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The Legal Status, Responsibility and Liability of International Institutions Under International Law

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Abstract
Since the creation of man and his activities a role has always been played by the idea of law. The idea that order is necessary and chaos inimical to a just and stable existence of the society. Every society has created for itself a framework of principles within which to develop. There are things to be done, what cannot be done, permissible acts, forbidden acts etc. all have been spelt out (most often in the primitive period not in written form) within the consciousness of that community. Progress has always been based upon the group as men and women combine to pursue commonly accepted goals. International institutions are imbued with all the above attributes. As with every other community, the activities of the international institutions are supervised by in-built mechanism within the body or expressly provided for by the treaty that gave rise to the particular institution. So also are provisions for sanctions where necessary. The legal status of the organizations have been of intense debate by academicians and jurists over the years. The end of the debate as to whether international institutions are legal personalities appears very remote. However the responsibilities and liabilities of these institutions may not be provided for in the treaties upon which they were established. But one may say that as with every human endeavour and association, these institutions should have responsibilities and liabilities whether provided for or not in the treaties that established them as such can be inferred from their functions/activities. This certainly is as it should be as no existence on earth goes without responsibilities and liabilities. This paper will, in the light of the above x-ray the legal status, responsibility and liability of international institutions under international law. The historical background and classification of international institutions shall also be discussed.
Keywords: Legal Status, Responsibility, Liability

1. History of International Institutions

The development of international organizations has been in the main, a response to the evident need arising from international intercourse rather than to the philosophical or ideological appeal of the notion of world or global government. The growth of international intercourse has been a constant feature of maturing societies, advances in the mechanics of transport and communications combined with the desire for trade and commerce have produced a degree of intercourse which ultimately called for international regulation by institutional means.[1] Such regulation has taken various forms.

Originally, international society was unorganized. Each state acted separately in resolving conflicts with other states. As relations increased, it became necessary to regulate and set common standards through bilateral and later multilateral diplomatic conferences. The first attempt towards organized society probably was the congress of Vienna in 1815 which marked the end of the Napoleonic wars. It was the first attempt to create a standing conference of European powers to deal with problems and streamline their policies. Many diplomatic conferences were held between 1820 and 1885 in Europe. One of such conferences was for the partition of African territories among the European powers after their intense struggles for African territories. The achievements during the period included co-operation in communication, transport, public health and economic fields.[2] Several Administrative unions were founded within the above stated period and they were the first definite steps towards a semi-organized international community. The permanent court of Arbitration came into existence in 1899.

The first attempt at a general political organization was the League of Nations which was set up in 1920. The Council of fifteen (including permanent members) had certain executive functions in handling and settling disputes between members. However, the requirement of unanimity (with certain exceptions in voting) limited its scope. The other main organs of the League of Nations were the Assembly and the Secretariat.

The Treaty of Versailles which also embodied the covenant of the league created the international labour organization (ILO). The shortcomings of the league included its inability to prevent the aggression by Japan against China in 1931 and Italy against Abyssinia in 1935-6. The league was also indifferent of colonial exploitation and abuses. The short comings of the league of Nations inevitably led to the formations of the United Nations in 1945 at the San Francisco conferences. There has emerged some other international organizations such as the European Union (E.U); the Economic Community of West African States (ECOWAS);

[1] Sauds & Klein: Boweth Law of International Institution, 2001, p.2.
[2] U. O. Umozurike: Introduction to International Law. P.233.

International Monetary Fund (IMF); The Arab League (AL); etc.

It can safely be said that the innovation of the twentieth century was of course, the creation of the global, comprehensive organizations as mentioned above. These were, in many ways, the logical culmination of the pioneering work of the private and public international unions, the large number of which required some form of central co-ordination which function both the league and the United Nations attempted to provide. These international organizations have different aims and objectives and certain scope of operations hence they are differently classified.

2. Classifications of International Institutions

The classification of international institutions are done with regard to their form, operation, aims and objectives and the scope or area of operation. International institutions may be classified as universal, global or regional according to whether they concern the universe as a whole or only part of it. In this regard, the United Nations (UN) ICAO[1] and IMO[2] are universal or near universal in their coverage. The Organization of African Unity (OAU), OAS[3] and NATO[4] are regional. A universal or global institution may have regional bodies such as the UN Economic Commissions for Africa, for the far East, for Europe and Latin America.

International institutions may also be general or specialized. They may have comprehensive or limited competence. The UN deals with all matters within its very wide scope. The ICAO, IMO, WHO and FAO deal with specific matters, they maybe advisory, regulatory. Members may obey their resolutions or ignore them without legal, as against political or moral consequences. The International Monetary Fund (IMF) and the ICAO are regulatory while the European Steel and Coal Community and the EEC[5] have supranational characteristics.

They maybe executive when they carry out specific functions for the members states like the River Basins. They maybe judicial like the International Court of Justice (ICJ) and the European Court of Human Rights as well as the International Criminal Court (ICC). They may also be political like the UN that has general political competence. They may also be classified as adhoc, provisional or permanent in relation to their duration and as single-purpose or multi-purpose according to the nature of their purpose.[6]

International institutions may also be classified as governmental when embrace representatives of governments, as most do, or private like the ICRC, International Parliamentary Union, the International Law Association and the International Chamber of Commerce. Every international organization usually has a plenary organ in which all members are represented with equal or weighted voting and an executive organ or secretariat.

3. Legal Status of International Institutions

The legal status of any organization means the recognition as an entity of that organization by the relevant law(s). Simply put, it means the legal personality of the organization. In other words, is the organization recognized by law as a legal person? In this context, therefore, what is the legal personality or status of international institutions?

Certain entities, whether individuals or companies, will be regarded as possession rights and duties enforceable at law[7] in any legal system. In that regard, an individual may prosecute or be prosecuted for any offence and a company can sue or be used for breach of contract. This is possible because the law recognizes them as "legal persons" possession the capacity to have and maintain certain rights and being subject to perform specific duties. Legal personality is very important and crucial. Without it, groups and institutions cannot operate for they need to be able to maintain and enforce claims. In municipal law, individuals, limited companies and public corporations are recognized as each possess a distinct legal personality, the terms of which are circumscribed by the relevant legislation.[8] It is the law that determines the scope and nature of personality.

An international person is an entity that is recognized as having rights and duties in international law. Such an entity is a subject of international law as opposed to an object that has no right and duties. Some international lawyers argue that only states can be the true subjects of international law. As Lauterpacht observers: "the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law".[9] It is, however, less clear that in practice this position was maintained. The Holy See (particularly from 1871 to 1929), insurgents and belligerents, international organizations, chartered companies and various territorial entities such as the League of Cities were all at one time or another treated as possessing

[1] ICAO – international Civil Aviation Organization
[2] IMO – International Maritime Organization
[3] OAS – Organization of American States
[4] NATO – North Atlantic Treaty Organization
[5] EEC – European Economic Community
[6] D.V. Bowet, The Law of International Institutions, 1975 pp. 9 - 11
[7] Crawford, The Creation of Statehood in International Law, Oxford, 1979
[8] R. Dias, Jurisprudence, 5th Ed. London, 1985, Chapter 12.
[9] Lauterpacht, International Law, p. 489.

the capacity to become international persons.[1]

3.1 Status of International Institutions

There is no doubt that states remain the typical and primary subjects of international law. However, not all states have the same capacities. One of the important developments in contemporary international law is the widening concept of international personality. What the personality entails for international persons are not necessarily identical.

Legal personality is now generally considered to be the most important constitutive element of international organizations. It is above all the fact that they are endowed with a separate legal personality that distinguishes international organizations from other entities which are nothing more than organs common to two or more states, as were most of the nineteenth century international secretariats or bureau. The recognition that there was no necessary link between international personality and sovereignty, on the one hand, and the appreciation of an increasing role for intergovernmental organizations in international affairs and relations, on the other, gradually resulted in a more general acceptance of the fact that international organizations possessed or could possess a separate legal personality with consequential effects in the international and domestic legal orders.[2]

The concept of legal personality and its implications are not always easy to understand. This seems to be particularly true in relation to international organizations given that they are "secondary subjects" of international law the creation of which flows from the will of other international legal persons (mostly states but also, more recently other international organizations). The explicit conferment of international legal personality on intergovernmental organizations has for a long time remained the exception rather than the rule. It was, hence, only in a bilateral instrument aiming at governing its status in the host country and not in the covenant, that the League of Nations was recognized as possessing "international personality and legal capacity"[3]. Similarly, the UN Charter only provides in Art 104 for the legal capacity of the organization in the territory of each of its members.

But such explicit recognition, by conventional means, is not the only way in which international legal personality has been conferred upon international organizations. As early as 1949, the I.C.J ruled in its celebrated *Advisory Opinion on the Reparation for injuries suffered in the service of the United Nations* that the organization was to be deemed to possess " a large measure of international personality".[4] In reaching its decisions, the court relied on various elements (such as the attribution of legal capacity, privileges and immunities in the territory of member states and the capacity to conclude treaties) to reach the conclusion that the organization possessed a juridical personality on the international plane, and was therefore capable of presenting such a claim. The judges observed that the members had entrusted the organization with a variety of functions, the fulfillment of which would not have been possible if the UN had not been endowed with a legal personality of its own.[5] The Court stated: "the organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged"[6].

It is also noteworthy that the judges took great care to link the attribution of such personality to the will of the member states – which is necessarily implied in this case. Although the I.C.J. emphasized the characteristics of the UN as an organization entrusted with particularly important responsibilities on international plane, it is now widely accepted that the same reasoning maybe adapted to any international organization, the international legal personality of which has not been explicitly proclaimed in its constitutive or other instruments.[7]

The attribution of international legal personality simply means that the entity upon which it is conferred is a subject of international law and that it is capable of possessing international rights and duties. The precise scope of those rights and duties will vary according to what may reasonably be seen as necessary, in view of the purposes and functions of the organization in question, to enable the later to fulfill its task. What is beyond debate is that in creating this capacity, the attribution of international legal personality to an intergovernmental

[1] Verzijl, International Law, pp. 17 – 43; Lauterpacht, International Law, pp.494-500.
[2] Reinisch, International Organizations before National Courts, 2000.
[3] 7 OJLN (1926), Ann. 911a, 1422
[4] (1949) I.C.J. Reps 179
[5] Ibid. 178
[6] Ibid. 179
[7] See eg Schermers and Blokker, International Institutional Law, 4th edn, 2004. Para. 1568.

organization establishes it as an entity legally distinct from its members. This is one of the elements emphasized by the I.C.J. in its 1949 Advisory Opinion. In the same vein, the Swiss Supreme Court (Tribunal Federal) ruled in the AOI, case that "the personality accorded to the AOI, as well as the autonomy conferred on it at the legal, financial and procedural level – are the obvious and unequivocal signs of the total legal independence of the organization in relation to the founding states.[1]

The sum total of all the above is that international institutions are legal personalities in the international plane.

4. Responsibilities of International Institutions

International institutions are established by states by international treaties. The establishment of an international organization with international personality results in the formation of a new legal person, separate and distinct from the states creating it. This separate and distinct personality necessarily imports consequences as to international responsibility, both to and by the organization. The I.C.J. noted in the **Reparations** case that "when an infringement occurs, the organization should be able to call upon the responsible state to remedy its default, and in particular, to obtain from the state reparation for the damage that the default may have caused" and emphasized and there existed an "undeniable right of the organization to demand that its members shall fulfill the obligations entered into by them in the interest of the good working of the organization".[2]

Responsibility is a necessary consequence of international personality and the resulting possession of international rights and duties. Such rights and duties may flow from treaties such as headquarters agreements or from the principles of customary international law.[3] The precise nature of responsibility will depend upon the circumstances of the case and, no doubt, analogies drawn from the law of state responsibility with regard to the conditions under which responsibility will be imposed.[4] It is worthy to note that the basis of international responsibility is the breach of an international obligation and such obligations will depend upon the situation. The court noted in the Reparation case[5] that the obligations entered into by member states to enable the agents of the UN to perform their duties were obligations owed to the organization. Thus, the organization has, in the case of a breach of such obligations, the capacity to claim adequate reparation, and in assessing this reparation, it is authorized to include the damage suffered by the victim or by persons entitled through it. Whereas the right of a state to assert a claim on behalf of a victim is predicated upon the link of nationality, in the case of an international organization, the necessary link relates to the requirements of the organization and therefore the fact that the victim was acting on behalf of the organization in exercising one of the functions of that organization.

As a state can be held responsible for injury to an organization, so can the organization be held responsible for injury to a state, where the injury arises out of a breach by the organization of an international obligation deriving from a treaty provision or principle of customary international law.[6] The issue of responsibility has arisen, particularly in the context of UN peacekeeping operations and liability for the activities of the members of such forces. In such circumstances, the UN has accepted responsibility and offered compensation for wrongful acts.[7] The crucial issue will be whether the wrongful acts in question are imputable to the UN and this has not been accepted where the offenders were under the jurisdiction of the national state, rather than under that of the UN. Much will depend upon the circumstances of the operation in question and the nature of the link between the offenders and the UN. It appears for example, to have been accepted that in the Korean (1950) and Kuwait (1990) operations, the relationship between the national forces and the UN was such as to preclude the latter's responsibility.[8] However, while responsibility will exist for international unlawful acts attributable to the institution in question, tortuous liability may also arise for injurious consequences caused by lawful activities for example environmental damage as a result of legitimate space activities.[9]

5. Liability of International Organizations Under International Law

The legal capacity conferred upon organizations in domestic legal orders by various international or national

[1] Judgment of July 19, 1988, 80 ILR 658
[2] ICJ Reports, 1949, p. 184; 16AD p.328
[3] See eg the WHO Regional Office case, ICJ Reports, 1980, p.73
[4] See the WHO Regional Office Case, ICJ Reports, 1980, pp.73, 90; 62 ILR pp.450, 474 referring to general rules of international law.
[5] See the Report of the ILC, 2002, A/57/10, p.228
[6] See e.g. the WHO Regional Office case, ICJ Reports, 1980, p.73; 62 ILR. P.450
[7] See B. Amrallah, The International Responsibility of the United Nations for Activities carried out by UN Peace-Keeping Forces; D.W. Bowett, Un Forces, London, 1964, lp.149
[8] See Amerasinghe, Principles, p. 244
[9] As to remedies, see K. Wellens, Remedies against International Organizations, Cambridge, 2002.

instruments generally includes the right to institute proceedings before domestic courts.[1] The more recent examples include the claim presented by the UN to Israel following the bombing by Israel forces of a UNIFIL compound in Southern Lebanon in 1976.

The fact that international organizations maybe held accountable for the consequences of their illegal or wrongful acts is no longer in doubt as same is widely accepted. Liability is thus generally presented as the logical corollary of the powers and rights conferred upon international organizations. The principle is clearly recognized by international organizations themselves. Illegal institutional acts of international organizations are to be considered as devoid of legal effects.[2] They may also, when they produce adverse consequences, make the organization liable to compensate for the damages caused.[3] The internal law of a few organizations extends this obligation to all damages caused by organs or agents in the course of their functions thus covering the consequences of legislative and executive activities. The most developed of those systems is found in the European Community. Article 288(2) of the Rome Treaty provides that:

> *"In the case of non-contractual liability, the community shall in accordance with the general principles common to the laws of the member states, make good any damage caused by its institutions or by its servants in the performance of their duties."*

A provision similar to the above (Art. 288) is to be found in the Euratom treaty (Art. 188(2)). Similarly, Art. 22 of Annex III of the United Nations Convention on Law of the sea provides that the International Sea-Bed Authority "shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions…" It is much more common to find internal rules providing for the liability of international organizations towards their own staff for service – incurred damages.

Liability may arise either under contracts concluded by international organizations and to which a national law is applicable or in circumstances where tortuous acts are attributable to an organization irrespective or any contractual link.[4] The fact that the contractual liability of international organizations is governed by the law applicable to the contract itself is undisputed.[5] Organizations may, in such cases, find themselves liable as a result of the non-performance, or wrongful performance of the contractual clauses as would any party to such a contract.

The principle, according to which international organizations may be liable under national law for damages resulting from their activities on the territory of a state is beyond dispute, and applies to contractual as well as non-contractual damages (tortuous liability). In other to protect themselves against the consequences of their non-contractual liability, organizations generally conclude insurance contracts with private companies[6]. Organizations may, in such cases, find themselves liable as a result of the non-performance, or wrongful performance of the contractual clauses as would any party to such a contract.

The principle according, to which international organizations may be liable under national law for damages resulting from their activities on the territory of a state is beyond dispute, and applies to contractual as well as non-contractual damages (tortuous liability). In other to protect themselves against the consequences of their non-contractual liability, organizations generally conclude insurance contracts with private companies[7] or in the case of short-term activities (conferences, etc), agreements with the host state providing for the transfer of liability (or more exactly, of the consequences of such liability) to that state.[8] Various devices have been developed to ensure an impartial adjudication of questions of liability, and to accord a remedy to parties aggrieved by the acts or omissions of international organizations. Claims immunity all afford means whereby the responsibility of the organization can be determined. Most instruments on priviledges and immunities even make it a duty for organizations to provide alternative dispute resolution mechanism in such cases.[9]

International organizations do not always comply with these obligations in practice. For instance the absence, in some of the contracts concluded by the ITC, of any clause providing for alternative dispute resolution, in spite of the inclusion in the headquarters agreement it had concluded with the United Kingdom (UK) of a

[1] See Generally Panico, The International Responsibility of the Host State for Damages to the United Nations Agents, 11 Politico (1976) pp. 112-138
[2] Sauds and Klein, Bowetts Law of International Institutions, 6th Edn. P.519
[3] See Arwt 233 (1) of the EC Treaty
[4] See the note of August 22, 2003 addressed by the Office of Legal Affairs to the Assistant Secretary-General, Department of Peace-Keeping Operations (2003) UNJY, at 536.
[5] See e.g. Lysen. The Non-Contractual and Contractual Liability of the European Communities, (1976) 155; Art. 9(1) of the European Patent Convention (for contracts concluded by the European Patent Organization).
[6] See eg. Art. XIII of the Agreement of January 29, 1992 between the United Nations and Colombia on the arrangement for the eight session of UNCTAD. U.N.J.Y. (1992) 22.
[7] This is sometimes specifically required in Headquarters agreements.
[8] See e.g. Art. XIII of the Agreement of January 29, 1992 between the United Nations and Colombia on the arrangements for the eight session of UNCTAD U.N.J.Y. (1992) 22.
[9] See S.29 of the Convention of the Privileges and Immunities of the United Nations

provision similar to that of the UN convention.[1] Such failures constitute a clear breach of their international organizations comply voluntarily with their obligation to provide compensation once their liability is established. However, precedents such as the west land and ITC cases show that it is not always so, and that it is sometimes only after lengthy judicial or arbitral proceedings that organizations finally comply with their obligations.

6. Conclusion

The role of international organizations in the world order centres on their possession of international legal personality. Once this is established, they become subjects of international law and thus capable of enforcing rights and duties upon the international plane as distinct from operating merely within the confines of separate municipal jurisdictions. It is however, not all arrangements by which two or more states co-operate will necessarily establish separate legal personality. The International Court of Justice in Nauru V. Australia[2] noted that the arrangements under which Australia, New Zealand and the UK became the joint 'Administering Authority' for Nauru in the Trusteeship Agreement approved by the UN in 1947 did not establish, a separate international legal personality distinct from that of the states. The question of personality will in the first place depend upon the terms of the instrument establishing the organization. This actually occurs in only a minority of cases. However, personality on the international plane may be inferred from the powers or purposes of the organization and its practice. This is the more usual situation and one authoritatively discussed and settled with respect to the UN by the ICJ.[3] The court held that the UN had international legal personality because this was dispensable in order to achieve the purposes and principles specified in the charter. In other words, it was a necessary inference from the functions and rights the organization was exercising and enjoying.

It has been shown that international organizations are responsible under international law for breaches of international norms binding upon them. It is accepted, largely, that the rules governing the responsibility of states may apply equally to international organizations, with the necessary modifications. The elements of state responsibility – breach of an international obligation and attribution of the wrongful act to the state, apply equally to the determination of an international organization's responsibility.[4] It is, however, clear that organizations do not bear responsibility for acts which, even though harmful, do not constitute a breach of an international obligation.

There is no doubt as to whether international organizations are liable on breach of international norms binding upon them. The scope of the liability to be borne by the international organizations is however not certain and depends on the circumstance(s) of each of such breach. It is, however, clear from judicial precedents, the conclusion of which were confirmed by both the institute of international law in its 1995 resolution and the international law commission in its work on the responsibility of international organizations so far, that the organizations themselves are the only subjects that maybe held liable for the consequences of their wrongful acts to the exclusion of their members.

[1] See in particular Standard Bank V. ITC, High Court, Queen's Bench Division (Commercial Court), April 17, 1986, 77 ILR8
[2] ICJ Reports, 1992, pp.240, 258; 97 ILR, pp.1, 25.
[3] The Reparation for Injuries Suffered in the Service of the United Nations Case, ICJ Reports, 1949, p.174, 16AD, p.318
[4] See Art. 3 of the draft articles on the responsibility of international organizations (DOC.A/63/10).