

RIGHTS, FUNCTIONS, AND INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

James D. Fry*

ABSTRACT

This Article asserts that every international organization carries some irreducible minimum attributes by virtue of them having rights (not just functions) vis-à-vis their member states, which give them their status as international organizations. The rise of such entities as the International Humanitarian Fact-Finding Commission has helped these issues relating to international legal personality regain the focus they received in the United Nation's early days with the Reparation advisory opinion. As new life is breathed into dormant international organizations and as emerging international organizations continue to expand their operations in the next few years, the importance of international legal personality will continue to grow. This Article's emphasis on rights over functions in determining international legal personality sets the framework within which this crucial debate will unfold.

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* Associate Professor of Law and Director of the LL.M. Program, University of Hong Kong Faculty of Law. The author thanks John Cerone, Ian Johnstone, Thilo Marauhn, Ernest Ng, Natasha Pushkarna and anonymous reviewers for their encouragement and feedback on earlier drafts of this Article.

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I. INTRODUCTION

Historical usage of international legal personality for international organizations typically has meant no more than an empty legal fiction that enabled institutions to participate in the international legal system.¹ For example, no rights and responsibilities are conferred by international legal personality *per se*, beyond mere participation. For many international institutions, international legal personality is a matter of fact, having been expressly provided for in the underlying constitutive instrument for that entity. As a result, few commentators on international institutional law spend time or energy on understanding or explaining the subtleties of this principle in recent years. However, for those international institutions struggling for recognition as *bona fide* international organizations, such as the International Humanitarian Fact-Finding Commission ("the Commission"), the principle of international legal personality lies at the heart of their efforts. The

¹ See JANNE E. NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 287 (2004) (quoting HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* § 1559, at 975 (3rd. rev. ed., 1995)); James E. Hickey, Jr., *The Source of International Legal Personality in the 21st Century*, 2 HOFSTRA L. & POL'Y SYMP. 1, 12-14 (1997); Paul H. Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 WIS. INT'L L.J. 69, 89-90 (1995); Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 32 DUKE L.J. 748, 762-67 (1983) (equating participation on the international level with international legal personality).

Commission received its first request for a forensic investigation in May 2017, as a result of a deadly incident in Eastern Ukraine.² In order to effectively carry out the Commission's functions in that tense and tumultuous region of the world, states will need to recognize the Commission's (already existing) international legal personality, and its commissioners and staff will need adequate privileges and immunities. This Article's emphasis on rights over functions not only revolutionizes the way we think about the international legal personality of international organizations, but it should also have the practical impact of helping nascent international institutions claim "organizationhood" and enjoy the benefits that come with such status.

For those tasked with creating arguments in favor of international legal personality where the institution's constitution lacks an express provision on such personality, it might be tempting to cherry-pick the italicized parts of the International Court of Justice's ("ICJ") 1949 *Reparation for Injuries Suffered in the Service of the United Nations* advisory opinion to argue that state parties intended to give international legal personality to that international institution if it needs such personality to fulfill its *functions*:

. . . [T]he [United Nations] Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article I); and in dealing with its Members it employs political means. The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. 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*

² News from the IHFFC, INT'L HUMANITARIAN FACT-FINDING COMM'N, <http://www.ihffc.org/index.asp?page=news> [<https://perma.cc/DF6M-DNXB>].

discharged.

*Accordingly, the Court has come to the conclusion that the Organization is an international person.*³

Indeed, scholars have engaged in such cherry-picking when asserting that international legal personality derives from an institution's functions.⁴ However, a closer reading of the portions that are not italicized in the above quotation reveals that the ICJ's opinion has more to do with state parties bestowing functions and *rights* on the international institution for it to have international legal personality, rather than functions alone. This is reinforced by the paragraphs that precede this quoted portion, where the ICJ started its analysis by first asking "whether the Charter has given the Organization such a position that it possesses, in regard to its Members, *rights* which it is entitled to ask them to respect" and otherwise focused on the *obligations* of the states towards the international organization.⁵

Focusing on this function-related language without its rights-related context is to pervert the doctrine of functional necessity as the basis for an international organization's powers. Of course, the issue typically will not arise because member states usually assign rights to an international institution at the time of its creation; these rights then act as the foundation for the institution to fulfill certain functions.⁶ Therefore, it is not surprising if commentators talk exclusively about functions without also including talk of rights, unless member states have totally denied the international institution of all rights. In such a case, it must not be forgotten that the existence of rights *vis-à-vis* member states is an integral part of determining the valid reliance of an international institution on the doctrine of functional necessity to derive its powers.⁷ This Article refocuses on the rights-related context to show how the act of states bestowing rights on an international institution is at the heart of international "organizationhood" and represents the lowest threshold for establishing international legal personality. This Article applies these points to the case of the Commission—an institution

³ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 179 (Apr. 11) (emphasis added).

⁴ *See, e.g.,* Jean d'Aspremont, *Cognitive Conflicts and Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship*, 46 VAND. J. TRANSNAT'L L. 1119, 1131 (2013) (noting how international legal personality also can derive from "the will of [the organization's] creators"); Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 24 (1997); William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42 BROOK. J. INT'L L. 207 (2016).

⁵ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. at 178 (emphasis added).

⁶ *See id.* at 179.

⁷ *Id.*

established by Article 90 of the 1977 First Additional Protocol to the Geneva Conventions of 1949⁸ that started operating in 1991—to demonstrate its unequivocal possession of international legal personality and the package of minimum attributes that come along with it.⁹

The Article is divided into five parts, including this introduction. Part II provides the historical background of international legal personality to help understand how international legal personality involves the bestowal of rights by states. Part III introduces a purely logical analysis of international legal personality in order to understand that it is the granting or denial of rights and responsibilities that is determinative of the possession of international legal personality, which is objective in nature. Part IV describes the package of minimum attributes of international organizations that come with the bestowal of rights on those organizations by states. Finally, the Article concludes by applying these principles to the Commission, focusing on the rights that states have bestowed upon it to argue that the Commission unequivocally possesses international legal personality and the package of minimum attributes afforded to international organizations. The arguments contained in this Article will set the framework upon which the ensuing debates over international legal personality—for the Commission and other emerging international organizations—will revolve.

II. HISTORICAL BACKGROUND OF INTERNATIONAL LEGAL PERSONALITY

The first legal person recognized by law in general is the natural person who has his or her own free will and capability to possess rights and duties.¹⁰ Gottfried Wilhelm Leibniz was the first jurist to bring this notion into the realm of international law.¹¹ In discussing the international legal personality of entities (such as personal sovereigns who were then the sole type of international person on the international level), Leibniz stated:

[An international person] possesses a personality in international law who represents the public liberty, such that he is not subject to the tutelage or the power of anyone else, but has in himself the power of war and of alliances; although he may perhaps be limited by the bonds of obligation towards a superior and owe him homage, fidelity and

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Internal Armed Conflicts (Protocol I) art. 90, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I to Geneva Conventions].

⁹ Erich Kussbach, *The International Humanitarian Fact-Finding Commission*, 43 INT'L & COMP. L.Q. 174, 174-75 (1994).

¹⁰ See JOHN C. GRAY, *THE NATURE AND SOURCES OF LAW* 19 (David Campbell & Philip Thomas eds., 1996); see also HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* § 1560, at 985 (5th rev. ed., 2011).

¹¹ See NIJMAN, *supra* note 1, at 29, 77.

obedience.¹²

The defining feature of this “definition” is that an international person is “not subject to . . . the power of anyone else.”¹³ This denotes equal and independent participation in a legal system. In essence, the notion of personality legitimized and recognized the participation of an entity to allow for legal regulation of such participation.¹⁴ This broad definition provided the foundation for later development of the scope of international legal personality, particularly regarding individuals in international law. Scholars have contended¹⁵ that the “personification of the ‘Will of the State’ as the unified will of the collective” was outdated,¹⁶ and that individuals, who were capable of bearing rights under international law, were unnecessarily excluded from participation in the system.¹⁷ In recognizing that international legal personality should not be limited to states, Giuseppe Marchegiano stated, “we may consider as ‘international persons’ *all those entities* whose juridical situating is governed, whose rights and obligations are determined, and whose competency is extended or restricted by public international law.”¹⁸ This echoed Leibniz’s definition in terms of the capability of being regulated by international rules.¹⁹

During the inter-war period, the international legal personality of international organizations also began to be recognized. Marchegiano applied his conception of international legal personality and concluded that an 1865 lighthouse commission was an international person.²⁰ Other scholars were more reserved on this point. At most, they only admitted a peculiar status for international organizations, which was then called a “conditional personality” to the effect that international organizations would only enjoy limited international legal personality to perform any rights and duties that had been conferred.²¹ In essence, the view that states were the supreme center of authority prevailed.²²

In 1949, the ICJ’s *Reparation* advisory opinion settled the status of

¹² See *id.* at 58-59 (quoting GOTTFRIED WILHELM LEIBNIZ, *CODEx IURIS GENITUM DIPLOMATICUS* 175 (1693)).

¹³ *Id.* at 58.

¹⁴ See NIJMAN, *supra* note 1, at 77.

¹⁵ See *id.* at 242-43.

¹⁶ *Id.* at 128.

¹⁷ See *id.* at 242-43.

¹⁸ Giuseppe Marchegiano, *The Juristic Character of the International Commission of the Cape Spartel Lighthouse*, 25 AM. J. INT’L L. 339, 340 (1931) (emphasis added); see also David J. Bederman, *The Souls of International Organizations*, 36 VA. J. INT’L L. 275, 336 (1996).

¹⁹ See *supra* text accompanying note 12.

²⁰ Marchegiano, *supra* note 18, at 340; see also Bederman, *supra* note 18, at 341.

²¹ Bederman, *supra* note 18, at 343-44, n.389.

²² SCHERMERS & BLOKKER, *supra* note 10, § 1562, at 986.

international organizations' international legal personality. The UN General Assembly asked the ICJ to issue an advisory opinion on the capacity of the United Nations to bring international claims for injuries suffered by its agents in Israel, which was a non-member at that time.²³ Objective international legal personality was necessary to answer the question affirmatively. The Court held that the United Nations possessed such objective personality.²⁴ On the definition of personality for the United Nations, the Court determined "that [the UN] is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims."²⁵ Notably, this was grounded on the basis of "functional necessity."²⁶ For the purposes of this chapter, this corresponded to what Leibniz and Marchegiano had proposed—legitimizing participation in the legal society and a separate will.²⁷

Since then, the concept of international legal personality has been used more frequently to include more participants, most notably individuals²⁸ and insurgents,²⁹ in the international legal field.³⁰ New debates have centered on whether international legal personality for international organizations is objective or subjective, both of which can be supported by different readings of the *Reparation* advisory opinion.³¹ Objective and subjective personality are addressed in the following part. The most recent academic discussions about international legal personality herald "the end of [international legal personality]" and a tendency to avoid its invocation altogether.³² This is another issue that this Article discusses in later sections. Before proceeding with that analysis, however, two points must be highlighted. First, international legal personality "depends on the needs of the community"³³

²³ See generally *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. at 174.

²⁴ *Id.* at 179.

²⁵ *Id.* However, the author disagrees with further comments made by the ICJ thereafter, for example, to characterize international legal personality for international organization as a "large measure" of personality. These criticisms are elaborated on later in this Article.

²⁶ See *id.*

²⁷ See NIJMAN, *supra* note 1, at 58-59; see also Marchegiano, *supra* note 18, at 340.

²⁸ See, e.g., *LaGrand Case (Ger. v. U.S.)*, Judgment, 2001 I.C.J. Rep. 466, ¶ 128 (June 27).

²⁹ See ANTONIO CASSESE, *INTERNATIONAL LAW* 46 (2001).

³⁰ See also NIJMAN, *supra* note 1, at 344-46.

³¹ See Finn Seyersted, *Objective International Personality of Intergovernmental Organizations- Do Their Capacities Really Depend upon the Conventions Establishing Them*, 34 NORDISK TIDSSKRIFT INT'L RET. 3, 9-10 (1964).

³² See generally NIJMAN, *supra* note 1, 347-445.

³³ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. at 178.

and may be expanded to allow for more participants or entities to participate when circumstances require.³⁴ Second, international legal personality is no more than a legal fiction that legitimizes one's participation through a recognition of the independent ability to interact with other international persons and denotes the capability to have rights and responsibilities alongside states.³⁵ These are the foundations for the ensuing exploration of the alternative analyses of international legal personality.

III. PURELY LOGICAL ANALYSIS OF INTERNATIONAL LEGAL PERSONALITY

This part explores the possibility that the ICJ's holding in the *Reparation* advisory opinion was unsatisfactory. This part posits that international legal personality arises, as opposed (and in the alternative) to the functional necessity approach adopted by the ICJ, in reality as: (1) a logical presupposition of international organizations being in existence; and (2) as an objective notion and opposable to all states regardless of their membership.

A. *The Subjectivity and Objectivity of International Legal Personality*

Before going into that pure logical analysis, however, it is necessary to clarify some important terminology—namely, subjective and objective personality. Schermers and Blokker highlight the fact that there are three main schools of thought when it comes to international legal personality: the subjective school, the objective school, and the moderate third school.³⁶ The subjective school maintains that an international organization acquires international legal personality only when its constitution expressly bestows it upon the organization.³⁷ This school of thought was the product of much debate between the two world wars and represented a concession mainly by socialist commentators who once maintained that international organizations did not have any international legal personality at all.³⁸ This school of thought apparently receives little support in contemporary times.³⁹

The objective school presents a special problem on the meaning of objectivity. The approach essentially argues that so long as an organization has a distinct will, it is *ipso facto* an international person.⁴⁰ Objectivity here

³⁴ *Id.*

³⁵ *Id.*

³⁶ See SCHERMERS & BLOKKER, *supra* note 10, § 1565, at 988-89.

³⁷ *See id.*

³⁸ *Id.* (stating that the school was supported mainly by socialist writers); accord Bederman, *supra* note 18, at 335-49 (broadly discussing the debate and evolution of the subjective school of thought).

³⁹ SCHERMERS & BLOKKER, *supra* note 10, § 1565, at 989.

⁴⁰ *See* Seyersted, *supra* note 31, at 45-47.

carries potentially two different meanings. The first meaning is that the personality of the organization does not depend on the intention—for example, the subjective will—of the state parties, but rather it exists as an objective fact.⁴¹ The second meaning, which takes the first meaning a step further, is that the personality of the organization is opposable to all states as an objective fact.⁴²

The prevailing view seems to be the moderate school, which considers that an international organization's personality is not inherent but rather is either expressly bestowed upon it or implicitly possessed.⁴³ The reason for the implication of personality—a position that is represented in the *Reparation* advisory opinion—is because where certain powers are given to an organization, it could not have been the state parties' intention *not* to give it a personality that enables it to exercise those powers..⁴⁴ As the introduction to this Article asserts, this represents a misreading of the *Reparation* advisory opinion. This point aside, whether or not the personality of the international organization thereby created is opposable to non-members is uncertain under this school of thought. The *Reparation* advisory opinion itself was ambiguous on this point by merely suggesting that the personality of the United Nations was opposable to all states without substantial reasoning.⁴⁵

For purposes of this Article, the notion of “objectivity” means that an organization's personality depends neither on the will of member states nor the will of non-member states to give it universal opposability. All the while, “subjective” personality means that personality exists only when: (1) member states expressly or implicitly confer personality according to their own will; and (2) non-member states recognize it according to their own will. The following section proposes a new approach to understanding international legal personality.

B. *Logical Presupposition as an Alternative Basis for International Legal Personality*

This section comes to logical presupposition as forming an alternative basis for international legal personality. Two relevant rules of international institutional law should be stated from the beginning. First, a “separate will” is a necessary component for an international organization under most

⁴¹ *Id.* at 45; see also SCHERMERS & BLOKKER, *supra* note 10, §1565, at 989.

⁴² See Seyersted, *supra* note 31, at 45.

⁴³ See SCHERMERS & BLOKKER, *supra* note 10, § 1565, at 989.

⁴⁴ See *id.* §§ 1565-66 (citing *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. at 178-79).

⁴⁵ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. at 185.

contemporary definitions.⁴⁶ Second, there is a presumption of *intra vires*. For example, as provided for by the ICJ's *Certain Expenses* advisory opinion, whenever the organization's constitution does not forbid a particular act, it is free to act within its purposes and objectives, subject only to member states' later express vitiation.⁴⁷ It is helpful to note that when the *organization* so acts, it must interpret its own constitutional provisions and then choose to act or not to act.⁴⁸ A separate will is indispensable to both of these steps.

There is an entire spectrum of possible scenarios regarding conferral of international legal personality and conferral of rights and responsibility in a constitution. There may be express conferral of or express denial of international legal personality. Theoretically, states may also elect to confer or deny rights and responsibilities to the entity to a varying degree between these extremes. This section identifies the twelve permutations that result from having three possibilities with international legal personality (conferred, denied and silent/no constitution) and four possibilities with rights (conferred, partially denied, completely denied and silent).

For organizations where rights are conferred and there has been no denial of international legal personality within the constitution,⁴⁹ the mere fact that an international organization possesses some rights necessarily means that they have: (1) a separate will that is necessary to exercise such rights;⁵⁰ and (2) the capacity to exercise such rights. Otherwise, the conferral of rights would be meaningless. To possess these two assets, it must be presupposed logically that the institution possesses international legal personality, without which the institution cannot exist. These are the characteristics that an international legal personality is designed to confer upon an institution.

For organizations where the constitution either confers or is silent on

⁴⁶ See, e.g., SCHERMERS & BLOKKER, *supra* note 10, § 44, at 44; Giorgio Gaja (Special Rapporteur on the Responsibility of International Organizations), *First Rep. on Responsibility of International Organizations*, U.N. Doc. A/CN.4/532, ¶ 34 (Mar. 26, 2003); Int'l Law Comm'n, Rep. on the Work of its Fifty-Fifth Session, U.N. Doc. A/58/10, ¶ 53 (2003).

⁴⁷ See *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. Rep. 151, 168 (July 20).

⁴⁸ This is opposed to *member states* electing to act according to their own will. See *id.*

⁴⁹ See, e.g., Treaty Establishing the European Coal and Steel Community art. 6, Apr. 18, 1951, 261 U.N.T.S. 140 (expired July 23, 2002) (expressly conferring international legal personality); Constitution of the Intergovernmental Committee for European Migration arts. 27-28, May 20, 1987, 207 U.N.T.S. 189 (entered into force Nov. 14, 1989) (expressly conferring international legal personality). See also U.N. Charter arts. 1-2 (silent on international legal personality); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 178-79; Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction art. 8, Sept. 3, 1992, 1974 U.N.T.S. 45 (entered into force Apr. 29, 1997) (silent on international legal personality).

⁵⁰ See GRAY, *supra* note 10, at 19.

international legal personality and where all rights are totally denied, the mere fact that they possess no rights necessarily means that they do not have a separate will for all practical purposes. Strictly speaking, this is logically fallacious by affirming the consequent since absence of rights does not necessarily mean absence of a separate will. In other words, an entity can have a separate will without holding actual rights and responsibilities.⁵¹ However, one has to appreciate that if the constitutive instrument expressly denies all rights, it would fly in the face of common sense that there is a separate will for that institution. Without a separate will, the entity is not, as a matter of law, an international organization proper.

For organizations where the constitution either confers or is silent on international legal personality and where the constitution either is silent or partially denies rights to the organization,⁵² international legal personality is there and is a logical presupposition of such silence or partial denial.⁵³ Recalling the second principle relied upon earlier, when an organization has the competence to determine the scope of its powers, it must necessarily have a separate will.⁵⁴ Technically, international legal personality is not a prerequisite to having a separate will. However, practically speaking, since international organizations are all legal persons artificially created by states, it would be extremely implausible to suggest possession of a separate will without the capacity to exercise such a will. This simply is as absurd as arguing that states create an international organization proper with a will, yet deprive it of all means to exercise that will. Therefore, the organization must possess an objective international legal personality, in the first sense as explained earlier, by virtue of it arising from a logical presupposition independent of a states' will, rather than from a states' conferral.

Finally, for entities where international legal personality has been expressly denied,⁵⁵ one simply can revert back to the logical and practical impossibility of having an entity with international competence without international legal personality, the former being exactly what the latter empowers one to acquire. It is unnecessary to answer the question whether

⁵¹ NIGEL D. WHITE, *THE LAW OF INTERNATIONAL ORGANIZATIONS* 32 (2d ed. 2005).

⁵² See, e.g., Treaty Establishing the European Economic Community art. 210, Mar. 25, 1957, 298 U.N.T.S. 3 (providing for international legal personality but silent on rights); Convention Concerning the Administration and Upholding of the Lighthouse at Cape Spartel, May 31, 1865, 14 Stat. 679, 18 Stat. (2) 525 (silent on international legal personality and rights); Bederman, *supra* note 18, at 276, 341.

⁵³ See White, *supra* note 51, at 32.

⁵⁴ See *supra* text accompanying note 50.

⁵⁵ See, e.g., Global Water Partnership, *Statutes for the Global Water Partnership Network*, art. 1, ¶ 2 (Dec. 12, 2002), <http://www.gwp.org/globalassets/global/about-gwp/legal-documents/gwp-statutes-as-amended-september-2011.pdf> [https://perma.cc/HX8E-2R3B]. See also SCHERMERS & BLOKKER, *supra* note 10, § 44, at 44.

the conferral of rights (expressly or impliedly) can go against the express denial of international legal personality, as it simply is illogical. However, it is important to ask the question whether these entities are international organizations as defined earlier.⁵⁶ They would appear to not be international organizations. The reason here is subtle. *Prima facie*, these organizations have a constitutive instrument and seemingly possess a separate will, particularly for those having rights conferred on them. However, by denying international legal personality, the organization will have *no* way to interact with other international legal persons since they are, by definition, incapable of possessing any rights and responsibilities. Therefore, they must act through their member states. This clearly is contrary to the spirit of requiring an international organization to have a will separate from its member states. By the very need to act through their member states, these entities are, for all practical purposes, devoid of a separate will of their own. Therefore, they are not international organizations as such.

Three conclusions can be drawn from these observations, assuming they are correct. First, all properly constituted international organizations—namely, those that have: (1) a constitutive instrument; and (2) a separate will for whatever reason—must possess international legal personality. Second, the international legal personality so possessed by them is logically presupposed independent of member states' conferral of international legal personality. The logical presupposition forms a part of treaty law as a matter of logic and law, and it does not depend on consent.⁵⁷ The prime example of this is *pacta sunt servanda*,⁵⁸ which is a well accepted principle derived not from treaty law but from the logical implication that a state entering into a treaty will honor its obligations.⁵⁹ The same is true for international legal personality: the presupposition is a logical step to make the constitution entered into by the states practicable and possible. Otherwise, the international organization's constitution will be rendered meaningless and the international organization will be rendered dysfunctional. Finally, and most importantly for the Commission, the conferral or denial of rights and responsibilities is determinative of the possession of international legal personality. Irrespective of whether states have conferred personality on an international organization, the fact that it possesses certain rights and responsibilities will bestow it with international legal personality. At the same time, if rights and responsibilities have been denied, the organization

⁵⁶ See *supra* text accompanying notes 46-48.

⁵⁷ See Vladimir-Djuro Degan, *Some Objective Features in Positive International Law*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 123, 127 (Jerzy Makarczyk ed., 1996) (citing DIONISO ANZILOTTI, *COURS DE DROIT INTERNATIONAL* 68 (Gilbert Gidel trans., 1929)).

⁵⁸ See *id.* at 125-26.

⁵⁹ See *id.* at 126.

falls short of the definition of international organization entirely. The practical implication is that all international organizations conferred with some rights must possess objective international legal personality, in the first sense.

C. *Objectivity, Member States and Third States*

From the observations and conclusions provided in the preceding section, it is possible to surmise that objectivity of the international legal personality holds true for all states regardless of their membership in the international organization and that objectivity does not depend on non-members' consent or recognition. This section elaborates on these two points.

1. Objectivity Holds True for All States Regardless of Their Membership

It must be appreciated that the term "objectivity" is used in the first sense as previously defined—that is, the personality arises independently from a member state's subjective will. As such, it is possible to argue that this does not entail objectivity to the whole world—that is, "objectivity" in the second sense provided above. This sub-section explores this point and argues that international legal personality arising from logic also is objective in the second sense.

If international legal personality is objective to member states, it must be the same for non-member states⁶⁰—"la personnalité juridique est une situation *erga omnes*, absolue, et non relative."⁶¹ This appears to be well accepted, and it logically flows from the objective nature of international legal personality.⁶² Even without regard to its objective nature, doctrinally speaking, a legal person must be absolute; there is no half-way measure of personality.⁶³ Therefore, the ICJ must be considered as having conflated the issue of international legal personality and degree of rights and responsibility (or in its words, a "large measure of international personality") that one legal

⁶⁰ See Reinhold Reuterswärd, *The Legal Nature of International Organizations*, 49 NORDISK TIDSSKRIFT FOR INT'L RET 14, 17 (1980).

⁶¹ *Id.* at n.10 (quoting Rolando Quandri, *La personnalité internationale de la Communauté*, in LES RELATIONS EXTERIEURES DE LA COMMUNAUTE EUROPEENNE UNFIEE 51 (1969)). See CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 104-5 (2005); *but see* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 92-93 (7th rev. ed., 1997).

⁶² See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 47-48 (1995); Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 BRIT. Y.B. INT'L L. 111, 118 (1970) (quoting Balldore Pallieri, *Diritto interzionale public* (1962)); Reuterswärd, *supra* note 60, at 14.

⁶³ See WHITE, *supra* note 51, at 117.

person may possess.⁶⁴ This qualification of “large measure” of international legal personality reflects no more than the remains of the state-dominant theory from the Cold War (and prior), and the somewhat strange status that was then given to international organizations.⁶⁵

2. Objectivity of International Legal Personality Does Not Depend on Non-members’ Consent or Recognition

It is further argued that the birth of an international organization as an international legal person is a matter of objective reality and does not depend on third states’ consent or recognition.⁶⁶ A few points must be made here with regard to the debate on recognition, the violation of state consent, and the notion of partial objectivity.

First, it must be noted that the creation of an international organization *per se* violates no state consent. It is also crucial to note that the creation of an international organization involves no state consent besides that of the member states.⁶⁷ In other words, third states’ rights and obligations are not affected by the mere fact that a legal person has been created. At this point, one must distinguish between “legal personality” and any “right and responsibility” of that legal person. When no rights and obligations are being affected, there can be no complaint of violation of consent.⁶⁸ The very core debate on recognition in international law concerns the creation of a state as an international legal person and whether recognition by other states is a necessary requirement.⁶⁹ The crucial question is whether or not the birth of an international legal person depends on third-state recognition.

Notwithstanding the debate, the prevailing view, which must be considered as better and correct, is that recognition plays no part in the constitution of an international legal person. In other words, recognition is

⁶⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. at 179.

⁶⁵ Robert Kolb, *Book Review*, 18 EUR. J. INT’L L. 775, 775 (2007) (reviewing J.E. NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY, AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* (2004)).

⁶⁶ See Higgins *supra*, note 62, at 47-48.

⁶⁷ See Vienna Convention on the Law of Treaties art. 9, May 23, 1969, 1155 U.N.T.S. 335 (entered into force Jan. 27, 1980) [hereinafter VCLT].

⁶⁸ See PHILIPPE SANDS AND PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* § 15-015 (6th ed., 2009) (asserting that states are free to acknowledge the existence of an organization or to deal with the establishing states directly, implicitly suggesting that in fact the establishment of an international organization does not *per se* violate the relativity (or privity) of treaties).

⁶⁹ See generally HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (H.C. Gutteridge et al. eds., 1947).

only of declaratory value.⁷⁰ One relevant reason is that if a group of states recognizes an entity to be an international legal person, whereas another group does not, there would be an anomaly where such an entity is an international legal person to the former but at the same time not an international legal person to the latter.⁷¹ Once it is accepted that international legal personality is an absolute concept, then the constitutive theory falls apart.

In the context of international organizations, the same point can be made, as there is no reason why a distinction should be made between states and international organization at this juncture.⁷² If a group of states recognizes an institution to be an international legal person and enter into an international agreement with it, then such an institution must, at least by implication, possess international legal personality. The group of states that does not recognize the international institution as an international legal person will be forced into either arguing that the international agreement is void *ab initio* or that the institution only possesses personality insofar as states recognize it. The former option is highly implausible, as the non-recognizing states are presented with a *fait accompli* of a conclusion of legal relationship (in the absence of customary vitiating factors).⁷³ It is not up to a third state to unilaterally determine the legal validity of such a transaction—for example, by “recognizing” or “not recognizing” it. The latter option must be rejected outright if one adheres to the absolute nature of international legal personality as stated earlier.

Even if one assumes otherwise, it must be rejected in any case: the mere fact that a state denies the personality of an international institution cannot be used to defeat its legal status, as it is fundamental that international legal personality and rights/responsibilities are two separate issues. The refusal to deal with the institution is a simple denial to engage in any potential exercise of rights and assumption of responsibility *vis-à-vis* that institution, which cannot have any effect on its international legal personality. Should the non-recognizing states maintain that their recognitions are constitutive to the international institution being an international legal person (which is a prerequisite for entering into legal relationships), we would return to the

⁷⁰ See Opinion No. 1, 92 I.L.R. 162, 165 (Conf. on Yugo. Arb. Comm’n 1992); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 22 (2d ed., 2006).

⁷¹ JAMES L BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 138 (Humphrey Waldock ed., 6th ed., 1963).

⁷² RACHEL FRID, *THE RELATIONS BETWEEN THE EC AND INTERNATIONAL ORGANIZATIONS: LEGAL THEORY AND PRACTICE* 18 (1995); accord JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 48 (2d ed. 2009) (arguing that third-state recognition, as a requirement as such, is inherently contradictory); Seyersted, *supra* note 31, at 103-04.

⁷³ See VCLT, *supra* note 67, arts. 46-53.

debate on recognition. This debate generally has been concluded in favor of the declaratory theory, which gives no weight of recognition to an entity being an international legal person.⁷⁴

Jan Klabbers has doubted the practical utility of an institution being endowed with international legal personality but with no states being interested in dealing with it. He stated that “[u]nder such a scenario, personality would be an empty concept, devoid of meaning, something which might exist on paper, but with no empirical reverberations.”⁷⁵ Indeed, as discussed earlier, international legal personality is an empty concept.⁷⁶ Klabbers’ doubts reflect no more than the reality of international law as it stands.

3. Tentative Conclusions

At this point, it tentatively can be concluded that international legal personality of international organizations must be objective and opposable to the whole world. Nonetheless, before moving into the analysis of minimum attributes, it is important to explore the importance of objectivity for several reasons.

Admittedly, international legal personality seems to occupy a less prominent place than what it did historically, with a general reluctance to use the notion of international legal personality in contemporary debates.⁷⁷ What matters now to third states is the dealings with a purported international organization and their respective rights and responsibilities.⁷⁸ Objectivity here is unimportant since, in any case, by voluntarily entering into dealings with the organization, the third states implicitly would have recognized the personality of the latter already. Nevertheless, the notion of objective international legal personality remains important when a non-member state that refuses to recognize the international legal personality of one organization enters into some non-contractual, and thus non-voluntary, transactions with that organization. These include, for example, the incurring of state responsibility through damaging the organization’s property or injuring its personnel. It is only when the personality of an international organization is objective that the organization will be able to make an international claim against the wrongdoing state. Indeed, there are other reasons to keep alive the issue of objectivity of international legal personality,⁷⁹ one of which is explored in the following part—namely, the

⁷⁴ Crawford, *supra* note 70, at 25.

⁷⁵ See KLABBERS, *supra* note 72, at 48.

⁷⁶ See *supra* text accompanying note 35.

⁷⁷ See NIJMAN, *supra* note 1, at 347-445.

⁷⁸ See MALANCZUK, *supra* note 61, at 93.

⁷⁹ See, e.g., CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL

“minimum attributes” of an international organization.

IV. MINIMUM ATTRIBUTES OF INTERNATIONAL ORGANIZATIONS

There must be certain minimum attributes of an international organization that flow from its very existence. This argument takes on two separate logical layers. First, it is argued that the objectivity of international legal personality does not *per se* give rise to these rights, although it does give them an objective nature. Second, these rights arise from a combination of a strict interpretation of functional necessity of an international organization and the logical presupposition that one must have when an international organization exists. This part explores both in turn.

A. *Objectivity of International Legal Personality Supports the Nature of the Minimum Attributes*

As previously mentioned, the debate on international legal personality still is useful in determining the “minimum attributes” of an international organization, to the extent that the objectivity of the international legal personality determines the objectivity of the minimum attributes. This does not, in substance, contradict the earlier statement that international legal personality is an empty fiction and gives no rights to an organization.⁸⁰ It is only the nature of international legal personality and the rights that are at stake. In this sense, the objectivity of the international legal personality of an international organization provides a necessary foundation for the search of these minimum rights, which has an objective quality as well. The reason is that if international legal personality were subjective, it would not be opposable to the world. To the non-member state, the organization will not be an international legal person, and so it will be incapable of bearing rights. All rights allegedly borne by the organization simply are non-existent in the eyes of third states and so cannot be objective.

To be clear, it is not suggested here that the notion of international legal personality automatically confers certain rights to an international legal person, in this case an international organization.⁸¹ A strict distinction between personality and rights is maintained, recalling that personality is a mere *fiction* conferring no more than *capacity* to possess rights and not rights

LAW OF INTERNATIONAL ORGANIZATIONS 78 (1996); WHITE, *supra* note 51, at 36-37.

⁸⁰ *Supra* text accompanying note 35.

⁸¹ See AMERASINGHE, *supra* note 79, at 98; PETER H.F. BEKKER, THE LEGAL POSITION OF INTERNATIONAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES 96 (1994). As an example, the recognition of some “inherent” capacities and powers flow from the fact that an international organization possesses international legal personality. See WHITE, *supra* note 51, at 34.

as such.⁸²

B. *Functional Necessity Lays the Foundation of the Minimum Attributes*

1. Functional Necessity Properly Understood

The starting point for properly understanding functional necessity is Bekker's statement of the law: "An entity shall be entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfillment of its purposes."⁸³ As explained in the introduction to this Article, the doctrine of functional necessity found its place in the *Reparation* advisory opinion and subsequent ICJ decisions,⁸⁴ but it nevertheless has received significant criticism. Klabbers has criticized it as (1) being biased towards international organizations; (2) that it assumes that international organizations must be a good thing; (3) that it is too flexible and too susceptible to changes; and (4) that it is subject to different interpretations, especially where the organizational constitutions are usually the product of hard negotiation and power struggles.⁸⁵ However, functional necessity is only a necessary condition for a finding of any minimum rights.⁸⁶ To detach the use of the doctrine from the criticism, one must not appeal to the purposes of an organization. In other words, one must avoid giving any "purpose- or goal-orientedness,"⁸⁷ as asserted in Bekker's definition.

Here, only a restrictive, or perhaps etymological, sense of the word "functional" is to be used: "function" in and of itself means "[a]n activity or mode of operation that is proper or natural to a person or thing; the purpose or intended role of a thing."⁸⁸ As such, the "functional necessity" understood here is what is necessary for the organization to exist or to survive as an international organization proper and no more. Bekker's position was that the *raison d'être* of an international organization generally is to perform its

⁸² *Supra* text accompanying note 35.

⁸³ BEKKER, *supra* note 81, at 39.

⁸⁴ *See, e.g.,* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 11 (July 8).

⁸⁵ KLABBERS, *supra* note 72, at 33-35. *See also* BEKKER, *supra* note 81, at 41-42; C. Wilfred Jenks, *Some Constitutional Problems of International Organizations*, 22 BRIT. Y.B. INT'L L. 11, 16 (1945) ("[T]here is clearly much to be said for defining the purposes of that organization in broad language so as to allow the widest possible scope for future development . . .")

⁸⁶ *See* BEKKER, *supra* note 81, at 41-42.

⁸⁷ *Id.* at 47-48 (referring to Michel Virally, *La Notion de Fonction Dans la Théorie de l'Organisation Internationale*, in 277 MELANGES OFFERTS A CHARLES ROUSSEAU: LA COMMUNAUTE INTERNATIONALE 281 (Suzanne Bastid et al eds., 1974)).

⁸⁸ *Function*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/75476?rskey=Wuz9PE&result=1#eid>.

assigned purpose.⁸⁹ This Article departs from this conception in the sense that Bekker's understanding would give a different *raison* to individual international organizations, depending on their own purposes.⁹⁰ Indeed, there might be one single *raison d'être* for *all* international organizations—all international organizations must exist as an international organization and international legal person in the first place, or else no purposes whatsoever can be realized. This is common to all international organizations, and therefore it can be seen as the *raison d'être* for international organizations as such.

2. Relevance of Functional Necessity Properly Understood

It is crucial to note the important but fine distinction between possessing certain rights by virtue of functional necessity (understood in the etymological way) and possessing certain rights under the functional necessity doctrine (understood in the conventional way). They are different concepts, with the former being stricter than the latter.⁹¹ In other words, functional necessity in the etymological sense gives an organization certain rights—such as, as shown later in this Article, the capacity to conclude an international agreement. However, the way the rights may be exercised is determined on the basis of functional necessity in the conventional way—that is, whether the exercise of a right can be done in such a way, i.e., what types of international agreements can be concluded.⁹²

Stated differently, the effort in this Article is to try to create generalized conclusions despite the diversity, if not extreme diversity, of international organizations. To adopt the conventional understanding of functional necessity, one inevitably concludes that every international organization has different powers since their functions are different. The effort of this Article is to identify common purposes among all international organizations, which, again, is the purpose to exist as such. It is too difficult, perhaps even impossible, to identify other *common* purposes identifiable among *all* international organizations. As a result, the proposed minimum attributes will be those that are necessary for the existence of all international organizations and *not* those that may further one organization's purpose but not the others.

⁸⁹ See BEKKER, *supra* note 81, at 46.

⁹⁰ *Id.* at 45-46. See, e.g., Convention on the World Meteorological Organization art. 2, Oct. 11, 1947, 77 U.N.T.S. 144; Constitution of the World Health Organization art. 2, July 22, 1946, 14 U.N.T.S. 185; Constitution of the United Nations Educational, Scientific and Cultural Organization art. I, Nov. 16, 1945, 4 U.N.T.S. 275.

⁹¹ Compare *supra* text accompanying note 88 with *supra* text accompanying note 83.

⁹² See BEKKER, *supra* note 81, at 47-48.

3. The Search for an Irreducible Core “Package” of Attributes

It follows from all of this that “minimum attributes” flow neither from international legal personality nor from a broad reading of functional necessity. They flow from the *raison d’être* of the organization. In other words, the minimum attributes are those rights (or any other attributes) that an international organization, having objective international legal personality, must possess for it to continue existing as an international organization. These rights are not implied since they do not depend on the institution’s constitutive instrument(s).⁹³ These rights may be considered as inherent,⁹⁴ but more properly, they exist by logical presupposition and they are irreducible.⁹⁵ To be clear, these inherent rights are distinct from those rights provided by the institution’s constitutive instrument(s) and that act as the basis for its international “organizationhood.” In other words, these inherent rights are independent of the text of the international agreement that establishes the international organization and the will of the member states, and they are objective.⁹⁶

It is important to elaborate on the “irreducibility” of these minimum attributes. International law is not purely based on the consent of states. The concept of “irreducible rights” is not unfamiliar to international lawyers, particularly in the field of international adjudication. The power of an international judicial body of *compétence de la compétence* and the inherent power to control the proceedings are the most notable examples.⁹⁷ These powers exist independent of the will of the parties and independent from the tribunal’s constitutive instrument. Without these powers, the court would not function at all.⁹⁸ The International Criminal Tribunal for the Former Yugoslavia already has echoed this and has emphasized that any limitation on *compétence de la compétence* “risks undermining the judicial character or

⁹³ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. at 182.

⁹⁴ See AMERASINGHE, *supra* note 79, at 98.

⁹⁵ *Id.* at 100.

⁹⁶ See *id.*; Rama-Montaldo, *supra* note 62, at 124.

⁹⁷ See generally Paola Gaeta, *Inherent Powers of International Courts and Tribunals*, in MAN’S INHUMANITY TO MAN: ESSAYS IN HONOUR OF ANTONIO CASSESE 353 (Lal Chand Vohrah ed., 2003); Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BRIT. Y.B. INT’L L. 195, 202 (2006); Jessica Liang, *The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application*, 15 NEW CRIM. L. REV. 375, 402 (2012); Andrew D. Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 MICH. J. INT’L L. 559, 578 (2010).

⁹⁸ CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 127 (2003) (citing numerous scholarly views including Cavaré, Calston, Balasko, Rousseau, Ralston, Calvo, Iaccarino and Salvioli) [hereinafter AMERASINGHE JURISDICTION].

the independence of the Tribunal,”⁹⁹ and runs counter to the invocation of judicial (or third-party) settlement.¹⁰⁰ The above reasoning can be transplanted to international organizations. Where any minimum attributes are taken away, the entity cannot be considered as an international organization proper—not because it does not fulfill the definition (however unsettled it is) of an international organization, but due to the very reason that such denial undermines the *raison d’être* of an international organization as an organization.

One last clarification is that the acquisition of a particular right as a minimum attribute does not by itself allow the international organization to freely exercise such rights in an unlimited way. Even states cannot act in whatever way they desire, and the scope of their rights is limited by, for example, international law¹⁰¹ and other states’ sovereignty.¹⁰² Power to exercise minimum attributes, in the context of international organizations, still must be limited by the doctrine of functional necessity (understood in Bekker’s sense, or to the same effect the conventional sense). In other words, they cannot be exercised so as to go beyond the purposes of the organization.¹⁰³ A few illustrations are necessary to clarify the proposed thesis—namely, (1) the right to bring a claim against a member and a non-member state and (2) the capacity to conclude an international agreement.

C. *The Right to Bring International Claims*

It is argued that the right to bring international claims, being one of the most important aspects of an international person, qualifies as one of the minimum attributes of an international organization.¹⁰⁴ If an international organization has a separate will and rights that are either expressly conferred or implied from its constitutive instrument, then one must also acknowledge that where a right cannot be enforced, its enjoyment and exercise by a separate will in the international legal system is meaningless.¹⁰⁵ The exercise

⁹⁹ Prosecutor v. Tadić, Case No. IT-91-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 19 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 2, 1995).

¹⁰⁰ See AMERASINGHE JURISDICTION, *supra* note 98, at 145.

¹⁰¹ See JAMES LESLIE BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS 44-45 (Hersch Lauterpacht & C.H.M. Waldock, eds., 1st ed. 1958); Ramamontaldo, *supra* note 62, at 140.

¹⁰² See The Case of the S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J., (ser. A) No. 10, at 18 (Sept. 7).

¹⁰³ See BEKKER, *supra* note 81, at 49-50.

¹⁰⁴ See Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. at 180-81.

¹⁰⁵ Cf. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 83 (Anders Wedberg trans., 1961) (1945).

of the right will be prone to interference without the ability to enforce the right before an international tribunal, and the “right” thus endowed will lose its characteristic as a right and practically would be relegated to goodwill. Bearing in mind that international organizations have no armed forces, let alone the right to wage a legitimate war such as self-defense, resort to legal settlement perhaps is the only way that a right can be vindicated, thereby separately manifesting the organization’s separate will. Therefore, the right to make international claims is no more than a manifestation of its being an international legal person under international law,¹⁰⁶ without which an international organization simply cannot function at all.

The same logic applies to both members and non-members. Where member states have endowed the organization with a will and certain rights, it plainly would be illogical and against the fundamental rule of *pacta sunt servanda* to refuse to give effect to those rights, as well as the organization’s inherent rights. It is paramount that in those cases the international organization properly can enforce its rights against the non-cooperative members. The situation may be more complicated regarding non-member states, in particular those that have not explicitly or implicitly recognized the international legal personality of the organization. In those cases, where there has been no interface at all between that state and the organization, since there would be no claims at all, it is necessary to enter into a discussion. However, where that state has entered into some form of interface with the organization, for example by injuring the organization’s personnel or damaging the property of the organization, a legal relationship must have arisen implicitly. The right to claim against that state (the objective nature of the right deriving from the objective nature of its personality) would become even more important, as without it an international organization would be susceptible to all forms of external interference without any recourse to a remedy.

D. *Capacity to Conclude an International Agreement*

The capacity to conclude an international agreement also qualifies as one of the minimum attributes of an international organization. The ICJ came to the same conclusion in its *Reparation* advisory opinion,¹⁰⁷ but this right can be established independently from the ICJ’s holding there. One must look back to the very nature of international legal personality as an indication of capability to acquire rights and responsibilities, as well as to legitimately participate in the international legal system, inasmuch as “[i]t gives such an

¹⁰⁶ See A. S. MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES: ASPECTS OF THEIR LEGAL RELATIONSHIP 82 (1995); Rama-Montaldo, *supra* note 62, at 140.

¹⁰⁷ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. at 179 (referring, seemingly, to treaty-making capacity as coming automatically with international legal personality).

entity . . . a face and a body by way of which it can be individualized and addressed.”¹⁰⁸ Treaty-making is the principal peaceful method in engaging in legal dialogue—the acquisition of bilateral rights and the incursion of responsibility. Without this capacity, there seems to be no plausible way that an international organization can enter into a legal interaction with other international legal persons, which can be seen as the *raison d’être* of an international organization being an international legal person.

It is necessary to define the boundary of this capacity, inasmuch as the exercise of minimum attributes is not unlimited. The mere fact that there is capacity does not mean that an organization can enter into all types of international agreements.¹⁰⁹ The types of international agreements that the international organization can enter into are determined by the “manner of exercise” of its right, which is governed by the doctrine of functional necessity.¹¹⁰ For example, the capacity to enter into a headquarters agreement seems to be a fair example since no organization would be able to function without at least an office and an address to start with. However, there may be problems if, for example, the International Organization of Vine and Wine were to conclude a treaty with North Korea to limit its plutonium production, even though the international community presumably would welcome such a breakthrough.¹¹¹

V. INTERNATIONAL LEGAL PERSONALITY AND THE INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION

This Article has asserted that every international organization carries some irreducible minimum attributes, by virtue of them having rights *vis-à-vis* their member states, which gives them their status as international organizations. In other words, whenever states confer one or more rights or responsibilities on an international organization, such acts consequentially will give rise to a series of objective minimum attributes that must be possessed for an institution to exist as an international organization proper. The right to claim and the capacity to conclude international agreements are two examples of such attributes, as explained in the preceding part.

To give the reader a sense of how these otherwise abstract notions apply to a real-life situation, this concluding part turns its attention to the International Humanitarian Fact-Finding Commission. It falls far outside the scope of this Article to recite the full history and legal status of the

¹⁰⁸ MULLER, *supra* note 106, at 71-72.

¹⁰⁹ See WHITE, *supra* note 51, at 118.

¹¹⁰ See *id.*

¹¹¹ Indeed, the principle of speciality emphasized in a 1996 ICJ advisory opinion remains intact. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. Rep. 66, 78-80 (July 8).

Commission, not to mention the vast literature devoted to the Commission.¹¹² Suffice it to say that Article 90 of the First Additional Protocol to the 1949 Geneva Conventions created the Commission.¹¹³ However, the Commission actually was not established until 1991 when its first 15 commissioners were appointed.¹¹⁴ The 1987 Commentary explains that the purpose of this Commission was to create a “check on compliance with the rules applicable in case of armed conflict” by a “permanent, impartial and non-political body.”¹¹⁵ The Commentary also noted that the International Committee for the Red Cross favored the creation of this Commission because it did not see itself as fulfilling an investigative role that could report breaches and factual findings, which this Commission was intended to do, in addition to making legal evaluations of certain facts concerning grave breaches and serious violations,¹¹⁶ as provided under paragraph 2(c) of Article 90.¹¹⁷ Much of Article 90 specifies how the Commission is to be formed and how it is to function.¹¹⁸ Article 90 provides the Commission with at least five rights *vis-à-vis* state parties to the First Additional Protocol:

- Paragraph 2(c)(i) makes the Commission competent to enquire of state parties “into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol”;¹¹⁹
- Paragraph 2(c)(ii) makes the Commission competent to “[f]acilitate, through its good offices, the restoration of an attitude

¹¹² For more information on the Commission, see generally Charles Garraway, *Fact-Finding and the International Humanitarian Fact-Finding Commission*, in *QUALITY CONTROL IN FACT-FINDING* 427 (Morten Bergsmo ed. 2013); Françoise Hampson, *Fact-Finding and the International Humanitarian Fact-Finding Commission*, in *2 ARMED CONFLICT AND THE NEW LAW: EFFECTING COMPLIANCE* 53, 76-82 (Hazel Fox & Michael A. Meyer eds., 1993); Kussbach, *supra* note 9, at 174; Aly Mokhtar, *Will This Mummification Saga Come to An End? The International Humanitarian Fact-Finding Commission: Article 90 of Protocol I*, 22 PENN ST. INT’L L. REV. 243 (2003).

¹¹³ Protocol I to Geneva Conventions, *supra* note 8, art. 90.

¹¹⁴ *The IHFFC in a Few Words*, INT’L HUMANITARIAN FACT-FINDING COMM’N, http://www.ihffc.org/index.asp?Language=EN&page=aboutus_general [https://perma.cc/HC4L-S9EA].

¹¹⁵ CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1040, 1042 (Yves Sandoz et al. eds., 1987).

¹¹⁶ *Id.* at 1040.

¹¹⁷ Protocol I to Geneva Conventions, *supra* note 8, art. 90, ¶ 2(c). See also PILLOUD, *supra* note 115, at 1040; Thilo Marauhn, *Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict—The Case of Syria*, 43 CAL. W. INT’L L.J. 401, 454-55 (2013) (mentioning the ICRC’s difficulties in fact-finding).

¹¹⁸ Protocol I to Geneva Conventions, *supra* note 8, art. 90.

¹¹⁹ *Id.* art. 90, ¶ 2(c)(i).

of respect for the Conventions and this Protocol”,¹²⁰

- Paragraph 2(d) states that “the Commission shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned”,¹²¹
- Paragraph 4(a) authorizes the Commission’s Chamber handling the enquiry to “seek such other evidence as it deems appropriate and . . . carry out an investigation of the situation *in loco*” in addition to the evidence the parties to the conflict voluntarily presented;¹²² and
- Paragraph 6 authorizes the Commission to “establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber” to “ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an enquiry, they are exercised by a person who is not a national of a Party to the conflict.”¹²³

All but the last depend in some way on the actions of others,¹²⁴ and so the strength of those rights is somewhat suspect. The last provision clearly gives the Commission the right to create its own rules,¹²⁵ which will then be applicable in any enquiry or investigation the Commission undertakes, no matter whether the state party in question has expressly consented to the application of those rules to that particular situation. The Commission first established its rules on July 8, 1992, which continue in force in their amended form.¹²⁶ These rights, especially the final one, are real in relation to those states that have consented to the Commission’s competence. Before critics dismiss these rights as insignificant compared to the rights the United Nations was invoking in the *Reparation* advisory opinion, they must not forget that the international claim the United Nations sought to bring actually was against a non-state at that time, inasmuch as the advisory opinion was issued

¹²⁰ *Id.* art. 90, ¶ 2(c)(ii).

¹²¹ *Id.* art. 90, ¶ 2(d).

¹²² *Id.* art. 90, ¶ 4(a).

¹²³ *Id.* art. 90, ¶ 6.

¹²⁴ *Cf.* Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT’L REV. RED CROSS 497, 514 (2003) (discussing the dependence of all international humanitarian law on others).

¹²⁵ *But see* Sylvaine Wong, *Investigating Civilian Casualties in Armed Conflict: Comparing U.S. Military Investigations with Alternatives under International Humanitarian and Human Rights Law*, 64 NAVAL L. REV. 111, 162 (2015) (asserting that the Commission’s procedures only can be changed through amendment of the First Additional Protocol while overlooking this right).

¹²⁶ *Rules of the International Humanitarian Fact-Finding Commission*, INT’L HUMANITARIAN FACT-FINDING COMM’N, www.ihffc.org/index.asp?page=rules_of_commission [https://perma.cc/3YC4-AF8D].

on 11 April 1949 and Israel was still fighting its war of independence until 20 July 1949.¹²⁷ In addition, the only right from the 1946 Convention on the Privileges and Immunities of the United Nations that the Court expressly cited was section 35 that related to the binding nature of the convention on member states,¹²⁸ which Articles 95 and 96 of the First Additional Protocol adequately provide.¹²⁹ Therefore, if those rights were sufficient in that situation, the Commission's rights are sufficient here.

In invoking these rights and fulfilling the Commission's functions, Article 90 (1)(c) specifies that the Commission is to act as an independent body with a distinct will of its own from the state parties, given that the 15 commissioners are to "serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting."¹³⁰ Such independence of the Commission, combined with its rights *vis-à-vis* state parties, places beyond doubt the Commission's international legal personality and status as an international organization as opposed to a treaty body as some commentators have classified the Commission.¹³¹ With this status comes (or should come) a package of objective minimum attributes that are not dependent on the Commission's functions, some of which were already mentioned at the beginning of this part. The Commission already has enjoyed the capacity to enter into international agreements when it entered into an agreement on May 18, 2017 with the Organization for Security and Co-operation in Europe for the Commission to investigate an April 2017 incident in Pryshyb in the Luhansk Province of Eastern Ukraine where a paramedic was killed and two members of the OSCE Special Monitoring Mission to Ukraine were injured.¹³² This will be the Commission's first investigation of record, notwithstanding the effort of several institutions to involve the Commission in investigations in the past.¹³³ Commentators have

¹²⁷ See generally U.N. Acting Mediator on Palestine, Comm. Transmitting the Text of an Armistice Agreement Between Israel and Syria from the Acting Mediator on Palestine to the Acting Secretary-General, U.N. Doc. S/1353 (July 20, 1949).

¹²⁸ Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. at 179.

¹²⁹ Protocol I to Geneva Conventions, *supra* note 8, arts. 94-95.

¹³⁰ *Id.* art. 90, ¶ 1(c); see also PILLOUD, *supra* note 115, at 1042.

¹³¹ See, e.g., Charles Garraway, *Fact Finding and States in Emergency*, 22 ILSA J. INT'L & COMP. L. 471, 478 (2016).

¹³² Press Release, Int'l Humanitarian Fact-Finding Comm'n, International Humanitarian Fact-Finding Commission to Lead an Independent Forensic Investigation in Eastern Ukraine (Luhansk Province) (May 19, 2017), <http://www.ihffc.org/index.asp?Language=EN&page=home&mode=newsarchive> [https://perma.cc/C5ZS-HVXF].

¹³³ See Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 CHI. J. INT'L L. 83, 88 (2017) (discussing how Médecins Sans Frontières and the UN Assistance Mission in Afghanistan called for an investigation by the Commission or another institution after the October 2015 attack on the Kunduz Trauma Center in Afghanistan); Tyler B.

speculated that access problems will be a significant limitation to the Commission's ultimate effectiveness with investigations,¹³⁴ and it remains to be seen whether the Commission will be able to overcome these sorts of problems. If the investigating commissioners and assisting staff members can enjoy the privileges and immunities typically afforded to members of international organizations when conducting their functions, such access problems largely will disappear. Constitutions, separate headquarters, host agreements, and privileges and immunities agreements of international organizations usually expressly provide such rights for the international organization *vis-à-vis* member states.¹³⁵ The Commission obviously will want these sorts of host agreements and privileges and immunities agreements in place before the investigation begins.

However, international agreements are not the only avenue for such protections. The ICJ's 1980 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* advisory opinion signaled that custom also can provide such rights. There, the Court was faced with the fundamental question of whether the World Health Assembly could confirm the political decision of the Eastern Mediterranean Sub-Committee of the World Health Organization to move the regional office from Alexandria to a different state in retaliation for the 1978 Camp David Accords between Egypt and Israel.¹³⁶ The Court had difficulty determining whether the 1951 Agreement was a host agreement or a privileges and immunities agreement.¹³⁷ Regardless, it looked at custom to determine how to terminate or otherwise amend the agreement that provided the regional office with privileges and immunities, with the Court determining custom by studying other international organizations' constitutive instruments and by studying the accepted practice between the

Musselman, *Skirmishing for Information: The Flaws of the International Legal System as Evidenced by the Russian-Georgian Conflict of 2008*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 317, 328 (2010) (discussing how Amnesty International called on Russia and Georgia to involve the IHFFC in investigating their 2008 conflict); Wong, *supra* note 125, at 113 (discussing how Amnesty International encouraged NATO to involve the Commission in an investigation into its actions in Kosovo). See also Amy M. L. Tan, *The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an Intentional Accountability Problem*, 49 N.Y.U. J. INT'L L. & POL. 181, 185-86 (2016) (discussing how the Commission had prepared itself to be asked to investigate the Kunduz attack).

¹³⁴ See Wong, *supra* note 125, at 115, 145-46.

¹³⁵ See, e.g., AMERASINGHE, *supra* note 79, at 320-21; JAN KLABBERS, ADVANCED INTRODUCTION TO THE LAW OF INTERNATIONAL ORGANIZATIONS 31-32 (2015); SANDS & KLEIN, *supra* note 68, §§ 15-035, 15-037; SCHERMERS & BLOKKER, *supra* note 10, § 1811, at 1163-64; WHITE, *supra* note 51, at 42.

¹³⁶ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, ¶¶ 28-32, 34-36 (Dec. 20).

¹³⁷ See *id.* ¶¶ 34-46.

WHO and Egypt.¹³⁸ The Court concluded that there already was in place a positive obligation to consult each other in good faith in determining whether and how a transfer would take place.¹³⁹ Therefore, the international organization's regional office enjoyed specific rights relating to privileges and immunities *vis-à-vis* the member states, even without a clear provision in an agreement. It is a small and reasonable step to extend this type of protection to an international organization's staff members through custom if such a custom can be found.

All of this is to say that the international legal personality of international organizations can no longer be called an anachronistic principle of questionable significance. On the contrary, with the rise of the Commission, international legal personality has regained the focus it received in the UN's early days with the *Reparation* advisory opinion. As new life is breathed into dormant international organizations and as emerging international organizations continue to expand their operations in the next few years, the importance of international legal personality will continue to grow. This Article's emphasis on rights over functions in determining international legal personality sets the framework within which this crucial debate will unfold.

¹³⁸ *Id.* ¶¶ 43-50.

¹³⁹ *Id.* ¶¶ 49-50.