that OSCE commitments have, inter alia, legitimating effect on laws enacted and policies pursued by the OSCE participating States.

[739] Jan Klabbers, “Institutional Ambivalence by Design: Soft Organizations in International Law”, p. 403-421.

[740] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Qatar v. Bahrain, [1994], ICJ Reports 112. The case was related to the proceedings instituted by Qatar against Bahrain in respect of certain disputes between the two States relating to sovereignty over the Hawar

engagement through political instruments, since the courts generally tend to support the premise that States commit themselves only through means of law.[741] Referring to the *Nuclear tests* case[742] and ICJ's findings in *Reparation for Injuries* as well as doctrines developed within the law of international organizations[743], the writer supports the view that "intent alone cannot decide the legal nature of instruments" and argues that "international law claims some authority over the entities we create, whether we like it or not."[744]

Islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah and the delimitation of their maritime areas. The Court first addressed the questions of jurisdiction and admissibility. Reviewing the exchanges of relevant letters and a document entitled "Doha Minutes" the Court held that these documents "constituted international agreements creating rights and obligations for the Parties; and that by the terms of those agreements they had undertaken to submit to the Court the whole of the dispute between them".

[741] Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law", p.409. For a more detailed analysis, see, Klabbers, "Qatar v. Bahrain: The Concept of 'Treaty' in International Law, 33 *Archiv des Völkerrechts* (1995), 361-376. See, also, Christine Chinkin, "A Mirage in the Sand? Distinguishing Binding and non-Binding Relations between States, *Leiden Journal of International Law* 10: 247 (1997). In her article, the writer expressed concern that the ICJ ruling in the case would "serve only to blur still further the grey twilight zone between binding and non-binding international agreements.

[742] *Nuclear tests case,* Australia v. France, [1974], ICJ Reports 253 (Dec.20). The case was related to a dispute between Australia and France concerning the holding of atmospheric tests of nuclear weapons by France in the South Pacific Ocean. A number of authoritative statements were made on behalf of French Government concerning France's intentions as to future nuclear testing in the area, which, according to the Australian Government fell short of giving assurance of the cessation of a further nuclear testing. Having analyzed the unilateral statements of the French authorities, in particular those of the French President, the Court held that such expressions constituted an undertaking on the part of France to effectively terminate the nuclear tests, striping the claim of the Applicant (Australia) of its object. While deciding upon the legal nature of the unilateral declarations made by French authorities, the Court took into consideration not only the intent of the speakers but also the reliance on good faith by others.

[743] Whereas the doctrine of attributed powers is driven solely by intent of the drafters, its "natural counterpart", implied powers, hinges on implication since the drafters cannot foresee all possible contingencies. Treating intent as "all decisive" would therefore disregard the differences between the two theories equating them to each other.

[744] Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law", p.414.

Yet the tendency to create soft organizations instead of hard ones is still strong. *Klabbers* offers two explanations why the OSCE insists on being characterized as a soft organization, and why it is suggested that the non-legal character of the organization adds to its effectiveness. The first reason relates to the history of the organization, which grew out of a non-legally binding instrument, the *Helsinki Final Act*. It is argued that the participating States from the two rival blocs did not want to create legally binding obligations but opted for the "apparently more flexible material of a political commitment."[745] Another reason, the writer suggests, might be related to a widespread perception of law as a rigid, inflexible and impractical instrument to accommodate political changes.[746] But the writer finds neither of the arguments very convincing. As regards the first argument, the writer underlines that classifying the *Helsinki Final Act* as a non-legally binding instrument is not unproblematic.[747] That the *Final Act* is a non-legally binding instrument, according to the writer, is a possible interpretation among various others, based mainly on the *Act*'s being non-eligible for registration under Article 102 of the Charter of the United Nations. More fundamentally, the writer questions the appropriateness of separation between political bindingness *versus* legal bindingness, between law and politics. He argues that "law is the normative order governing political behaviour: our political arguments become law, whether we intend them or not, precisely because 'politics' is not (and can hardly be) a separate normative order".[748]As for the second argument (that law is too rigid to accommodate political changes) the writer notes that law is not that rigid and offers flexibility that would

[745] *ibid.*, p.411.
[746] *ibid.*, p.411.
[747] Klabbers draws attention to the differing views of the drafters on the binding nature of the commitments contained in the *Final Act*, and notes that while some drafters really insisted on creating a non-legal but binding instrument, some (including the US delegation) doubted whether things would be that simple, whereas some (including the UK delegation) wondered whether they had made anything binding at all. Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law", p.412
[748] *ibid.*, p. 412

accommodate various needs of the drafters (in terms of swift entry into force, and easy termination, of agreements).[749]

It seems safe to conclude that the intention of the drafters of the *Helsinki Final Act* and the subsequent CSCE/OSCE instruments was to establish a pool of politically binding commitments, and that they deliberately refrained from undertaking legally binding obligations. The general consensus among the drafters of the *Helsinki Final Act* in denying the legally binding effects of its provisions has been seconded so far by the subsequent practice of the participating States. However, initial intent of the drafters to develop politically binding commitments *per se* cannot prevent these instruments from gaining legally binding force through customary international law when the required conditions are met; namely, the states practice and *opinio iuris*. Actually, the International Court of Justice in the *Nicaragua case*[750] referred to the prohibition of use of force contained in the *Helsinki Final Act* as an expression of *opinio iuris*, lending support to arguments that the *Final Act* and other OSCE documents may qualify as customary international law. Noting that the United States accepted the principle of the prohibition of the use of force, whereby the OSCE participating States undertake to "refrain in their mutual relations, as well as in their international relations in general" the Court stated that "acceptance of a text in these terms confirms the existence of an *opinio iuris* of the participating States prohibiting the use of force in international relations."[751]

The Court confirmed in its judgment the customary content of the prohibition of use of force contained in the *Final Act*:

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[749] *ibid.,* p. 413.

[750] ICJ Reports, 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua **v.** United States of America*). Merits, Judgment, 14. The case relates to military and paramilitary activities carried out by the United States against Nicaragua from 1981 to 1984, which were brought by the latter before the Court claiming that the activities violated international law.

[751] *Nicaragua case,* [1986] ICJ Reports 14, para. 189.

> The Court has also emphasized the importance to be attached, in other respects, to a text such as the Helsinki Final Act... Texts like these, in relation to which the Court has pointed to the customary content of certain provisions such as the principles of the non-use of force and non-intervention, envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies.[752]

It is important at this point to note that many scholars have drawn attention to the legally binding nature of the *Helsinki Final Act*[753], in particular the Decalogue, "which includes general customary law and general principles of international law".[754]

Yet, it may be problematic to determine if and when the subjective requirement (*opinio iuris*) is fulfilled, in other words, whether State practice is accompanied by the conviction of adhering to a rule of law ('accepted as law'), and not *merely* to political or moral commitments governed by soft-law instruments. When considering the question one should keep in mind that a *soft* law instrument may be actually a *hard* one as far as its effects are concerned. As *Fastenrath* noted, "soft-law agreements can themselves have *norm-generating, norm-regulating* and *norm-legitimating* (or *delegitimizing*) functions".[755] Indeed, soft-law instruments are preferred not for excluding their legal significance but, generally, for escaping a rather complicated

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[752] *ibid*. 264.

[753] See, Jordan Paust, "Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act", 45 Law & Contemporary Problems 53-70 (Winter 1982), p.57-61.

[754] Odello, "The Developing Legal Status of the Organization for Security and Co-operation in Europe", p.375.

[755] Ulrich Fastenrath, "The Legal Significance of the CSCE/OSCE Documents", in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1995/1996*, Baden-Baden 1997, p.419. See, also Eric Manton, The OSCE Human Dimension Process and the Process of Customary International Law Formation, Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), OSCE Yearbook 2005, Baden-Baden, p.208. (https://ifsh.de/en/core/publications/osce-yearbook/2005/)

process of the treaty making.[756] *Manton* tested the OSCE commitments against the usual criteria of customary international law and presented evidence of State practice and *opinio iuris*, demonstrating therefore the possibility that the OSCE commitments can qualify, according to the required criteria, as "regional customary law."[757]

Manton first draws attention to three areas to identify sufficient evidence of state practice for OSCE human dimension commitments: (i) the process of drafting OSCE documents; (ii) the documents themselves; and (iii) multi- and bilateral minority rights documents in the OSCE region that have incorporated the OSCE documents. In line with the premise that participation in codifying conferences can be evidence of state practice, as stated by the ICJ in *Namibia Advisory Opinion* of 1971 and the *Fisheries Jurisdiction* cases of 1974[758], the writer argues that "the OSCE process of formulating human dimension commitments in consensus-based political decision-making forums

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[756] Hillgenberg listed a number of reasons why States seek to avoid the conventional treaty form (hard-law). Hillgenberg's list below could be valid, as is suggested, for the OSCE as well:
"- a general need for mutual confidence-building;
- the need to stimulate developments still in progress;
- the creation of a preliminary, flexible regime possibly providing for its development in stages;
- impetus for co-ordinated national legislation;
- concern that international relations will be overburdened by a "hard" treaty, with the risk of failure and a deterioration in relations;
- simpler procedures, thereby facilitating more rapid finalization (e.g. consensus rather than a treaty conference);
- avoidance of cumbersome domestic approval procedures in case of amendments"
Hartmut Hillgenberg, A Fresh Look at Soft Law, *European Journal of International Law* 3/1999, p.419 (Manton, p.208).

[757] Manton, "The OSCE Human Dimension Process and the Process of Customary International Law Formation", Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), OSCE Yearbook 2005, Baden-Baden, p.200-205.

[758] Referring to the Second United Nations Conference of the Law of the Sea, 1960, the Court held that "two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference." *Fisheries Jurisdiction* cases, ICJ Reports [1974], p.3, paras.51-52; *Namibia* (Advisory Opinion), ICJ Reports [1974].

is illustrative of this type of state practice".[759] As for the documents themselves, while references are mostly made to United Nations resolutions as evidence of state practice, the writer argues that the OSCE documents are also eligible to be treated as such.[760] On the third area, *Manton* underlines the most immediate effect of the OSCE commitments in development of international conventional law on minority rights, and argues that the adoption of and reference to OSCE human dimension commitments (mainly those of the Copenhagen document[761]) in treaties signed in 1990s between the OSCE participating States "has turned 'politically binding' obligations into 'legally binding' ones".[762] Referring to *Fastenrath*, the writer holds that "the use of OSCE commitments in these treaties can also be considered evidence of regional State practice."[763]

As regards the subjective element of custom, namely *opinio iuris*, the writer first reminds us that "resolutions, decisions and declarations of international organizations that are formulated in such a way as to state that they should be considered as law or binding commitments and obligations for member States can be evidence of *opinio iuris".*[764] He refers, in this regard, to the *Nicaragua case*, in which the Court stated that "the attitude of states

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[759] Manton, "The OSCE Human Dimension Process and the Process of Customary International Law Formation", p.202

[760] *ibid*. Manton draws attention, in this regard, to the qualifiers of type of language and proportion of support for the OSCE documents (mandatory terminology, express obligations and unanimous acceptance of commitments).

[761] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (5-29 June 1990). The 1990 OSCE Copenhagen Document outlines a number of human rights and fundamental freedoms, introduces far-reaching provisions regarding national minorities, and broadens the scope of human rights matters to include election commitments.

[762] *ibid*.

[763] *ibid*. Fastenrath, remarked that "certain treaties under international law have referred to CSCE/OSCE documents and taken their political obligations over into the legally binding treaty […] explicitly incorporate the commitments on the protection of national minorities contained in CSCE commitments, especially the Copenhagen Document […] The result of such references is that political obligations are transformed into legal ones." Fastenrath, "The Legal Significance of the CSCE/OSCE Documents", p.417

[764] Manton, "The OSCE Human Dimension Process and the Process of Customary International Law Formation", p.203.

towards, inter alia, the *Helsinki Final Act*, as well as 'the effect of consent to the text', were evidence- 'with all due caution'- of *opinio iuris*".[765]

Therefore, *Manton* asserts that some OSCE documents, in particular the *Helsinki Final Act*, which constitutes the backbone of the Organization's activities, meet the two criteria required for the emergence of international customary law: state practice and *opinio iuris*. In particular, the OSCE's human dimension commitments "can be considered as 'regional customary law', thus providing these commitments with the 'legal binding force' that has been previously denied."[766]

In conclusion, it can be argued that the *Helsinki Final Act* and the subsequent CSCE/OSCE commitments, politically binding as they are, may qualify as customary international law notwithstanding the original intention of the drafters. As mentioned above, some of the OSCE commitments have already gained legal force. Distinction drawn by *Klabbers* between the normative order (law) and the politics suggests that adoption by participating States of the politically binding OSCE commitments do not necessarily exclude them from the realm of law. While accumulation of the constitutional provisions contained in the OSCE documents since the adoption of the *Helsinki Final Act* makes up the political constitution of the OSCE, such provisions may also stand as the constituent legal instrument of the Organization insofar as they are recognized as regional customary law. Despite the views expressed generally to the contrary, this conclusion would be supportive of the view that the founding documents of OSCE, in the first place the *Helsinki Final Act* and the *Charter of Paris for a New Europe,* are governed by international law. This being said, it can also be argued that state practice, even if accepted as existing, arises not out of a sense of a legal but merely political or moral obligation. OSCE political commitments which have been translated into legal obligations in various treaties may have gained the

[765] *ibid.*, p.203. *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua case*, *supra* Note 751), para.99f.
[766] Manton, "The OSCE Human Dimension Process and the Process of Customary International Law Formation", p.214.

status of international customary law, but the sense of their legally binding nature occurs to states not from them being formulated as politically binding OSCE commitments but as legally binding treaty provisions.

b) Consensus Rule in Decision-Taking

Establishing the CSCE/OSCE as a forum for political negotiations made it necessary that respect for equality of participating States irrespective of their political and economic power or geographical size is ensured for effective functioning of the organization. That principle was reinforced with the consensus rule in decision-making so that commitments contained in the *Helsinki Final Act* would be equally binding on all participating States. Defined as the absence of any objection in the *Final Recommendations of the Helsinki Consultations*[767] the consensus rule[768] together with the principle of equality of participating States[769] was included in the *OSCE Rules of Procedure*, adopted at the Ministerial Council meeting in Brussels in 2006[770], reiterating and further specifying the Blue Book recommendation. According to the *OSCE Rules of Procedure*;

> Decisions of the OSCE decision-making bodies shall be adopted by consensus. Consensus shall be understood to mean the absence of any objection expressed by a participating State to the adoption of the decision in question.[771]

As mentioned above the OSCE decision-making bodies are the (i)

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[767] The Blue Book (1973), para.69, see, *supra,* Note 671.
[768] Consensus is slightly different from unanimity. Defined as "the absence of objection" consensus suggests a more tacit agreement than unanimity, which implies an affirmative vote rather than no objection. See, "Consensus Denied? Challenges for OSCE Decision-Making in 2017", *Helsinki Commission Report*, March 27, 2017.
[769] "All States participating in the OSCE shall do so as sovereign and independent States and in conditions of *full equality*" (emphasis added). OSCE Rules of Procedure, para. I, 1.
[770] Document of MC.DOC/1/06 (1 November 2006).
[771] OSCE Rules of Procedure, para. II. (A) 2.
available at: http://www.osce.org/mc/22775.

Meeting of Heads of States or Government (Summit), (ii) the Ministerial Council (MC), (iii) the Permanent Council (PC), (iv) the Forum for Security Co-operation (FSC)[772]. The Summit is the highest OSCE decision-making body, setting priorities and providing orientation at the highest political level. The MC is the central decision-making and governing body of the OSCE between the Summits. Consisting of Minister of Foreign Affairs, the MC is the central forum for political consultations within the OSCE and may consider and take decisions on any issue relevant to the OSCE. The PC is the principal decision-making body for regular political consultations and for governing the day-to-day operational work of the Organization between meetings of the Ministerial Council. The FSC is the autonomous decision-making body with the mandate set in relevant decisions of the Meetings of Heads of State or Government and the Ministerial Council[773]. Therefore, the consensus rule applies for adoption of decisions by the decision-making bodies, and any texts, which have been adopted by a decision-making body by consensus, such as decisions, statements, declarations, reports, letters or other documents are referred to as OSCE decisions or OSCE documents.[774]

The consensus rule reflects the "Organization's co-operative approach to security, and the fact that all States participating in the OSCE activities have equal status."[775] However, while the consensus rule enhances the legitimacy of decisions taken, it may be difficult for representatives of participating States to achieve consensus at all times on a specific issue as it would take only one participating State to block the adoption of a decision. Unfortunately this is quite often the case in particular with regard to commitments to be adopted in the human dimension. The *OSCE Rules of Procedure* offers relief in this regard according to which participating States can express a formal reservation of their specific interpretation of a given decision or submit an interpretative statement (declaration) to specify or clarify the meaning or scope of a commitment while still joining the

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[772] See *supra* Notes 706-709.
[773] See, OSCE Rules of Procedure, para. II. (B).
[774] See, OSCE Rules of Procedure, para. II. (A) 3.
[775] OSCE Handbook, p.28-29.

consensus. According to the *OSCE Rules of Procedure*;

> Representatives may ask for their formal reservations or interpretative statements concerning given decisions, including those through a silence procedure, to be duly registered by the Secretariat and circulated to the participating States. Such formal reservations and interpretative statements must be submitted in writing to the Secretariat.[776]

In treaty law, *reservation* is defined as "a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state."[777] *Interpretative declaration* means "a unilateral statement, however phrased or named, made by a state or an international organization, whereby that state or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions."[778] The difference between *reservation* and *interpretative statement* is clear in treaty law. While in the former the legal effect of a treaty provision in question is excluded or modified in its application to the state which utilizes it, the legal effect remains valid as specified or clarified by the state in question in the latter. However, the difference between the two concepts is not that clear in the OSCE practice. Actually, all statements are registered in the *Journals* of meetings as interpretative statements irrespective of their content. *Schlager* maintains that as opposed to its usage in treaty law, a reservation may not conflict with or even limit commitments or agreements which have achieved consensus.[779] While this argument is in tune with the concept of the consensus rule as a fundamental characteristic of the OSCE, one cannot help wondering

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[776] See, OSCE Rules of Procedure, para. IV. 1 (A) 6.
[777] Vienna Convention on Law of Treaties, Article 2 (1)(d).
[778] Guide to Practice on Reservation to Treaties, *Yearbook of the International Law Commission*, 2011, Vol.II, Part II, para.1.2 (A/66/10, para.75).
[779] Schlager Erika, A Hard Look at Compliance with Soft Law: The Case of the OSCE, in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2000, p.350.

the use or added value of expressing a formal reservation if it were to fall short of ensuring the exclusion or modification of the 'political effect' of the related provision in its application to the state in question. Apparently making a reservation is in conflict with the consensus rule, and for that reason it always raises concern among participating states over implementation of a commitment by the participating state that submits a formal reservation against it.[780]

The difficulty in achieving consensus has led to many criticisms being raised against the long-standing consensus rule because of deficiencies stemming from it[781], together with proposals for its modification. One such proposal came from the OSCE Parliamentary Assembly at its Second Annual Session in Helsinki in 1993, calling for the OSCE to abandon the consensus rule.[782] At its following subsequent Annual Session in Vienna in 1994, the OSCE Parliamentary Assembly advocated adopting a decision-making procedure that is based on requiring an 'approximate consensus', whereby the OSCE could act with the agreement of participating States which equals 90 per cent of both membership and financial contribution, rather than the

[780] Athanasia Spiliopoulou Åkermark, Justifications of Minority Protection in International Law, Kluwer Law International, The Hague, 1996, p.257.
[781] President of the OSCE PA, Mr. Javier Ruperez, said at the Lisbon Summit in 1996 that "the requirement for unanimity among 55 states for virtually all important decisions in OSCE will allow single states to use their veto to paralyze the OSCE and to prevent collective action in times of crisis…the end result of requiring absolute unanimity is at best the lowest common denominator, rather than our highest common purpose." See, Javier Ruperez, Asambleas parlamentarias y diplomacia: la OSCE y la OTAN, *Politico Exterior*, Vol. XLLI, 1999, p.37. (https://www.oscepa.org/documents/all-documents/documents-1/955-2005-the-parliamentary-assembly-and-its-political-influence-in-the-osce/file) (last accessed on 24 November 2018)
[782] The OSCE parliamentarians have also offered proposals to use the consensus for certain types of decisions, which involve principal commitments or decisions related to the security situation, but to use 'approximate consensus' for budget and senior personnel decisions. At nearly every Annual Session since that time, the Parliamentary Assembly has reiterated its call for the abandonment of the consensus requirement on all - even minor - decisions. (Statement by Spencer Oliver, Secretary General of the OSCE PA, The Parliamentary Assembly and Its Political Influence In the OSCE: https://www.oscepa.org) (last accessed on 24 November 2018).

unanimous consensus procedure.[783]

Despite criticisms increasingly raised against it and proposals for its modification, the consensus rule still stands as a fundamental characteristic of the OSCE. That approach was kept also when preparing the draft Convention on the International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE, which will be examined below. However, there are two exceptions to the consensus rule. The first, the so-called *consensus minus one* decision-making procedure was devised at the Prague Meeting of the CSCE Council on 30-31 January 1992. In that meeting, the Council of Ministers "decided, in order to develop further the CSCE's capability to safeguard human rights, democracy and the rule of law through peaceful means, that appropriate action may be taken by the Council or the Committee of Senior Officials, if necessary *in the absence of the consent of the State concerned*, in cases of clear, gross and uncorrected violations of relevant CSCE commitments. Such actions would consist of political declarations or other political steps to apply outside the territory of the state concerned" (emphasis added).[784]

The *consensus minus one* exception has been invoked to suspend Yugoslavia[785] from the CSCE later in the same year the procedure was devised amid the worsening human rights conditions and rule of law crisis in, and regardless of the opposition raised by, that State. The case of Yugoslavia remains to date the only occasion where the *consensus minus one* exemption was applied. Since then it is the understanding of all participating States that decisions may be taken without consent of the State concerned in cases of that State's clear, gross and uncorrected violation of CSCE commitments.

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783 Vienna Declaration of the CSCE Parliamentary Assembly, 8 July 1994. Chapter I (Political Affairs and Security), Para. 65 reads: "To adopt a decision-making procedure which no longer requires consensus or consensus-minus-one. A starting-point for discussion could be a rule requiring a consensus of 90% of both membership and financial contributions."
784 Prague Document on Further Development of CSCE Institutions and Structures (30 January 1992), para. IV, 16.
785 See Perry, "The OSCE Suspension of the Federal Republic of Yugoslavia", p.44-54;

The second exception, referred to as *consensus minus two* procedure, was adopted at the CSCE Council in Stockholm in December 1992. In accordance with the decision taken in that meeting, "the Council or the Committee of Senior Officials of the CSCE may direct any two participating States to seek conciliation to assist them in resolving a dispute that they have not been able to settle within a reasonable period of time."[786] Thus, the Ministerial Council is authorized to direct two participating States that are in dispute to seek reconciliation, regardless of whether or not they agree to settle the dispute by means of conciliation. So far, this exemption has not been put into practice.[787]

It is submitted that the consensus rule gives the decisions and documents of the OSCE added weight in terms of state practice and *opinio iuris*.[788] What's more, notwithstanding the difficulties in reaching consensus on decisions to be taken on a wide range of issues, the consensus-based decision-making process encourages the participating States, in particular those coming from rival blocs, to join a forum for discussion and negotiation on issues of common interest. The reason is obvious: in an international organization with a consensus decision-making process, the participating States would not be asked to honour a commitment that they did not approve. They can break the consensus easily. There is no reason to hesitate to take a seat at the negotiation table. Accordingly, the consensus rule forces the participating States to undertake the widest possible consultations so that support for a decision to be taken, be it active backing or absence of objection,

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[786] *Summary of Conclusions* from the Stockholm Council Meeting, *Decision on Peaceful Settlement of Disputes*, Annex 2, Stockholm 1992.

[787] Apart from these, Bloed notes that the Moscow Mechanism as well as the Berlin Mechanism can also be considered an exemption to the consensus rule. See, Bloed, *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, op. cit.*, p.20-21. For the OSCE Mechanisms and Procedures, see *OSCE Mechanisms and Procedures*, Summary/Compendium, 2011, OSCE.

[788] Manton, "The OSCE Human Dimension Process and the Process of Customary International Law Formation", p.198. As discussed above, however, state practice regarding OSCE decisions or documents arises not out of a sense of a legal but political or moral obligation. See, supra, Part II-B (a).

is gained, a process that becomes a political consultation forum.

Consensus based decision-making procedure is a fundamental principle also for other security organizations. Consensus rule is accepted as the sole basis for decision-making in NATO since its creation in 1949. Although the North Atlantic Treaty does not provide any explicit voting mechanism, with the sole exception of Article 10 according to which a state can be invited to join the Alliance only with unanimous agreement, NATO has developed a set of customary rules through which decisions are arrived at by common consent. Absent any voting procedure, consultations take place until a decision that is acceptable to all is reached in NATO.[789]

Likewise, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (Commission-CTBTO) functions mainly on consensus base. According to the *CTBTO Rules of Procedure* all decisions of the Commission should be taken by consensus. If consensus cannot be reached despite the efforts of the Chairman, it is only then that voting takes place according to which decisions on matters of substance can be taken by two thirds majority of the members present and voting, whereas it requires simple majority of the members present and voting to take decision on questions of procedure.[790] While voting mechanism is provided by the Rules of Procedure, consensus rule remains the traditional practice of CTBTO.

While the consensus rule serves as an important procedure where the common consent of members of an organization is manifested, an interesting question arises whether that rule reconciles with the organization having distinct will of its own. *Klabbers* correlates the decision-making procedure and the legal personality of organization, and argues that an organization can have its own will distinct from that of its founders only if it can take decisions

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789 For more information, see, Leo Michel, NATO Decision-making: How the "Consensus Rule" Works, *Croatian International Relations Review*, January-June, 2006.
790 CTBTO Rules of Procedure, Rule 26.

binding its members by a majority of its members. The writer notes that unanimous decisions can be traced back to the member States.[791] Convincing as it may sound, this argument may have hard time in explaining why a majority decision reflects distinct will of an organization while a consensus decision fails to do so. In the end, the majority decision can be traced back to majority of the member States too. It can be submitted that the consensus rule has no negative impact on OSCE's having will distinct from that of the participating States, as is the case with NATO. Exemptions of the consensus rule, namely *consensus minus one* and *consensus minus two*, together with the Moscow and Berlin Mechanisms can be cited as supportive of this argument.

In conclusion, it can be safely argued that the consensus rule is one of the assets of the OSCE adding to its attractiveness to stand as a forum where participating States are encouraged to engage into dialogue without fear of being obliged to comply with commitments that may arise out of their consent. While the rule may have negative impact on the OSCE's effectiveness in decision-making, its benefit outweighs such a consequence. This conclusion proved correct in the drafting process of the Convention on International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE, which kept the consensus rule as the basis of the Organization's decision-making. However, the proposal made by the OSCE Parliament Assembly, which on the one hand requires that the OSCE decisions are taken by *approximate consensus* which to some extent addresses the concerns of some of the participating States who wish to maintain the right to veto any decision, and ensures, on the other hand, that the decisions are taken more effectively in particular when urgency matters in times of political crises, can be taken as a starting point to balance the two conflicting interests.

As regards the impact of the consensus rule on international

[791] Klabbers, *An Introduction to International Institutional Law,* p.49. While the term 'unanimity' is slightly different from the term 'consensus', Klabbers' reasoning applies to the consensus-based decision making since the adoption of decisions under the consensus rule requires support of the member States, if not actively at least in a passive way.

organizations' legal status, it can be argued that a consensus-based decision is not necessarily the true reflection of wills all the member states but a compromise which has not been broken by any of them. The will of a member state which neither actively supports the decision nor breaks consensus on it, for a number of reasons, is not equivalent of the will expressed in the organization's decision. Therefore, the decision taken should be attributed to the organization as reflection of its distinct will rather than to the member states whose preference of the formulation of the decision might have been different. In any case, argument that the consensus-based decisions can be traced back to member states can equally apply to majority-based decisions, as noted above. Finally, international practice suggests that international organizations that function on consensus-based decisions do not lose ground on their legal personality.

C- Efforts to Strengthen the Legal Status of the OSCE

Absence of a constituent legal instrument has created legal consequences to the detriment of effective functioning of the OSCE such as the lack of legal capacity of the Organization to conclude treaties and engage in commercial activities as well as lack, or insufficiency, of privileges and immunities of the OSCE staff, and of the Organization itself, in particular in regions where legal protection is needed most. While the States hosting the CSCE institutions (CSCE Secretariat, CPC, ODIHR) conferred legal capacity on the CSCE/OSCE institutions and privileges and immunities to their personnel, that was not the case in the remaining wide territory of the OSCE countries. With the CSCE operations expanding, efforts to address legal questions arising from the ambivalent legal nature of the OSCE intensified in parallel with steps taken for the institutionalization of the Organization. During the negotiations leading to the 1992 Helsinki Summit, a number of options were available to provide for legal capacity and privileges and immunities, with the US Government suggesting that the Organization should be granted by all CSCE States such legal capacity and privileges and immunities as were required for, and limited to, its effective functioning, while some members of the then European Community preferred that a treaty be concluded in this regard. However, the second option was problematic as it would require ratification by all participating States, which was very unlikely. At the end of the discussions, it was agreed, upon a proposal of the United States, that a political declaration be issued under which each participating government would commit itself to seek legislative authority, as necessary, to implement a common set of legal capacities and immunities.[792]

a) The Rome Council Decision

Having considered a report prepared by an ad hoc Group of Legal experts on the relevance of an agreement granting internationally recognized status to the CSCE institutions, the CSCE participating States agreed at the Rome Council meeting in December 1993 to confer domestic legal capacity on the CSCE institutions and equip these institutions and their officials and staff with certain privileges and immunities.[793] Since making rules concerning the legal status of the CSCE institutions and privileges and immunities required involvement of the legislature in most of the participating States, it was decided that the participating States should confer on the CSCE institutions, namely the CSCE Secretariat, ODIHR, and any other institution determined by the CSCE Council, such legal capacity as is necessary for the exercise of their functions, subject to their respective constitutional, legislative and related requirements. The legal capacity would include in particular the capacity to contract, to acquire and dispose of movable an immovable property, and to institute and participate in legal proceedings.[794]

The decision further committed participating States to provide the CSCE institutions, their property and assets, with the same immunity from legal process as is enjoyed by foreign states. The premises of the CSCE

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[792] For the history of the 1993 Rome Council decision putting the US proposal into effect, see Miriam Sapiro, "Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation", *The American Journal of Law,* Vol.89, No.3 (July 1995), pp.634-636.

[793] CSCE, "*Provisions Concerning the Legal Capacity of the CSCE Institutions and Privileges and Immunities*" (Rome Council Decision), CSCE/4-C/Dec.2, 1 December 1993.

[794] *ibid.,* Annex 1, Art.1.

institutions would be inviolable, and their property and assets would be immune from search, requisition, confiscation and expropriation. The CSCE institutions would also enjoy inviolability of archives and exemption from direct taxes, customs and duties. They would be able to hold and transfer funds and currency without financial restrictions, and enjoy for their official communications the same treatment as that accorded to diplomatic missions.[795]

While permanent missions of the participating States to the CSCE were to be accorded diplomatic privileges and immunities in conformity with the Vienna Convention on Diplomatic Relations of 1961, representatives of participating States attending the CSCE meetings or taking part in the work of the CSCE institutions would enjoy certain privileges and immunities while exercising their functions and during their journey to and from the place of meeting.[796]

Participating States also agreed to seek to confer certain privileges and immunities to CSCE officials[797] and members of CSCE missions. The privileges and immunities to be conferred would include, *inter alia*, immunity from legal process for official acts, exemption from immigration restrictions and aliens registration as accorded to diplomatic agents, the same privileges in respect of exchange facilities and the same repatriation facilities in time of international crisis as accorded to diplomatic agents.[798]

As seen above, rather than transforming the CSCE into a treaty-based structure when addressing the questions related to its legal status as well as privileges and immunities to be granted, the participating States agreed that these questions be settled through domestic means subject to legal

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[795] *ibid*., Annex 1, Art.4-10.
[796] *ibid*., Annex 1, Art. 11-12.
[797] In 1993 Rome Council Decision, "CSCE officials" means the Secretary General, the High Commissioner on National Minorities and persons holding positions determined by the appropriate CSCE decision-making body or designated by it.
[798] *ibid*., Annex 1, Art.13-16.

requirements of respective states. A step forward in enhancing the operational and administrative capacity of the CSCE/OSCE as it may be, this approach fell short of bringing all-encompassing and lasting solution to many questions arising from lack of internationally recognized legal status as well as uniform privileges and immunities recognized in all OSCE countries.

First of all, the decision did not address the question of the internationally recognized legal status, in other words international legal personality, of the CSCE. Rather, it asked the participating States to confer legal capacity, subject to their legal requirements, on the CSCE Secretariat, ODIHR, and other CSCE institutions determined by the CSCE Council. What would be granted in accordance with the Rome decision was not international legal personality, which would be related to the legal status of the CSCE, but legal capacity, which is related to the capacity of performing domestic legal transactions of private law, and of being liable for such transactions. Besides, the beneficiary would only be the listed institutions, and neither the CSCE (OSCE) itself nor CSCE missions in participating States.

On the other hand, while the CSCE institutions, permanent missions of participating States, representatives of participating States, CSCE officials and members of CSCE missions would enjoy certain privileges and immunities, subject to the constitutional, legislative and related requirements of participating States, CSCE missions were not listed among the beneficiaries of the any of the privileges and immunities. That exception is regarded one of the main weaknesses of the decision.

Implementation of the Rome decision through legislative or administrative measures, subject to legal requirements of the respective participating States, which are not necessarily identical, led inevitably to legal fragmentation in the CSCE/OSCE region.[799] Since its adoption in 1993, the

[799] Currently twenty-four separate structures operate in twenty-two different countries under a very broad variety of national arrangements. See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", *ibid*, p.5.

decision has remained largely unimplemented by the majority of the participating States. Twenty-six years after its adoption, and in addition to the legislation of the host states of Austria[800], Czech Republic[801] and the Netherlands[802], only the following states adopted legislative or other measures for implementing the Rome decision: Denmark[803], Germany[804], Hungary[805], Italy[806], Norway[807], Slovakia[808], Sweden[809], Switzerland[810], the United Kingdom[811] and the United States.[812]

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800 *Supra* Note 486.

801 As host state to the OSCE Secretariat's Documentation Centre in Prague, the Czech Republic adopted the Act no. 125/1992 in respect of the OSCE Secretariat in 1992. See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.5.

802 The Netherlands, Act of 31 October 2002 containing provisions concerning the legal personality and privileges and immunities of the High Commissioner on National Minorities, HCNM.

803 Denmark informed the OSCE Secretary General of the steps it took to implement the relevant provisions of the Rome Council decision and pointed out that "the Danish Government is able to implement the provisions [of the Rome Council decision] by administrative measures on the basis of existing legislation" and specified that "in order to grant privileges and immunities to representatives of participating States, officials and members of missions, it is essential for the Government to receive adequate information prior to the arrival of delegations in Denmark". PC.DEC/383, 26 November 2000, Attachment 1 to Annex.

804 Verordnung über Vorrechte und Immunitäten der Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE), 18 February 2016, Federal Law Gazette (Bundesgesetzblatt) II No.4 of 2016, 138 ff. See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.6.

805 Act on Extension to Institutions, Officers and Employees of the Conference on Security and Cooperation in Europe, Representatives of participating States and Members of CSCE Missions of the Privileges, Exemptions and Mitigations Granted under the Vienna Convention on Diplomatic Relations dated April 18, 1961, 1994, Act LXXXV of 1994. See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.6.

806 Law number 301 of 1998, 30 July 1998, Official Gazette number 196 of 24 August 1998. See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.6.

807 Regulation FOR-2000-01-07-14 *Forskrift om immunitet og privilegier mv. for personer, eiendom og aktiva tilknyttet Organisasjonen for Sikkerhet og Samarbeid i Europa (OSSE), og for personer som foretar inspeksjoner og evaluering under Wien-dokumentet av 1994* (Regulations relating to immunities, privileges, etc, for persons attached to and property and assets

One reason raised by participating States, in particular by the Russian Federation, to explain the failure to implement the Rome decision is that since the Rome decision is a political instrument, which places no legal obligations on participating States, there exists constitutional obstacle to grant legal capacity or privileges and immunities to the CSCE institutions and other beneficiaries listed in the decision. This explanation is usually invoked to support the argument that there has to be a treaty-based structure in place to provide it with legal capacity as well as privileges and immunities that are needed.[813]

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connected with the OSCE, and for persons conducting inspections and evaluations in accordance with the Vienna document of 1994), 1994, available at: https://lovdata.no/dokument/SF/forskrift/2000-01-07-14. See, Tabassi, p.6.

[808] Czech Republic and Slovak Republic, Act number 125 of 1992, 1992, (n.21). See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.6.

[809] *Lag (1976:661) om immunitet och privilegier i vissa fall* (Act on Privileges and Immunities in Certain Cases), 1 July 1994, § 2 (b); *Lag (1994: 716) om rättslig ställning för institutioner inom Konferensen om säkerhet och samarbete i Europa (ESK)* (Act 1994:716 on the Legal Capacity of CSCE Institutions), 9 June 1994. See, Tabassi, *op. cit.*, p.6.

[810] Federal Act on Immunities, Privileges and Facilities and the Financial Subsidies granted by Switzerland as a Host State, 22 June 2007, RS 192.12; Ordinance to the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State, 7 December 2007, RS 192.121. See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.6.

[811] UK, International Organisations Act, 2005, available at: www.legislation.gov.uk/ukpga/2005/20/contents, Chapter 20, Section 4 "The Organisation for Security and Cooperation in Europe". See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.6.

[812] Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Public Law 103-236, Section 422; Implementing, for the United States, the Provisions of Annex 1 of the Decision Concerning Legal Capacity and Privileges and Immunities, Issued by the Council of Ministers of the Conference on Security and Cooperation in Europe on December 1, 1993, 3 December 1996, Executive Order 13029. See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.6.

[813] Helmut Tichy, "The Role of the Participating States in Reforming the Legal Framework of the OSCE-Past Developments, Status Quo and Future

Besides the poor implementation of the Rome decision by some participating States through national legislation, bilateral Memoranda of Understanding and other instruments concluded with various participating States hosting the OSCE field operations[814] as well as the recent Headquarters Agreement concluded with Austria[815] and shortly thereafter an Arrangement concluded with Poland[816] only added to the legal fragmentation of the OSCE. It should be noted that the national legislation as well as MoU and other instruments concluded with the OSCE bear the risk of being amended or interpreted unilaterally by the participating States even without the OSCE having been informed in advance.

b) Convention on the International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE

Lack of clear legal status, together with various problems arising from lack of, or insufficient or non-uniform, privileges and immunities brought about negative impact on daily functioning of the organization, and led the participating States to increase their to efforts to reach a lasting solution, which at the same time would ensure respect for the flexibility of the OSCE institutions. Noting that a large number of participating States have not been able to implement the 1993 Rome decision, the Heads of State or Government of the OSCE participating States agreed at the Istanbul Summit in 1999 that a determined effort should be made to review issues related to the

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Ambitions", Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds), *The Legal Framewoek of the OSCE*, Cambridge University Press, Cambridge, 2019, p.85. See also Gleb Bogush, "Domestic Implications of the OSCE's Legal Personality under Russian Constitutional Law", ibid, p.119-133.

[814] MoU concluded with Armenia (ratified by parliament), Kazakhstan, Kyrgyzstan (ratified by parliament), Montenegro, Serbia, Tajikistan, Turkmenistan, Ukraine (two MoU, both ratified by parliament), and Uzbekistan. The OSCE field operation in Kosovo is carried out under UN Security Council resolution 1244 (1999) and subsidiary regulations issued by the UN Interim Administration Mission in Kosovo (UNMIK). See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.6

[815] See, *supra* Note 560.

[816] See, *supra* Note 561.

implementation of the commitments under the Rome decision, and to this end tasked the Permanent Council, through an informal open-ended working group to draw up a report, including recommendations on how to improve the situation[817]. The working group examined a number of possible options on the basis of a non-paper of the Austrian Chairmanship, from among which a convention on the legal personality and privileges and immunities of the OSCE enjoyed an overwhelming support.[818] The working group also discussed the substance of future provisions on legal personality, legal capacity and privileges and immunities, and exchanged views on a short convention, which would contain the substance of the 1993 Rome Council decision with some extensions. However, no consensus was reached on any of the options discussed.[819] The result of deliberations conducted by the working group is contained in a draft Convention on the international legal personality, legal capacity and privileges and immunities of the OSCE.[820]

In 2005, a Panel of Eminent Persons on strengthening the effectiveness of the OSCE proposed that "the OSCE's development from a conference to a full-fledged international organization must now be completed, finally making *participating States* into *member States*". According to the Panel "the OSCE's standing as an international organization is handicapped by its lack of legal personality. The lack of a clear status also

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[817] Istanbul Document 1999, Istanbul Summit Declaration, para.34 (SUM.DOC2/99, 19 November 1999), OSCE Yearbook 2000, Baden-Baden 2001, p.421.

[818] Non-paper issued by the Austrian Chairmanship on the OSCE Legal Capacity and Privileges and Immunities (CIO.GAL/42/00 of 23 June 2000). The non-paper suggested that three main options may be considered: (i) unilateral action: better implementation of the Rome Council decision or adoption of a new Ministerial decision to supersede the Rome Council decision; (ii) multilateral action: constituent treaty (such as constitution, charter or statute) or convention on the OSCE's legal capacity and privileges and immunities; (iii) bilateral action: adoption by the Ministerial Council of a model bilateral agreement between the OSCE and each participating State, conferring legal capacity and privileges and immunities on the Organization.

[819] The Permanent Council endorsed the report of the open-ended working group envisaged by the Istanbul Summit Declaration. PC Decision No.383, Report on OSCE Legal Capacity and on Privileges and Immunities to the Ministerial Council (PC.DEC/383 of 26 November 2000).

[820] Document CİO.GAL/49/01 of 26 September 2001.

affects OSCE personnel when stationed in crisis areas without the protection that diplomatic recognition would give them."[821] The Panel therefore recommended that:

> (a) Participating States should devise a concise Statute or Charter of the OSCE containing its basic goals, principles and commitments, as well as structure of its main decision-making bodies. This would help the OSCE to become a full-scale regional organization;
>
> (b) Participating States agree on a Convention recognizing the OSCE's legal capacity and granting privileges and immunities to the OSCE and its officials. Such a convention would not diminish in any way the politically binding character of OSCE commitments.[822]

Efforts to establish OSCE as a formal organization failed but an agreement was reached to start negotiations on OSCE's legal capacity and privileges and immunities.

Taking into account the report of the informal open-ended working group and the recommendations of the Panel of Eminent Persons and on the basis of the recommendations of a group of legal experts established by the Chairmanship in 2006[823], the Brussels Ministerial Council decided to establish

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[821] "Common Purpose Towards a More Effective OSCE", Final Report and Recommendations of the Panel of Eminent Persons On Strengthening the Effectiveness of the OSCE, 27 June 2005, para. 3.1 (29).
[822] "Common Purpose Towards a More Effective OSCE", Final Report and Recommendations of the Panel of Eminent Persons On Strengthening the Effectiveness of the OSCE, 27 June 2005, para. 3.1 (30) (emphasis added).
[823] Chairman of the group of experts tasked with reviewing the implications of the lack of international legal status and uniform privileges and immunities of the OSCE reported on the various options as the following:
(i) Convention on the International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE: The convention would be adopted by the appropriate body of the OSCE, and then be opened for signature, subject to ratification, acceptance or approval of participating States (not favoured by all participating States);
(ii) Statute of the OSCE: In addition to addressing the international legal personality, legal capacity and privileges and immunities of the OSCE, the

an informal working group at expert level tasked with drafting a convention on legal personality, legal capacity, and privileges and immunities of the OSCE.[824] The working group held several meetings and reached consensus on

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instrument would govern questions relating to functions, tasks of the organs and structure of the OSCE. Adoption and entry into force would be similar to the first option (not favoured by majority of the participating States);
(iii) Convention on the Privileges and Immunities of the OSCE: The issue of legal personality and legal capacity would be addressed in a separate legal instrument or a political decision. Adoption and entry into force would be similar to the previous options (not all participating States would be able to follow this approach);
(iv) OSCE Decision on the International Legal Personality of the OSCE: An appropriate body of the OSCE would adopt a decision according to which the OSCE would be regarded as an international organization, and therefore would be able to conclude treaties under international law. The issue of privileges and immunities would be addressed separately (not all participating States would be able to follow this approach);
(v) (Declaratory) OSCE Decision on the International Legal Personality of the OSCE: An appropriate body of the OSCE would adopt a decision which would declare that the OSCE has in the course of time acquired the status of international legal personality, and therefore could conclude treaties under international law. The issue of privileges and immunities would be addressed separately (not all participating States would be able to follow this approach);
(vi) (New) OSCE Decision on the International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE: An appropriate body of the OSCE would adopt a politically binding decision, to be implemented through legislation of the participating States (which some participating States say is not possible for them);
(vii) Model law on the International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE: An appropriate body of the OSCE would adopt a decision, placing political obligation on participating States to enact such a domestic law (which some participating States say is not possible for them);
(viii) Model bilateral agreement between the OSCE and mission receiving countries: An appropriate body of the OSCE would adopt a model text for agreements with certain countries. Already in practice to a certain extent, this option does not solve the issue of international legal personality, and fails to confer upon the OSCE a uniform system of privileges and immunities.
For comments on the options, see, Tichy Helmut & Köhler Ulrike, "Legal Personality or not-The Recent Attempts to Improve the Status of the OSCE", Isabelle Buffard, James Crawford, Alain Pellet, Stephan Wittich (eds), *International Law between Universalism and Fragmentation*, Festschrift in Honour of Gerhard Hafner, 2008 Leiden-Boston, Martinus Nijhoff Publishers, p.455-478.
[824] Ministerial Council decision no.16/06 on the legal status and privileges and immunities of the OSCE (MC.DEC/16/06).

the text of a draft Convention.[825] Thus, the Convention was drafted to endow the OSCE with international legal personality and confer upon it such legal capacity as is necessary for the exercise of its functions.[826] Consensus-based decision making procedure and politically binding nature of the OSCE commitments would be maintained.[827] The OSCE[828], representatives of participating States[829], members of the Secretariat and Institutions[830],

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[825] Change in the position of the United States, which until that time objected to the elaboration of a convention on legal personality of the OSCE made it possible for the working group to resume the work on the convention and to reach consensus on the text, albeit with three footnotes. Until 2006, the delegation of the United States, together with some other delegations, objected in principle to a legally binding document which would address the constitutional issues of the Organization. One reason for sticking to that position was the reluctance of the United States administration to submit to its legislature a legal instrument dealing with privileges and immunities of the OSCE, which had already been addressed by the Executive Order of the US President on 3 December 1996 on the implementation of the Rome Council Decision. The United States was not even convinced of the necessity of equipping the OSCE with international legal personality since, according to the US delegation, concluding politically binding memoranda of understanding, rather than treaties, would suffice for the effective functioning of the OSCE. See, Tichy & Köhler, "Legal Personality or not-The Recent Attempts to Improve the Status of the OSCE", p.467-468.

[826] Article 3 of the draft Convention reads: "The OSCE shall possess international legal personality."

Article 4 of the draft Convention reads: "The OSCE shall possess such legal capacity as is necessary for the exercise of its functions, including the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and participate in legal proceedings."

[827] Article 2 of the Convention reads:

"1-Nothing in the present Convention shall affect the OSCE decision-making process.

2. Nothing in the present Convention shall be construed to create any legal obligation for any State Party other than the obligations expressly set forth herein, nor shall anything in the present Convention affect the political, non-legally binding character of the OSCE commitments of the participating Sates."

[828] The Convention does not provide a substantive definition of the OSCE, however there is a clear understanding, as reflected in the definitions, that it includes the Secretariat, institutions and field operations.

[829] "Representatives of participating States" refers to participating States' delegates, deputy delegates, advisers, technical experts and secretaries of delegations (Art. 1 (d) of the draft Convention).

[830] "Members of the Secretariat and Institutions" refers to the Secretary General, the Heads of Institution, as well as the staff members of the OSCE Secretariat and Institutions, but does not include persons who are locally

members of Field Operations[831] and other persons performing tasks of the OSCE[832] would be granted functional privileges and immunities.[833] The Convention would be open for signature by all participating States, to be followed by ratification, acceptance, approval or accession. It would enter into force sixty days after the date of deposit of the instruments of ratification, acceptance, approval or accession by two-thirds of the participating States.[834]

However the draft Convention contained three footnotes referring to an OSCE charter, which the Russian Federation and some other participating States insisted should be adopted together with, or in advance of, the adoption

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recruited and receive an hourly or daily rate of pay (Art. 1 (i) of the draft Convention. "Institutions" refers to the Office for Democratic Institutions and Human Rights (ODIHR), the Office of the High Commissioner on National minorities (HCNM), the Office of the Representative on Freedom of the Media (FOM) and any other institution established by OSCE decision-making bodies. (Art, 1 (f) of the draft Convention).

[831] "Members of Field Operations" refers to staff members of Field Operations, including the Heads of Mission, but does not include persons who are locally recruited and receive an hourly or daily rate of pay (Art. 1 (j) of the draft Convention). "Field operations" refers to the OSCE Field Operations, including OSCE Missions, Centres, Presences, Offices, Project Co-ordinators and other types of field operations established by OSCE decision-making bodies (Art. 1 (g) of the draft Convention). An important difference between immunities enjoyed by "Members of Secretariat and Institutions" and "Members of Field Operations" relates to the immunity from personal arrest or detention, which is only granted to "Members of Field Operations".

[832] "Other Persons Performing Tasks of the OSCE" refers to i) OSCE experts on mission, and ii) representatives of the OSCE Chairman-in-Office, but does not include persons who are locally recruited and receive an hourly or daily rate of pay. For the purposes of the draft Convention, members of the OSCE Parliamentary Assembly, as well as officials of its secretariat, taking part in the work of the OSCE as identified by the Chairman-in-Office are also treated as such. (Art. 1 (k) of the draft Convention). There is a general understanding that in case a member of the Secretariat or Institution temporarily serves on mission outside his/her usual duty station, he/she will, in addition, enjoy the privileges and immunities of "Other Persons Performing Tasks of the OSCE".

[833] Articles 5-17 of the draft Convention.

[834] Article 22 of the draft Convention. However, article on provisional application of the Convention (Article 23) would ensure the recognition of the international legal personality as well as uniform set of privileges and immunities of the OSCE, by participating States willing and able to do so, even before entry into force of the Convention.

of the Convention.[835] Although no consensus could be reached on a text of a convention cleared from footnotes[836] referring to a charter, which apparently enjoyed support from only a small number of participating States, the draft Convention on the International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE was annexed to the statement of the OSCE Chairman-in-Office at the fifteenth meeting of the OSCE Ministerial Council on 29-30 November 2017, in Madrid.[837] So far, the draft Convention could not be adopted because of the arguments raised by some participating States, including the Russian Federation, that were reflected in their previously announced interpretative statement[838] and since there would arise constitutional obstacle, as maintained by some delegations, to adopt such a convention in the absence of a statute or charter.

c) Statute of the OSCE

It was against this background that the Russian Federation together with Armenia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan introduced a draft Ministerial Decision on the Charter of the OSCE in 2007

[835] In an interpretative statement attached to the MC decision no.16/06 (*supra* Note 824), the Russian Federation, while joining the consensus on the decision, declared that the only way of settling the matter in accordance with the norms of international law was to devise a founding OSCE document in the form of a statute or charter. Without a charter, the OSCE could not be regarded as a fully-fledged international organization. Russian Federation stressed that the entry into force of a convention on privileges and immunities would be possible only in conjunction with the entry into force of a statute or charter of the OSCE.
[836] The preambular part contained two such footnotes. The first reads: "Referring to the appropriate provisions of the OSCE Charter which require to define the privileges and immunities of the OSCE in a separate multilateral agreement". In the second preambular paragraph, reference to the functions and purposes of the OSCE was clarified by adding "as they are set forth in the OSCE Charter" to the end of the sentence. The same footnote was added to Article 4 of the Convention which dealt with legal capacity of the OSCE.
[837] Letter from Chair of the Informal Working Group at Expert Level to the Spanish Chairmanship dated 22 October 2007, annexing the Final Document of the Informal Working Group on the Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE (CIO.GAL/159/07; Annex to MC.DEL/67/07).
[838] *supra* Note 835.

with a view to devising a concise Charter of the OSCE containing its basic goals, principles and commitments, as well as the structure of its main decision-making bodies.[839] A draft Charter was annexed to the draft decision governing not only the aim, membership and structure of the OSCE but also international legal personality and functional legal capacity of the Organization. The draft Charter contained a provision of the political nature of the OSCE commitments. It was also stipulated that the privileges and immunities of the OSCE, its officials and of representatives of its members would be defined in a separate agreement, a reference to the draft Convention on the International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE. As expected, the proposal to devise a constituent instrument, be it a charter or a statute, for the OSCE did not attain the required support from participating States, on the one hand for fear that adoption of such an instrument would weaken the much needed flexibility of the OSCE, and on the other hand, for the likelihood that the already agreed commitments, albeit binding politically, would be reopened for discussions. It was also held that devising a constituent instrument before adoption of a convention on international legal personality, legal capacity and privileges and immunities of an international organization might be a general practice but not necessarily a legal precondition. In other words, resort to constitutional requirement that a constituent instrument should be adopted in advance of, or together with, the adoption of a convention on legal personality, legal capacity and privileges and immunities of the OSCE did not seem convincing. Neither does it hold convincing today.

d) Other Options under Consideration

While it has not been possible to solve the question of international legal personality, legal capacity and privileges and immunities of the OSCE, efforts have been made in particular through Chairmen-in-Office to strengthen the legal framework of the OSCE. In this regard, the open-ended Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG) has endeavoured to

[839] PC.DEL/897/07, 18 September 2007.

resolve this matter since 2009. IWG has concentrated its work in particular on the following four options on which legal experts exchanged views :[840]

i) Option 1: Adoption of the 2007 draft Convention;

ii) Option 2: Adoption of a constituent document prior to, or in parallel with, adoption of the 2007 draft Convention;

iii) Option 3: Development of a *Convention Plus* (a hybrid solution consisting of elements of a constituent instrument incorporated into the 2007 draft Convention);

iv) Option 4: Implementation of the 1993 Rome Council Decision through signature and ratification of the 2007 draft Convention by a group of interested participating States.

Positions of the participating States regarding the first two options have not changed so far. Originally against the idea of elaborating a convention on international legal personality, legal capacity and privileges and immunities of the OSCE, the United States has changed its position and agreed on adoption of the draft Convention (Option 1), however its objection to concluding a charter or a statute as a constitutive instrument (Option 2, and therefore Option 3) of the Organization has remained unchanged. As a possible way forward, on the other hand, the United States has signaled green light to considering Option 4 as a possible way forward.[841] The European Union has adopted similar approach, the main difference being its readiness to discuss Option 2 as a long-term project provided that the existing structures of the OSCE would remain unchanged.[842] The Russian Federation, on the other side, has insisted on the need to conclude a constituent instrument (Option 2) together with, or in advance of, the adoption of the draft Convention (Option 1). In addition to its constitutional requirements according to which it would

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[840] Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018 (Document C.GAL/10/18 of 7 December 2018).

[841] Tichy, "The Role of Participating States in Reforming the Legal Framework of the OSCE-Past Developments, Status Quo and Future Ambitions", *op. cit.*, p.85; The Third Meeting of the Open-ended Informal Working Group on Strengthening the Legal Framework of the OSCE, CIO.GAL/177/17 of 19 September 2017; OSCE Informal Working Group Meeting, 6 October 2017.

[842] *ibid.,* OSCE Informal Working Group Meeting, 6 October 2017.

not be legally possible to grant privileges and immunities to an international organization in the absence of a constituent instrument, the Russian Federation referred to the 1949 ICJ Advisory Opinion (*Reparation* case) to underline the importance of a constituent instrument.[843] Indeed, the Court inferred in that case the United Nations' powers, which are not expressly provided in the Charter but conferred upon it by necessary implication as being essential to the performance of its duties. The Court had to examine the Charter to determine whether the power in question was essential for the performance of the United Nation's duties. While this argument can be raised in favour of drafting a constituent instrument (Option 2), it does not explain why the draft Convention cannot be adopted in the absence of a constituent instrument.

Discussions among representatives of the participating States have focused on Option 4 with favourable consideration being given by over half the participating States as the preceding options were unlikely to be realized given the objections described above.[844] This Option is based on the ongoing commitment of the participating States in implementing the 1993 Rome Decision, which, while articulating the legal capacity and privileges and immunities of the CSCE/OSCE, left it to each participating State to determine the best ways of meeting that commitment. Therefore, the Rome Decision could be implemented, inter alia, through the signature and ratification of the 2007 draft Convention without the footnotes attached.[845]

On 20 April 2018, IWG held a panel discussion among treaty law experts invited by the OSCE Chairmanship (Italy) to discuss feasibility of

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[843] *ibid.,* OSCE Informal Working Group Meeting, 6 October 2017.
[844] (Austrian) Chairmanship Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017, MC.GAL/7/17, 8 December 2017.
[845] Tichy, "The Role of Participating States in Reforming the Legal Framework of the OSCE-Past Developments, Status Quo and Future Ambitions", *op. cit.*, p.85-88; (Swiss) Chairmanship Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2014, MC.GAL/5/14/Corr.1, 3 December 2014; Chairmanship Non-Paper on a possible "Convention Plus or OSCE Statute", attached to CIO.GAL/173/14, 2 October 2014.

Option 4 under international law.[846] During the discussions, Prof. *Solntsev*, from the People's Friendship University, seconded the Russian approach (Option 2) and warned that concluding the draft Convention (Option 1) in the absence of a constituent instrument would create a bad precedent or an artificial international custom without sufficient state practice. He underlined that establishing an international organization by concluding its constituent instrument is the traditional and established practice, as in the cases of ASEAN, the CoE, the CSTO, the OAS etc., a pattern which therefore has become part of the international custom in this field. Prof. *Solntsev* also argued that preference for Option 4 would violate the principle of consensus at the core of the OSCE and risk the fragmentation of international law.[847]

Prof. *Blokker*, noting that normally international legal person can come into being either through an explicit clause in the same treaty that created the international organization, or implicitly through the subsequent practice of member states, none of which are applicable to the OSCE[848], draw attention to the necessity of considering other approaches. He explained that it is legally possible, albeit seen less frequently, to establish an international organization through explicit provisions in a separate instrument.[849] While the best solution, according to *Blokker*, would be the adoption of the 2007

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[846] (Italian) Chairmanship Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018, MC.GAL/10/10, 7 December 2018. Participants of the IWG Panel Discussion composed of Prof. Dr. Niels Blokker (Leiden University), Prof. Dr. August Reinisch (University of Vienna), and Prof. Dr. Alexander Solntsev (People's Friendship University of Russia, Moscow).

[847] *ibid.*

[848] Blokker maintained that since the OSCE does not have a constituent document, and there exist persistent disagreements whether "the [OSCE] 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" (reference to ICJ, *Reparation* case, ICJ Reports 1949, page 9), normal practice of coming into being of an international organization is not the case with the OSCE.

[849] Prof Blokker gave the examples of the "1999 Agreement for the Recognition of the International Legal Personality of the International Potato Centre", and the "2009 Agreement Recognizing the International Legal Personality of the Partnerships in Environmental Management for the Seas of East Sea". See, *ibid.*

Convention under Option 1, the OSCE participating States wishing to agree to a slightly modified text of the 2007 Convention (Option 4) would be legally entitled to do so should there arise no consensus on Option 1. In other words, although not a usual practice, Option 4 is not unlawful. Prof *Blokker* also disagreed with Prof *Solntsev*'s argument that Option 4 would violate the principle of consensus. *Blokker* noted that the Convention under Option 4 would be a non-OSCE agreement and thus the principle of consensus would be irrelevant. He described Option 4 as an effective tool for harmonizing some of the different national implementation measures currently in force rather than risking the fragmentation of international law.[850]

Prof *Reinisch*, too, endorsed the view that Option 4 is compliant with international law, drawing analogy to Article 41 (1) of the Vienna Convention on the Law of Treaties[851]. Although there is no treaty to be amended, the current legal situation of the OSCE would still be amended with the adoption of the draft Convention, a consequence resembling what is described in the aforementioned Article of VCLT. The condition that the possibility of such a modification is provided for by the treaty would be satisfied given that the 1993 Rome Council Decision recognized the need for legal capacity, privileges and immunities of the OSCE and recommended that participating States should grant appropriate treatment through domestic legislatures to the Organization accordingly. In addition to the 1993 Rome Council Decision, *Reinisch* reminded IWG that the OSCE participating States decided in 1994 Budapest Summit to examine ways of complying with these commitments, including by concluding treaties. Moreover, Option 4 is permitted by VCLT given that it is not prohibited by the treaty and that, on the one hand, the 2007

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[850] *ibid.*

[851] Article 41 (1) of VCTL reads:
"Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
(a) The possibility of such a modification is provided for by the treaty; or
(b) The modification in question is not prohibited by the treaty and:
(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

draft Convention would not prejudice reluctant participating States, and on the other hand, equipping the OSCE with privileges and immunities would not compromise the aims of the instruments establishing it. He concluded that now that modification of a treaty as between certain parties would be allowed, stronger argument could be made in favour of permissibility of Option 4 where there would be no treaty to deviate from.[852]

Discussions held so far regarding the first three options have reached a stalemate. Apparently there is no legal obstacle against adopting a constituent instrument together with a convention on international legal personality, legal capacity and privileges and immunities of the OSCE. Nor is there a legal obstacle before the *Convention plus* option. Arguments against these options are more of political nature. Flexibility and efficiency of the OSCE can still be maintained once its legal status is strengthened under these options. The same can be said for maintaining the political nature of OSCE decisions. Although the OSCE in its current status as a political platform, where participating States more easily come together to find political solutions to various problems feeding the conflicts, is an invaluable asset that participating States aspire to keep at hand, transforming the OSCE from a political forum into a legal entity through a constituent instrument would not necessarily diminish the role that it is expected to play. On the other hand, international law does permit endowing an international organization with international legal personality, legal capacity and privileges and immunities in the absence of a constituent instrument. Legal certainty would be better ensured, it may be argued, under Option 2 or 3, but lack of a constituent instrument is not a legal reason why the OSCE's legal status cannot be strengthened through a convention.

Apparently no further step can be taken unless positions of the participating States driven by political considerations remain unchanged. This leaves Option 4 as the only option promising success. As *Blokker* rightly

[852] IWG Panel Discussion, Chairmanship Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018, MC.GAL/10/10, 7 December 2018.

pointed out, there is no rule under international law or within the OSCE prohibiting participating States, wishing to do so, from concluding a slightly modified text of the 2007 draft Convention. Such an initiative would help harmonizing the national implementation measures adopted so far, rather than fragmenting the already fragmented legal framework of the OSCE. Recent bilateral agreements concluded between the OSCE and the two host states, Austria and Poland, are likely to encourage participating States, wishing to equip the OSCE with international legal personality legal capacity and privileges and immunities, to conclude a multilateral treaty, even if not adopted by the OSCE.

e) Model Standing Arrangement

With only a few of the participating States having adopted legislative or executive measures to implement the 1993 Rome Council decision, on the one hand, and IWG having failed so far in its efforts since 2009 to reach a consensus on a multilateral solution to recognize international legal personality, legal capacity and immunities and privileges of the OSCE, on the other, the OSCE Secretary General proposed, in 2015, a 'model Standing Arrangement'[853] to be concluded with each participating State with a view to harmonizing the rules governing the legal status of the OSCE in the region.[854] Without prejudice to the ongoing discussions of IWG on legal status of the OSCE, the model Standing Agreement is formulated to address the Secretary-General's duty of care[855] towards OSCE staff.

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[853] For the Secretary-General's initiative for a bilateral Standing Arrangement with each OSCE participating State, see OSCE Doc. SEC.GAL/117/17, dated 11 September 2017.

[854] OSCE Doc. SEC.GAL/148/15, dated 24 July 2015, and reissued as OSCE Doc. SEC.GAL/135/16, dated 8 September 2016, to reflect revisions and comments by delegations.

[855] As an Anglo-Saxon concept used mainly in common law, corresponding to "legal responsibility" in civil law systems, "duty of care is a legal obligation imposed on an individual or an organization, to adhere to a standard of reasonable care while performing act (or omissions) that present a reasonably foreseeable risk of harm to others." Maarten Merkelbach, Voluntary Guidelines on the Duty of Care to Seconded Civilian Personnel, Swiss Federal Department of Foreign Affairs, Stabilisation Unit, Center for International

The first bilateral treaty concluded between an OSCE participating State and the OSCE, based on the model Standing Arrangement text, is the *Arrangement between the OSCE and the Government of the Republic of Poland Regarding the Status of the OSCE in the Republic of Poland.*[856] The experience gained during negotiations of the Arrangement concluded with Poland on 28 June 2017 has been translated into the revised version of the model Standing Arrangement[857], which also enjoyed improvements from the *Agreement between the Republic of Austria and the OSCE regarding the Headquarters of the Organization for Security and Co-operation in Europe* that had been concluded two weeks earlier[858].

As an initiative on a separate but parallel track to IWG consultations on multilateral options, the model Standing Arrangement grants, *inter alia*: (i) legal personality and legal capacity[859] to the OSCE and its institutional structures[860]; (ii) inviolability of its premises, property, assets, and archives; (iii) immunity from jurisdiction and execution; (iv) tax and customs

Peace Operations, Berlin, 2017, p.9. See, also, Lisa Tabassi, Duty of Care in practice, OSCE Legal Digest 2016-2017; Deborah Russo, "Implementation of the Duty of Care by the OSCE", Andrea de Guttry, Micaela Frulli, Edoardo Greppi, Chiara Macchi (eds), *The Duty of Care of International Organizations Towards Their Civilian Personnel-Legal Obligations and Implementation Challenges*, T.M.C. Asser Press, 2018, p.265-290.

[856] See Jasna Arsić-Đapo, "Another Brick in the Wall, Building up the OSCE as an International Organization One Agreement at a Time"

[857] OSCE Doc. SEC.GAL/135/16, dated 8 September 2016.

[858] For the Agreement between the OSCE and Austria, see Tichy Helmut & Quidenus Catherine, "Consolidating the International Legal Personality of the OSCE-A Headquarters Agreement with Austria", International Organizations Law Review, 14 (2017), p. 403-413.

[859] "The OSCE and each of its institutional structures shall possess legal personality and legal capacity as is necessary for the exercise of its functions including the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and participate in legal proceedings." (Article 1(2) of the model Standard Arrangement).

[860] For the purposes of the model Standard Arrangement the OSCE refers to "the Organization for Security and Co-operation in Europe, including its institutional structures. Such structures include the Secretariat, institutions, field operations, special representatives or other operational instruments of the OSCE, as well as the OSCE Parliamentary Assembly." (Article 1(1) of the model Standard Arrangement).

exemptions; (v) financial and communicative facilities; (vi) right to use OSCE flags and symbols for official purposes. The model Standard Arrangement also provides privileges and immunities to: (i) representatives of OSCE participating States and Partners for Co-operation; (ii) members of the OSCE Parliamentary Assembly and their alternates; (iii) OSCE officials.[861]

In addition to the overarching model Standing Arrangement intended to be concluded with each participating State to cover all the activities of the OSCE in the national territory, a second agreement, the model Specific Arrangement[862], has been developed to be concluded with participating States which are hosting field operations, with a view to agreeing on supplementary arrangements for the implementation of the Standing Arrangement[863]. Representing a headquarters agreement for the field operation in question, the model Specific Arrangement addresses in detail issues relating to, *inter alia*, legal capacity of the field mission and privileges and immunities granted to the mission members including citizens or permanent residents of the signatory participating State.

Although the model Standing Arrangement does not aim at introducing a lasting solution to the problems arising from lack of international legal personality, legal capacity and uniform privileges and immunities of the OSCE, it serves as an interim solution to address operational needs of the Organization. Given its model role in devising agreements between the OSCE and participating States, in which the OSCE's

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[861] For the purposes of the model Standing Arrangement, "OSCE Officials" refers to: (i) any person subject to OSCE Staff Regulations, including the Secretary General, the Heads of OSCE Institutions and the Heads of OSCE Missions and all staff/mission members; (ii) Representatives appointed by the Chairperson-in-Office; (iii) OSCE Experts on Mission; and (iv) the Secretary General of the OSCE Parliamentary Assembly, members of its International Secretariat and its experts on mission (Article 10 (1) of the model Standard Arrangement).
[862] OSCE Doc. SEC.GAL/117/17, dated 11 September 2017.
[863] The model Standard Arrangement provides that "(T)he Parties may enter into such supplementary arrangements...may be necessary to implement this Standing Arrangement", in which case the Standing Arrangement would apply to the OSCE presence/office (Article 15 (1) of the model Standing Arrangement).

legal personality, legal capacity and privileges and immunities are recognized by signatory States, OSCE Secretary General's initiative of developing model Standard Arrangement increases the state practice and thereby lends support to arguments, shared by the OSCE Secretariat, that the OSCE enjoys *de facto* or objective international legal personality.

D- Legal Status of the OSCE and its Specific Capacities

Ambiguity in legal status of the OSCE brings to the fore many questions that need to be settled to ensure safe and effective functioning of the Organization, which carries out, *inter alia*, potentially hazardous operations in conflict zones where its vulnerability is fully exposed. In this regard, specific capacities of the OSCE, namely its international responsibility, privileges and immunities, and its treaty-making capacity will be examined below in relation with its long debated international legal personality.

a) Privileges and Immunities of the OSCE

As opposed to the majority of international organizations, the OSCE does not enjoy privileges and immunities based on a treaty. Whereas privileges and immunities are mostly accorded to international organizations in their constituent instruments, the OSCE, devoid of one, relies rather on customary law [864], host country agreements [865], memoranda of understanding[866], national laws[867] as well as courtesy offered to it. Variety of the legal resources brings about disharmony in the scope and implementation of the privileges and immunities accorded to various beneficiaries of the OSCE.

Poor implementation of the 1993 Rome Council Decision opened the way for drafting a *Convention on the International Legal Personality, Legal*

[864] See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.23.
[865] See, *supra* Notes 560, 561.
[866] See, *supra* Note 814.
[867] See, *supra* Notes 800-812.

Capacity, and Privileges and Immunities of the OSCE[868]. While discussions continue, albeit without tangible progress, on whether and how to adopt a convention addressing the issue of privileges and immunities of the OSCE, the draft Convention stands as a reasonable option offering comprehensive solution to various questions arising from the lack of a legal instrument.

Privileges and immunities contained in the draft Convention are bestowed upon the Organization[869] itself, representatives of the participating States[870], members of the Secretariat and Institutions[871], members of Field Operations[872] and other persons performing tasks of the OSCE.[873] Privileges and immunities contained in the draft Convention can be summarized as follows:

(i) The OSCE, its property and assets shall enjoy immunity from jurisdiction.[874] In addition to immunity from jurisdiction and execution, the Convention provides that the premises, archives and documents of the OSCE are inviolable, and that the OSCE, its assets, income and other property shall be exempt from all direct taxes as well as custom duties on imports and exports in respect of articles imported or exported by the OSCE for its official use.[875]

Moreover, the OSCE is granted facilities in respect of communications.[876] It shall enjoy freedom of official communications, at a level not less favourable than that accorded to any international organization or diplomatic mission, and freedom from censorship. It is also provided that the OSCE is entitled to use codes, and dispatch and receive correspondence by courier or in bags, on the same basis as diplomatic couriers and bags.

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[868] See, supra Note 837.
[869] Article 5-12 of the draft Convention.
[870] Article 14 of the draft Convention.
[871] Article 15 of the draft Convention.
[872] Article 16 of the draft Convention.
[873] Article 17 of the draft Convention.
[874] Article 7 of the draft Convention.
[875] Articles 5, 6, 8 and 9 of the draft Convention.
[876] Article 11 of the draft Convention.

(ii) Representatives of the OSCE participating States shall enjoy a number of privileges and immunities.[877] They shall enjoy immunity from personal arrest and detention and from seizure of their personal baggage as well as immunity from jurisdiction in respect of their official words, and they are exempt from immigration restrictions, aliens registration and national service obligation. Their papers and documents are inviolable, and they are entitled to use codes and receive correspondence by courier or in sealed bags. They are also accorded the same privileges in respect of currency or exchange facilities and the same immunities and facilities in respect of their personal baggage, as are accorded to diplomatic agents of foreign States.

In case of a representative of a member state having nationality of the host state, no privileges and immunities apply.

(iii) Members of the Secretariat and Institutions are granted such privileges and immunities as are necessary for the independent exercise of their functions.[878] In this regard, they are accorded immunity from legal process in respect of words spoken or written and acts performed in an official capacity, exemption from national service obligations, immigration restrictions and alien registration, and exemption from direct taxes on their salaries, allowances and emoluments. They are accorded the same privileges in respect of currency and exchange facilities and the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys of the same level as well as the same repatriation facilities in times of international crisis. They are also entitled to import free of duty their furniture and effects at the time of first taking up their post and to export the same free of duty when they leave their post.

States Parties may decline to accord abovementioned privileges, immunities and facilities to their own nationals or permanent residents except

[877] Article 14 of the draft Convention.
[878] Article 15 (1) of the draft Convention.

for immunity from jurisdiction in respect of words spoken or written and acts performed in an official capacity.[879]

In addition, the Secretary General and Heads of Institution and their families are granted the same privileges, immunities, exemptions and facilities as are accorded to heads of diplomatic missions in accordance with international law.[880]

(iv) Members of Field Operations are granted such privileges and immunities as are necessary for the independent exercise of their functions during the period of their mission.[881] Privileges, immunities and facilities accorded to members of Field Operations include immunity from personal arrest or detention, immunity from legal process in respect of words spoken or written and acts done by them in the course of the performance of their mission, inviolability for papers and documents, the same facilities in respect of currency or exchange restrictions, the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, exemption from taxation on the salaries, allowances and other emoluments, exemption from the social security regulations of the host State, exemption from national service obligations, immigration restrictions and aliens registration, the same repatriation facilities in times of international crises as diplomatic agents, and the right to import free of duty their furniture and effects at the time of first taking up their post and to export the same free of duty when they leave their post.

States Parties may decline to accord abovementioned privileges and immunities to their own nationals or permanent residents except for immunity from personal arrest or detention as well as from legal process in respect of words spoken or written and acts done by them in the course of the performance of their mission[882].

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[879] Article 15 (2) of the draft Convention.
[880] Article 15 (3) of the draft Convention.
[881] Article 16 (1) of the draft Convention.
[882] Article 16 (2) of the draft Convention.

In addition, the Heads of Mission and their families are granted the same privileges, immunities, exemptions and facilities as are accorded to heads of diplomatic missions in accordance with international law.[883]

(v) Other persons performing tasks of the OSCE are accorded similar privileges and immunities as are accorded to members of Field Operations except for exemption from taxation on the salaries, allowances and other emoluments, exemption from national service obligations, and the right to import/export free of duty their furniture and effects at the time of first taking up their post/when they leave their post. They are also granted the right to use codes and to receive papers or correspondence by courier or in sealed bags.[884]

States Parties may decline to accord immunity from personal arrest or detention to their own nationals or permanent residents except for acts performed in their official capacity.[885]

Since the draft Convention could not be adopted due to the fact that a number of participating States require that a constituent document (OSCE Charter) should be adopted in advance or together with the adoption of the draft Convention, uniformity between the legal regimes of privileges and immunities granted under domestic regimes remains one of the major problems to be tackled with, on the one hand, and the position of the OSCE permanent institutions and field operations continues to be regulated by, in other words remains at the discretion of, legislative means, on the other.

The privileges and immunities of the headquarters of the OSCE Secretariat, for example, are governed under a specific Austrian statuary law of 1993[886]. By virtue of that *Federal Act*, the OSCE institutions based in

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[883] Article 16 (3) of the draft Convention.
[884] Article 17 (1) of the draft Convention.
[885] Article 17 (2) of the draft Convention.
[886] See, *supra* Note 486. Normally the privileges and immunities of international organizations are regulated under the Federal Act of 14 December 1977 on the Granting of Privileges and Immunities to International

Vienna and their staff members and experts, offices established in Austria of OSCE institutions having their headquarters in another state and the Liason Office of the OSCE Parliamentary Assembly in Vienna (together with the staff members of these offices), other staff and experts of OSCE institutions having their headquarters in another state who are in Austria on official duty, and Representatives of the Chairperson-in-Office and their staff, who are in Austria for official duty and the offices of these representatives in Austria enjoy privileges and immunities that correspond to those enjoyed by the United Nations in Austria under the UN Seat Agreement [887] and the Convention on the Privileges and Immunities of the United Nations of 1946.[888] However, the OSCE Office for Democratic Institutions and Human Rights, ODIHR, in Warsaw, and the Office of the high Commissioner on National Minorities, HCNM, in The Hague, are not covered by the Federal Act.

What may be regarded as a breakthrough development is that despite the fact that the OSCE lacks a generally acknowledged international legal status Austria signed a Headquarters Agreement with the OSCE on 14 June 2017[889]. Upon entry into force in 2018 the Agreement replaced the Federal Act on the Legal Status of OSCE Institutions in Austria, Federal Law Gazette No.511/1997, in accordance with its provision to that effect[890] without altering the substance of the privileges and immunities already enjoyed by the OSCE institutions.

Organizations (See *supra* Note 485). However, the Federal Act of 1977 does not cover the OSCE because of on-going dispute about the institution's international legal personality on the one hand, and the vagueness of the OSCE's status of international organization from international law point of view on the other, which was the reason why no headquarters agreement could concluded between Austria and the OSCE for years.

[887] Agreement between the Republic of Austria and the United Nations regarding the Seat of the United Nations in Vienna, Federal Law Gazette BGBI. III Nr. 99/1998.

[888] Federal Law Gazette, BGBI. Nr. 126/1957. See, Tichy & Quidenus, "Consolidating the International Legal Personality of the OSCE-A Headquarters Agreement with Austria", p.409.

[889] See *supra* Note 560.

[890] Section 46 (b) of the Agreement.

In the preambular part of the Headquarters Agreement it is underlined that the parties to the Agreement desire to define the status, privileges and immunities of the Organization for Security and Co-operation in Europe in the Republic of Austria and to enable it to fulfil its roles and mandates as established by the 1975 Helsinki Final Act and subsequent documents. As in the Federal Act, the Agreement provides the OSCE with immunities, privileges and facilities required for its effective functioning. These include inviolability of the headquarters[891] of the OSCE and of its archives and documents[892], immunity from jurisdiction and other actions[893], protection of the headquarters of the OSCE[894], facilities in respect of public services within the headquarters of the OSCE[895], facilities in respect of communications, publications and transportation[896], exemption from taxation[897], financial facilities[898]. Moreover, the OSCE and its officials are exempt from domestic social security obligations[899]. Besides, as a country hosting the headquarters of the OSCE, Austria has undertaken to take necessary steps to facilitate transit and residence of certain categories of persons.[900]

In addition, representatives to the OSCE and persons who have official business with the OSCE[901], officials of the OSCE[902] and experts on mission

[891] Section 4 (a) of the Agreement reads: "The Headquarters of the OSCE shall comprise the land, installations and offices that the OSCE occupies for its activities. Its area shall be defined by common understanding between the Government and the OSCE."
[892] Article V of the Agreement.
[893] Article VI of the Agreement.
[894] Article VII of the Agreement.
[895] Article VIII of the Agreement.
[896] Article IX of the Agreement.
[897] Article X of the Agreement.
[898] Article XI of the Agreement.
[899] Article XII of the Agreement.
[900] Article XIII of the Agreement. Persons covered by this Article include, *inter alia*, members of Permanent Missions and delegations of participating States, of Partners for Cooperation, of other States and intergovernmental organizations to the OSCE in Vienna; officials of the OSCE based in Vienna; experts on mission for the OSCE.
[901] Article XIV of the Agreement.
[902] Article XV of the Agreement.

for the OSCE[903] are conferred upon functional privileges, immunities and facilities.

It is yet to be seen whether the United Nations Secretariat will register and publish the Agreement in accordance with Article 102 of the UN Charter. It is worth noting, however, that the parties to the Agreement, Austria as the host country and the OSCE, have concluded the instrument governed by international law.[904] With that Agreement, Austria has acknowledged that the privileges and immunities granted to the OSCE Secretariat by virtue of its domestic legislation will be treated as governed by international law once the Agreement has entered into force.

Likewise, privileges, immunities and facilities granted under the Arrangement between the OSCE and the Republic of Poland on the Status of the OSCE in the Republic of Poland[905], which not only addresses the

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[903] Article XVI of the Agreement.

[904] Tichy, "The Role of the Participating States in Reforming the Legal Framework of the OSCE-Past Developments, Status Quo and Future Ambitions", p.89-93.

[905] See *supra* Note 561. After the establishment of the OSCE Office for Free Elections (OFE) in 1990 by the Charter of Paris for New Europe, the Council of Ministers of the Republic of Poland passed Decision No.65 on 2 May 1991 in which the OFE, its staff and members of their households would enjoy the facilities, privileges and immunities specified in the 1946 Convention on the Privileges and Immunities of the United Nations. The Decision granted relevant privileges, immunities and facilities also to members of the delegations participating in the meetings organized by the Office as well as staff members of the Secretariat and the OSCE Centre for Conflict Prevention during their official missions in Poland. On 5 June 1992, the Council of Ministers passed Decision No.62 in which it recognized the name change of the Office (from OFE to ODIHR) and granted relevant facilities, privileges and immunities to ODIHR, its staff, members of delegations taking part in the meetings of ODIHR as well as staff members of the Secretariat and the OSCE Centre for Conflict Prevention during their official missions in Poland. Although the Decision No.62 was repealed, effective as of 30 March 2001, following the adoption of the new Constitution in 1997, the *de facto* status of the ODIHR remained unaffected, as endorsed in 2006 in a Note Verbal (Note Verbal No. PD-130-1-06 OSCE/684/06, dated 11 July 2006). For the history of the OSCE and ODIHR in Poland and negotiations leading to the conclusion of the Arrangement, see Jasna Arsić-Đapo, "Another Brick in the Wall, Building up the OSCE as an International Organization One Agreement at a Time".

questions relating to the status of ODIHR but also ensures the legal status of all the OSCE structures in Poland, will be treated as governed by international law once the Arrangement has entered into force as it was concluded, like the Headquarters Agreement signed between Austria and the OSCE, as a treaty, thus representing the position of the signatory state vis-à-vis the OSCE's status as a subject of international law with treaty-making capacity.[906]

Despite the valuable contribution of Austria and Poland to settling the issue of international legal personality, legal capacity and privileges and immunities of the OSCE by addressing the issue not only through their domestic law but also through treaty law, questions arising from ineffective and even non-implementation of the 1993 Rome Council Decision remains a serious concern for the Organization. It can be safely argued that a treaty-based solution would be the more effective and preferable than that offered by unilateral domestic initiatives or legally weak memoranda of understanding. The draft Convention offers lasting solution to the problems arising from non-uniform regime of privileges and immunities, no matter with or without the footnotes. As *Pingel* notes, such a convention would facilitate the work of the OSCE and the recruitment of staff in the first place.[907] Another argument put forward in favour of adopting such a convention relates to the protection of field staff, especially in crisis areas. Noting that no state hosting a field operation has implemented the 1993 Rome Council Decision, the writer draws attention to problems related to the conclusion and implementation of memoranda of understanding with host States.[908] Equipped with privileges

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[906] See Jasna Arsić-Đapo, "Another Brick in the Wall, Building up the OSCE as an International Organization One Agreement at a Time", p.415.

[907] Isabelle Pingel, "Privileges and Immunities of the Organization for Security and Co-operation in Europe (OSCE)", MPIL Research Paper Series No.2018/37. In Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds.): *The Legal Framework of the OSCE*, Cambridge University Press, 2019, p.7. The writer highlights in particular the importance of tax exemption of the OSCE staff and notes that denial of tax exemption may impair the Organization's ability to attract qualified staff.

[908] *ibid.*, p.9-10. Based on the experiences of the OSCE Secretariat, Pingel notes that negotiating a MoU is a lengthy and complex process, especially because every new activity within the framework of the field operation would require the negotiation and conclusion of a new MoU, which is more problematic in cases of urgency as in the case of Ukraine in 2015. Even if a

and immunities under a multilateral convention, the OSCE and its staff would definitely carry out their functions effectively and free from state interferences.

b) Treaty-Making Capacity of the OSCE

As examined above, it is generally accepted that treaty-making capacity is a consequence of international legal personality. As *Alvarez* noted, international legal personality of international organization is essential to its ability to act externally on international plane vis-à-vis other international organizations[909], which includes the treaty-making capacity. International organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purpose.[910] The capacity of an international organization to conclude treaties is governed by the rules of that organization[911], among which constituent instruments come first. Once it is established that an entity has international legal personality, determination on whether it has the capacity to conclude treaties is generally made based on the previously examined doctrines. While powers of an international organization can be established from explicit provisions contained in its constituent document or can be implied from implicit provisions in accordance with the organization's functions and purposes[912], it is widely recognized that the capacity to conclude treaties proceeds from

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MoU is concluded, problems arising from lack of legal capacity would continue and, thus, it would not be possible to perform commercial transactions. Another reason why MoU are not satisfactory when it comes to implementation is that they generally refer to the 1961 Vienna Convention on Diplomatic Relations, which provides that local staff can enjoy privileges and immunities to the extent accorded to them by the accrediting State (Article 38(2) of the Convention). Lack of effective protection of the local staff necessarily impairs the independence of considerable labour force of the OSCE.

[909] Alvarez, *International Organizations as Law-makers,* p. 129-139.

[910] Eleventh preambular paragraph of 1986 VCLT.

[911] Article 6 of 1986 VCLT. For discussions whether this provision should be read as referring to the legal foundation of an international organization's treaty-making capacity, or as referring to the factual exercise of such capacity, see Brölmann, *The Institutional Veil in Public International Law,* p.204.

[912] See discussions above on powers of international organizations, Part I/G.

transfer of power by member states, either through the constitutive instrument or through later acts, it is also argued that the treaty-making capacity of international organizations derive from customary law [913] and that all intergovernmental organizations have inherent general[914] or specific[915] treaty-making capacity.

The practice of the UN and the EU showcases the capacity of international organizations to conclude treaties where the constituent instrument is silent on the question of international legal personality. Although the constituent instrument of the UN, the Charter of the United Nations, is silent on the Organization's international legal personality, the UN's capacity to conclude treaties was not contested as in the case of the UN-US Headquarters Agreement. In *Reparation* case the ICJ highlighted that the UN "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*."[916] The EU, likewise, concluded various agreements[917] despite the fact that it was not endowed with international legal

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913 Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded, op. cit.,* p.34; Klabbers, An Introduction to International Institutional Law, p.252.

914 Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities really Depend on the Conventions Establishing Them, op. cit.,* p.19-23; Amerasinghe, *Principles of the Institutional Law of International Organizations,* p.101.

915 For inherent right of international organizations to conclude treaties relating to their headquarters as well as privileges and immunities to be granted to them and to their staff, see Schermers & Blokker, *International Institutional Law*, p.1101.

916 *Reparation* case, ICJ Reports 1949, page 9 (emphasis added).

917 See, for example, Agreement between the EU and Yugoslavia concerning the activities of EU Monitoring Mission in Yugoslavia, OJ 2001, L 125/1. It was held that it was within the EU's *implied power* to conclude such an agreement in line with the *Reparation* Advisory Opinion (Blokker&Wessel, Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice", p.13). For EU's generous practice of its treaty-making power granted by Articles 24 and 38 of the Treaty on European Union (TEU) in the field of common foreign and security policy and police as well as judicial cooperation, see Schoutheete & Andoura, "The Legal Personality of the European Union", Egmont Royal

personality in its constituent document until the conclusion of the Treaty of Lisbon in 2007.[918]

Devoid of a constitutive legal instrument, lacking therefore international legal personality as granted in a legal document, the OSCE, too, has concluded a number of agreements with participating States, which are similar in nature to host country agreements, granting, *inter alia,* legal capacity in the national territory, privileges and immunities to the OSCE structure and its officials.[919] Similarities can be drawn therefore between the OSCE and the previous examples of the UN and the EU. As was the case with the UN and EU, resistance from participating States to equipping the Organization with international legal personality can be explained on political grounds rather than legal ones. But the differences are stronger. Both UN and the EU have constituent legal instruments from which their international legal personality could be derived, to start with. Moreover, both UN[920] and the EU[921] have been explicitly endowed with the treaty-making powers (or

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Institute for International Relations, in *Studia Diplomatica* Vol. LX, No.1, 2007, p.5-6

[918] The 1992 Maastricht Treaty (known in updated form as Treaty on European Union (2007)/TEU), which created the EU, did not contain any provision on EU's legal personality. Neither was an agreement reached on the issue at the European Council meeting that took place in Amsterdam in 1997. Amending the Maastricht Treaty and the Treaty of Rome of 1957 (known in the updated form as Treaty on the Functioning of the European Union (2007)/TFEU) as well as the Treaty Establishing the European Atomic Energy Community (EURATOM), the Treaty of Lisbon (initially known as the Reform Treaty), signed by the EU member states on 13 December 2007, has explicitly recognized the legal personality of the EU, allowing the Organization to negotiate and conclude international agreements with other states and international organizations in all areas of Union action. Article 47 of the Treaty on European Union reads: "The Union shall have legal personality".

[919] As discussed above, the most recent ones were signed with the two host states: *Agreement between the Republic of Austria and the OSCE Regarding the Headquarters of the OSCE* and the *Arrangement Regarding the Status of the OSCE in the Republic of Poland*.

[920] UN Charter, Articles 43, 57, 63 and 105. See, *supra*, Notes 506-508.

[921] See, consolidated versions of the TEU and TFEU, Article 216. Taking effect on December 1, 2009, the Lisbon Treaty removed ambiguity as to the legal personality and treaty-making power of the EU. Article 216 reads: "1. The Union may conclude an agreement with one or more third countries or

competence) in their constituent instruments. It has been held therefore that "the lesson learnt from the UN and the EU suggests that perhaps practice has not, or not yet, been sufficiently powerful to overcome the political hurdles."[922]

i. Agreement on the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe

An analysis can be offered on the OSCE's treaty-making power (competence)[923] based on the legal nature of the agreements concluded by the Organization, as *Hafner* did on the legal nature of the *Agreement on the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe* (Agreement).[924] Having examined the substance of the Agreement[925], *Hafner* noted that the wording and outer appearance of the text of the instrument resembled those of a typical international treaty[926], and

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international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. (2) Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

922 Blokker&Wessel, "Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice", p.14.

923 Distinction is made between 'capacity' and 'competence' (or power) of treaty-making, where the former is said to derive from general international law, while the latter would derive mainly from the rules of the organization (institutional make-up). See, Klabbers, An Introduction to International Institutional Law, p.252. For the conceptional distinction between the two terms, see Brölmann, The Institutional Veil in Public International Law, p. 90-94.

924 Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", p.40-57.

925 Concluded between the Chairman-in-Office of the OSCE and the Minister of Foreign Affairs of the Federal Republic of Yugoslavia (FRY) on 16 October 1998.

926 Although majority of the instruments concluded by the OSCE bear the nomenclature of 'Memorandum of Understanding', suggesting that they are binding not legally but politically, the instrument in question bears the nomenclature of 'Agreement'. Substantive provisions of the Agreement address various issues including the establishment and termination of the

listed a number of explanations that could be offered concerning the legal nature of the Agreement: i) a *non-legal act*, entered into on behalf of the OSCE constituting a non-legal entity or on behalf of participating States; ii) a *treaty* between the OSCE and the FRY, where the OSCE is regarded as a subject of international law; iii) an *agreement* between the Chairman-in-Office of the OSCE (the Polish Foreign Minister Bronislaw Geremek) on behalf of the participating States of the OSCE and the FRY; iv) a *gentleman's agreement* binding only the two persons who signed it (the Polish Foreign Minister and the Foreign Minister of the FRY)[927].

When analyzing the treaty-making power of the OSCE, *Hafner* notes that although the legal nature of an international instrument is generally determinative of the international legal status of the entity concluding it, this is not necessarily valid for all cases. While international organizations, as subjects of international law, "can enter into engagements which are not intended to form international treaties; the qualification of an instrument as a treaty… does not necessarily make the concluding entity an international organization since even some entities which unquestionably do not figure among international organizations such as the ICRC are equipped with rights under international law."[928] *Hafner* emphasizes, however, that such rights and duties can be granted to an entity which is not an intergovernmental organization either by a specific norm of international law or through explicit recognition by the other partner to the instrument. The writer holds, consequently, that "if there does not exist any explicit legal norm on a specific

Mission, general responsibilities, roles and missions, terms of reference concerning the operation of the Mission, composition of the Mission and facilities granted, and questions on the field presence.

[927] The writer dismissed the last two alternatives given the fact that both signatories signed the Agreement on behalf of the OSCE and for the FRY, respectively, with consequence that the Agreement can be attributed to either the OSCE or the OSCE conceived as the collectivity of the participating States, and respectively to the FRY. The writer also excluded the argument that the Agreement could be identified as a contract governed solely by domestic law given the substantive provisions of the instrument, which fall definitely out of the domain of domestic law. Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", p.40-41

[928] Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", p. 41-42.

treaty-making power assigned to the OSCE, it is only the legal status of the entity itself which could serve as evidence of the legal nature of the instrument entered into by it."[929] *Hafner* than lists a number of arguments in favour of and against the legal status of the OSCE. Arguments in favour of the OSCE's status can be summarized as follows:

(1) Irrespective of its soft-law basis, the OSCE stands as an international organization. This conclusion derives from "the obvious will of the participating States to endow the OSCE with such legal nature since otherwise it could not fulfill the functions conferred upon it."[930]

(2) Even if the OSCE lacks international personality, it still constitutes international organization.[931]

(3) Given the preceding explanations and now that the 1986 VCLT recognizes that international organizations possess the power to conclude treaties, the same conclusion can be reached also for the OSCE.

(4) Despite the fact that the Preparatory Commission (PrepCom) for the Comprehensive Nuclear Test-Ban Treaty Organization lacks a constituent treaty[932], it has been treated like an international organization by the host State, Austria, and a bilateral headquarters agreement was concluded between

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[929] ibid, p.42.

[930] *ibid*. Reference is made to Seidl-Hohenvelern Ignaz, "Internationale Organisationen aufgrund von soft law", in: U. Beyerlin et al (ed.) *Recht zwischen Umbruch und Bewahrung*. Festschrift für Rudolf Bernhardt, Berlin 1995, 233.

[931] Reference is made to M. Wenig, Der Völkerrechtliche Status der OSZE: gegenwärtiger Stand und Perspektiven, in: OSZE-Jahrbuch, 3 (1997), p.401; E. Klein, Die Internationalen und Supranationalen Organisationen als Völkerrechtssubjecte, in: W. Graf Vitzthum, Völkerrecht, Berlin-New York 1997, p.279.

[932] CTBTO was established on 19 November 1996 by a Resolution (CTBT/MSS/RES/1, 17 October 1996) adopted by the Meeting of the States Signatories to the Comprehensive Nuclear Test-Ban Treaty at the United Nations in New York.

them.[933] The case of the PrepCom sets a good example of an entity being treated as an international organization despite the lack of a constituent treaty. Similarly, the UN treated the OSCE as an *organization* whereas the OSCE considered itself as an *regional arrangement* under Chapter VIII of the UN Charter.[934]

(5) Certain international functions have been assigned to the OSCE by the Dayton Agreement[935] as well as the Agreement between the NATO and the FRY[936] such as coordination of air and ground surveillance activities between NATO and OSCE Missions. These functions with effect to other subjects of international law can only be achieved if the OSCE enjoyed a certain legal status. Moreover, the OSCE enjoys rights under international law as specified in UN Security Council Resolution 1203 (1998). It may be suggested that the "UN is likely to classify the OSCE as an international organization which accordingly seems to enjoy treaty-making power within the ambit of its competences."[937]

Notwithstanding the views in favour of the legal status of the OSCE, *Hafner* lists a number of contradicting arguments that reflect the traditional view that the OSCE does not constitute an international organization *stricto sensu*, and therefore lacks any international personality under international law so that it is unable to conclude an international treaty[938]. Those arguments can be summarized as follows:

(1) Notwithstanding the increasing institutionalization since the

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[933] Agreement between the Republic of Austria and the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization regarding the seat of the Commission. BGBI. III, No.70/1997.
[934] See, *supra,* Note 690.
[935] The General Framework Agreement for Peace in Bosnia and Herzegovina, signed in Paris on 14 December 1995.
[936] Kosovo Verification Mission Agreement between the North Atlantic Treaty Organization and the Federal Republic of Yugoslavia (UN Doc.S/1998/991 of 23 October 1998).
[937] Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", p.44.
[938] *ibid*., p.44.

Paris Charter of A New Europe, the entire OSCE process has always been characterized as remaining outside legal rules *stricto sensu*, nor was it considered endowed with a treaty-making capacity[939].

(2) Except for the Convention on Conciliation and Arbitration[940], the instruments connected with the OSCE are non-legal acts, which belong to the domain of soft-law.[941]

(3) Due to the opposition from several participating States to conclude an agreement granting an internationally recognized status to the CSCE Secretariat, the Conflict Prevention Center and the ODIHR, arising from fear of damaging the *flexibility* of the whole body, solution was offered through the 1993 Rome Council Decision, which obliged the participating States to take the relevant measures subject to their domestic requirements. Host States, including Austria, implemented the Decision by means of domestic legislative acts. According to the explanation accompanying the relevant Austrian Act, "the CSCE did not constitute an international organization *stricto sensu*" and, it was even underlined that the "legal status was granted not to the CSCE as such, but to the individual institutions."[942]

(4) The UN did not conclude a treaty with the CSCE on matters of cooperation, but only *Framework for Cooperation and Co-ordination between the United Nations Secretariat and the Conference on Security and Co-operation in Europe.*[943] The title and the reference to the UN Secretariat suggest that the UN was not prepared to acknowledge the treaty-making power of the CSCE.[944]

(5) The UN recognized the OSCE not as a *regional agency* but a *regional arrangement*[945] for dealing with such matters relating to the

[939] *ibid.*, p.45.
[940] See, *supra*, Note 684.
[941] *ibid*.
[942] *ibid*, p.46. Reference is made to 1095 Beil Sten Prot. NR, XVIII GP.
[943] UN Doc. A/48/185, appendix, 26 May 1993.
[944] *ibid*, p.47.
[945] See, *supra*, Note 690.

maintenance of international peace and security as are appropriate for regional action. "This designation addresses entities which are not international organizations, but some other form of cooperation"[946].

(6) Decision-making process of the Court of Conciliation and Arbitration[947] established in accordance with the Convention on Conciliation and Arbitration within the OSCE is presented as another manifestation of non-legal nature of the OSCE acts. While the objective of the Conciliation Commission is to assist parties to a dispute in finding settlement in accordance with international law and their OSCE commitments[948], function of the Arbitral Tribunal is to decide the disputed submitted to it in accordance with international law.[949] The Convention clearly separates compliance with OSCE commitments from legally binding obligations as the Arbitral Tribunal is mandated to render arbitral award only based on international law without OSCE commitments being taken into consideration.[950]

Weighing the abovementioned arguments in favour and against the legal status of the OSCE, *Hafner* concludes that the OSCE in its entirety remains out of the scope of international organizations enjoying international legal personality, and thus unable to conclude an international treaty *stricto sensu* as this power has not been explicitly conferred upon it in any of the OSCE documents.[951] Analyzing also the Agreement itself, *Hafter* concludes

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[946] *ibid*, p.47. Reference is made to A.Agioia, The UN and regional organizations in the maintenance of peace and security, in: Bothe, Ronzitti, Rosas, p.199. Regarding the "observer" status granted to the OSCE by the UN General Assembly (UN Doc.A/RES/48/5 of 13 October 1993), Hafner advises that this status was granted prior to the resolution of the General Assembly, by which the observer status was limited only to States and international organizations (UN Doc. A/49/426).
[947] See, *supra*, Notes 689, 711.
[948] Article 24 of the Convention.
[949] Article 30 of the Convention.
[950] Hafner, "Did the FR Yugoslavia Make the OSCE an International Organization?", p.47.
[951] *ibid*, p.48. Hafner notes that neither the Decisions of Helsinki of 1992, in general, nor the decisions of the Permanent Council, in the specific case of Kosovo, equips the OSCE with treaty-making power. Nor can a mandate for the Chairman-in-Office to conclude a treaty be derived from the decision of

that "the Agreement does not constitute an international treaty in the sense of international law[952]" and can be qualified as a *non-legal act* as long as the clear intention to treat it as an international treaty cannot be established.[953]

While *Hafner*'s thorough analysis definitely sheds light on the assessment of the OSCE's treaty-making capacity, considerable developments have taken place since the conclusion of the Agreement on the OSCE Kosovo Verification Mission, most recently the two agreements concluded between the OSCE and the two host States, Austria and Poland. *Tabassi* holds that with the accumulation of instruments adopted by the OSCE decision-making bodies over four decades, the OSCE has gained *de facto* international personality[954] on a customary basis across the OSCE region, and therefore has the treaty-making capacity. Referring to the *Reparation Case*, where the ICJ made it clear that international organizations may enjoy functions and rights based on a large measure of international personality, the writer maintains that "the conclusion of host country agreements for its executive structures falls squarely within the existing limited functional international legal personality of the OSCE."[955]

ii. Legal Arrangements Concluded by the OSCE

Moving from various legal arrangements concluded by the OSCE, *Tabassi* notes that "the OSCE's possession of international personality is

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the Permanent Council on the establishment of Kosovo Verification Mission (PC. DEC.263, of 25 October 1998).

[952] The writer holds, therefore, that the Agreement does not transform the OSCE into an international organization or subject of international law. *Ibid.*, p.53.

[953] *ibid*, p. 52. See, also, *ibid,* p. 52-53 for the legal effect derived from the qualification of the Agreement as "unilateral act".

[954] Tabassi holds that "despite the statement that the renaming of the CSCE to the OSCE in 1994 had no substantive effect, the acquisition of international legal personality was inherent in that (Budapest) Summit decision". See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.16.

[955] *ibid*, p.4.

accepted by many states and international organizations."[956] Indeed, legal instruments concluded with Armenia[957], Austria[958], Azerbaijan[959], Kyrgyzstan[960], Poland[961], Ukraine (2)[962] have been ratified by respective parliaments. Ratification by parliaments of the legal instruments concluded with the OSCE may suggest that the government treats the legal instrument as a treaty governed by international law and thus treats the OSCE as an entity with treaty-making capacity. However, instruments concluded with Federal Republic of Yugoslavia[963], Kazakhstan[964], Montenegro[965], Serbia[966],

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[956] *ibid*, p. 20.

[957] *Memorandum of Understanding between the OSCE and the Government of the Republic of Armenia on the Establishment of an Office of the OSCE in Yerevan*, signed by the OSCE and the Government on 15 September 1999 and ratified by parliament.

[958] *Agreement between the Republic of Austria and the OSCE Regarding the Headquarters of the OSCE* was signed on 14 June 2017 and upon ratification by the Parliament entered into force on 1 June 2018.

[959] *Memorandum of Understanding between the OSCE and the Government of the Republic of Azerbaijan on the OSCE Project Co-ordinator in Baku*, signed by the OSCE Secretary General and the Minister of the Foreign Affairs of the Republic of Azerbaijan on 24 September 2014 and ratified by parliament.

[960] *Memorandum of Understanding between the OSCE and the Government of the Kyrgyz Republic on the Establishment of an OSCE Centre in Bishkek*, signed by the OSCE and the Government on 3 December 1998 and ratified by parliament.

[961] *Arrangement between the OSCE and the Republic of Poland regarding the Status of the OSCE in the Republic of Poland*, signed by the Director of ODIHR and the Minister of Foreign Affairs of the Republic of Poland on 28 June 2017, and entered into force on 5 February 2018.

[962] - *Memorandum of Understanding between the OSCE and the Government of Ukraine concerning the Creation of a New Form of Co-operation*, signed by the OSCE and the Government on 13 July 1999 and ratified by parliament.
- *Memorandum of Understanding between the OSCE and the Government of Ukraine on Deployment of an OSCE Special Monitoring Mission*, signed by the OSCE Secretary General and the Ukrainian Ambassador on 14 April 2014 and ratified by parliament.

[963] *Agreement on the OSCE Kosovo Verification Mission*, Belgrade, 16 October 1998 (UN Doc. S/1998/978).

[964] *Memorandum of Understanding between the OSCE and the Government of the Republic of Kazakhstan on the Opening of an OSCE Centre in Almaty,* signed by the OSCE and the Government on 2 December 1998.

[965] *Memorandum of Understanding between the OSCE and the Government of the Republic of Montenegro on the Establishment of the OSCE Mission to Montenegro,* signed by the OSCE Secretary General and the Minister of Foreign Affairs on 24 October 2006.

Tajikistan[967] and Turkmenistan[968] have not been submitted to parliaments. Apparently, these instruments are not treated as a treaty governed by international law, weakening thus the previous argument. These instruments mostly bear the nomenclature 'Memoranda of Understanding'. That the titles of these instruments do not read 'Agreement', however, does not necessarily exclude them from the domain of treaties governed by international law.[969] Conclusion on the legal nature of the instrument can be reached through the intention of the parties and the substantive content of the instrument. *Tabassi* advises that the texts of these instruments are "very similar in content to the usual host country agreements concluded as treaties with treaty-based organizations", and that they are "necessarily legally binding for the very reason that the provisions need to be enforceable under national law and oftentimes cannot be granted as a courtesy."[970]

The OSCE has also entered into a number of arrangements with other international organizations covering a broad range of activities. International organizations that have concluded cooperation agreements with the OSCE

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966 *Memorandum of Understanding between the OSCE and the Federal Government of the Republic of Yugoslavia on the Establishment of the OSCE Mission to the Federal Republic of Yugoslavia,* signed by the Head of Mission and the FRY Ambassador on 16 March 2001.

967 *Memorandum of Understanding between the OSCE and the Government of the Republic of Tajikistan on the Terms of the OSCE Office in the Republic of Tajikistan,* signed by the OSCE and the Government on 8 June 2011.

968 *Memorandum of Understanding between the OSCE and the Government of Turkmenistan on the Establishment of an OSCE Centre in Ashgabat,* signed by the OSCE and the Government on 3 December 1998.

969 The Commentary on the Vienna Convention on the Law of Treaties highlights that extraordinarily varied nomenclature has developed in the field of international agreements and "in addition to 'treaty', 'convention' and 'protocol', one not infrequently finds titles such as 'declaration', 'charter', 'covenant', 'pact', 'act', 'statute', 'agreement', 'concordat', whilst names like 'declaration', 'agreement' and 'modus vivendi' may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as 'agreement', 'exchange of notes', 'exchange of letters', 'memorandum of agreement', or 'agreed minute' may be more common than others." United Nations Conference on the Law of Treaties, OR, UN Doc. A/CONF.39/11/Add.2, p.8.

970 Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.20.

include the United Nations[971] (including the UN Development Programme (UNDP)[972], United Nations Economic Commission for Europe (UNECE)[973], High Commissioner for Refugees (UNHCR)[974], UN Human Rights Office[975], UN Office for Drugs and Crime (UNODC)[976], UN Entity for Gender Equality and the Empowerment of Women (UN Women)[977]), International Criminal Tribunal for the Former Yugoslavia (ICTY)[978], European Community[979],

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[971] *Framework for Co-operation and Co-ordination* between the United Nations Secretariat and the CSCE, agreed upon through letters exchanged between the Secretary General of the United Nations and the Chairman of the Council of the CSCE on 26 May 1993.

[972] *Memorandum of Understanding* between the OSCE and the UNDP, signed by the UNDP Assistant Secretary General and the Director of the Regional Bureau for Europe and the CIS, and the Director of the OSCE Conflict Prevention Centre on 9 October 2013.

[973] *Memorandum of Understanding* between the Secretariat of the Organization for Security and Co-operation in Europe and the Secretariat of the United Nations Economic Commission for Europe, signed by the Secretary General of the OSCE and Executive Secretary of the UNECE on 6 December 2004.

[974] *Memorandum of Understanding* between the OSCE Office for Democratic Institutions and Human Rights and the Office of the United Nations High Commissioner for Refugees, signed by the Director of the ODIHR, the Director of the Division of International Protection of the UNHCR, the Director of the Division of Regional Bureau of the UNHCR, and the Director of the Regional Bureau of Asia–Pacific of the UNHCR on 22 June 2011.

[975] *Joint Declaration* signed by UN Human Rights Chief and the Director of the OSCE Office for Democratic Institutions and Human Rights on 12 June 2014.

[976] *Exchange of Letters* on modalities of cooperation between the Secretariat of the OSCE and the UNODC, based on a *Joint Action Plan*, and signed by the Secretary General of the OSCE and the Executive Director of the UNODC on 7 September and 16 September, 2011, respectively. OSCE Doc. SEC.GAL/164/11/Corr.1 of 18 October 2011.

[977] *Memorandum of Understanding* between the OSCE and the United Nations Entity for Gender Quality and the Empowerment of Women, signed by the OSCE Secretary General and UN Women Deputy Executive director on 27 September 2018.

[978] *Understanding* between the Organization for Security and Co-operation in Europe and the International Criminal Tribunal for the Former Yugoslavia regarding the monitoring of war crimes trials reached through *Exchange of Letters* signed by the Prosecutor of the ICTY and the Chairman-in-Office of the OSCE (Minister for Foreign Affairs of Slovenia) on 28 February 2005 and 19 May 2005, respectively. OSCE Doc. PC.DEC/673 of 19 May 2005.

[979] *Agreement* between the European Community, represented by the Commission of the European Communities, and the Organization for Security

Council of Europe[980], World Customs Organization (WCO)[981], International Organization for Migration (IOM)[982], the General Secretariat of the International Criminal Police Organization (INTERPOL)[983], International Anti-Corruption Academy[984]. Arrangements concluded with such treaty-based international organizations enhance the OSCE's capacity to carry out its mandates, functions and achieve its purposes.

While engaging in such arrangements with participating States and various international organizations the OSCE acts in accordance with its rules and established practice. Agreements are generally signed by the OSCE Secretary General in his capacity as the representative of the Chairperson-in-Office[985] and as the Chief Administrative Officer of the OSCE and the Head

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and Co-operation in Europe, signed by the Director General of Europe Aid Cooperation Office and the Secretary General of the OSCE on 11 July 2007.

[980] *Declaration* on Co-operation between the Council of Europe and the Organization for Security and Co-operation in Europe, attached to the *Joint Statement*, signed by the Chairman of the Committee of Ministers of the Council of Europe (the Minister of Foreign Affairs of the Republic of Poland) and the Chairman-in-Office of the OSCE (the Minister of Foreign Affairs of the Republic of Slovenia) on 17 May 2005; *Co-operation Agreement* on Local Government Assistance in South East Europe between the Organization of Security and Co-operation in Europe and the Council of Europe, signed by the Secretary General of the OSCE and Secretary General of the Council of Europe on 17 May 2005.

[981] *Working Arrangement* between the OSCE and the World Customs Organization, signed by the Secretary General of the OSCE and the Secretary General of the WCT on 16 October 2018.

[982] *Memorandum of Understanding* between the International Organization for Migration and the Organization for Security and Co-operation in Europe, signed by the Director General of the IOM and the Secretary General of the OSCE on 20 August 2001.

[983] *Memorandum of Understanding* between the General Secretariat of the INTERPOL and the Secretariat of the OSCE, signed by Secretary General of the OSCE and the Secretary General of the INTERPOL on 25 May 2014.

[984] *Memorandum of Understanding* concerning Co-operation between the Organization for Security and Co-operation in Europe and the International Anti-Corruption Academy (IACA), signed by the Secretary General of the OSCE and the Chairman of the IACA International Transition Team on 28 March 2011.

[985] Deriving from the traditional position of the Head of State, it is submitted that supreme organs such as the OSCE Chairperson-in-Office are authorized to represent the organization vis-à-vis third States or other entities. Hafner,

of the Secretariat. Though no such mandate has been provided in any of the OSCE documents, *Tabassi* maintains that the legal basis for allowing the Secretary General to assume the treaty-making power arises from his/her "duty of care as Chief Administrative Officer, accountable to the Permanent Council for protection of officials and OSCE assets, as stipulated in his approved mandate and the OSCE Common Regulatory Management System[986], in both the Staff and Financial Regulations." Noting that this practice has not encountered objection from participating States, the writer holds that such an established practice "indicates that *per facta concludentia* States recognize the Secretary General with the power to conclude such agreements with States."[987]

iii. Headquarters Agreement Concluded with Austria

An assessment of the OSCE's treaty-making capacity can be made based on an analysis of the most recent agreement concluded between the OSCE and the Republic of Austria, as the host country, namely the *Agreement between the Republic of Austria and the OSCE Regarding the Headquarters of the OSCE*. Whether this agreement constitutes a treaty governed by international law necessitates examination of the will of the parties, which could be determined from the substantive provisions of the instrument as well as the procedure followed for its conclusion.[988]

As noted above, Austria was among the few countries, which had taken domestic measures to implement the 1993 Rome Council Decision by conferring domestic legal capacity on the CSCE (OSCE) institutions and

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"Did the FR Yugoslavia Make the OSCE an International Organization?", p.43

[986] See PC.DEC/705 of 1 December 2005. The Permanent Council established a comprehensive Common Regulatory Management System to structure all the activities of the OSCE and facilitate the effective and efficient management of the human, financial and material resources provided to the Organization for attaining the objectives set by the participating States.

[987] Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.20-21.

[988] See discussions above, Part II/D-b

equipping these institutions and their officials and staff with certain privileges and immunities.[989] While efforts to endow the OSCE with international legal personality by a multilateral instrument are unlikely to produce a positive result anytime soon, the Austrian proposal to conclude a headquarters agreement with the OSCE dates back to 2007[990]. In a letter sent on 29 May 2007 the Austrian Ministry of Foreign Affairs stated that Austria "has shown a very flexible attitude on the issue of recognition of the OSCE's international legal personality and its legal capacity to conclude agreements under international law" and confirmed that Austria "would be ready to conclude a headquarters agreement under international law with the OSCE along the lines of existing headquarters agreements between Austria and International Organizations, if the OSCE is in a position to do so".[991] On 22 July 2016 the OSCE accepted the Austrian proposal to conclude a headquarters agreement, until which time the OSCE had already concluded a number of instruments with participating States hosting OSCE field operations.[992]

Terminology employed in the Agreement, such as *shall, right, enter into force* as well as the appearance, including the testimonium, and substance of the instrument suggest that the parties have intended to conclude an agreement governed by international law. Unlike the titles of many of the arrangements concluded by the OSCE which suggest that the instrument concerned belongs to the domain of soft-law or the domestic law of the State concerned, such as *memorandum of understanding, working arrangement, declaration, framework* etc., the instrument in question bears the nomenclature of *Agreement* leaving no room for misinterpretation that may arise from its name. The Agreement has a preambular part, which refers to the OSCE's founding documents, including the 1975 *Helsinki Final Act* and the 1990 *Charter of Paris for A New Europe*, on the one hand, and reflects the

[989] See, *supra* Note 486.
[990] For the background and an overview of the Agreement, see Tichy & Quidenus, "Consolidating the International Legal Personality of the OSCE-A Headquarters Agreement with Austria", p.404-412.
[991] *ibid,* p.407.
[992] Tichy, "The Role of the Participating States in Reforming the Legal Framework of the OSCE-Past Developments, Status Quo and Future Ambitions", p.93.

intention of the parties (defining the status, privileges and immunities of the OSCE) which can be realized only through legal actions, on the other. The employment of the word 'shall' throughout the Agreement, which places obligation on the parties, is indicative of the intention of the parties that the instrument is to be treated as a legally binding one. Another indicative is that the Agreement was signed by the Secretary General of the Austrian Ministry of Foreign Affairs, for whom full powers were issued by the Austrian Federal President. Equipping the Secretary General of the Austrian Ministry of Foreign Affairs with full powers as required by the Vienna Convention on Law of Treaties stands as an evidence that the Agreement was signed as an instrument governed by that Convention. On behalf of the OSCE, the Agreement was signed by the Secretary General as the Chief Administrative Officer of the OSCE[993], in accordance with established practice of the Organization, which has not encountered any objection from participating States. The Agreement will enter into force after the Austrian Government has notified the OSCE Secretary General, in accordance with the Agreement, that the necessary constitutional conditions for its entry into force have been fulfilled[994], which is another indicative of the instrument being governed by international law. It should be noted, however, that the Agreement did not set a specific procedure in which the OSCE's consent to be bound by the Agreement would be expressed. It may be interpreted, therefore, that the consent was expressed at the time of signature.[995]

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[993] It is submitted that "the highest ranking official of the organization ('the chief administrative officer of the Organization' within the meaning of article 85, paragraph 3, of the Convention on the Representation of the States), with his immediate deputies, is usually considered in practice as representing the organization without further documentary evidence". See, Commentary, Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations: [1982] *Yearbook of International Law Commission*, vol. II, Part Two; Article 7, Commentary (7).

[994] Section 46 (1) of the Agreement.

[995] Article 24 (1) of the 1986 VCLT reads: "A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations may agree."

Regarding the substantive provisions, two aspects of the Agreement are of great importance for the analysis. Firstly, the obligations undertaken by Austria[996] in the Agreement can be fulfilled mostly by taking legislative actions. For instance, the OSCE, its assets, income and other property can be exempt from all forms of taxation[997] only if the Austrian domestic legal system allows for this. It is beyond question therefore that the Agreement is formulated to bear legal consequences. However, the obligations undertaken by Austria in the Agreement had already been translated into Austrian legal system far before the conclusion of the Agreement. Once entered into force, the Agreement will replace the Federal Law[998] and will not alter the substance of the privileges and immunities already enjoyed by the OSCE institutions.[999] This brings us to the second aspect of the Agreement. What is the added value of concluding an agreement the provisions of which are already in force? First of all, once it is accepted that the Agreement is a legal instrument subject to treaty law, the legal status of the OSCE and the privileges and immunities granted to it will no longer be under the exclusive jurisdiction of Austria but will be governed by international law. Thus modification on legal provisions governing the legal status and privileges and immunities of the OSCE could be made only if the OSCE agreed to it, which is not the case when they were administered by unilateral acts of the host country. Moreover, concluding with the OSCE a treaty governed by international law would be the logical consequence of recognizing the international legal personality of the OSCE, which is *sine qua non* for treaty-making capacity of the Organization.

Apparently, treaty-making capacity of the OSCE is directly linked to the question whether or not it enjoys international legal personality. An answer in the negative for the latter would negate the conclusion for the former. It may be argued, however, that the OSCE does enjoy *de facto* or

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[996] See, *supra* Notes 891-903.
[997] Article X Section 15 of the Agreement.
[998] Article XIX Section 46 (b) of the Agreement.
[999] It should be noted, however, that the Agreement addresses the legal status of the OSCE as such and no longer the status of its individual institutions. Tichy & Quidenus, "Consolidating the International Legal Personality of the OSCE-A Headquarters Agreement with Austria", 410.

objective international legal personality on the basis of customary international law.[1000] This is how the OSCE Legal Department approaches the issue, as did the host countries, Austria and Poland[1001], when they concluded abovementioned the treaties. It remains to be seen, however, whether the United Nations Secretariat will register the treaties concluded with the OSCE, the founding documents of which, ironically, are not eligible for such registration.

c) International Responsibility of the OSCE

As examined in the first part, *general principles of law* constitute a ground for attribution of international responsibility to international organizations, which are governed by the principles of international law.[1002] In addition to general principles of law, it is further argued that *international customary law* requires that international organizations should be held responsible for violation of international law. Scholars are generally of the

[1000] See, Tichy & Quidenus, "Consolidating the International Legal Personality of the OSCE-A Headquarters Agreement with Austria", p.412.
[1001] For a similar approach adopted by Poland when signing with the OSCE the *Arrangement Regarding the Status of the OSCE in the Republic of Poland*, see Jasna Arsić-Đapo, "Another Brick in the Wall, Building up the OSCE as an International Organization One Agreement at a Time", *op. cit*. It should be noted that while the *Headquarters Agreement* concluded between Austria and the OSCE is silent on the legal personality of the Organization, the *Arrangement regarding the Status of the OSCE in the Republic of Poland* provides that "the OSCE, OSCE institutions, including the ODIHR, and OSCE missions, shall possess legal personality", in addition to the legal capacity conferred upon the OSCE in both instruments. The difference can be explained by the fact that the legal status of the CSCE institutions had already been determined by domestic legislation in Austria back in 1993 whereas the Decision No.2 (1992) of the Polish Council of Ministers, which superseded the previous Decision No. 65 (1991), addressed the issues relating to the privileges and immunities of the ODIHR (previously the CSCE Office for Free Elections) but not dealt with the issue of its legal personality. Following the adoption of a new Constitution, the Decision No.2 was repealed in 1992 but the de facto status of the ODIHR remained unchanged. Therefore while the (domestic) legal personality was granted to the OSCE with a legal instrument governed by international law (and became part of the Polish national legal system upon ratification of the instrument by the Polish parliament), it was granted to the CSCE institutions by a legislative act in Austria.
[1002] See *supra* Note 573.

view that responsibility is a necessary consequence of international personality and the resulting possession of international rights and duties. Possession of international legal personality is a reason and also a precondition for attribution of international responsibility to international organizations. Amerasinghe notes that "[o]nce the existence of international personality for an international organization is conceded…they can be held responsible to other international persons because they have obligations at international law."[1003] In the absence of international personality, actions of the organization can only be attributed to its member states.[1004]

i. Draft Articles on Responsibility of International Organizations

The ILC's work on responsibility of international organizations was driven by these approaches. In the draft Articles on Responsibility of International Organizations (DARIO), the term *international organizations* has been defined as being "established by a treaty or other instrument governed by international law and possessing its own international legal personality"[1005]. Therefore, DARIO cover international organizations, (i) which are established by a treaty or other instrument governed by international law, and (ii) which have their international legal personality distinct from that of their member states.

Although there was a reference to the OSCE whereby it was acknowledged that relevant provisions of the ILC's work would be applicable

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1003 Amerasinghe, *Principles of the Institutional Law of International Organizations*, *op. cit.*, p.399. The writer compares international responsibility of international organizations with that of states. In the case of states, duties flow from the control states exercise over territory, airspace, persons, or their relations with other international persons. In the case of international organizations, while their control over some of the elements controlled by states –territory, airspace, etc- is nonexistent, they still have a certain amount of control over persons and enter into relations with other international persons including by concluding treaties.

1004 *ibid.*, p.412.

1005 Report of the International Law Commission, Sixty-third session, UN General Assembly Official Records Supplement No. 10 (A/66/10), 2011; Article 2 (a).

to an international organization established by implicit international agreement [1006], in their comments and observations presented to the Commission, Austria and the OSCE maintained that the OSCE, for the time being, did not fulfill either of the two conditions.[1007]

As discussed above, the OSCE was not established by a treaty. Whether it was established by another instrument *governed by international law* is a more contentious issue. Relevant decisions of the OSCE decision-making bodies that established the OSCE and paved the way for its gradual institutionalization may well be called a "political constitution in international relations, (but) not a legal constitution under international law."[1008] Even if these decisions may, taken together, be treated as constituent instrument, they are not governed by international law. It can be argued that some of the OSCE political decisions are governed by international law insofar as that they also constitute part of international customary law. It has been submitted, for example, that the adoption of and reference to OSCE human dimension commitments in *multi- and bilateral treaties on minority rights,* signed in 1990s between some OSCE participating States, "has turned 'politically binding' obligations into legally binding ones."[1009] It has been argued, therefore that "OSCE human dimension commitments can be considered as regional customary law." [1010] However, what may constitute part of international customary law are the commitments entered by OSCE participating States in various fields that the OSCE carries out activities, and not decisions on procedural issues, including on establishment and subsequent institutionalization of the OSCE.

[1006] Report of the International Law Commission, UN General Assembly Official Records, (A/58/10), 2003, para.4 of the commentary to Article 2: "although an implicit agreement may be held to exist, member States insisted that there was no treaty concluded to that effect, as for example in respect of OSCE".
[1007] See, *supra*, Note 718.
[1008] Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.2.
[1009] Fastenrath, "The Legal Significance of the CSCE/OSCE Documents", p. 417.
[1010] Manton, The OSCE Human Dimension Process and the Process of Customary International Law Formation, p. 214.

If DARIO does not apply, given that the OSCE does not fit in the definition provided therein, how will international responsibility of the OSCE be determined? Who would be held responsible for internationally wrongful acts of the OSCE? Would an agent of the OSCE be held responsible for his/her conduct in the performance of functions entrusted to the OSCE in clear contradiction with the provisions of DARIO?[1011] Or would it be the OSCE participating States to be held responsible from violations of international law that might occur in the fulfillment of the OSCE's mandate? So far these questions have not been dealt with by a court.

ii. International Legal Personality and Legal System of the OSCE as Determinative of its International Responsibility

In his contribution to a research project on the OSCE Legal Framework led by the Max Planck Institute for Comparative Public Law and International Law, *Gasbarri* dealt with the OSCE's international responsibility.[1012] Making reference to the approach adopted by the ILC on its work on DARIO, and instead of concluding safely that as long as legal status of the OSCE remains unclear the OSCE participating States would incur responsibility for violation of international law by the OSCE, the writer discusses four possibilities of the OSCE's international personality based on whether or not it has international legal personality, and whether it possesses a derivative or an original legal system. When doing that, the writer distinguishes the following different but correlated phenomena: (i) the OSCE's capacity to develop a legal system; (ii) the OSCE's possession of legal personality, whether international or domestic, does not compromise the

[1011] Conduct of organs or agents of an international organization is governed by DARIO as follows: "The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization". Article 6 (1).
[1012] Lorenzo Gasbarri, "The International Responsibility of the OSCE" in Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds.): *The Legal Framework of the OSCE*, Cambridge University Press, Cambridge, 2019, p.215-239.

existence of the institution as such; and (iii) the OSCE's international responsibility is dependent upon the fact that the organization is either considered as founded by an instrument of international law or by an act of creation not based on international law.

While the presence of OSCE's legal personality as well as its being governed by international law can be doubted, the writer notes, the fact that it exists and that it has developed a normative system[1013] is beyond any doubt. Unclear legal nature of the OSCE's internal normative system may give rise to it being perceived as having an *original* legal system under which its norms do not belong to international law, or as being *derived* from international law, under which the will of its member states determines the nature of its legal system.[1014] The nature of OSCE's legal system, together with lack or presence of its international legal personality is therefore determinative of the Organization's international responsibility.[1015] In other words, *Gasbarri*'s four alternative legal conceptions of OSCE's international responsibility rests on combination of two interacting elements: (i) presence or lack of international legal personality; and (ii) the nature of its legal system, which can be perceived as either *original* or *derivative*.

[1013] Drawing attention to the fact that every institution develops a system of norms that governs its internal functioning, whether we call them political or legal, Gasbarri notes that the OSCE's human dimension has created an internal normative system despite the Organization's unclear relation to international law. Gasbarri, "The International Responsibility of the OSCE", p.217.

[1014] Referring to a distinction between originality and derivation offered by Romano (Santa Romano, *L'Ordinamento giuridico* 1917), Gasbarri states that "legal systems are 'original' when they are not established by a legal instrument belonging to a different legal system (e.g. states), and conversely legal systems are 'derivative' when they are established by a legal instrument belonging to a different legal system (e.g. international organizations)". Gasbarri, "The International Responsibility of the OSCE", p.221-223.

[1015] The writer draws parallel between the EU's "exceptionalism" and the OSCE's "exceptionalism". "The EU requires that the conduct of its member states be considered as its own when they are performing actions under its exclusive competence... it requires to be treated as an 'original' legal system with international legal personality. Conversely, the OSCE's quest for exceptionalism requires that the organization be treated as an 'original' legal system without international legal personality." Gasbarri, "The International Responsibility of the OSCE", p. 223.

Under the assumption that the *OSCE does not have international legal personality*, *Gasbarri* offers the following two possibilities:

(i) *If the OSCE's legal system is derived from international law*:

In that scenario, the OSCE is no more than a forum for dialogue, negotiation and cooperation, a transparent vehicle, where participating States meet to set standards for international behavior, and is totally dependent on the conduct of the participating States. It cannot conclude international agreements, it cannot incur international legal responsibility, and it does not enjoy privileges and immunities under international law. As the OSCE cannot incur international legal responsibility due to lacking legal personality, it cannot take legal action for demanding reparations either.

Consequently, only the participating States would be responsible for violations of international law that might occur in the fulfillment of the OSCE's mandate. Responsibility of the OSCE participating States would be ascertained in accordance with the Articles on State Responsibility elaborated by ILC. Internal dispute settlement mechanisms of the OSCE apply by virtue of the *lex specialis* rule on state responsibility.[1016]

The writer also underlines that in case of the OSCE deriving from international law there's no need to distinguish between legally binding and politically binding obligations as it would have "consequences only in the conceptualizations based on original legal system."[1017] The distinction between legal and political is in reality a distinction between international and non-international. Noting that this controversial issue arises from the practice of soft law, "under which the law should not be a 'binary phenomenon' but rather a matter of degrees", the writer warns us that "legality as a matter of degree is mistakenly applied in the context of the OSCE to separate legal

[1016] Gasbarri, "The International Responsibility of the OSCE", p.225.
[1017] *ibid*, p.226.

obligations from political or morally binding obligations"[1018], and concludes that "the derivative legal system cannot acknowledge the distinction between legally binding and politically binding obligations within the same (international) legal system, because it cannot acknowledge different decrees of bindingness, but only an either/or option".[1019]

(ii) *If the OSCE's legal system is original*:

Under this conception, the OSCE, having an independent legal system yet not standing as a subject of international law, cannot conclude international agreements, nor can it incur international legal responsibility, and as opposed to the previous scenario, it is not governed by international law. This conceptualization is based on the OSCE practice, since its inception, of making distinction between politically binding and legally binding obligations. With the commitments entered by the OSCE participating States, binding upon them not legally but merely politically, the OSCE is disconnected from international law and its activities are governed only by its internal legal system.

When the OSCE commitments, in other words politically binding obligations are violated, remedy is offered through mechanisms developed for accountability, not for international responsibility. The writer gives the example of the Federal Republic of Yugoslavia being suspended from participation the CSCE/OSCE meetings, from 1992 to 2000, due to its violation of the fundamental rules of the Organization.[1020]

1018 Refering to Klabbers (Klabbers, The Concept of Treaty 1996, N.198), Gasbarri reminds us that "under the soft-law thesis states can intentionally decide to make their agreements legally binding in varying degrees, while remaining within one and the same (international) legal order". However, in the practice of the OSCE, participating States call political what the regard a non-legal obligation. Gasbarri, "The International Responsibility of the OSCE", p.225-226.
1019 Gasbarri, "The International Responsibility of the OSCE", p.225-226
1020 See, *supra* Note 735. The writer notes that during these years "the OSCE was developing an internal dispute settlement system, consisting of different political procedures: the so-called Valetta Mechanism, the OSCE Conciliation Commission, the Directed Conciliation, and the Court of Conciliation and

Gasbarri brings to our attention the question of how the Organization would function in the absence of 'internationally binding norms'. As systems of internal accountability[1021] refer to the independence of the Organization[1022], accountability emerges as a useful notion for "isolating an internal system from international law".[1023]

As for international responsibility of participating States for their conduct taken in the framework of the OSCE, the writer holds that given the opaque (closed)[1024] quality of the OSCE as an original entity, the "institutional veil"[1025] cannot be pierced[1026] and that participating States may rely on their

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Arbitration". Since the Court decides in accordance with international law, politically binding commitments cannot be subject to international arbitration but to conciliation procedure. Gasbarri, "The International Responsibility of the OSCE", p.229-231.

[1021] The writer refers to the reports on methodology published by ODIHR. *Ibid,* p.13. See, OSCE, ODIHR, *Common Responsibility Commitments and Implementation* 2006.

[1022] It should be noted that maintaining the "independence" of the Institutions of the OSCE (ODIHR, HCNM, and FOM) is among the reasons why some OSCE participating States are reluctant to equip the Organization with a Charter, in which their functions would be described in detail.

[1023] Gasbarri, "The International Responsibility of the OSCE", p.13

[1024] The dual legal images of international organizations –as vehicles for states and as independent actors- are examined in detail in Brölmann, *op. cit*., The Institutional Veil in Public International Law. In her analysis of institutional structure of international organizations Brölmann concludes that international organizations are in themselves 'transparent' legal entities, in other words, member states and other institutional components are to some extent 'legally visible', which means that the component parts of an organization are addressed from, and involved in, the general international plane. International organizations are not legally impermeable (closed/opaque) in the way of states (although impermeability of states' legal order has diminished in parallel to emergence of individual as addressee of international legal norms), but neither are they entirely open structures as they possess separate institutional legal order. Thus they have both semi-open and semi-closed legal images. See, *ibid*, p. 251-271.

[1025] The metaphor of 'institutional veil' in the area of international organizations has been used in Brölmann, *The Institutional Veil in Public International Law*, p.267-271.

[1026] The term 'piercing the corporate veil' was first mentioned by Wormser in 1912 (Maurice Wormser, Piercing the Veil of the Corporate Entity, 12 Colum.L.Rev. 496(1912)). Rationale for veil-piercing is to address the risk of creditors inherent in dealing with a corporation as the shareholders are quality of organs of the Organization[1027].

Gasbarri discusses the two possibilities also under the assumption that the *OSCE possesses international legal personality*:

(i) *If the OSCE's legal system is derived from international law*:

Gasbarri highlights the institutionalization process of the OSCE, through which it transformed from a conference to an organization albeit its legal status remaining ambiguous, and holds that the OSCE can incur international responsibility for its acts under this conception and that DARIO would apply in such a case[1028]. As for OSCE's responsibility of the violation

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generally not personally liable. For piercing the corporate veil, see Angela Schneeman, *The Law of Corporations and Other Business Organizations*, Fifth Edition, 2010, p.256. Regarding the piercing of the institutional veil of international organizations, Brölmann notes that in the sphere of international responsibility it is doubtful to mention the existence of a general norm imposing secondary responsibility of member states. The writer also refers to the conclusions of Higgins in her 1989 Report for the Institut de Droit International: "…there is no principle of general international law beyond this." ('The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations Toward Third Parties', in 66 Yearbook of the Institute of International Law 1995, 251-469, at 284-285).

1027 *ibid*, p.14. The writer draws parallel between the OSCE and multinational corporations giving as an example the case of an attempt to sue the parent company for the conduct of subsidiaries. Referring to Robe, the writer notes that "multinational organizations are *de facto* entity not recognized by national or international law. Each subsidiary of the group is a singular entity incorporated in a state and is subject to the internal legal order of that state, with the result that the multinational entity constitutes a legal order of its own, with its own peculiarities". See, Jean-Philippe Robe, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in Gunther Teubner, *Global Law Without A State* (Farnham:Ashgate 1997), 45-78.

1028 Gasbarri, "The International Responsibility of the OSCE", *op. cit.* p.225-226. The writer refers to a report prepared by the Irish Chairmanship on legal framework of the OSCE, which explained practical effects of the lack of legal personality: "The lack of legal personality causes reputational damage, since other regional or international organizations may fail to take the OSCE seriously as a proper organization or, in some cases, may be unable to deal with the OSCE as a partner. In addition, it is the view of international legal experts that the *OSCE is a subject of international law in the sense that it can incur international responsibility for its acts, despite the lack of a clear internal legal status* (emphasis added). It may result in adverse consequences of an internal rule, however, the writer warns us that international responsibility can arise only if the rule is international in nature[1029], and that the ILC project would "not be applicable to the OSCE if the Organization's internal rules are *lex specialis* in relation to the conditions, the content or the implementation of international responsibility."[1030]

The writer maintains that in case the OSCE violated an international obligation, participating States involved would also be held responsible for the violation. Referring to the decision of the European Court of Human Rights in *Al-Dulimi v. Switzerland*[1031], *Gasbarri* holds that the institutional

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if the OSCE can incur responsibility, while still being unable to enjoy rights such as privileges and immunities. Perhaps most importantly, the impasse on this issue has contributed to an ongoing lack of progress in developing the operational capacity and progressing the aims of the Organization." OSCE, Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2012, MC.GAL/15/12, 7 December 2012, para.3.

[1029] The writer refers to DARIO, Article 10: "1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned. 2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization."

[1030] The writer refers to DARIO, Article 64: "These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or *the content or implementation of the international responsibility of an international organization* (emphasis added), or of a state in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members."

[1031] ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], judgment of 21 June 2016, no.5809/08; ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland* , judgment of 26 November 2013, no. 5809/08. The Court discussed in the case on whether there was a norm conflict between the UNSC Resolution 1483 of 22 May 2003 and Article 6 of the ECHR. The UNSC Resolution 1483 required the Member States, *inter alia*, to freeze without delay and immediately transfer to the Development Fund for Iraq funds or other financial assets or economic resources acquired by the senior officials of the former Iraqi regime. In 2004, the Sanctions Committee created by the UN Security Council included the applicants (Mr Khalaf Al-Dulimi and the Montana Management Inc, a corporation for which Mr Dulimi worked as managing director) in a list of individuals whose assets veil would be pierced in such a case and international responsibility would not rest exclusively with the OSCE and that the conduct would be imputable also to the participating States concerned.[1032]

(ii) *If the OSCE's legal system is original*:

This conceptualisation is based on the premise that the legal personality of international organizations derives not from the will of member states but from general international law.[1033] Under this scenario, the OSCE

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were to be frozen in accordance with the Security Council resolution. Thereafter Switzerland included the applicants' names in a sanctions list which it adopted accordingly. Despite the applicants' attempts to remove their names from the list, Switzerland insisted that it acted in accordance with the binding resolutions of the Security Council, and that the names could be deleted only upon a relevant decision of the Sanctions Committee, and therefore denied the applicants the right to access to an impartial court. Emphasizing the importance of harmonizing the obligations arising from the UN Charter and international law, the European Court of Human Rights found that Article 6 of the ECHR had been violated since Switzerland declined the applicants' request to access to a fair and public hearing by an independent and impartial tribunal. The Grand Chamber underlined that the Security Council resolution did not exclude the possibility of judicial supervision. Therefore there existed no conflict between the Security Council resolution and Article 6 of the ECHR, which otherwise trigger the application of Article 103 of the Charter. The Grand Chamber interpreted the Security Council resolution under the presumption that the Council would not and did not intend to impose any obligation on Member States to breach the fundamental principles of human rights. It, too, therefore found that Article 6 of the ECHR was violated.

[1032] Gasbarri, "The International Responsibility of the OSCE", p.228.

[1033] In the case of the OSCE, the writer refers to Ryngaert, who considers that the OSCE acquires legal personality through "a norm of intra-institutional customary law" based on the institutional "duty of loyalty" of OSCE participating States *vis-à-vis* the Organization. *Ibid*, p.14. In his effort to explore alternative to general customary law governing the legal status of the OSCE, Ryngaert first notes that participating States owe it to the OSCE to endow it with the necessary legal status in order to enable it to effectively carry out its mandate to comprehensively realize security in the pan-European area. He points out to distinction between international legal personality and domestic legal status, in that while the former is mainly concerned with questions of responsibility, the latter mainly pertains with privileges and immunities in States' domestic legal order. Thus, "even when lacking international legal personality, the OSCE can still claim to be an organization entitled to domestic legal status, and it may be argued on this basis that participating States have a duty of loyal cooperation to realize this status".

possesses an “original legal system”[1034] with international legal personality, and as such is treated similar to a federal state, with participating States constituting its organs, and therefore it can incur international responsibility for its wrongful act under international law.

As for the OSCE participating States, *Gasbarri* draws attention to difficulties in holding them responsible for their implementation of the OSCE commitments for two reasons: (i) They themselves might not even be bound by the obligation[1035]; (ii) their conduct would be regarded as the conduct of the OSCE.[1036] The writer holds that “organizations considered as original entities thus adopt a closed structure, developing an institutional veil that is opaque and not easily pierced.”[1037]

As we have seen, *Gasbarri*'s four concepts of the OSCE's international responsibility is driven on the one hand by the unsettled question of the Organization's international legal personality, and on the other, by the unclear nature of the legal system it develops. Once it's acknowledged that the OSCE lacks international legal personality, it will be concluded that the

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Cedric Ryngaert, “Basing the Legal Status of the OSCE on Participating States' Duty of Loyalty”, *Völkerrechtsblog*, 3 August 2016, doi: 110.17176/20180412-215645.

[1034] According to Gasbarri, the OSCE's human dimension constitutes a ‘distinct internal order' capable of penetrating the participating States' internal order as it has long been recognized that issues relating to human rights are no more domestic affairs of states. He also notes that despite the fact that OSCE human dimension commitments are now part of international law, they are still binding rules of a ‘different normative order'. Gasbarri, “The International Responsibility of the OSCE”, p. 231-232.

[1035] Gasbarri draws parallel between the OSCE and the EU, and referring to an Advisory Opinion of International Tribunal for the Law of Sea (*Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*), he holds that “the OSCE, as an original entity with legal personality, would have the competence to conclude international agreements that benefit participating States without them being a (formal) party to the agreement” which is the case of EU member states in agreements concluded by the UE alone. Gasbarri, “The International Responsibility of the OSCE”, p.231-232.

[1036] Referring to *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, Gasbarri holds that in such a case participating States would be considered as acting as a ‘sub-organ' under the OSCE's ‘ultimate authority and control'.

[1037] Gasbarri, “The International Responsibility of the OSCE”, *op. cit.,* p.231.

OSCE cannot incur international legal responsibility. The OSCE can incur international responsibility only if it is to be treated as an organization with international legal personality. In case the OSCE is treated as an entity without legal personality, OSCE participating States would be held responsible for violations of international law if they occurred in the fulfillment of the OSCE's mandate.[1038]

An analysis on international organizations' responsibilities based on a distinction between legal natures of their internal normative systems pivoting around a dichotomy between *original* and *derivative*, as *Gasbarri* did in the case of the OSCE, inevitably leads to a discussion relating to the ultimate source of authority: member states or the international order. As noted above, the legal nature of the rules of international organizations was discussed by the ILC in the context of international responsibility.[1039] *Brölmann* maintains that it is undisputed in legal writing[1040] and in positive international law[1041] that internal legal order of international organizations stands apart from

[1038] See, Klabbers, *An Introduction to International Institutional Law,* p. 290; Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.412; Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities really Depend on the Conventions Establishing Them,* p.114.
[1039] See *supra* Notes 602, 603.
[1040] Reference is made to Ian Brownlie, *Principles of International Law*, Oxford, Clarendon Press 2003; René-Jean Dupuy, *Manual sur les organizations internationals/A Handbook on International Organizations*, 1998, at 377-398 (by Philippe Cahier); Nigel White, *The Law of International Organization* Second Edition), 2005, at 104; Eckart Klein and Matthias Pechstein, Das Vertragsrecht internationaler Organisationen, 1985, at 39; Günther Hartmann, 'The Capacity of International Organizations to Conclude Treaties' in Karl Zamanek (ed), *Agreements of International Organizations and the Vienna Convention on the Law f Treaties,* 1971; Hermann Mosler, The International Society as a Legal Community, in RdC, 1974, 11-320, at 201. See Brölmann, Brölmann, *The Institutional Veil in Public International Law*, p.28.
[1041] Reference is made to the general reservation clause in Article 5 of the 1969 Vienna Convention on the Law of Treaties: "The Present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization *without prejudice to any relevant rules of that organization*." (Emphasis added) See, Brölmann, *The Institutional Veil in Public International Law*, p.28.

general international law.[1042] However, it is hard to reconcile this argument with the approach taking the will of the primary subjects of international law as the determinative authority in international legal order. It can be submitted that a normative legal order other than any national legal system, and created by states, is *per se* part of international law. Legal order does not recognize a normative legal field that remains out of its governance. However, the conceptualization under which the OSCE's legal system is original and the Organization does not possess international legal responsibility leaves the way open for a scenario where, while the OSCE does not incur international responsibility and its activities are scrutinized merely under its accountability mechanisms, participating States hide themselves under the institutional veil. This conclusion contradicts with the fundamental principle of international law that every internationally wrongful act entails international responsibility on the part of the wrongdoer.

Besides, the conceptualization where the OSCE has an original legal system and stands as an international organization with international law seems problematic. This scenario is based on an assumption that legal personality derives from general international law; and it is further assumed that OSCE's original legal system is separate from, and is not governed by, international law. It remains hard to explain how international law confers international legal personality on the OSCE yet fails to govern its legal system.

As for the OSCE's responsibility to its staff under its internal law, it should be noted that this question needs to be distinguished from the OSCE's international responsibility.[1043] As *Amerasinghe* noted, the latter is a species

[1042] Brölmann, *The Institutional Veil in Public International Law*, p.28.
[1043] Internal organization and functioning of international organizations are governed by their internal law. Amerasinghe describes the internal law as a branch of, and forming part of, international law with an explanation that the basis of the internal law is the constituent treaty of the organization and that the power to enact the internal law and its effect are derived from this treaty and its interpretation. The writer highlights the practical reasons for the existence of an independent system of law governing the employments relations of international organizations, and lists the following as the most

of responsibility under international law but does not involve the relations of the OSCE with states or other international organizations.[1044] That issue will be addressed below in the context of the duty of care of the OSCE.

iii. The Duty of Care of the OSCE

Gradual increase of the activities of international organizations in providing safety, civil protection, technical assistance, crisis-management operations, humanitarian aid, etc. through their multipurpose field missions, in particular in conflict or post-conflict situations, where security challenges are at stake has become a key concern for states and international organizations deploying such personnel in terms of protecting their health, safety and security. Duty of care, therefore, has emerged as an obligation incumbent on the international organization to take adequate and effective measures to protect the personnel deployed for such missions.

As an evolving concept of law, duty of care is defined as "a requirement that a person acts towards others and the public with watchfulness, attention, caution, and prudence that a reasonable person in the circumstances would. If a person's actions do not meet this standard of care, than the acts are considered negligent, and any damages resulting may be claimed in a lawsuit for negligence."[1045] Another dictionary defines duty of

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important ones: (i) Application of the national law of a state, such as the host state, or even the conflicts of law of a particular state, to their relations with the organization for which they work would result in an arbitrary and artificial choice; (ii) independence of the international official from national pressures needs to be preserved. Making reference to various decisions of the International Administrative Tribunal the writer notes that the sources of employment law of international organizations (international administrative law) includes, in particular, contract of appointments, constituents instruments, decisions of the main legislative organs of international organizations (staff regulations, staff rules and written sources), general principles of law and practice of the organization. See, Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.271-315.

[1044] Amerasinghe, *Principles of the Institutional Law of International Organizations*, p.385.

[1045] Free Collins Dictionary of Law, available at: https://legal-dictionary.thefreedictionary.com/duty+of+care

care as "an obligation to conform to a certain standard of conduct for the protection of another against an unreasonable risk of harm."[1046]

Giving as an example the UK legal system, Professor *Guttry* notes that various national legislation and case-law, including those of Australia, France, Belgium, Germany, The Netherlands and Spain are now in place to implement the obligation of duty of care as stipulated in various international instruments[1047] including the 1966 UN Covenant on Economic, Social and Cultural Rights[1048]. *Guttry* highlights the clear-cut position adopted by the ICJ

[1046] See, Duhaime's Law Dictionary, available at: http://www.duhaime.org/LegalDictionary/D/DutyofCare.aspx

[1047] Guttry lists in this regard the "1981 Occupational Safety and Health Convention", the "1981 Occupational Safety and Health Recommendation No.164" and "ILO 2006 Convention 187, Promotional Framework for Occupational Safety and Health Convention", and also refers to Article 31(1) of the Charter of Fundamental Rights of the European Union, which states that "[e]very worker has the right to working conditions which respect hir or her health, safety and dignity." Andrea de Guttry, *Duty of Care of the EU and Its Member States towards Their Personnel Deployed in International Missions*, Whitepaper (2012), p.7.

[1048] Article 7 of the 1966 UN Covenant on Economic, Social and Cultural Rights reads: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (…) (b) Safe and healthy working conditions."

in *Reparation Case*[1049]*,* which was followed by a number of UN decisions adopted to address the duty of care of the Organization.[1050]

Having examined international jurisprudence, in particular relevant judgments of the competent Administrative Tribunals of the UN and Administrative Tribunal of the ILO[1051], *Guttry* has listed a number of

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[1049] The Court ruled that, "[h]aving regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed. For the same reason, the injuries suffered by its agents in these circumstances will
sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the *Organization must provide them with adequate protection*. This need of protection for the agents of the Organization, as a condition of the performance of its functions, has already been realized, and the Preamble to the Resolution of December 3rd, 1948 **(…**), shows that this was the unanimous view of the General Assembly." See, *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion:* ICJ Reports*,* 1949, p.174

[1050] Professor Guttry refers to the "U.N. Staff Regulations", in particular the "2009 Staff Regulations of the United Nations and Provisional Staff Rule" (UN Doc. ST/SGB/2009/7, 21 October 2009), and highlights the "Principle 37" of the "Standards of Conduct in the International Service" according to which "while an executive head must remain free to assign staff in accordance with exigencies of the service, it is the responsibility of the organizations to make sure that the health, well-being and lives of their staff, without discrimination whatsoever, will not be subject to undue risk. The organizations should take measures to protect their safety and that of their family members. On the other hand, it goes without saying that it is incumbent on international civil servants to comply with all instructions designed to protect their safety."

[1051] Recent judgment of the International Labour Organization Administrative Tribunal (ILOAT) considering a complaint filed by Ms. Helene Assaf against the International Criminal Court (ICC) elaborates on the evolving nature of the duty of care principle in international administrative law. The complainant, an ICC interpreter, took part in a mission to Libya together with her three colleagues in June 2012, where they were detained by the Zintan authorities and charged with various criminal offences. After intense diplomatic efforts, the complainant and her colleagues were released on 2 July 2012. About a year after her release, the complainant filed an internal complaint with the ICC claiming moral and punitive damages in connection elements identified as characterizing the duty of care of international organizations as the following:[1052]

(i) Healthy working environment: The obligation incumbent on international organizations to provide a working environment conducive to the health and safety of its staff members;

(ii) Knowledge of security risks: The obligation of the recruiting institutions to provide adequate information to their dependents about the potential dangers they might face in the mission they have been assigned to;

(iii) Standard of conduct: The obligation of international organizations to treat their staff with due consideration, to preserve their dignity and to avoid causing them unnecessary injury;

(iv) Sound administration, due process and access to justice: The obligation to have sound administrative procedures, to act in good faith and to

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with her detention in Libya on the basis that the ICC had acted with malice, reckless disregard for her safety and gross negligence. Having exhausted internal remedies, the complainant brought her claims before ILOAT seeking moral and exemplary damages. The Tribunal recognized that the complainant's ordeal in Libya was a direct result of the ICC's failure to properly prepare for the mission, specifically, its failure to (i) establish a diplomatic basis with Libya prior to the mission, (ii) establish a mission plan which identified the objectives of the mission, the locations to visit and persons to be met, and (iii) ensure that all safety protocols were followed and advice was implemented to guarantee the safety and security of the staff members on mission. For these failures and taking into account the damage suffered during the confinement as well as the continuous mistreatment by the Registar in the period following her return from Libya, the Tribunal awarded moral damages to the complainant. *A.v.ICC,* Judgment No.4003, 26 June 2019.

[1052] Guttry, *Duty of Care of the EU and Its Member States towards Their Personnel Deployed in International Missions, op. cit.*, p.10-16. See further, Andrea de Guttry, Introducing a New Set of Guidelines to Implement the 'Duty of Care' of the EU Institutions and Agencies towards their Internationally Mobile Workforce, 9 European J. International Management (2015); Maarten Merkelbach, Voluntary Guidelines on the Duty of Care to Seconded Civilian Personnel (Swiss Federal Department of Foreign Affairs (FDFA), Stabilisation Unit (SU), and Center for International Peace Operations (ZIF), 2017.

have properly functioning internal investigation mechanisms to address request and complaints by the employee within a reasonable time;

(v) Emergency medical services: The duty in organizing and providing effective medical services to be offered to the staff should an emergency occur;

(vi) Diplomatic (functional) protection: Diplomatic protection, which is a well-known instrument available for a state (and an international organization, at least under certain circumstances), to take diplomatic and other actions against another state on behalf of its national/officer whose rights and interests have been violated by the other state (in our case most probably the state hosting the mission); and

(vii) Training: The need to provide adequate training to the personnel for the task the have to perform.

As the world's largest regional organization carrying out activities to ensure comprehensive and co-operative security to a region stretching from Vancouver to Vladivostok, the OSCE conducts various field operations for early warning, conflict prevention, crisis management and post-conflict rehabilitation mostly in situations where security challenges are at stake. Therefore, ensuring a safe workplace for its staff and protecting them in hazardous environments arises as a major responsibility of the Organization. In her comprehensive overview on the implementation of the duty of care within the OSCE, Professor *Russo* explains the legal resources for the duty of care of the OSCE as the following: (i) rules of customary international law[1053], including those on the responsibility of international organizations;

[1053]The writer points out to the link between possessing legal personality and assuming the duty of care, and holds that "once it is established that the OSCE may operate on the international scene as an independent subject in possession of international personality, the main consequence is that the first legal source of the duty of care becomes customary international law, including human rights law." Russo, "Implementation of the Duty of Care by the OSCE", p. 275.

(ii) general principles of international law; (iii) OSCE Staff Regulations[1054] and Staff Rules; (iv) OSCE Operational Guidelines for Working in a Potentially Hazardous Environment (Operational Guidelines). [1055] The Operational Guidelines state that "the OSCE has a duty of care towards its staff. Stated simply, it means that the organization must take reasonable steps to ensure actions undertaken on its behalf do not knowingly cause harm to its employees, but also other individuals. Duty of care is a broad ranging and complex legal principle that includes elements of whether an incident resulting in harm was reasonably foreseeable and the proximity or casual connection between one person's conduct and the other person's injury".[1056]

Apart from these legal resources, reference is made to the Voluntary Guidelines on the Duty of Care to Seconded Civilian Personnel[1057], which makes a significant contribution to the conceptualization of the duty of care. The guidelines place the duty of care as a legal obligation upon the shoulders of both the receiving and seconding organizations.[1058]

While every internationally wrongful act of an international organization entails the international responsibility of that organization[1059], identification of the bearer of that responsibility emerges as a question to be settled. *Guttry* holds that "in the absence of specific arrangements, it is the body which recruited and/or sent the given person on a mission which bears

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[1054] OSCE Staff Regulation 2.07, titled "functional protection", reads: "OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules". Under Staff Regulation 1.01, "OSCE Officials" means "any person subject to the Staff Regulations in accordance with the Regulation 1.03, including the Secretary General, the heads of the institutions and the heads of mission and all international or local staff, contracted or seconded, fixed-term and short-term staff/mission members".

[1055] Russo, "Implementation of the Duty of Care by the OSCE", *op. cit.*, p.275-277.

[1056] OSCE Operational Guidelines for Working in a Potentially Hazardous Environment, 2.2, Duty of Care.

[1057] See, *supra* Note 855.

[1058] Russo, "Implementation of the Duty of Care by the OSCE", p.277.

[1059] Article 3 of the Draft articles on the Responsibility of International Organizations.

the responsibility to protect him/her, provided that it exercises 'full control' over him/her."[1060] According to the OSCE Operational Guidelines:

> The primary responsibility for the security, as well as the safety and dignity of OSCE staff and property, rests with the Host Government of the country in which the OSCE field activity takes place. However, the OSCE staff in overall charge of the field activity is responsible for ensuring appropriate security arrangements and procedures are in place for the field activity being undertaken.[1061]

Tabassi, Head of the OSCE Legal Services, advises that the concept of duty of care has been mainstreamed into policies and decision making of management, taking into the abovementioned seven principles, to the extent that the OSCE has sufficient resources (human and material) to do so.[1062] From among the duty of care obligations, exercising 'functional protection' was successfully provided in two recent cases: abduction of eight OSCE

[1060] Guttry, *Duty of Care of the EU and Its Member States towards Their Personnel Deployed in International Missions, op. cit.,* p.21. The writer notes that in the *Behrami* case of 2007, the European Court of Human Rights made reference to the similar but not equivalent notion of "ultimate authority and control".

[1061] OSCE Operational Guidelines for Working in a Potentially Hazardous Environment, 1.1, Responsibility State, Institutional, Individual. According to the Guidelines, OSCE staff have also "responsibility to abide by security policy, guidelines, directives, plans and procedures of the Organization as well as national law. Failure to do so may lead to disciplinary measures."

[1062] However, in an academic discussion attended by professors Andrea de Guttry, Deborah Russo and Eduardo Greppi, held on 17 October 2018 upon the invitation of the OSCE Chairmanship, it was pointed out that the OSCE does not have a convention similar to the 1999 United Nations Convention for the Safety of United Nations Personnel, absence of which might lead to fragmentation as a consequence of case by case approach to be adopted. It was also noted that the OSCE does not have an Administrative Tribunal and that the role and involvement of the OSCE Internal Oversight is not clear, running the risk of denial of justice. OSCE, Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018, MC.GAL/10/18, 7 December 2018, para.35. For analysis of OSCE policies and practices of the duty of care, see Russo, "Implementation of the Duty of Care by the OSCE", p.278-288.

officials in 2014; and the tragic incident of 2017, resulting in the death of an OSCE paramedic and injuring two other Mission members.[1063]

i. 2014 Abduction of OSCE Officials:

Because of the turbulent political situation in Ukraine, allegations of human rights abuses and a rising death toll among civilians, and following a request from the government of Ukraine to the OSCE, the Permanent Council decided to deploy a special OSCE monitoring mission of international observers to Ukraine (OSCE Special Monitoring Mission (SMM) to Ukraine) on 21 March 2014 (PC.DEC/1117, dated 21 March 2014). The aim of the Mission was to contribute, throughout the country and in co-operation with the concerned OSCE executive structures and relevant actors of the international community (such as the United Nations and the Council of Europe), to reducing tensions and fostering peace, stability and security; and to monitoring and supporting the implementation of all OSCE principles and commitments. In May 2014, eight monitors (seconded nationals of Denmark, Estonia, Germany, Netherlands, Russian Federation, Spain, Switzerland and Turkey) were abducted and held incommunicado for several weeks. The abducted OSCE officials were released following OSCE internal response. The following measures were taken:

(i) The SMM Chief Monitor immediately notified the OSCE Secretary General, who in turn immediately notified the OSCE Chairperson-in-Office (Foreign Minister of Switzerland), the seconding States concerned, the host country (Ukraine), all participating States and the OSCE Permanent Council.

(ii) An interdepartmental task force was established.

[1063] See, Tabassi, "Duty of care in practice", *OSCE Legal Digest* (2016-2017).

(iii) A hotline was established in the Secretariat for the families of the abducted officials and medical/psychological support was secured to be available to the abducted officials from the moment of release.

(iv) Efforts were made to determine the whereabouts of the abducted officials.

(v) Upon release to the SMM, the officials were given medical examination and granted special leave with pay for eight weeks.

(vi) The Secretary General gave due consideration to the request of granting limited waivers of immunity to allow the officials (who were willing) to be questioned by the competent national authorities.

(vii) Legal analysis was carried out to determine the applicable law.

(viii) The Secretariat negotiated with Ukraine the Memorandum of Understanding regarding the legal status, privileges and immunities of the SMM and its mission members. However, the Memorandum of Understanding was ratified and entered into force only after the release of the abducted officials. Without a clear legal status governed by a legal instrument, SMM monitors did not enjoy privileges and immunities required for the fulfillment of their functions, nor did they receive security guarantees from the host state (Ukraine).[1064]

ii. Tragic Incident of 2017:

An OSCE paramedic was killed and two other SMM members were injured in a mine explosion that took place in Luhansk region of eastern Ukraine on 23 April 2017. The SMM members were in an armoured vehicle

[1064] It has been underlined, therefore, that the OSCE "did not exercise its duty of care as an employer, and was potentially liable for any damages suffered by its monitors". See, Interim Report and Recommendations of the Panel of Eminent Persons on European Security as a Common Project, "Lessons Learned for the OSCE from its Engagement in Ukraine", June 2015, p.11.

patrolling the road, which they had also used in previous days. The tragic incident of 2017 was the first service-incurred death since the OSCE established its first field operations in the early 1990s. The following measures were taken:

(i) On the day of the incident, similar notification was made as in the previous case; additional security measures were implemented; and, an OSCE internal task force was established in the Secretariat to draft terms of reference for investigation of the incident.

(ii) OSCE Permanent Council adopted in a special meeting a Declaration of Support for the SSM Following the Incident that Occurred on 23 April 2017.[1065]

(iii) While the OSCE Chairmanship tasked the Secretary General to form and deploy a team of experts to conduct a forensic post-blast investigation of the incident, the OSCE Office of Internal Oversight launched an internal investigation. The objective of the investigation was (i) to determine internal individual responsibilities; (ii) to establish the sequence of events and to find out whether and how the relevant rules were followed; and (iii) to establish whether actions taken aftermath were appropriate.

(iv) Ukraine requested the OSCE cooperation with the Ukrainian criminal investigation of the incident, and the Secretary General responded in the positive.

(v) The OSCE concluded a Memorandum of Understanding with the International Humanitarian Fact-Finding Commission (IHFFC) related to cooperation between the two organizations, to be followed by a Distinct Arrangement concluded between the two organizations with a view to benefiting the OSCE from the good offices of the IHFFC to establish an independent forensic post-blast-scene investigation (IFI) of the tragic incident.

[1065] PC.DEC/1/17.

Three weeks later, the Financial Protocol to the Distinct Arrangement was concluded. Strict confidentiality of the conduct was ensured through a Non-Disclosure and Service Undertaking, concluded with each IFI member.

(vi) The IFI Report was submitted to the Secretary General, which was later presented to the OSCE Permanent Council. Executive summary of the report was placed on the OSCE website on 7 September 2017.[1066]

(vii)The Office of Internal Oversight issued an Interim Report on the internal investigation and distributed its summary to OSCE participating States. The SMM Response Plan to the findings of the report was distributed to participating States. A summary of the Final Report was distributed to participating States.

(viii) The Secretary General notified Ukraine that the investigations had been completed.

The measures taken by the OSCE in the abovementioned incidents demonstrate how seriously and effectively the Organization implemented its duty of care in hazardous areas. It goes without saying that effectiveness of the measures in meeting the duty of care of the OSCE is directly proportional to human and financial resources of the Organization.

It is also noteworthy that the OSCE participating States left it to the Organization to deal with the cases. In other words, the OSCE was expected to perform actions as if it were a fully-fledged international organization. Yet the answer to the question of who would be the bearer of international

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[1066] http://www.osce.org/home/338361. Based on the outcome of the investigations, the IFI concluded that "it is unlikely that the SMM was the intended target, given that the Mission rarely used this road, the patrol was planned late, and there was limited opportunity to lay mines during the patrol...given the known fact that the road was used by civilian traffic heavy enough to trigger the mine, any such recent placement constitutes an indiscriminate and thus unlawful usage of an anti-vehicle mine pursuant to international humanitarian law."

responsibility remains ambiguous as long as the ambiguity on the legal status of the OSCE remains as is.

E- Theories Tested in the Case of the OSCE

We have examined the three prominent theories explaining international legal personality of international organizations as well as their specific capacities, both in general and in the case of the OSCE, as an international organization lacking a constituent legal document. The theories will be tested in the context of the OSCE below.

a) Will Theory

As we have seen in Part I, the *will theory* takes as basis the will of the founders of the organization, which can generally be established through constitutional provisions that equip the organization with international legal personality, or can be derived from the organization's objectives in the absence of constitutional attribution of such quality. Neither strict application of the *will theory* based on explicit attribution of international legal personality nor its broader version based on implicit inference of that quality allows us to conclude that the OSCE possesses international legal personality.

The OSCE lacks not only a constitutional provision in which it was explicitly equipped with international legal personality, but it lacks a constitutional legal instrument to start with. Irrespective of the debates concerning legal nature of the OSCE documents, including the 1975 *Helsinki Final Act* and the subsequent Summit documents, which altogether may be called a *political constitution* of the Organization, the OSCE participating States never intended to confer international legal personality on the OSCE. On the contrary, it has been the intention of the OSCE participating States since the creation of the Conference on Security and Co-operation in Europe back in 1975 to bring into being not an organization with international legal personality but a forum for political dialogue on a wide range of security issues. In the 1993 Rome Council Decision, participating States were recommended to grant national legal capacities and privileges and immunities to particular institutions but not to the OSCE as such.[1067] Moreover, it was decided at the Budapest Summit Declaration -*Towards a Genuine Partnership in a New Era*- that the name change on 1 January 1995 from CSCE to OSCE would not alter either the politically binding nature of the CSCE commitments, or the status of the CSCE and its institutions[1068]. Although the participating States have agreed on the text of the draft *Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE,* with three footnotes notwithstanding, they could not reach consensus in adopting it. Hence, even if it can be argued that the participating States are ready to bestow upon the OSCE international legal personality, legal capacity, and privileges and immunities as foreseen in the draft Convention, they have not yet consented to do it either explicitly or implicitly. Therefore, one can safely conclude that the OSCE does not possess international legal personality under the *will theory*.

Since the OSCE lacks international legal personality, under the *will theory*, it does not stand as a subject of international law and therefore is not capable of possessing international rights and duties[1069]. Under the *will theory,* therefore, the OSCE cannot incur international responsibility, nor does it enjoy privileges and immunities under international law. Moreover, it does not have treaty-making capacity either.

In the absence of international legal personality, actions of the OSCE can only be attributed only to the participating States.[1070] In other words, only the participating States would be responsible for violations of international law that might occur in the fulfillment of the OSCE's mandate. Responsibility of the OSCE participating States would be ascertained in accordance with the Articles on State Responsibility elaborated by ILC. According to *Gasbarri*, this conclusion can be reached if the OSCE's legal system is derived from

[1067] See discussions on the Rome Council Decision above, Part II/C-a.
[1068] See, *supra*, Note 695.
[1069] See the ICJ's conclusion for the United Nations in *Reparation for injuries,* p. 179.
[1070] See, Amerasinghe, *Principles of the Institutional Law of International Organizations,* p. 412.

international law. Under the conception that the OSCE's legal system is original, however, the institutional veil cannot be pierced and participating States may rely on their quality of organs of the Organization. In such a case, OSCE's activities are governed by its internal legal system and scrutinized by its mechanisms of accountability to ensure compliance with the OSCE commitments.[1071]

As for the immunities and privileges the OSCE would rely on domestic administrative and legislative measures to be taken by the participating States including for the implementation of the 1993 Rome Council Decision as well as the courtesy that may be offered to it. Provisions of various arrangements engaged with participating States relating to privileges and immunities of the OSCE would have impact on the Organization only if the participating State concerned took the relevant domestic measures, unilaterally. Since the OSCE lacks international legal personality, it would not rely on customary international law even if there existed customary rules applicable to international organizations[1072].

Regarding the treaty-making capacity of the OSCE, the conclusion that the Organization does not possess that capacity is based on the assumption that as an entity devoid of international legal personality, under the will theory, it is not a subject of public international law, a *sine qua non* for concluding a treaty "governed by international law".[1073] Therefore, this conclusion can be reached not only due to the lack of a constitutional

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[1071] See discussions on the OSCE's international responsibility above Part II/D-c.

[1072] Based on her analysis of eleven final judgments from Austrian courts that deal with the immunity of international organizations, Schmalenbach notes that "according to the Austrian Supreme Court, however, it is doubtful whether there are customary rules on the immunity of international organizations, given that international organizations are a twentieth-century phenomenon and therefore a rather recent development". Schmalenbach, "Austrian Courts and the Immunity of International Organizations". p.452.

[1073] For a document to be governed by international law, "there must be an intention to create obligations under international law". Aust, Modern Treaty and Practice, *op. cit.*, p. 51. *Aegean Sea Continental Shelf* case, ICJ Reports (Jurisdiction and Admissibility), 1994, p.3, at pp.39-44.

provision equipping the OSCE with such capacity, but first and foremost since the OSCE lacks international legal personality. However, the link between international legal personality and the treaty-making capacity of the organization has not remained unchallenged.[1074] As we have seen, *Chiu* also held that neither constitutional provisions nor the implied power theory constitutes a sufficient basis for the capacity of international organization to conclude treaties, and argued that treaty-making capacity is conferred upon all international organizations by a rule of customary international law as far as the conclusion of the treaty falls into the sphere of the organization's functions.[1075] If accepted, this argument would need to be discussed taking into account the impact of raising persistent objection to international legal personality of the OSCE, which is a practice adopted by some participating States.

Once it is accepted that the OSCE, lacking international legal personality under the *will theory*, does not possess treaty-making capacity, arrangements it has engaged with subjects of international law, in particular those concluded with participating States, would not be treated as treaties governed by international law but as arrangements belonging to the domain of soft-law or the domestic law of the state concerned. In this case, provisions of such arrangements would gain legal force only when they have become part of the domestic of the state concerned, and the rights thus established could be claimed only before the relevant domestic authorities of that state.

b) Objective Theory

Unlike the *will theory, objective theory* of personality takes as basis not the will of the founders of the organization, either expressed or implied in the constitution, but the mere existence of the organization with certain criteria. As *Seyersted* suggested, it is not the provisions of the constitution or the intention of its drafters, which establish international personality of the

[1074] Chiu, The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded, p.29.
[1075] *ibid.*, 34.

organization, but the objective fact of its existence.[1076] Thus, an international organization acquires legal personality not through its constitution, but by virtue of international law as soon as it comes into existence and meets certain criteria described in Part I. Under this theory, therefore, lack of a constituent legal instrument of the OSCE would not be a reason to conclude that it does not possess international legal personality. It may be argued under this theory that the OSCE possesses international legal personality by virtue of international law if it can be established that it is an association of participating States with lawful objects and organs, which are subject only to the authority of the participating States acting jointly in these organs, and that there exits distinction between the OSCE and participating States in respect of legal rights, duties, power and liabilities on the international plane as contrasted with the national or transnational plane.[1077]

In other words, in order to conclude that the OSCE possesses international legal personality, it would suffice to establish that the OSCE has international organs with a will distinct from that of the members, which exercises sovereign powers as suggested by *Seyersted*.[1078]

As a forum for political dialogue on a wide range of security issues, the OSCE is governed by (i) the Heads of State or Government of the OSCE participating States, who set the Organization's priorities and provide orientation at the highest political level, (ii) the Ministerial Council as the central decision-making body, (iii) the Permanent Council as the principal decision-making body for regular political consultations, and (iv) the Forum for Security Co-operation as the autonomous decision-making body providing a platform to discuss security concerns and increase co-operation. Decisions of these bodies are adopted by consensus, which means the absence of any

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[1076] Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities really Depend on the Conventions Establishing Them,* p.40.
[1077] See discussions on objective legal personality above, Part I/E-c (ii).
[1078] Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities really Depend on the Conventions Establishing Them,* p.41.

objection expressed by a participating State to the adoption of the decision in question. Mandates of the OSCE's institutions (namely the High Commissioner on National Minorities, the Office for Democratic Institutions and Human Rights, the Representative on Freedom of the Media) are set by the participating States' representatives in the OSCE decision-making bodies through consensus-based decision-making procedure. Therefore the OSCE organs are not subject to authority of any one State or other organized community, but only to that of the participating States acting jointly through their representatives on such organs. It may even be argued that the OSCE exercises exclusive *organic jurisdiction*, its *sovereignty*, in internal matters as recognized by the host country, Austria, in the Host Country Agreement concluded with the OSCE.[1079] The OSCE also provides functional protection for its staff arising from its duty of care obligations as enshrined in OSCE Staff Regulations and Staff Rules, which is another manifestation of its exercise of organic jurisdiction. Moreover, the OSCE participating States accredit permanent delegations or members of their diplomatic missions to the host State to act concurrently as permanent representatives to the OSCE, while the OSCE opens permanent offices in and sends field missions to risky areas, which are actions performed by fully fledged international organizations.

Abovementioned attributes can be taken as indicative of the OSCE's international legal personality. However, the question whether there exists distinction between the OSCE and participating States in respect of legal rights, duties, power and liabilities on the international plane is not likely to be answered in the affirmative easily. It should be noted that while determination on whether an international organization possesses international legal personality is not made, under the *objective theory* of personality, based

[1079] Article V Section 6 (a) of the Agreement reads: "The OSCE shall have the power to make regulations, operative within the Headquarters of the OSCE, for the purpose of establishing therein conditions in all respects necessary for the full execution of its roles and mandates. No law or regulation of the Republic of Austria which is inconsistent with a regulation of the OSCE authorized by this section shall, to the extent of such inconsistency, be applicable within the Headquarters of the OSCE."

on whether the constitution reflects the founders' explicit or implicit grant of legal personality to the organization, there is a need to refer to the constitution of the organization to determine whether it has *volonté distincte*, a will of its own distinct from that of its members. Whether there exits distinction between the organization and its members in respect of legal rights, duties, power and liabilities on the international plane as contrasted with the national or transnational plane can also be determined only by referring to the relevant provisions of the constitution. The OSCE lacks such a *legal* document. In other words, the argument that the OSCE enjoys legal rights, duties, power and liabilities on the international plane distinct from its members cannot be supported by provisions of a legal constituent instrument. Explaining the distinct will on the basis of politically binding non-legal instruments would call for attributing normative force to such documents[1080]. What would be even more problematic is to establish that the OSCE exercises sovereign and international acts in its own name based on the existing non-legal instruments. It should be noted that while one reason for insistence of a number of OSCE participating States for the adoption of the draft *Convention on International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE* only together with an OSCE Statute is to ensure that the OSCE and its institutions do not act *independently*, opposition to the adoption of an OSCE Statute is rooted in the preference of a vast number of OSCE participating States to maintain the *flexibility* of these entities.

Moreover, it is unlikely to argue convincingly that *volonté distincte* of the OSCE can be established based on customary international law because of a lack of *opinio iuris*. Besides, it can be submitted that the fact that the OSCE decisions are adopted by the decision-making bodies on consensus basis lends some support to the argument that the OSCE lacks a will of its own distinct from the that of the participating States. Indeed, it does not seem convincing to maintain that an organization has a will of its own distinct from its

[1080] For the OSCE's internal normative system created by non-legal instruments, see *supra* Note 1013. See also *supra* Note 748 for politically binding commitments not constituting a separate normative order.

members when even one of its members is entitled to block any decision it does not wish to be taken. However, exceptions to the consensus rule (consensus minus one, consensus minus two)[1081] and current international practice as in the case of the NATO could be cited as a counterargument.

Despite the fact that the founders of the OSCE intentionally established a forum (CSCE), later to be designated as an organization (OSCE), devoid of international legal personality, and that they have not equipped the Organization with distinct legal rights, duties, power and liabilities on the international plane, the OSCE has gained recognition of its international legal personality, in particular by the two host States, Austria and Poland, in the course of its operations spanning the geographical area from Vancouver to Vladivostok and covering wide range of security related issues. Having concluded a headquarters agreement with the OSCE, Austria now considers the Organization as "having already obtained international legal personality on the basis of far-reaching, although not general, state practice accepted as law, ie, on the basis of customary international law."[1082]

The Legal Department of the OSCE also subscribes to the opinion that the OSCE enjoys international legal personality and privileges and immunities on a *de facto* or customary basis across the OSCE region.[1083] Relying upon the 1949 Advisory Opinion of the ICJ in *Reparation Case*, in which the Court concluded that in order for the UN to achieve its ends, the attribution of international legal personality was indispensable[1084], *Tabassi* holds that "even if the intention of the participating States remains *not* to create an international legal person, the acts of the decision-making bodies have had the

[1081] See, *supra*, Notes 784, 786.
[1082] Tichy & Quidenus, "Consolidating the International Legal Personality of the OSCE-A Headquarters Agreement with Austria", p.412.
[1083] Tabassi acknowledges, however, that this argument can easily be dismissed by those opposing it. See, Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.19.
[1084] *Reparation for injuries,* p.179.

de facto consequence of doing just that, as OSCE operations and treatment are otherwise not explainable."[1085]

Despite the counterarguments that may easily be raised, if it were established under the *objective theory* of personality that the OSCE had acquired international legal personality, it would have been accepted that the OSCE had an *inherent power* to perform any sovereign act or any act under international law which it is in a factual position to achieve its aims set by the participating States, provided that it is not precluded by the participating States from performing these acts.

Under that assumption, it would have been acknowledged that the OSCE, as an international organization having international legal personality, would incur international responsibility for its violation of international law. In such a case, however, DARIO would still not apply since the OSCE was not "established by a *treaty or other instrument governed by international law*" unless application of DARIO is recognized as requirement of international customary law for international organizations irrespective of the legal nature of their constituent documents. As for participating States' responsibility, *Gasbarri*'s conceptions give way to two scenarios. Under the conception that the OSCE's legal system derives from international law, participating States could be held responsible in addition to the OSCE. Under the original legal system scenario, however, participating States hide behind the institutional veil of the OSCE where responsibility rests exclusively with the Organization.[1086]

Apart from the privileges and immunities granted to the OSCE by domestic acts as well as those registered in treaties, the OSCE would be entitled to enjoy immunity as recognized by customary international law.

[1085] Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.21.
[1086] See discussions on international responsibility above, Part II/D-c

As for the treaty-making capacity, it would be recognized that the OSCE possessed that capacity. Therefore it could conclude treaties through which it was in a factual position to achieve its aims, including headquarter agreements and agreements on privileges and immunities with States as well as co-operation agreements with other international organizations, which could be regarded as falling in its inherent capacity.

c) Theory of Presumptive Personality

According to this theory an organization is *presumed* to possess international legal personality if it can be established that it undertakes international actions consistent with that personality. An organization which exists and performs legal acts which can only be explained by on the basis of its international legal personality is presumed to have it.

Unlike *Seyersted*'s objective theory, *Klabbers*' arguably less absolutist presumptive theory allows for denial of personality based on practice or intent, for example, if the constitution contains explicit clause denying personality, or if the organization has no external relations and lacks the competences to engage in such relations.[1087] On the other hand, under the presumptive theory there is no need to establish that the organization exercises inherent power, which is an essential component of the objective theory.

Conclusion of international agreements, in particular the most recent ones concluded with the two host States, Poland and Austria, manifests the OSCE's external relations, which bear legal effects. Such agreements open the way for the OSCE to enjoy privileges and immunities, which require relevant administrative and legislative measures to be taken. Besides, cooperation agreements concluded between the OSCE and other international organizations lay the ground fulfilling more effectively the objectives set by

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[1087] Klabbers, "On Seyersed and his *Common Law of International Organizations"*, p.387. Despite the explanation provided by Klabbers regarding the difference between the objective and presumptive theories, one wonders why the possibility of denying the legal personality of the organization is granted to the latter while it is denied to the former.

the participating States. Conclusion of various agreements with a number of subjects of international law implies that the OSCE possesses the *jus tractatuum*, which is usually considered the main attribute of international legal personality.[1088]

Moreover, the fact that the OSCE participating States accredit permanent delegations or members of their diplomatic missions to the host State to act concurrently as permanent representatives to the OSCE adds to the conclusion that is the OSCE makes use of attributes of international legal personality, including the right to receive missions.

It has been submitted in this regard that perhaps the most pragmatic solution to the legal status question of the OSCE would be to follow *Klabbers*' (somewhat circular) notion of presumptive personality.[1089] *Tabassi* held that "even if the intention of the participating States remains *not* to create an international legal person, the acts of the decision-making bodies have had the de facto consequence of doing just that, as OSCE operations and treatment are otherwise not explainable."[1090]

Whether the participating States deny international legal personality of the OSCE is a question that has to be answered in the negative if the presumptive theory were to sustain. The OSCE cannot be presumed to be in possession of international legal personality if the participating States object to it.[1091] As we have seen, the OSCE was established with the intention to bring into being an entity without international legal personality and that a number of participating States still maintain their objection to the OSCE's legal personality. Despite the name change from *Conference* to *Organization*, participating States continue to stick to the current designation and decline to

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[1088] Klabbers, Presumptive Personality: The European Union in International Law, p.251.

[1089] Blokker & Wessel, "Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice", p.9.

[1090] Tabassi, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", p.21.

[1091] Verdirame, *The UN and Human Rights. Who Guards the Guardian?,* p.60.

be called Member States. Although the presumptive theory of personality does not require recognition of the organization by other subjects of international law, objection to its personality by the participating States stands in the way of OSCE's gaining international legal personality. This is similar to the negative effect of the constitutional provisions as emphasized by *Seyersted*.[1092]

However, two arguments can be raised against the current status and legal effect of the objection. Firstly, although intention of the founders of the OSCE (CSCE) was to devise an entity without international legal personality, in the course of deliberations to strengthen the legal status, legal capacity, and privileges and immunities of the OSCE, the participating States have adopted an approach, and they still maintain it now, which lends support to the OSCE's international legal personality. Indeed, the main difference of thought among the participating States revolves not around whether or not to bestow upon the OSCE international legal personality, but around how to do it. Although the participating States have not yet agreed on how to grant international legal personality to the OSCE, either through one of the available options or by adopting a different approach, none of the participating States has expressed an objection to the OSCE's gaining international legal personality irrespective of the procedure to be followed.

Secondly, even if the position of a number of participating States who opposed the adoption of the draft *Convention on International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE* without footnotes can be likened to that of persistent objectors, it is questionable whether the persistent objectors can prevent the emergence of international legal personality of the OSCE. It is submitted that "persistent objectors should not be considered to be in a position to prevent the creation of a rule of customary international law and, consequently, prevent an

[1092] See, Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities really Depend on the Conventions Establishing Them,* p.23-25.

organization from obtaining international legal personality."[1093] Indeed, "when a State has persistently objected to an *emerging* rule of customary law, and maintains its objection after the rule has crystallized, that rule is not opposable to it."[1094] In other words, the State establishing itself as a persistent objector is exempt from the binding force of the rule of customary international law in question. As a matter of fact, the persistent objector rule (doctrine) relates to the rule of customary international law, which otherwise would have a legally binding force for all States. Whether the OSCE has gained international legal personality relates to establishment of an objective fact, not to the effect of a rule of an international customary law. It can be argued therefore that persistent objection to the international legal personality of the OSCE would not have negative impact on the Organization's legal status if the theory of objective personality were to be taken as basis. For such an objection would not prevent emergence of a customary rule but its application to the opposing state. Under the theory of *presumptive theory*, however, it should be submitted that such an objection, not even a necessary one, to legal personality of the OSCE would invalidate the argument that the OSCE has acquired international legal personality.

F- Conclusions

In the first Part, we have examined the effects of constitutional provisions on international legal status of international organizations in general, and we have examined, in the second Part, specific capacities of the OSCE, an international organization lacking a legal constituent instrument, and tested on it the prominent theories explaining international legal

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[1093] Tichy & Quidenus, "Consolidating the International Legal Personality of the OSCE-A Headquarters Agreement with Austria", p. 413.

[1094] At its sixty-forth session, in 2012, the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work. At its 3412th meeting, held on 25 May 2018, the Commission adopted the entire set of *draft conclusions on identification of customary international law* on second reading. Conclusion 15/1 reads: "Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection." [2018] *Yearbook of the International Law Commission*, vol.II, Part Two. See, UN Doc. A/73/10, Conclusion 15, Commentary (1).

personality of international organizations. As discussed above, the *will theory* fails to explain international legal personality of the OSCE, mainly due to the lack of a constituent legal instrument from which the will of participating States could be established. Moreover, participating States did not intend to confer international legal personality to the OSCE at its inception, even when the Conference was changed into an Organization, nor did they do it in the course of the OSCE's activities so far. The other two theories, namely the *objective* and *presumptive* theories of personality, are highly unlikely to offer a convincing explanation either. Objection from a member state to legal personality of the organization, *if clearly established,* renders the *presumptive theory* untenable. Since the conception of the *presumptive theory* is built upon non-existence of an objection to legal personality of the organization concerned, it can be traced back to the will of the members, which brings us to the same conclusion in the case of the OSCE. Therefore, the only theory which offers a more convincing explanation on the OSCE's international legal personality seems to be the *objective theory* of legal personality. The biggest advantage of this theory is its distance to the will of the member states. There is no need to examine in a constituent legal instrument the will of the participating States to determine on the OSCE's legal status. Moreover, unlike in the *presumptive theory*, an objection to OSCE's international legal personality from a participating State does not stand in the way of its gaining that status. Once established that the OSCE meets the objective criteria, as explained above, international customary law equips the Organization with international legal personality. However, while there is no need for a constituent legal instrument to determine whether the OSCE has international legal personality, such a need is obvious to determine whether the Organization has its own will distinct from that of participating States, which is a precondition under the *objective theory*. What is more, the biggest advantage of the *objective theory*, its distance to the will of member states, is also its weakest point as it disregards the will of the primary subjects of international law. If it is the intention of the participating States to create an entity without legal personality, they can do it. Furthermore, for the *objective theory* to qualify in explaining international legal personality of the OSCE, it should be established that the Organization exercises sovereign and international acts in its own name. However, whether the OSCE does or should possess this attribute is a question that creates deep division of views among the OSCE participating States.

Apparently, the theories explaining international legal personality of international organizations are away from making a convincing and indisputable case for the OSCE. Yet the OSCE passes *the duck test*.[1095] It has an institutionalized structure including decision-making bodies and operational institutions, comprehensive set of mechanisms[1096] to monitor the commitments entered by participating States, presence in twenty-two different countries, in particular field missions conducting operations, generally in risky areas, under tailored-made mandates agreed by consensus of participating States, and engagements with subjects of international law by concluding various arrangements that bear legal effects, including the most recent international agreements concluded with the two host States, Austria and Poland. Therefore, notwithstanding the intention of its founders and lack of a legal constituent instrument, the OSCE does look like an international organization, and acts, decides and functions like a fully-fledged one.

Yet it faces many legal problems centring round the issue of the vagueness of its legal status. Generally speaking, participating States, do not consider the OSCE, as an international organization with international legal personality. Solutions offered so far to deal with many legal problems

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[1095] "If it looks like a duck, swims like a duck, and quacks like a duck, it probably is a duck." Borrowed from Blokker & Wessel, "Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice", p.20.

[1096] The OSCE mechanisms are grouped under Human Dimension and Politico-Military Dimension. The Human Dimension mechanisms are (i) the *Vienna Mechanism* and (ii) the *Moscow Mechanism*. The Politico-Military Dimension mechanisms are (i) *Mechanisms for Risk Reduction* (consultation and co-operation regarding unusual military activities, voluntary hosting of visits, measures regarding hazardous incidents of a military nature), (ii) *Early Warning* (provisions relating to early warning and preventive action, the Berlin mechanism), and (iii) *Peaceful Settlement of Disputes* (the Valetta mechanism, Convention on conciliation and arbitration within the OSCE). For the OSCE Mechanisms and Procedures, see *OSCE Mechanisms and Procedures*, Summary/Compendium, 2011, OSCE.

frequently encountered, or having the potential to arise, in the course of daily functioning of the OSCE have given rise to disharmony in the Organization's enjoyment of legal capacity, privileges and immunities granted by host States in accordance with their constitutional and legislative requirements. Disharmony set aside, it makes things even worse that the OSCE cannot enjoy in some participating States legal capacity, privileges and immunities that it needs for the exercise of its functions and fulfilment of its purposes simply because it lacks international legal personality.

Useful as domestic legislative and administrative measures taken by a number of participating States may have been, legal problems that the OSCE encounters can be addressed more effectively in a treaty-based solution, as is the usual practice with international organizations. While participating States could not agree so far on a treaty-based solution that would address the questions arising from vagueness of the OSCE's legal status, they have displayed their readiness to provide the Organization with international legal personality. Currently, we can speak of disagreement among the OSCE participating States not on whether or not conferring on the Organization international legal personality but on how to do it. Among the available options[1097] currently under debate, discussions have intensified on whether to adopt the draft *Convention on the International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE* (without footnotes) (2007 Draft Convention-Option 1), or to adopt a constituent document (charter or statute) prior to or in parallel with the adoption of the draft Convention. All the options under consideration[1098] would definitely offer a safe legal environment where the OSCE could enjoy its international legal personality, legal capacity, privileges and immunities. Equipping the OSCE with its legal necessities (Option 1) is definitely possible in international law notwithstanding its poor frequency[1099]. On the other hand, it is obvious that

[1097] See, *supra*, Note 840.
[1098] See discussions above on options under consideration, Part II/C-d.
[1099] Although it has been submitted that it might create domestic legal problems to confer international legal personality, legal capacity and privileges and immunities on an international organization in the absence of a constituent legal instrument, regard should be had to the 1993 Rome Council

the second Option offers legal certainty, and that certainty would be enjoyed not necessarily to the detriment of the OSCE's flexibility, whatever that expression may mean. There is no reason to believe that flexibility of the OSCE's institutions can be guaranteed if their mandates are established by politically binding decisions and not by legally binding rules. Legal documents, too, may provide the desired flexibility of the institutions if formulated properly. That was the main reason why the consensus-based decision making and politically binding nature of the OSCE decisions were maintained at the draft Convention.

Failing a compromise on these options may encourage a number of participating States to consider the forth option, according to which the 1993 Rome Council Decision would be implemented through signature and ratification of the 2007 draft Convention. That option, too, could be implemented without an obstacle arising from international law. Neither international law nor the OSCE rules place any obstacle against the adoption of the draft Convention by certain participating States among themselves (bottom-up approach) instead of it being adopted by the OSCE Ministerial Council (top-down approach). However, if not signed by a considerable number of participating States, Option-4 might run the risk of adding to the already fragmented legal framework of the OSCE. Consequently that option might fail to introduce a lasting solution to the problem. On the other hand, it might also add to the assessment of the OSCE as an international organization enjoying *de facto* or objective legal personality, which was triggered by the host States, Austria and Poland. In that case, not only would it be ensured that the OSCE enjoyed international legal personality, legal capacity, and privileges and immunities, as enshrined in the draft Convention, in the OSCE participating States which would have ratified it, but also the OSCE's

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Decision where participating States had already committed to confer domestic legal capacity on the CSCE institutions and equip these institutions and their officials and staff with certain privileges and immunities subject to their constitutional, legislative and other requirements. Since the Rome Council Decision was adopted by consensus, it would be a reasonable anticipation that no participating State would encounter domestic legal obstacle in honouring their commitment.

international legal status would be significantly augmented, which consequently would enhance the OSCE's capacity to engage in action in the international plane.

It should be noted that legal considerations have all been consumed regarding possible legal solutions to the OSCE's legal problems arising from lack of its constituent legal instrument. It remains to be seen whether or when the need for reaching a treaty-based solution will surpass the benefits, if any, of having the OSCE functioning on a vague (or flexible) legal status.

Abbreviations

ABH	: Arab British Helicopter Company
ABM	: Anti-Ballistic Missile
ADB	: Asian Development Bank
AFDRC	: Armed Forces of the Democratic Republic of Congo
AIAM	: Annual Implementation Assessment Meetings
AJIL	: American Journal of International Law
ALADI	: Latin American Integration Association
AMF	: Arab Monetary Fund
AOI	: Arab Organization for Industrialization
ASEAN	: Association of Southeast Asian Nations
AU	: African Union
BSEC	: Black Sea Economic Cooperation
BYIL	: British Yearbook of International Law
CARICOM	: Caribbean Community
CERN	: European Organization for Nuclear Research
CiO	: Chairman-in-Office
CFE	: Conventional Armed Forces in Europe
CFSP	: Common Foreign and Security Policy
CoE	: Council of Europe
CPC	: Conflict Prevention Centre
CSCE	: Conference for Security and Co-operation in Europe
CSO	: Committee of Senior Officials
CSTO	: Collective Security Treaty Organization
CTBTO	: Comprehensive Nuclear-Test-Ban Treaty Organization
DARIO	: Draft Articles on the Responsibility of International Organizations
EBRD	: European Bank for Reconstruction and Development
EC	: European Community
ECC	: European Economic Community
ECJ	: European Court of Justice
ECR	: European Court Reports
ECHR	: European Convention of Human Rights
ECrtHR	: European Court of Human Rights
ECOWAS	: Economic Community of West African States
ECSC	: European Coal and Steel Community
EEC	: European Economic Community
EPO	: European Patent Organization
ERTA	: European Road Transport Agreement
ESA	: European Space Agency
EU	: European Union
EURATOM	: European Atomic Energy Community
FAO	: Food and Agriculture Organization
FRY	: Federal Republic of Yugoslavia
FSC	: Forum for Security Co-operation
GATT	: General Agreement on Tariffs and Trade
G8	: Group of Eight
G20	: Group of Twenty
HCNM	: High Commissioner on National Minorities

IACA : International Anti-Corruption Academy
IAEA : International Atomic Energy Agency
IBRD : International Bank for Reconstruction and Development
ICAO : International Civil Aviation Organization
ICC : International Criminal Court
ICJ : International Court of Justice
ICRC : International Committee of the Red Cross
ICTY : International Criminal Tribunal for the Former Yugoslavia
ICWM : International Committee for Weights and Measures
IDA : International Development Association
IDB : Inter-American Development Bank
IFAD : International Fund for Agricultural Development
IFC : International Finance Corporation
IFI : Independent Forensic Post-Blast-Scene Investigation
IHFFC : International Humanitarian Fact-Finding Commission
ILA : International Law Association
ILC : International Law Commission
ILO : International Labour Organization
ILOAT………: International Labour Organization Administrative Tribunal
IMF : International Monetary Fund
IMO : International Maritime Organization
INTERPOL : International Criminal Polis Organization
IOIA : International Organizations Immunities Act
IOM : International Organization for Migration
ISA : International Seabed Authority
ITA : International Tin Agreement
ITC : International Tin Council
ITLS : International Tribunal for the Law of the Sea
ITU : International Telecommunication Union
IWG : Informal Working Group
MC : Ministerial Council
MIGA : Multilateral Investment Guarantee Agency
MoU : Memorandum of Understanding
MONUC : Democratic Republic of Congo
NATO : North Atlantic Treaty Organization
OAS : Organization of American States
ODIHR : Office for Democratic Institutions and Human Rights
OFE : Office for Free Elections
OJ : Official Journal of the European Union
ONUC : United Nations Operation in the Congo
OPCW : Organization for the Prohibition of Chemical Weapons
OPEC : Organization of the Petroleum Exporting Countries
OSCE : Organization for Security and Co-operation in Europe
OSCE PA : OSCE Parliamentary Assembly
PAIGH : Pan American Institute of Geography and History
PC : Permanent Council
PCIJ : Permanent Court of International Justice
PrepCom : Preparatory Commission
RFOM : Representative on Freedom of the Media
SMM : Special Monitoring Mission

TEC	: Treaty Establishing the European Community
TEU	: Treaty on European Union
TFEU	: Treaty on the Functioning of the European Union
UAE	: United Arab Emirates
UK	: United Kingdom
UN	: United Nations
UNCIO	: United Nations Conference on International Organization
UNDP	: United Nations Development Programme
UNEF	: United Nations Emergency Force
UNESCO	: United Nations Educational, Scientific and Cultural Organization
UNHCR	: United Nations High Commissioner for Refugees
UNICEF	: United Nations Children's Fund
UNIDO	: United Nations Industrial Development Organization
UNODC	: UN Office for Drugs and Crime
UNMIK	: UN Interim Administration Mission in Kosovo
UNRRA	: UN Relief and Rehabilitation Administration
UNRWA	: UN Relief and Works Agency
UNECE	: United Nations Economic Commission for Europe
UNTS	: United Nations Treaty Series
UPU	: Universal Postal Union
US/USA	: United States/United States of America
USSR	: Union of Soviet Socialist Republics
VCLT	:Vienna Convention on the Law of Treaties
WFP	: World Food Programme
WHO	: World Health Organization
WIPO	: World Intellectual Property Organization
WMO	: World Meteorological Organization
WTO	: World Trade Organization
YILC	: Yearbook of International Law Commission

Bibliograpy

Åkermark Athanasia Spiliopoulou, Justifications of Minority Protection in International Law, Kluwer Law International, The Hague, 1996

Alvarez Jose E., *International Organizations as Law-makers*, New York, 2005

Amerasinghe Chittaranjan Felix, *Principles of the Institutional Law of International Organizations*, Second Edition, Cambridge, 2005

Anzilotti Dionisio, *Cours de Droit International*, Paris, 1929

Archer Clive, - *International Organizations*, Second Edition, London, 1992

- "An Introduction to International Organizations", *The Europa Directory of International Organizations*, Forth Edition, London & New York, 2002

Arsić-Đapo Jasna, "Another Brick in the Wall, Building up the OSCE as an International Organization One Agreement at a Time", International Organizations Law Review, 2017, Volume 14, Issue 2

Aréchaga Jimenez E., "International Responsibility", Manual of Public International Law, (M.Sørensen, ed. London,1968)

Aufricht Hans, "Personality in International Law", American Political Science Review, 37

Aust Anthony, Modern Treaty and Practice, Third Edition, Cambridge University Press, 2017

Bederman David, "The Souls of the International organizations: legal Personality and the Lighthouse at Cape Spartel", (1996) *Virginia Journal of International Law*, 36

Bekker Peter H. F., The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities, Dordrecht, Martinus Nijhoff, 1994

Benedek Wolfgang, Isak Hubert, Kicker Renate (eds), Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday, Frankfurt am Main: P. Lang, 1999

Berger Christian, OSCE and International Law, 24 Int'l. J. Legal Info. 36 (1996)

Bertrand Christine, “La nature juridique de l’Organisation pour la Sécurité et de la Coopération en Europe (OSCE)”, 98 Revue Générale de Droit International Public, 1998

Bindschedler Rudolf L., “International Organizations, General Aspects”, *Encyclopedia of Public International Law*, R. Bernhardt (ed.), Volume II, North-Holland 1995

Bloed Arie (ed.), *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, 1972-1993*, Dordrecht, 1993

Blokker Niels M., “International Legal Personality of the European Communities and the European Unions: Inspirations from Public International Law”, *Yearbook of European Law*, Vol.35, No.1, 2016

Blokker Niels M. & Wessel Ramses A., “Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice”, Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds), *The Legal Framework of the OSCE*, Cambridge University Press, Cambridge, 2019

Bogush Gleb, “Domestic Implications of the OSCE’s Legal Personality under Russian Constitutional Law”, Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds), *The Legal Framewoek of the OSCE*, Cambridge University Press, Cambridge, 2019

Brierly James Leslie, *The Law of Nations: An Introduction to the International Law of Peace 1*, Sixth edition (Humphrey Waldock edition, London), 1963

Brölmann Catherine, “Specialized Rules of Treaty Interpretation: International Organizations”, Amsterdam Center for International Law, No.2012-01

- *The Institutional Veil in Public International Law* – International Organizations & the Law of Treaties, 2007

Buergenthal Thomas, “The CSCE Rights System”, The George Washington Journal of International Law and Economics, Washington, Vol.25, Issue 2, 1991

Buffard Isabelle, Crawford James, Pellet Alain, Wittich Stephan (eds), *International Law between Universalism and Fragmentation*, Leiden-Boston, 2008

Caplan Richard, *International Governance of War-Torn Territories: Rule and Reconstruction*, Oxford University Press, 2005

Cassese Antonio, *International Law*, Second Edition, Oxford, 2005

Cavaglieri Arrigo, Règles Générales du Droit de la Paix, 26 Recueil des cours de l'Académie de droit international, 1929-I

Charlesworth Hilary & Chinkin Christine, *The Boundaries of International Law*, 2000

Cheng Bin, United Nations Resolutions on Outer Space: "Instant" International Customary Law? 5 *Indian Journal of International Law* 23, 36 (1965)

Chinkin Christine, - "A Mirage in the Sand? Distinguishing Binding and non-Binding Relations between States, *Leiden Journal of International Law* 10: 247 (1997)

- "Normative Development in the International Legal System", in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2000

Chiu Hungdah, The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded, The Hague, Kluwer Academic Publishers, 1966

Clapham Andrew, "Human Rights Obligations of Non-State Actors", 2006 (Merja Pentikäinen, "Changing International 'Subjectivity' and Rights and Obligations under International Law-Status of Corporations", *Utrecht Law Review*, Vol.8, Issue 1, 2012)

Claude L. Inis, *Swords into Plowshares: The Problems and Progress of International Organizations*, Second Edition, New York, 1959

Collins Richard, White D. Nigel (eds), *International Organizations and the Idea of Autonomy*, Oxon, 2011

Cohen Jonathan, Critical Notice: The Concept of Law by H.L.A.Hart, 71 MIND (1962), Issue 283

Corten Olivier, Klein Pierre (eds) *The Vienna Conventions on the Law of Treaties-A Commentary*, Vol.I, 2011

Crawford James, *Brownlie's Principles of Public International Law,* Oxford, Eighth Edition, 2012

Crawford James, Pellet Alain, Olleson Simon (eds), *The Law of International Responsibility*, Oxford University Press, 2010

David Eric, "1986 Vienna Convention Preamble", *The Vienna Conventions on the Law of Treaties-A Commentary*, (Edited by Olivier Corten and Pierre Klein), Vol.I, 2011

De Guttry Andrea, Frulli Micaela, Greppi Edoardo, Macchi Chiara (eds), *The Duty of Care of International Organizations Towards Their Civilian Personnel-Legal Obligations and Implementation Challenges*, The Hague, 2018

De Schoutheete Philippe, Andoura Sami, "The Legal Personality of the European Union", *LX Studia Diplomatica 1*, Egmont European Affairs Publication, 2007

Debuf Els, "Tools to do the job: The ICRC's legal status, privileges and immunities", International Review of the Red Cross (2016), 97 (897/898)

Dinstein Yoram (ed.), *International Law at a Time of Perplexity* (Essays in honour of Shabtai Rosenne), 1989

Dixon Martin-McCorquodale Robert-Williams Sarah, *Cases & Materials on International Law*, Sixth Edition, 2016

Dominicé Christian, "L'immunité de juridiction et d'exécution des organisations internationales", Collected Courses of the Hague Academy of International Law, 1984, IV (Dordrecht, Martinus Nijhoff, 1985)

-'L'émergence de l'indivu et droit international public', in Chiristian Dominicé, *L'ordre juridique international entre tradition et innovation* (Paris: PUF 1997), 109-123

Eaton Martin R., "Common Foreign and Security Policy" in David O'Keeffe and Patrick M. Twomey (eds), *Legal Issues of the Maastricht Treaty*, Chancery Law Publications, London, 1994

Fastenrath Ulrich, "The Legal Significance of the CSCE/OSCE Documents", in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1995/1996*, Baden-Baden 1997

Fitzmaurice Gerald, The Law and the Procedure of the International Court of Justice, 1951-1954; General Principles, and Sources of Law, 30 Brit.Yb. Int'l L. 1, 2 (1953)

G.E.do Nascimento e Silva, "The 1986 Vienna Convention and the Treaty-Making Power of International Organizations", GYIL, vol.29, 1986, Berlin

Gadkowski Andrzej, *The doctrine of implied powers of international organizations in the case law of international tribunals*, European Journal of International Law 9 (1998), 437-467

Galbreath David, The Organization for Security and Co-operation in Europe, New York, 2007

Gasbarri Lorenzo, "The International Responsibility of the OSCE", in Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds.): *The Legal Framework of the OSCE*, Cambridge University Press, Cambridge, 2019

Gautier Philippe, J.A. Frowein and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Kluwer Law International, 2000

Gazzini Tarcisio, "The relationship between international legal personality and the autonomy of international organizations", *International Organizations and the Idea of Autonomy,* (Eds. Collins Richard & White D. Nigel), Oxon, 2011

Ghebali Victor-Yves, "The CSCE in the Post-Cold War Europe", NATO Review, April 1991, No.2, Vol.39, Brussels

Guttry Andrea de, *Duty of Care of the EU and Its Member States towards Their Personnel Deployed in International Missions*, Whitepaper (2012)

Guttry Andrea de, Frulli Micaela, Greppi Edoardo, Macchi Chiara (eds), *The Duty of Care of International Organizations Towards Their Civilian Personnel-Legal Obligations and Implementation Challenges*, The Hague, T.M.C. Asser Press, 2018

Hafner Gerhard, "Did the FR Yugoslavia Make the OSCE an International Organization?", Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday, edited by Wolfgang Benedek, Hubert Isak, Renate Kicker, Frankfurt am Main: P. Lang, 1999

- "The Amsterdam Treaty and the Treaty-Making Power of the European Union. Some critical comments", *Liber Amicorum Professor Seidl-Hohenveldern-in honour of his 80th birthday*, Kluwer Law International, Dordrecht, 1998

Heraclides Alexis, Security and Co-operation in Europe-The Human Dimension 1972-1992, London, 1993

Helfer, Laurence R. & Wuerth, Ingrid B., *Custom in the Age of Soft Law* (working paper)
http://www.iilj.org/wp-content/uploads/2016/07/WuerthIILJColloq2014.pdf

Hillgenberg Hartmut, A Fresh Look at Soft Law, *European Journal of International Law* 3/1999

Hirsch Moshe, *The Responsibility of International Organizations Toward Third Parties*, Dordrecht, 1995

Hobbes Thomas, *Leviathan*, Chapter XVI, "Of Persons, Authors, And Things Personated", 1651 A.D.

Jacobson K. Harold, *Networks of Independence*, Second Edition, New York, 1984

Jenks Clarence Wilfred, *International Immunities*, London and New York, 1961

Kaczorowska Alina, *European Union Law*, Second Edition, 2009

Kant Immanuel, *Perpetual Peace: A Philosophical Essay,* 1795 (htpp://oll.libertyfund.org/titles/357)

Kelsen Hans, - *General Theory of Law and State*, (New York: Russel & Russel, Wedberg trans.), 1945

- *Principles of International Law*, New York, Lawbook Exchange edition, 2003, 2012.

- The Law of the United Nations, A Critical Analysis of its Fundamental Problems, New York, 1950

Kirgis Frederic L., *International Organizations in Their Legal Settings*, Second Edition, St.Paul, Minnesota, 1993

Klabbers Jan, - *An Introduction to International Institutional Law,* Second Edition, Cambridge, 2009

- "Presumptive Personality: The European Union in International Law", *International Law Aspects of the European Union, Martti Koskenniemi (Ed), Kluwer Law International*, The Hague, 1998

- "Institutional Ambivalence by Design: Soft Organizations in International Law", *Nordic Journal of International Law,* Vol. 70, Issue 3, 2001

- "Qatar v. Bahrain: The Concept of 'Treaty' in International Law, 33 *Archiv des Völkerrechts*, 1995

- "On Seyersted and his Common Law of International Organizations", *International Organizations Law Review* 5, 2008

- *International Law*, Second Edition, Cambridge, 2017

Kovar Robert, "La contribution de la cour de justice à l'edification de l'ordre juridique communautaire", (1993) 4/1 Requeil de l'Académie de droit européen

Lauterpacht Hersch, *International Law: Collected Papers,* Cambridge, 1975, Vol.II

Levrat Nicolas, "1986 Vienna Convention Article 6-Capacity of international organizations to conclude treaties", The Vienna Conventions on the Law of Treaties-A Commentary, (Edited by Olivier Corten, Pierre Klein), Vol.I, 2011

Marchegiano Giuseppe, "The Juristic Character of the International Commission of the Cape Spartel Lighthouse", 25 American Journal of International Law, 1931

Mangone Gerard J, *A Short History of International Organization*, New York, 1954

Manton Eric, "The OSCE Human Dimension Process and the Process of Customary International Law Formation", Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), OSCE Yearbook 2005, Baden-Baden

Mazzeschi Pisillo, Riccardo, "Forms of International Responsibility for Environmental Harm" in *International responsibility for environmental harm*, London, 1991

Merkelbach Maarten, Voluntary Guidelines on the Duty of Care to Seconded Civilian Personnel, Swiss Federal Department of Foreign Affairs, Stabilisation Unit, Center for International Peace Operations, Berlin, 2017

Michel Leo, NATO Decisionmaking: How the "Consensus Rule" Works, *Croatian International Relations Review*, January-June, 2006

Miller Anthony J., "The Privileges and Immunities of the United Nations", International Organizations Law Review, Vol.6, 2009

Möldner Milka, Responsibility of International Organizations-Introducing the ILC's DARIO, Max Planck Yearbook of United Nations Law, Volume 16, 2012

Mugerwa Nkambo, "Subjects of International Law", in Max Sørensen (ed.) *Manuel of Public International Law*, London, 1968

Muller Sam, *International Organizations and Their Host States: Aspects of Their Relationship*, The Hague, 1995

Muller A.S., Raić D., Thuránszky J.M. (eds), *International Court of Justice-Its Future Role After Fifty Years*, Kluwer Law International, The Hague 1997

Mutz Reinhard, The CSCE up to the End of the Cold War: What It Achieved and What It Failed, OSCE Yearbook 2015, Baden-Baden 2016

Nijman Janne Elisabeth, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, The Hague, 2004

Nuenlist Christian, “Expanding the East-West dialog beyond the bloc division-The Neutrals as negotiators and mediators, 1969-75”, *Origins of the European Security System: The Helsinki Process Revisited*, 1965-75, edited by Andreas Wenger, Vojtech Mastny, and Christian Nuenist, London and New York, 2008

Odello Marco, “The Developing Legal Status of the Organization for Security and Co-operation in Europe”, *Anuario de Derecho Internacional*, 2006, Issue XXII, pp. 351-393

Olufemi Elias, “Who Can Make Treaties? International organizations”, The Oxford Guide to Treaties, (Edited by Duncan B. Hollis), 2012

Oppenheim Lassa, *International Law: A Treatise*, Eighth Edition, H. Lauterpacht ed., Vol.I: Peace, 1955

Osieke Ebere, *Ultra vires acts in international organizations-the experience of the International Labour Organization*, 48 BYIL, 259-280 (1976-1977)

Palchetti Paolo, “Maclaine Watson & Co. Ltd v. International Tin Council”, 26 October 1989, UK House of Lords, 81 ILR 670, *Judicial Decisions on the Law of International Organizations,* Edited by Cedric Ryngaert, Ige F. Dekker, Ramses A. Wessel, Jan Wouters, 2016

Paust Jordan, “Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act”, 45 Law & Contemporary Problems 53-70 (Winter 1982)

Pease Kelly-Kate S., *International Organizations-Perspectives on Governance in the Twenty-First Century*, Second Ed., New Jersey, 2003

Pellet Alain, “The Definition of Responsibility in International Law,”, James Crawford, Alain Pellet, Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, 2010

Perry Valery, “The OSCE Suspension of the Federal Republic of Yugoslavia” (1998) 4 *Helsinki Monitor*

Petersmann Hans G., *The Legal Evolution of the International Monetary System since Bretton Woods*, 2 German Yearbook of International Law, p. 376-402 (1982)

Pingel Isabelle, “Privileges and Immunities of the Organization for Security and Co-operation in Europe (OSCE)”, MPIL Research Paper Series No.2018/37. In Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds.): *The Legal Framework of the OSCE*, Cambridge University Press, 2019

Portmann Roland, *Legal Personality in International Law*, Cambridge University Press, 2010

Potter B. Pitman, - "Origin of the Term International Organization", *The American Journal of International Law*, Vol.39, No.4, pp. 803-806, 1945

- *An Introduction to the Study of International Organization,* Fifth Edition, New York, 1948

Prévost Jean-François, "Observations sur la nature juridique de l'Acte final de la Conférence sur la sécurité et la coopération en Europe", *Annuaire français de droit international*, 21, 1975

Ratner Steven, "International Tin Council v. Amalgamet Inc.", *The American Journal of International Law*, October 1988, Vol.82/4

Reinisch August, *International Organizations Before National Courts*, Cambridge University Press, 2000

- *Österreichisches Handbuch des Völkerrechts*, Reinisch August *(ed.),* Band I-Textteil, 5. Auflage, Manz, 2013

- Essential Questions in EU Law, Cambridge University Press, New York, 2009

Reinalda Bob, *Routledge History of International Organizations: From 1815 to the Present Day*, 2009

Ridruejo J. A. Pastor, *Curso de derecho internacional publico y Organizaciones internacionales*, Madrid, 1992

Robe Jean-Philippe, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in Gunther Teubner, *Global Law Without A State* (Farnham:Ashgate 1997)

Russel Harold S., "The Helsinki Declaration: Brobdingnag or Lilliput?" A.J.I.L., Vol.70, Issue 2, 1976

Russo Deborah, "Implementation of the Duty of Care by the OSCE", Andrea de Guttry, Micaela Frulli, Edoardo Greppi, Chiara Macchi (eds), *The Duty of Care of International Organizations Towards Their Civilian Personnel-Legal Obligations and Implementation Challenges*, The Hague, T.M.C. Asser Press, 2018

Ryngaert Cedric, "Basing the Legal Status of the OSCE on Participating States' Duty of Loyalty", *Völkerrechtsblog*, 3 August 2016, doi: 110.17176/20180412-215645

Ryngaert Cedric, Dekker Ige F., Wessel Ramses A., Wouters Jan (eds), *Judicial Decisions on the Law of International Organizations,* 2016

Sands Philippe & Klein Pierre, *Bowett's Law of International Institutions*, Fifth Edition, London, 2001

Sapiro Miriam, “Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation”, *The American Journal of Law,* Vol.89, No.3 (July 1995)

Schermers Henry G. & Blokker Niels M., *International Institutional Law*, Third Revised Edition, The Hague, 1997

Schlager Erika, “A Hard Look at Compliance with Soft Law: The Case of the OSCE”, in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2000

Schmalenbach Kirsten, “Austrian Courts and the Immunity of International Organizations”, *International Organizations Law Review* 10 (2013) 446-463

Schmalenbach Kirsten & Dörr Oliver (eds), Vienna Convention on the Law of Treaties- A Commentary, Second Edition, 2018

Schmalenbach Kirsten & Schreuer Christoph, *Österreichisches Handbuch des Völkerrechts*, Band I-Textteil, 5. Auflage, Manz, (Edited by August Reinisch,) 2013

Schoutheete Philippe & Andoura Sami, “The Legal Personality of the European Union”, Egmont Royal Institute for International Relations, in *Studia Diplomatica* Vol. LX, No.1, 2007

Schwarzenberg Georg, - *A Manual of International Law*, First Edition, London, 1947

- *International Law*, Vol. I, International Law as Applied by International Courts and Tribunals: I, Third Edition, London, 1957

Seidl-Hohenveldern Ignaz, Piercing the Corporate Veil of International Organizations: The International Tin Concil Case in the English Court of Appeals, *German Yearbook of International Law* 32 (1989)

-Review (Chiu’s work), The American Journal of Comparative Law, Vol.15, No.3 (1966-1967)

Seidl-Hohenvelern Ignaz, “Internationale Organisationen aufgrund von soft law“, in: U. Beyerlin et al (ed.) *Recht zwischen Umbruch und Bewahrung*. Festschrift für Rudolf Bernhardt, Berlin 1995

Seidl-Hohenveldern Ignaz & Loibl Gerhard, *Das Recht der Internationalen Organisationen einschliesslich der Supranationalen Gemeinschaften* 38, Fifth Revised Edition, 1992

Seyersted Finn, - *Common Law of International Organizations,* Leiden, 2008

- *United Nations Forces in the Law of Peace and War*, Leiden, 1966, Chapter V

-*Objective International Personality of Intergovernmental Organizations: Do their Capacities really Depend on the Conventions Establishing Them*, Copenhagen, 1963.

Shaw Malcolm, *International Law*, Sixth Edition, New York, 2008

Shelton Dinah (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2000

Skubiszewski K, "Implied Powers of International Organizations", in: Yoram Dinstein (ed.), *International Law at a Time of Perplexity* (Essays in honour of Shabtai Rosenne) 1989

Steinbrück Platise Mateja, Moser Carolyn, Peters Anne (eds), *The Legal Framework of the OSCE*, Cambridge University Press, Cambridge, 2019

Stewart Ian, "The Critical Legal Science of Hans Kelsen", (1990) 17 (3) *Journal of Law and Society*

Stumer Andrew, "Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections", *Harvard International Law Journal*, Vol. 48

Sztucki Jerzy, "International Organizations as Parties to Contentious Proceeding Before the International Court of Justice?", *International Court of Justice-Its Future Role After Fifty Years*, (ed. by Muller, Raic and Thuranszky), Kluwer Law International, The Hague 1997

Tabassi Lisa, "The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE Legal Status", Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds), *The Legal Framewoek of the OSCE*, Cambridge University Press, Cambridge, 2019

- Duty of Care in practice, OSCE Legal Digest 2016-2017

Tichy Helmut, "The Role of the Participating States in Reforming the Legal Framework of the OSCE-Past Developments, Status Quo and Future Ambitions", Mateja Steinbrück Platise, Carolyn Moser, Anne Peters (eds), *The Legal Framewoek of the OSCE*, Cambridge University Press, Cambridge, 2019

Tichy Helmut & Köhler Ulrike, "Legal Personality or not-The Recent Attempts to Improve the Status of the OSCE", Isabelle Buffard, James Crawford, Alain Pellet, Stephan Wittich (eds), *International Law between Universalism and Fragmentation*, Festschrift in Honour of Gerhard Hafner, Leiden-Boston, Martinus Nijhoff Publishers, 2008

Tichy Helmut & Quidenus Catherine, "Consolidating the International Legal Personality of the OSCE-A Headquarters Agreement with Austria", International Organizations Law Review, 14 (2017)

Tillotson John, European Community Law, Second Edition, London: Cavendish, 1996

Tomuschat Christian, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', Recueil des Cours 281 (1999), 11-438

Triepel Heinrich, *Droit International et Droit Interne*, Bibliothèque française de Droit des Gens de la Fondation Carnegie, Paris, 1920

Tunkin Grigory Ivanovich, "The Legal Nature of the United Nations", 119 *Recueil des Cours de l'Académie de droit international* (1966 III)

Verdirame Guglielmo, *The UN and Human Rights. Who Guards the Guardian?* Cambridge University Press, 2011

Vinacke Harold, *International Organization*, New York, F.S.Crofts & Co., 1934, *American Journal of International Law,* 29 (2)

Virally Michel, "Definition and Classification of International Organizations: A Legal Approach", 29 *International Social Science Journal*, 1977

Wenig Marcus, "The Status of the OSCE under International Law-Current Status and Outlook", in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed), *OSCE Yearbook 1997*, Baden-Baden, 1998

Wenger Andreas, Mastny Vojtech, Nuenist Christian (eds), *Origins of the European Security System: The Helsinki Process Revisited*, 1965-75, London and New York, 2008

Wessel Ramses A., "Revisiting the International Legal Status of the EU", *European Foreign Affairs Review* 5, 2000

Wohlfeld Monika, "Reconceptualization of Security in the CSCE and OSCE," *Globalization and Environmental Challenges Hexagon Series on Human and Environmental Security and Peace* 3 (7), 2008

White Nigel, The Law of International Organizations, Second Edition, 2005

Wouters Jan/ Odermatt Jed, "Are All International Organizations Created Equal? Reflections on the ILC's Draft Articles of Responsibility of International Organizations", Global Governance Opinions, March 2012

Zemanek Karl, *Das Vertragsrecht der Internationalen Organisationen*, Vienna 1957

-“The legal foundations of the international system: General course on public international law”, *Recueil des Cours*, Volume 266, 1997

OTHER SOURCES

- *Annuaire de l’Institut de Droit International,* Vol. 66-II (1996); 55 (1973)

- “Common Purpose Towards a More Effective OSCE”, Final Report and Recommendations of the Panel of Eminent Persons On Strengthening the Effectiveness of the OSCE, June 27, 2005

- *Helsinki Commission Report*, “Consensus Denied? Challenges for OSCE Decision-Making in 2017”, March 27, 2017

- ILC, Special Rapporteur, *First Report on Responsibility of International Organizations*, UN Doc. A/CN.4/532 (Mar.26, 2003) (prepared by Giorgio Gaja).

- ILC, Special Rapporteur, *Eight Report on Responsibility of International Organizations*, UN Doc. A/CN.4/640 (Mar.26, 2011) (prepared by Giorgio Gaja).

- ILC, Special Rapporteur, *Fourth Report on Relations between States and International Organizations (*second part of the topic), UN Doc. A/CN.4/424/Corr.1 (April 24, 1989) (prepared by Leonardo Díaz González).

- Jan Wouters-Pierre Schmitt, *Challenging Acts of Other United Nations’ Organs, Subsidiary Organs and Officials*, Working Paper 49, April 2010, Leuven Centre for Global Governance Studies

- *OSCE Mechanisms and Procedures*, Summary/Compendium, 2011, OSCE.

- *OSCE Yearbook* 1995/1996, Baden-Baden, 1997

- *OSCE Yearbook* 1997, Baden-Baden, 1998

- [1950] *Yearbook of International Law Commission,* Vol.II

- [1951] *Yearbook of International Law Commission*, Vol.II

- [1953] *Yearbook of International Law Commission*, Vol.II

- [1956] *Yearbook of International Law Commission* Vol. I

- [1959] *Yearbook of International Law Commission* Vol. II

- [1962] *Yearbook of International Law Commission*, Vol.II, 37 (UN Doc. A/CN.4/144).

- [1963] *Yearbook of International Law Commission*, Vol. II, p.162. Report to the International Law Commission by Abdullah El-Erian, Special Rapporteur, 1963. (*Document A/CN.4/161 and Add.1*: First report on the relations between states and inter-governmental organizations)

- [1966] *Yearbook of International Law Commission*, Vol.II

- [1970] *Yearbook of International Law Commission*, Vol. II , p.179, Second Report of State Responsibility, by Roberto Ago, Special Rapporteur

- [1973] *Yearbook of International Law Commission*, Vol.II

- [1974] *Yearbook of International Law Commission*, Vol.I, II

- [1975] *Yearbook of International Law Commission*, Vol.II

- [1977] *Yearbook of International Law Commission*, Vol.II, Part One, 140-55. Report to the International Law Commission by Abdullah El-Erian, Special Rapporteur. (*Document A/CN.4/304*: Preliminary Report on the Second Part of the Topic of Relations between States and International Organizations)

- [1981] *Yearbook of International Law Commission*, Vol. II, Part Two

- [1982] *Yearbook of International Law Commission*, Vol. II, Part Two

- [1985] *Yearbook of International Law Commission*, Vol.II, Part One

- [1989] *Yearbook of International Law Commission*, Vol. II, Part One, p.153-168. Report to the International Law Commission by Leonardo Díaz-González, Special Rapporteur. (*UN Doc. A/CN.4/424*: Fourth Report on Relations Between States and International Organizations -Second Part of the Topic)

- [2011] *Yearbook of the International Law Commission*, Vol. II, Part Two

- [2018] *Yearbook of the International Law Commission*, Vol.II, Part Two

Table of Cases

Permanent Court of International Justice

Case of the S.S. Lotus (Judgment), [1927] Publ. P.C.I.J. Series A, no.10

Case Concerning the Factory at Chorzow (Claim for Indemnity), jurisdiction, [1927] Publ. P.C.I.J., Series A, judgment no. 8

Competence of the International Labour Organization to Regulate the Conditions of Labour of Persons in Agriculture, Advisory Opinion [1922] Publ. P.C.I.J., Series B, Nos. 2 and 3

Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer, Advisory Opinion [1926] Publ. P.C.I.J., No. 13

Interpretation of the Greco-Turkish Agreement of 1 December 1926, PCIJ Publications 1928, Series B., no.16

Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion [1926] Publ. P.C.I.J. Series B, No.14, (Dec.8)

International Court of Justice

Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Mazilu), Advisory Opinion, [1989] ICJ Reports 177

Certain expenses of the United Nations, Advisory Opinion, [1962] ICJ Reports 151

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, [1999] ICJ Reports, 88-89

Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion [1954] ICJ Reports 47

Fisheries Jurisdiction cases, ICJ Reports [1974]

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, [1996] ICJ Reports 66

Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar v. Bahrain, [1994], ICJ Reports 112

Military and Paramilitary Activities in and against Nicaragua (Nicaragua ***v.*** *United States of America*). Merits, Judgment, [1986] ICJ Reports 14

Namibia (Advisory Opinion), ICJ Reports [1974]

North Sea Continental Shelf, Judgment, ICJ Reports [1969]

Nuclear tests case, Australia v. France, [1974], ICJ Reports 253 (Dec.20)

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, [1949] ICJ Reports, 174

South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) preliminary objections, [1962] ICJ Rep 465, 475 (Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice)

International Tribunal for the Law of Sea

Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion of 2 April 2015, Case No.21

International Criminal Tribunal for the Former Yugoslavia (ICTY)

ICTY, Prosecutor v. Simic et al., Case No. IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999

International Labour Organization Administrative Tribunal
A.v.ICC, Judgment No.4003, 26 June 2019.

Court of Justice of the EU

Case 22/70, Commission v. Council (ERTA), [1971] ECR 263

Case 26/62, N. V. Algemene Transport, *En Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Revenue Administration,* [1963] ECR 1

Case 28/67, Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn [1968] ECR 143

Case 9/70, *Franz Grad v. Finanzamt Traunstein* [1970] ECR 838

Case 34/23, *Variola SpA v. Administrazione italiana delle Finanze* [1973] ECR 981

Case 241/87, MacLaine Watson v. Council and Commission or the European Communities, 30 Official Journal of the European Communities (No.C 262) 5 (1987);

Case 19/89, AMT (Tin Recoveries) v. Council and Commission or the European Communities, 32 Official Journal of the European Communities (No. C 62) 7 (1989).

European Court of Human Rights

Al-Dulimi and Montana Management Inc. v. Switzerland [GC], judgment of 21 June 2016, no.5809/08; *Al-Dulimi and Montana Management Inc. v. Switzerland* , judgment of 26 November 2013, no.5809/08.

Beer and Regan v. Germany, Grand Chamber of ECrtHR, 18.2.1999, Application No. 28934/95

Behrami and Behrami v. France, Grand Chamber of the ECrtHR*,* 28 September 2000, Application, No. 71412/01.

Saramati v. France, Germany and Norway, Grand Chamber of the ECrtHR, 28 September 2001, Application No. 78166/01.

Waite and Kennedy v. Germany, Grand Chamber of the ECrtHR, 18.2.1999, Application No.26083/94

Domestic Courts

Belgium

Manderlier v Organisation des Nations Unies et l'État Belge (Ministre des Affaires Etrangères), Brussels Civil Tribunal, 11 May 1966, (1966) Journal des Tribunaux 721; (1972) 45 ILR 446

Canada

United Nations v Canada Asiatic Lines Ltd, Superior court Montreal, 2 December 1952, Rapports de Pratique du Québec (1954) 158-60; (1954) 48 AJIL 668; (1958 II) 26 ILR 622.

Italy

Galasso v. Istituto italo-latinamericano, Corte di Cassazione, 3 February 1986
Cristiani v. *Istituto italo-latino-americano* (Tribunale Roma, 17 September 1981; Corte di Cassazione, 23 November 1985)

Netherlands

UNRRA v Daan, Cantonal Court Amersfoort, 16 June 1948, District Court Utrecht, 23 February 1949, Supreme Court (Hoge Raad) of the Netherlands, 19 May 1950, (1951) NJ 150; (1955) 82 Journal de droit international (Clunet) 855-87; (1949) 16 ILR 337-8.

Iran-US Clams Tribunal, 94, International Law Reports, 1994

Palestine

YY v UNRWA, 17 August 1957, Annual Report of the Director of UNRWA, 12 UN GAOR, Supp. (No. 14) 47, note 34, UN Doc. 1/3686 (1957)

Switzerland

Arab Organization for Industrialization and Others v. Westland Helicopters, Geneva Court of Justice, 23 October 1987, 80 International Law Reports, 622 287

Westland Helicopters v. Arab Organization for Industrialization and Others, Federal Supreme Court, 19 July 1988, 80 International Law Reports

ZM v. *Permanent Delegation of the League of Arab States to the UN,* 116 International Law Reports

Syria

XX v UNRWA, 1955-6, Annual Report of the Director of UNRWA, 7 UN GAOR, Supp.(No.13) 44, UN Doc. A/2171 (1952)

The United Kingdom

Arab Monetary Fund v. Hashim and Others, [1990] 1 All ER p.685

Australia & New Zealand Banking Group Ltd., et al. v. Australia, et al., 29 I.L.M. 670

Entico Corp Ltd v. UNESCO [2008] EWHC 531 (Comm) 18 March 2008

Maclaine Watson v. Department of Trade and Industry (High Court), 80 International Law Reports 39, 46 (1989) (International Tin Council Case, High Court)

Rayner (JH) (Mincing Lane) Ltd v. Department of Trade and Industry, [1990] 2 AC p 418

Rayner v. Department of Trade and Industry (High Court), 77 International Law Reports 56, 74 (1988) (International Tin Council Case, High Court)

Thomas v. Babtiste, [2000] 2 AC 1(PC), 23 (Lord Millett)

The United States

Balfour, Guthrie&Co. Ltd et al.v.United States et al, USDC ND Cal., 5 May 1950

International Tin Council v. Amalgamet Inc., 524 NYS 2 nd (1988)

McCulloch v. State of Maryland (1819); Henry Wheaton, Reports of Cases Argued and Adjudged in the Supreme Court of the United States (New York, 1910)

Mendaro v. The World Bank [1983] US Court of Appeals No.82-2247, CA 80-01204

The Broadbent Case, 628 F. 2nd (1980) p.27 (OAS);

Rayner (JH) (Mincing Lane) Ltd v. Department of Trade and Industry Crawford

Arbitration

Permanent Court of Arbitration

Island of Palmas (Miangas) Case, Netherlands v. United Nations, Permanent Court of Arbitration (1928), 2 U.N.Rep.Int'l Arbitral Awards 829

International Chamber of Commerce

Westland Helicopters v. Arab Organization for Industrialization and Others, Arbitral Award, 5 March 1984, ICC Case No. 3879, 80 International Law Reports (1989)