THE HISTORICAL DEVELOPMENT OF INTERNATIONAL ORGANISATIONS WITH SEPARATE LEGAL PERSONALITY SINCE THE 19th CENTURY

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Abstract

An examination of the development of the separate legal personality of international organisations since the 19th century demonstrates that international organisations do in fact exist as separate legal entities that operate independently from the states that establish them. Notably, when an international organisation is established, it is the founding members of these organisations who determine whether the organisation will possess separate legal personality or not. Such personality may be granted either expressly or by implication. Consequent to the existence of the separate legal personality of international organisations, these entities may possess rights and duties under international law. It is therefore clear that these organisations may be held responsible for the breach of a primary obligation that arises pursuant to the conduct of the organisation in question.

Keywords: international organisations; separate legal personality; express recognition; implicit recognition; rights and duties; responsibility

1 Introduction

International organisations have, as their name suggests, developed their activities at an international level through the conclusion of treaties, ordering of military action and/or participation in financial transactions.[1] The extension of the activities of international organisations and their increased competencies has raised the (seemingly inevitable) question of responsibility for their conduct.[2] In pronouncing the legal position of international organisations, 'it is useful to start by considering whether such entities possess legal personality and, if so, what the consequences

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1 JE Alvarez *International Organizations as Law Makers* (2006) 129.

2 Ibid.

of that legal personality are'.[3] To say that an entity (in this case, an international organisation) possesses a separate legal personality is to say that the organisation itself is the bearer of rights and duties derived from international law.[4] Such responsibility arises in response to a breach of an international organisation's primary obligation(s).[5] In essence, an international organisation which is endowed with separate legal personality is, and should be, capable of being held responsible for the breach of those primary obligations incumbent upon it.[6]

The understanding (and acceptance) that international organisations are indeed capable of possessing a separate legal personality, distinct from that of its members, did not come to be accepted without contestation. Throughout the 19th and early 20th centuries, international lawyers often asserted that states were the only subjects of international law.[7] Such assertions, in no uncertain terms, denounced the possibility of international organisations possessing a separate legal personality under international law.[8] Today, however, it remains largely undisputed that international organisations can possess separate legal personality (under both international and domestic laws).[9] The progression from the initial rejection to the eventual acceptance of the existence of a separate legal personality of international organisations is a process which spans two centuries and was in no way spared from complex and adverse circumstances of growth.

This article seeks to examine the development of the separate legal personality of international organisations by surveying key organisations and their respective contributions to international law. It begins with a brief overview of the proliferation of international organisations during the 19th and early 20th centuries, exploring the historical development of international organisations and the acceptance of their separate legal personalities. Thereafter, a comprehensive discussion regarding the development of the separate legal personality of the European Union (EU) is undertaken.

Prior to discussing the separate legal personality of the EU, a summation of the express and implicit recognition of the separate legal personality of international organisations will be given. The International

3 D Akande 'International organizations' in MD Evans (ed) *International Law* 3 ed (2010) 255.
4 Id 256.
5 MN Shaw *International Law* 6 ed (2008) 1311.
6 Alvarez (n 1 above) 129; see also Akande (n 3 above) 268.
7 Akande (n 3 above) 256; see also HG Schermers & NM Blokker *International Institutional Law* 4 ed (2011) 986.
8 Ibid.
9 R Portmann *Legal Personality in International Law* (2010) 7–8.

Labour Organization (ILO)[10] forms the central focus of the discussion regarding the express recognition of the separate legal personality of an international organisation, whereas the League of Nations (the League)[11] is fundamental in the discussion of the implicit recognition of the separate legal personality of an international organisation. Homage is given to the ILO and the League as they can be viewed as the initial contributors towards the discussion of express and implicit recognition of the separate legal personality of international organisations.

Following the respective discussions concerning the separate legal personality of the ILO and the League, the recognition of the separate legal personality of the United Nations (UN)[12] will be discussed. In discussing the existence of the separate legal personality of the UN, the decision of the International Court of Justice in *Reparations for Injuries Suffered in the Service of the United Nations* case, Advisory Opinion[13] will be relied upon. Thereafter, the complex development of the separate legal personality of the EU is investigated. Following the above discussions, the legal justification for separate legal personalities of international organisations will be explored. In conclusion, the responsibility of international organisations will be discussed, raising several issues concerning the attribution of conduct.

2 The Gradual Self-limitation of Sovereign States and the Rise of Modern Organisations

Cassese and Gaeta confirm that '[t]he international community in its modern shape is contemporaneous with the consolidation of states'.[14] States gradually evolved in Europe between the 12th and 16th centuries with England, France, Spain and Portugal at the helm.[15] These states consisted mainly of centralised power structures wielding exclusive political and moral authority as well as a monopoly of force over a population living in a vast territory.[16] Markedly, it would not be until the 19th century when the international system of states – at least in Europe – would become sufficiently stable to allow (and require) these

10 Constitution of the International Labour Organisation (1919).
11 League of Nations, Covenant of the League of Nations (1919).
12 The Charter of the United Nations (1945) (UN Charter).
13 *Reparations for Injuries Suffered in the Service of the United Nations* case, Advisory Opinion, 1949 ICJ Reports 174 (*Reparations* case).
14 A Cassese & P Gaeta *Cassese's International Criminal Law* 3 ed (2013) 49.
15 V Barth *International Organisations and Congresses,* Institut für Europäische Geschichte (2012) 18.
16 Ibid.

parties to seek forms of co-operation among themselves.[17] At the beginning of the international community,[18] and for many centuries thereafter, sovereign states have been considered omnipotent in this international community.[19] This was attributable to the fact that states were recognised as the sole actors on the international scene.[20] States had been (and perhaps still are) perceived as monads, pursuing their own political, economic and military interests – expressing little or no interest in co-operating with other states.[21]

However, the self-interest of states could not prevent the emergence of major world problems, many of which have attained a dimension stretching far beyond that of any single nation's boundaries.[22] Deadly diseases, for example, do not stop at national boundaries.[23] Consequently, problems that span across the boundaries of multiple nations would require international solutions.[24] The need for the development of international solutions in response to cross-border issues brings to light the tension existing between the actual interdependence of states and their formal independence (sovereignty).[25] This tension is, undoubtedly, a 'classic theme' in international law and has been explored in several literary works.[26] Notably, this 'classic theme' appears to have produced a paradox: to exercise their functions, and to remain as independent as possible, states are forced to co-operate due to the unavoidable reality of interdependence and globalisation. To a certain extent, international co-operation allows them to control external influences.[27]

Foreign Secretary Hurd of the United Kingdom, in a speech about the

17 C Archer *International Organizations* 4 ed (2015) 4–5.

18 It was only around the time of the Peace of Westphalia (1648), which brought an end to the merciless Thirty-Year War, that modern states emerged as an international subject 'and the international society took its current shape'; Cassese & Gaeta (n 14 above) 50.

19 Id 51.

20 Id 54.

21 Ibid.

22 Schermers & Blokker (n 7 above) 1.

23 As a result of globalisation, states are increasingly becoming aware of the importance of (seemingly) distant international problems in relation to domestic issues. States are no longer able to decide 'independently over issues such as refugees, development aid or international investment, as these issues strongly depend on the protection of human rights or the fairness of political systems in other parts of the world'. A Ferreira-Snyman 'Regional organisations and their members: The question of authority' (2009) 42 *CILSA* 183–184. See also J Klabbers *An Advanced Introduction to the Law of International Organizations* (2015) 1.

24 Schermers & Blokker (n 7 above) 1; see also Klabbers (n 23 above) 1.

25 For a general discussion, see ch 1 of Schermers & Blokker (n 7 above).

26 Id 2.

27 Ibid.

Treaty of the European Union, illustrates the tension existing between the interdependence and independence of states[28] as follows:

> It is against our fundamental interests to isolate ourselves from the continent of Europe that policies are organized there which deeply affect our security or our prosperity but in which we have no important say. If that were to happen we could keep our sovereignty as a slogan, but its substance would have gone.[29]

Moreover, article 1 of the Charter of the Organization of American States clearly highlights this tension by stating, inter alia:

> The American states establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.[30]

Notably, these examples both deal with international organisations. To facilitate international co-operation among themselves, states have become progressively more willing to sacrifice some of their sovereign prerogatives in favour of an international organisation with the view of (presumably) combatting common problems that may exist among states.[31] Nevertheless, the creation and functioning of international organisations on the international plane has not caused sovereign states to be relegated to the sidelines. On the contrary, states remain the leading actors in international relations, with international organisations performing an important supporting role.[32]

The 19th century experienced a proliferation in the establishment of international organisations in modern society – evolving from '*ad hoc* multilateral conferences convened by states to deal with a particular situation'[33] (such as the Congress of Vienna (1815) which settled issues arising from the end of the Napoleonic wars) into institutions that saw states meeting regularly and possessing organs that functioned on a permanent basis.[34] The 'early international organisations' dealt with

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28 Consolidated Version of the Treaty on European Union, 2006 OJC 321 E/5 (TEU pre-Lisbon).

29 Speech from the European Policy Forum, London, 1 October 1992. Text of the speech obtained from the Information Section of the British Embassy in The Netherlands; see also Schermers & Blokker (n 7 above) 3.

30 Charter of the Organization of American States, 1948 (OAS).

31 Klabbers (n 23 above) 18.

32 Schermers & Blokker (n 7 above) 3.

33 Akande (n 3 above) 253; see also PK Menon 'The subjects of modern international law' (3) *Hague Yearbook of International Law* (1990) 30–86.

34 Ibid.

technical, non-political matters and included commissions regulating European rivers such as the Rhine, the International Telegraphic Union (1865) and the Universal Postal Union (1874).[35]

Despite the continued creation of international organisations during the 19th century, the prevailing view remained that state sovereignty was predominant and that international organisations merely performed an observing function.[36] Entities other than states were consequently precluded from possessing separate legal personality under international law.[37] Notwithstanding their lack of separate legal personality, international organisations of the time managed to participate in international relations by entrusting all action taken by the organisation to one member state.[38] This practice, naturally, did not contribute to the development of the separate legal personality of international organisations. The separate legal personality of international organisations would only experience its 'breakthrough' in 1919 at the Versailles Peace Settlement.[39]

The gathering at Versailles was 'primarily an intergovernmental meeting of heads of state and government, foreign ministers and their advisors. It was mostly concerned with the question of international peace and security, while economic and social questions were given only perfunctory consideration'.[40] The conference ultimately led to the formation of the League of Nations and the ILO. This was the first steps towards the recognition of separate legal personality of international organisations under international law.[41] Notably, the respective organisations sparked conversations at opposite spectrums of the debate: the League put forward the possibility of implicit recognition of the separate legal personality[42] of international organisations, whereas the ILO facilitated the discussion regarding the express recognition of separate legal personality of international organisations.

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35 Ibid; see also Shaw (n 5 above) 1283; J Klabbers *An Introduction to International Institutional Law* (2005) 18.

36 Schermers & Blokker (n 7 above) 986.

37 Ibid.

38 In the old German Customs Union, all action taken under international law was entrusted to one member state, Prussia, which acted on behalf of the collective membership.

39 Treaty of Peace between Allied and Associated Powers and Germany, and Protocol (Treaty of Versailles) (incorporating the Covenant of the League of Nations – Part I, and the Constitution of the International Labour Organization – Part XIII) (Versailles, 28 June 1919) 225 CTS 189, 225 CTS 195 (ILO Part XIII); see also Klabbers (n 23 above) 19.

40 Archer (n 17 above) 3.

41 Schermers & Blokker (n 7 above) 986; see also CF Amerasinghe *Principles of Institutional Law of International Organizations* 2 ed (2005) 68.

42 See heading 2.2 of the discussion.

2.1 The Express Recognition of the Separate Legal Personality of an International Organisation

The constitution of the ILO was the first constituent treaty which expressly provided for the separate legal personality of an international organisation.[43] Article 39 of the ILO constitution expressly recognises the separate legal personality of the organisation, thus making it clear that under international law the ILO is capable of incurring rights and obligations in its own name.[44] Significantly, the question of separate legal personality will in the first instance depend on the terms of the instrument establishing the organisation.[45] Where a provision in the constitution of an international organisation explicitly avers that an international organisation shall possess a separate legal personality (distinct from that of its members), it is evident that the founding states intended this to be the case.[46] Therefore, if states wish to specifically endow an international organisation with a separate legal personality, this will appear in the constitution of the organisation and will be determinative of the issue.[47] Nevertheless, it has also been the case that the constitution of an international organisation provides that no international legal personality is created.[48] Regardless of whether a provision in an international organisation's constitution expressly grants or denies the separate legal personality of that organisation, at the very least there is certainty regarding the organisation's position under international law.

Owing to the constitution of the ILO, the act of including an express provision regarding the separate legal personality of an international organisation in its constitution saw an increase during the 1900s.[49] Examples include the constitutions of the World Trade Organization (WTO);[50] the Agency for International Trade Information and Co-operation

43 Archer (n 17 above) 13.

44 Article 39 of the Constitution of the ILO (n 10 above) provides that '[t]he International Labour Organisation 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'.

45 Shaw (n 5 above) 1297.

46 Ibid.

47 Shaw (n 5 above) 1267.

48 Article 2.2 of the Agreement Relating to the Establishment of the Functional Airspace Block 'Europe Central' between Germany, Belgium, France, Luxemburg, The Netherlands and Switzerland (2 December 2010) reads: 'This Agreement does not create an international organization with international legal personality.'

49 Schermers & Blokker (n 7 above) 988.

50 Marrakesh Agreement Establishing the World Trade Organization (1994), art VIII (Marrakesh Agreement).

as an Intergovernmental Organization;[51] as well as Mercosur.[52] However, the inclusion of an express provision pertaining to legal personality is not necessarily present in the constitution of every international organisation. In fact, this only occurs in a minority of cases.[53] Consequently, where there is a failure to expressly provide for international legal personality, one must determine whether states have implicitly endowed the organisation with international legal personality.

2.2 The Implicit Recognition of the Separate Legal Personality of an International Organisation

The Treaty of Versailles[54] not only saw the establishment of the ILO but simultaneously brought into existence the League of Nations. The League was the first international organisation designed with a purpose other than that of organising co-operation between states in areas of transport and communication[55] and 'was probably the first organisation to be clearly visible as an independent international actor'.[56] Notably, the constitution of the League adopted a contradictory approach to that of the ILO when it came to the inclusion of an express provision bestowing the organisation with separate legal personality. Put plainly, the League had not expressly been granted separate legal personality. The lack of an express provision providing for the separate legal personality of the League unavoidably led to the question whether such personality instead had been implicitly granted.

When determining whether an international organisation may have implicitly been granted separate legal personality, the powers or purpose of the organisation and/or the practice of the organisation serve as valuable factors for consideration.[57] These factors held true in the determination of the existence of the separate legal personality of the League. Despite the controversy which ensued in writings regarding the existence of a separate legal personality of the League,[58] states ultimately accepted the personality of the League based on the organisation's ability to conclude international agreements. Where

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51 Article 13 of the Agreement Establishing the Agency for International Trade Information and Co-operation as an Intergovernmental Organization (2002) (International Trade Information Agreement).

52 Article 34 of the Protocol of Ouro Preto (1994) (Ouro Preto Protocol).

53 Shaw (n 5 above) 1267.

54 Treaty of Versailles (n 39 above).

55 Klabbers (n 23 above) 19–20.

56 C Brölmann *The Institutional Veil in Public International Law: International Organizations and the Law of Treaties* (2007) 49.

57 Shaw (n 5 above) 1297.

58 For a general discussion, see Brölmann (n 56 above) 54–64.

an international organisation is empowered to conclude treaties, to exchange diplomats and to mobilise international forces (in its own right), it is difficult to imagine that such an organisation is devoid of separate legal personality.[59]

Despite being the first international organisation to deal with issues other than those of 'low politics', the League would only manage to make modest contributions to international diplomacy.[60] It did, however, facilitate regular annual meetings between representatives of states who would discuss threats to peace and security in the international community.[61] These discussions would come to serve as the foundation upon which the League would attempt to fulfil its aim of peace and security in the international community.[62] Nonetheless, the start of World War II in 1939 would see that the League – for obvious reasons – could never fulfil its aim of international peace and security. Despite the failure of the League, its system 'can be seen as a crucial link which brought together the strand of pre-1914 international organisations and wartime co-operation into a more centralised and systematic form on a global scale, thus providing a stepping stone towards the more enduring [United Nations]'.[63]

Following the end of World War II, the United Nations would come to replace the League, which met its ultimate demise in 1946, a year after the UN Charter was signed. In drafting the UN Charter, some of the lessons learned from the League's failure were kept in mind.[64] Yet, one discernible similarity between the two organisations, and their respective establishments, is the omission in both organisations' constitutions of an express provision dealing with the personality of the respective organisations. Consequent to this omission, the topic of the separate legal personality of the UN was considered during the drafting of the UN Charter, 'but the sub-committee bearing responsibility for what was to become article 104[65] eventually rejected a proposal to refer to international legal personality alongside domestic legal personality'.[66]

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59 Schermers & Blokker (n 7 above) 989.
60 Archer (n 17 above) 19.
61 Ibid.
62 Archer (n 17 above) 15.
63 Id 21.
64 First, a notorious distinction was to be made between the major powers and ordinary states. The major powers were to become permanent members of a new institution, the Security Council. Second, the UN Charter does not contain a withdrawal clause. Klabbers (n 23 above) 21.
65 Article 104 of the UN Charter, 1945 provides: 'The Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'
66 Klabbers (n 23 above) 53.

The reasoning given by the subcommittee for the rejection of the inclusion of an express provision endowing the UN with separate legal personality was that it was simply 'not necessary'.[67] The subcommittee purported that the inclusion of an express provision would be superfluous as the separate legal personality of the UN 'will be determined implicitly' from the Charter as a whole.[68]

Despite the statements made by the subcommittee regarding the separate legal personality of the UN, the International Court of Justice (ICJ) soon came to face the question of whether the UN, as an international organisation, did in fact have a separate, international legal personality. In *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion),[69] the issue before the ICJ arose from the murder of a UN diplomat (Count Folke Bernadotte) by a Jewish group in Jerusalem.[70] It should be noted that Israel was not a member of the UN at the time of the event in question. To this end, the UN General Assembly requested the opinion of the ICJ as to whether the UN was able to bring an action against Israel for the reparation of the loss of its staff member. However, the question put forward by the General Assembly did not specifically request the ICJ to discuss the issue of international legal personality of the UN. Nevertheless, the ICJ opted to deal with this question preliminarily to those brought before the court. This was followed by a dual determination as to whether the UN, like states, may resort to customary methods of presenting claims and whether these claims could be brought against both member and non-member states.[71] In answering the question of whether the UN possessed separate legal personality, the ICJ held:[72]

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

67 UNICO Documents (1945), vol XIII, 710; see also Klabbers (n 23 above) 53.
68 Ibid.
69 *Reparations* case (n 13 above) 175.
70 Id 177–178.
71 'Claims' in this instance includes also negotiations and arbitration. Alvarez (n 1 above) 130.
72 *Reparations* case (n 13 above) para 179.

The opinion delivered by the ICJ makes it clear that the UN member states intended the organisation to possess separate legal personality. Member states implicitly recognised the organisation's legal personality by entrusting it with certain functions, duties and responsibilities and the competence required to discharge those functions effectively.

Moreover, the opinion of the ICJ in respect of the separate legal personality of the organisations may have a significant impact on determining, by analogy, whether other international organisations possess implicit international legal personality. Even if dealing with a specific organisation, ie an international organisation entrusted with a particular function as opposed to the general function of ensuring international peace and security, the opinion is usually referred to when addressing issues relating to the separate legal personality of an international organisation.[73]

The African Union (AU),[74] successor of the Organisation of African Unity (OAU),[75] serves as an example of an organisation capable of analogously relying on the approach followed by the UN. As is the case with the constituent agreement of the UN, that of the AU does not expressly provide the organisation with separate legal personality. Instead, the separate legal personality can be inferred from the functions of the AU and the powers it exercises. However, there has not been a huge debate about the legal personality of the AU, which has concluded treaties in its own name.[76] This leaves little to no doubt as to the existence of the AU's separate legal personality.

3 The Legal Personality of the European Union

The end of World War II prompted the demand for an international organisation that would maintain international peace and security. This was achieved through the establishment of the UN. Notably, the need for economic co-operation among states was also thrust into the spotlight.[77] This need was met by the establishment of international organisations such as the International Monetary Fund (IMF) and the World Bank.[78]

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73 P d'Argent, 'Reparation for the injuries suffered in the service of the United Nations (advisory opinion)' *Max Planck Encyclopaedia of Public International Law* (2006), opil.ouplaw.com/home/EPIL (accessed 4 August 2019).

74 The Constitutive Act of the African Union (2000).

75 Charter of the Organization of African Unity, Addis Ababa (1963).

76 The AU concluded its headquarters agreement with the Federal Democratic Republic of Ethiopia, http://webmail.africa-union.org (accessed 29 January 2018).

77 M Lavinge *Organized International Economic Cooperation after World War II* (1990) 35.

78 Agreement: International Monetary Fund and International Bank for Reconstruction and Development (1944).

Economic co-operation also served as the initial premise upon which the European Union,[79] as it is referred to today, was conceived.

Notably, there has been little discussion, in doctrine or practice, concerning the question of the separate legal personality of international organisations since the 1970s except for the discussion concerning the legal status of the EU.[80] The EU is considered the most developed and legally sophisticated international organisation to date.[81] Although the EU imposes much more stringent restraints on the competencies of its member states to take unilateral decisions, compared to other international organisations, its founding instruments are international treaties and can therefore, to some extent, be compared to those of other organisations.[82] The evolution of the EU can be described as complex and intricate, spanning a period of more than 60 years. Accordingly, the status of the EU's separate legal personality was in no way spared from such complexities.

The foundations for the establishment of the EU were first laid on 9 May 1950 when French foreign minister Robert Schuman announced what would come to be known as the Schuman Plan. In accordance with this plan, Europe's national coal and steel industries would be amalgamated under the administration of a single joint authority.[83] On 18 April 1951, six member states[84] signed the Treaty of Paris,[85] creating the European Coal and Steel Community (ECSC), which showed little success other than raising the feasibility of integration. The ECSC only became operational in July 1952 after each member state had ratified the terms of the treaty.[86] Notably, the ECSC as an organisation had its separate legal personality expressly attributed in its constitution,[87] but would come to expire in mid-2002 after 50 years of existence.[88]

The limited success of the ECSC saw Europeanists taking an alternative approach in their attempts to achieve the integration of Europe and foreign ministers started fresh negotiations. These negotiations resulted in the signing of the Treaties of Rome in March

79 TEU pre-Lisbon (n 28 above).
80 Schermers & Blokker (n 7 above) 991.
81 Klabbers (n 23 above) 22.
82 Schermers & Blokker (n 7 above) 4, 20.
83 J McCormick *Understanding the European Union* 4 ed (2008) 45; see also C Egenhofer, S Kurpas, PM Kaczynski & L van Schaik *The Ever Changing Union: An Introduction to the History, Institutions* and *Decision-Making Process of the European Union* 2 ed (2011) 5.
84 Belgium, France, Germany, Italy, Luxemburg and The Netherlands.
85 Treaty of Paris (1951), 261 UNTS 140.
86 McCormick (n 83 above) 52.
87 Article 6 of the Treaty of Paris (n 85 above).
88 Egenhofer *et al* (n 83 above) 5.

1957,[89] which established the European Economic Community (EEC). The EEC was expressly granted separate legal personality through article 22 of its constitution.[90] Likewise, the European Atomic Energy Community (Euratom) was granted separate legal personality through article 184 of the Euratom Treaty. To date Euratom remains separate from the EU due to the fact that it was established through a sectoral treaty.[91]

The next notable development in the EU was the signing of the Treaty of the European Union (TEU) pre-Lisbon,[92] which was signed in 1992 by the then 12 member states. The treaty 'converted' what was previously known as the EEC into the European Community (EC). This conversion subsequently broadened the organisation's scope of co-operation beyond that of purely economic issues. The TEU pre-Lisbon encapsulated the first attempt at a common approach in policy areas that had previously been considered the traditional competencies of sovereign states.[93] The TEU pre-Lisbon introduced EU citizenship, a structure of cross-border police co-operation, a common approach towards immigration policy and a common security policy.[94]

In view of the requests of some 'member states to keep national control over foreign affairs as well as justice and home affairs', a pillar structure of three different pillars was established under a common roof.[95] The first pillar represented supranational co-operation[96] derived from the EEC treaties, which included a customs union and single market, trade policy, EU citizenship and so forth. As previously mentioned, the EEC was granted express legal personality in terms of its constitution, which was

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89 'Treaties' refer to the Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 11 (EEC Treaty) and the Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 UNTS 167 (Euratom Treaty).

90 '(a) The Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes, as defined in Supplementary Protocol No I, to the present Convention; (b) The Organisztion, its officials, and representatives of the members of the organization shall be entitled to the privileges and immunities set out in the above-mentioned Supplementary Protocol.' Protocol No I supplements art 22 of the OOEC Convention through Part 1, art 1, which provides that: 'The Organization shall possess juridical personality. It shall have the capacity to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings'.

91 J Piris *The Lisbon Treaty: A Legal and Political Analysis* (2010) 65.

92 TEU pre-Lisbon (n 28 above).

93 Egenhofer *et al* (n 83 above) 9.

94 Ibid.

95 Ibid.

96 Supranational co-operation is understood to mean that the participating states confer some of their decision-making powers upon the organisation/institution that they (as member states) have created; *Glossary of English EU Terminology* http://www.euenglish.hu/wp-content/uploads/2012/05/EU_English_199.pdf (accessed 4 August 2019).

carried through to the EC. Therefore, the first pillar continued to operate with separate legal personality. Pillar two of the EC covered issues concerned with common foreign and security policy, and the third pillar concerned issues of justice and home affairs. However, neither pillar two nor three was endowed with separate legal personality. The lack of separate legal personality of both pillars two and three saw member states retaining their sovereignty within the areas administered by pillars two and three, for the time being.

The TEU pre-Lisbon was followed by the Treaty of Amsterdam,[97] which was intended to deal with the 'unfinished business' that was left from the establishment of the TEU pre-Lisbon.[98] The Treaty of Amsterdam was, however, not concluded to the satisfaction of all member states and was ultimately rectified by the Treaty of Nice,[99] which was then only accepted pursuant to some rather difficult negotiations.[100] The issues recognised as the 'three Amsterdam left-overs' as dealt with at the Conference of Nice were: the size and composition of the European Commission; the weighting of votes in the European Council;[101] and possible extensions of qualified majority voting in the European Council. The Treaty of Lisbon[102] has since removed the pillar structure previously used by the EU.[103]

Markedly, the separate legal personality of the EU was not explicitly granted to in the 1992 TEU pre-Lisbon, the 1997 Amsterdam Treaty or

97 Treaty of Amsterdam, 1997, OJ (C340) 1, 37 ILM 253.

98 Unfinished business such as streamlining decision-making, increasing transparency and other institutional aspects. Achievements which were new under the Treaty of Amsterdam were those of the so-called 'enhanced co-operation procedure'; see Egenhofer *et al* (n 83 above).

99 Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (2000).

100 Egenhofer *et al* (n 83 above) 13–16.

101 The European Council is the institution through which the heads of state and government plus its permanent president and the European Commission president meet at least four times a year (European Summits). The main task of the European Council is to provide political guidance from the highest political level. The main function of the European Council is not to be confused with that of the European Commission. The European Commission took office in February 2010 and consists of one commissioner per member state. 'The European Commission has five basic functions: the right and duty of initiating Union action and legislation; the role of guardian of the treaties; responsibility for the implementation of Union decisions; decision-making authority in the field of competition policy; and external representation of the EU, with the exception of the CFSP and other cases explicitly provided for in the Treaties.' Egenhofer *et al* (n 83 above) 21–22, 30 and 34.

102 European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01 https://www.refworld.org/docid/476258d32.html (Treaty of Lisbon 2007) (accessed 14 March 2019) .

103 Piris (n 91 above) 67.

the 2001 Nice Treaty.[104] However, there are legal writings that argue that the EU enjoyed implicit legal personality.[105] Practice supporting this position would only come to pass in April 2001 when the EU became a party to a treaty in its own name.[106] The practice of concluding a treaty in its own name supported the assumption that the EU had the capacity to incur rights and obligations in its own name under international law. In December 2001 European heads of state met at a summit in Laeken, Belgium, and decided that it would be necessary to convene a 'Convention on the Future of Europe' to prepare a more profound revision of the treaties. This revision would ultimately take the form of a 'Draft Constitutional Treaty'.[107]

It was a meeting of the European Convention in Brussels during the spring of 2002 that led to the decision to create a working group on the legal personality of the EU. To this end, the *main* conclusion of the report was that there was broad consensus that the EU should have its own explicit legal personality. This was ultimately adopted by the Convention and translated 'into article 6 of the Draft Treaty transmitted to the European Council in July 2003', which held that 'the Union shall have legal personality which became article I-7 of the treaty signed in Rome on 29 October 2004'.[108] Article I-7 was further complemented by article IV-438,[109] confirming the existence of the separate legal personality of the EU.

One of the objectives of the Draft Treaty was 'to assert its [the EU's] identity on the international scene, in particular through the implementation of a common foreign and security policy' as stated in article 2 of the treaty.[110] For an international organisation to assert an identity on the international scene, it would first need to be recognised as a legal entity with the ability to act and contract with other international

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104 Klabbers (n 23 above) 992.

105 NM Blokker & T Heukels 'The European Union: Historical origins and institutional challenges' in T Heukels, N Blokker & M Brus (eds) *The European Union after Amsterdam – A Legal Analysis* (1997) 9–50.

106 Agreement concluded between the EU and Yugoslavia concerning the activities of the EU Monitoring Mission in Yugoslavia, OJ 2001, L 125/1. This agreement was approved by the Council on behalf of the EU. Another example would be the agreement between the United States of America on extradition and on mutual legal assistance, signed on 25 June 2003, OJ 2003, L 181/25.

107 Draft Treaty Establishing a Constitution for Europe, 2004 OJ C 310/1 (never ratified) (Draft Treaty); see also Egenhofer *et al* (n 83 above).

108 P de Schoutheete & S Andoura 'The legal personality of the European Union' (2007) LX(1) *Studia Diplomatica* 3.

109 'The European Union established by this treaty shall be the successor to the European Union established by the treaty on European Union and the European Community.' Draft Treaty (n 106 above).

110 De Schoutheete & Andoura (n 108 above) 3.

actors.[111] However, this was not the view that prevailed with regard to the EU as some members believed that giving legal personality to the EU would in fact compromise national sovereignty in foreign affairs. It was ultimately agreed that the EU would not have legal personality.[112]

After what was termed a 'period of reflection', the treaty reform process was put back on track during the first of half of 2007.[113] It was at the European Council in May 2007 that European leaders agreed on a detailed mandate for another Intergovernmental Conference (IGC). The IGC agreed on a text which preserved most of the content of the Draft Constitutional Treaty but stripped the text of its constitutional symbolism. Instead of replacing existing treaties, the new treaty would amend them.[114] The Treaty of Lisbon (2007)[115] added another layer to the already complex system of EU treaties. Despite difficulties during ratification, the Treaty of Lisbon came into force on 1 December 2009, and states in no uncertain terms that '[t]he Union shall have legal personality'.[116] With this, the EU has now attained a single legal personality and is also the legal successor to the European Community.

In summary, the purpose of determining whether an international organisation has a separate international legal personality is to ascertain whether an international organisation, by acting independently from its member states, can acquire rights and duties in terms of international law. This personality may be granted implicitly, as is the case with the League, the UN as well as the AU. A separate legal personality may also be granted expressly through constituent agreements, as illustrated by the constituent agreement of the ILO.

The EU, however, represents a unique development of an international organisation's separate legal personality: it illustrates the situation where an organisation did not initially receive a separate legal personality (implicitly or expressly) but over time and through practice, ultimately developed such a personality. Nevertheless, the EU has since expressly been granted separate legal personality in the Treaty of Lisbon.[117]

4 The Legal Justification for Separate Legal Personality of International Organisations

The development of international organisations and their separate

111 Id 5.
112 Id 5–6.
113 Id 16–17.
114 Ibid.
115 Treaty of Lisbon (n 102 above).
116 Article 47 of the Treaty of Lisbon (n 102 above).
117 Treaty of Lisbon (n 102 above).

legal personality through practice is concretised in article 2 of the Draft Articles on the Responsibility of International Organizations (DARIO).[118] The language used in article 2 of the DARIO confirms that international organisations are understood to operate separately from their member states and are therefore capable of obtaining rights and duties in their own name.[119] The preceding discussion demonstrates the manner in which an international organisation may come to be bequeathed with separate legal personality, ie implicitly, expressly or through practice. From this, we are able to identify two main schools of thought in the domain of international law about endowing international organisations with separate legal personality.[120]

The first school of thought follows the 'subjective theory'. The premise of this theory is based on accepting the intention of the founding members of the international organisation in question.[121] The intention of these members may be exhibited either expressly or implicitly in the constitution of respective international organisation(s).[122] The logical point of departure, in terms of the subjective theory, is therefore to determine whether there is an express provision within the international organisation's constitution indicating that the organisation in question will or does possess a separate legal personality. Where such a provision exists, the intention of the founding members is clear and leaves little or no room to question the existence of separate legal personality of the international organisation involved.[123] However, where no such provision exists, the intention underlying the organisation's constitution must be

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[118] UN ILC 'Draft Articles on the Responsibility of International Organizations with Commentaries' (2011) II *Yearbook of the International Law Commission* (DARIO). Art 2 of the DARIO provides: 'For the purposes of the present draft articles (a) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality; international organizations may include as members, in addition to states, other entities; (b) "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization; (c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization; (d) "agent of an international organization" means an official or other person 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 the organization acts.'

[119] Amerasinghe (n 41 above) 78.

[120] Akande (n 3 above) 257.

[121] Ibid.

[122] Amerasinghe (n 41 above) 79; see also SJ Gudbrandsen 'Legal personality of international organisations' Spesial oppgave, University of Oslo, 2003 http://hdl.handle.net/10852/18865 (accessed 20 August 2016).

[123] For example, art 47 of the Treaty of the European Union (as amended by the Lisbon Treaty) and art 6 of the European Coal and Steel Community Treaty.

sought. Determining the underlying intention of the founding member states (as contained in the organisation's constitution) will make it possible to determine whether legal personality is in fact intended for the organisation in question.[124] In this instance, the personality of an international organisation is to be gleaned from the capacities, powers, rights and duties conferred on that organisation in its constitution and which are necessary for the 'fulfilment of the functions ascribed to it by its members'.[125]

The second school of thought follows the 'objective theory'. In terms of this theory, the separate legal personality of an international organisation is associated with the fulfilment of 'certain criteria'.[126] Accordingly, the fulfilment of these criteria endows the 'organisation with a separate legal personality on the basis of general international law.[127] Notably, the separate legal personality of an international organisation, in terms of the objective theory, can be seen as similar to that of states in that the entity as a matter of law possesses international legal personality as soon as it comes into existence.[128] However, it would appear that the principle underlying the objective theory results in a seemingly circular argument that leads back to the principles of the subjective theory. As mentioned above, the objective theory requires that 'certain criteria' must be fulfilled in order for the international organisation in question to be recognised as having a separate legal personality. In effect, the members of the international organisation ascribe certain characteristics to the organisations that consequently satisfy the criteria for conferring separate personality. Therefore, the possession of these characteristics arises from the intention of the members, as is the case in terms of the subjective theory.[129]

Akande argues that, in essence, there is no radical difference between the two theories. However, separate legal personality can only be

124 Gudbrandsen (n 122 above).

125 Akande (n 3 above) 68.

126 Seyersted lists the following criteria: 'international organs (i) which are not all subjects to the authority of any other organized community except that of participating communities acting jointly; and (ii) which are not authorized by all their acts to assume obligation (merely) on behalf of the several participating communities.' See F Seyersted 'International personality of intergovernmental organizations' (1964) 4 *Indian Journal of International Law* 53. Brownlie summarises the criteria required as follows: '(i) a permanent association of states, with lawful objects, equipped with organs; (ii) a distinction, in terms of legal powers and purpose, 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.' See I Brownlie *Principles of Public International Law* 5 ed (1998) 679.

127 Amerasinghe (n 41 above) 79; see also Akande (n 3 above) 257.

128 Klabbers (n 23 above) 989; see also Gudbrandsen (n 122 above).

129 Akande (n 3 above) 257.

attained if the characteristics conferring separate legal personality on an international organisation are brought to bear through the express intention of its members. He puts forward that once these characteristics are conferred, the rules of international law bestow international personality on the organisation in question 'with all the consequences that this entails'.[130] The objective theory promotes the idea that the separate legal personality of an international organisation is dependent on the fulfilment of certain criteria, but it would be illogical to support this theory if the determining factor for fulfilment of these criteria is, in fact, the intention of the members of the organisation.

5 Responsibility of International Organisations

Despite the ever-increasing competencies of international organisations throughout the 19th century, the subject of responsibility for the conduct of these organisations would remain a (somewhat) neglected topic of discussion until the *International Tin Council* (*ITC*) cases[131] would come to be heard before English courts. These cases arose out of the failure of the ITC (an international organisation established to control the price of tin on the world markets) to meet its commercial obligations. The ITC operated a buffer stock of tin, bought tin when prices were low (thereby creating a demand) and would then resell when the prices were high. The organisation itself was empowered, through its constituent agreement, to borrow money to finance these transactions.

Consequent to the persistent drop in the price of tin, the ITC was no longer able to carry out trading and defaulted on numerous contracts with tin brokers and commercial bankers. These parties (tin brokers and commercial bankers) brought an action in England seeking, inter alia, to hold members *directly* liable for the defaulting organisation. These actions were dismissed at all levels of the English courts on the ground that the separate legal personality of the ITC (as an international organisation) precluded holding the members liable. The House of Lords primarily relied on domestic law whereas the majority of the Court of Appeal reached the same conclusion on the basis of international law.[132] The topic of responsibility of international organisations has since

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130 Ibid.

131 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*, Decision on Appeal, [1989] 3 WLR 969, [1990] 2 AC 418, [1989] 3 All ER 523, [1990] BCLC 102, (1990) 81 ILR 670, ILDC 1733 (UK 1990), 26 October 1989, United Kingdom; House of Lords [HL] (*Tin Council* cases).

132 *Maclaine Watson v Department of Trade and Industry* [1988] 3 WLR 1033 (Court of Appeal); 8 ILR, 49 and [1989] 3 ALL ER 523 (House of Lords) sub nom *JH Rayner Ltd v Department of Trade and Industry*; 81 ILR, 671. See Shaw (n 5 above) 1315–1317 for a general discussion; see also Akande (n 3 above) 269.

gained increased attention and continues to be a contentious issue in international law.[133]

In 2002, the International Law Commission (ILC) commenced its work on the DARIO and provisionally adopted a complete set of draft articles in 2009 (the so-called first reading of the articles). It then proceeded to a final consideration (the second reading) and final version in 2011. Notably, the DARIO is modelled after the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),[134] even using similar wording in many of the corresponding articles.[135]

Article 3 of the DARIO provides that '[e]very internationally wrongful act of an international organisation entails the international responsibility of that organisation'. As in the case with state responsibility, an international organisation commits an internationally wrongful act when (i) the conduct is attributable to that organisation under international law; and (ii) that conduct constitutes a breach of an international obligation of that organisation.[136] Compared to state responsibility, the ILC has 'adopted similar rules with regard to the attribution, breaches of international obligations, circumstances precluding wrongfulness, the content of international responsibility and the implementation of the international responsibility of international organisations'.[137] In some areas where there is very little practice with regard to the responsibility of international organisations, 'for example, circumstances precluding wrongfulness such as countermeasures and necessity', the ILC has simply proceeded by way of analogy with state responsibility.[138]

Despite the similarity with state responsibility, there are notable differences between states and international organisations. These differences warrant an alternative approach in some areas of responsibility of international organisations or, at the very least, have

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133 The *Institut de Droit International* dedicated a session to this question and elaborated a draft resolution. The International Law Association (ILA) in 2004 adopted a Final Report on the Accountability of International Organizations which encompasses the question of responsibility and liability; see also M Hartwig 'International organizations or institutions, responsibility and liability' *The Max Planck Encyclopaedia of Public International Law* (2011) opil.ouplaw.com/home/EPIL (accessed 7 November 2017).

134 International Law Commission (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No 10 (A/56/10), chp IVE1 (ARSIWA).

135 International Law Commission (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No 10 (A/56/10), chp IVE1 (ARSIWA); see also Akande (n 3 above) 269.

136 Article 4 of the DARIO (n 118 above) provides: 'There is an internationally wrongful act of an international organization when conduct consisting of an action or omission (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization.'

137 Akande (n 3 above) 269.

138 Ibid.

required special attention. One such area is the responsibility between international organisations and their member states.[139] As was pointed out above, one of the consequences of the separate legal personality of international organisations is that these organisations are responsible under international law for breaches of their international obligations. Following from the existence of the separate legal personality of international organisations, there is a rebuttable 'presumption that members of the organisations are not liable with respect to the obligations of the organisation'.[140]

Often, international organisations act through their members (or the organs of their members), consequently raising the question of whether the acts of the members (or the organs of their members), when acting within the context of the organisation, will initiate responsibility for the state or for the organisation (or for both). The general rule with regard to the attribution of conduct to international organisations is that 'the conduct of an organ or agent of an international organisation in the performance of functions of that organ or agent shall be considered an act of that organisation under international law'.[141] However, circumstances exist where states make available their organs to an international organisation, with the result that those organs become organs of the organisation itself. Nevertheless, the organs in question also remain organs of the lending state as, in part, they still act on behalf of the state.[142] The question arising in this instance is whether the act of the organ is attributable to the organisation or to the lending state (or both). This question is of particular importance in the context of peace keeping, because 'although the UN peace-keeping forces are subsidiary organs of the UN, the troops contributed by the state and these states

[139] Akande (n 3 above) 270.

[140] Id 268–269; see also *Tin Council* cases (n 131 above).

[141] Article 6 of the DARIO (n 118 above) provides: '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. 2. The rules of the organization shall apply in the determination of the functions of its organs and agents.'

[142] Akande (n 3 above) 270.

retain jurisdiction and some degree of control over their troops'.[143] Article 7 of the DARIO provides that:[144]

> 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.

Therefore, whether the UN is legally responsible for the acts of peace-keeping forces will depend on the factual control exercised by the UN over the troops in question and their conduct.[145] This is generally the case with peace-keeping troops that are placed under the operational command and control of the UN.[146] Since UN peace keepers often continue to act within their national chain of command, a troop-contributing state will be held responsible in instances where it is the state that has directed the activities of the force in question.[147]

Despite the existence of the separate legal personality of international organisations, member states may not escape responsibility for breaches of their own obligations 'simply by causing the organisations to perform an act, which if performed by member states would be in breach of the member's obligation'.[148] Thus, the European Court of Human Rights has held that states parties to the European Convention on Human Rights (ECHR) cannot avoid their obligations under the ECHR by transferring functions to an international organisation.[149] When such cases arise,

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[143] The importance of the practice relating to peace-keeping missions is particularly significant because of the control that the contributing state retains over disciplinary and criminal matters. This may have consequences with regard to the attribution of conduct. 'Attribution of conduct to the contributing state is linked to the retention of some powers by that state over its national contingent and thus on the control that the state possesses in the relevant respect. This could in turn have an impact on the attribution of responsibility for such conduct.' DARIO (n 118 above) 20; see also Akande (n 3 above) 270.

[144] Article 7 of the DARIO (n 118 above).

[145] Akande (n 3 above) 270.

[146] Ibid.

[147] Ibid.

[148] Akande (n 3 above) 271; see also art 61 of the DARIO (n 118 above) which provides: '1. A state member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the state's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the state, would have constituted a breach of the obligation. 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.'

[149] *Waite v Kennedy* [GC], No 26083/94 ECHR 1999-I; see also *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland* European Court Reports 2008 I-06351 paras 157–158 (*Bosphorus*).

'the state is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention'.[150] The importance of this principle cannot be denied as it prevents states from conferring competencies to an international organisation to act in the area in question in an effort to avoid their international obligations.[151]

Where an international organisation is held to be responsible for the commission of an internationally wrongful act, it has an obligation to make reparations for the injuries caused by the wrong. However, the mechanisms by which this responsibility can be established remain underdeveloped. International organisations are usually immune from the jurisdiction of domestic courts and cannot be parties to contentious cases before the ICJ.[152] In addition to there being a lack of mechanisms through which the responsibility of international organisations can be established, international organisations are not bound by the same obligations as states.[153]

This lacuna may lead to a lack of responsibility for conduct that causes factual harm but cannot be considered wrongful due to a lack of an encumbering obligation upon an organisation. Conversely, states may be held responsible for the same conduct as they may have the obligation encumbered upon them, which the organisation in question does not have. This in itself intensifies the allure for states to act through international organisations in an effort to avoid responsibility in its entirety. For example, states are incapable of freezing a person's assets without providing a form of judicial review, 'but the UN can issue non-reviewable sanctions which significantly interfere with an individual's right to property'.[154] The jurisdictional immunity of international organisations, in addition to the lack of encumbering obligations upon them, brings to light the question of the appropriateness of (parallel) responsibility of member states for the conduct of their organisations.

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150 *Bosphorus* ibid.

151 Akande (n 3 above) 271.

152 There are also few standing tribunals with competence to decide cases involving international organisations. Akande (n 3 above) 271.

153 N Birkhäuser 'Sanctions of the Security Council against individuals – Some human rights problems' (2005) 8 http://www.statewatch.org/terrorlists/docs/Birkhauser.PDF (accessed 4 May 2017).

154 O Murray 'Piercing the corporate veil: The responsibility of member states of an international organization' (2011) 8 *Int'l Org L Rev* 297. The scenario formed the basis of the challenge to the EC regulations implementing UNSC sanctions in the cases of *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 (*Kadi I*); *European Commission and Others v Yassin Abdullah Kadi* (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P), Judgment, ECJ, 18 July (*Kadi II*).

6 Conclusion

The development of the separate legal personality of international organisations has spanned across two centuries and has not been without strife. An increased need for international co-operation to combat international issues has continued to bolster states to sacrifice some of their sovereign prerogatives in favour of international organisations.[155] Nevertheless, the creation and functioning of international organisations on the international stage have not relegated sovereign states to the wings. On the contrary, states remain the leading actors in international relations with international organisations performing an important supporting role.[156]

It is largely uncontested that international organisations can possess separate legal personalities and thus are capable of bearing rights and duties in their own names. Still, states remain instrumental in the establishment of the separate legal personality of an international organisation. Whether an organisation's separate legal personality is granted expressly or implicitly, it remains a reflection of the intention of the founding member of the organisation in question. Where a state grants an international organisation separate legal personality within an express provision contained in the organisation's constitution, there can be no doubt as to the legal status of that organisation. However, the lack of such provision does not preclude an international organisation from possessing separate legal personality.

In instances where an international organisation's separate legal personality has not been granted in an express provision of its constitution, it may implicitly be granted. To determine whether an international organisation may have implicitly been granted separate legal personality, the powers or purpose of the organisation and/or the practice of the organisation serve as valuable factors of consideration.[157] With the possession of separate legal personality comes the possibility that an international organisation could incur responsibility for the breach of its primary obligation. Following from the existence of the separate legal personality of international organisations, there is a rebuttable 'presumption that members of the organisations are not liable with respect to the obligations of the organisation'.[158]

[155] Klabbers (n 23 above) 18.
[156] Schermers & Blokker (n 7 above) 989.
[157] Shaw (n 5 above) 1297.
[158] Akande (n 3 above) 268–269.