

**Applying the Draft Articles on the Responsibility of
International Organizations: Making International
Organizations Accountable**

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To my seven wonderful children who have tirelessly cheered me on in this endeavour.
This includes you, Eli Benjamin, my beloved first-born, for in your silence and suffering
you have spoken to me and motivated me to complete this work more than anyone else.

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Abstract

The primary aim of this research is to investigate whether the Draft Articles on the Responsibility of International Organizations (ARIO) which were completed in 2011 are an effective means of making IOs accountable for international wrongdoing.

In order to determine this a hypothetical case was created based on the imaginary scenario that the IMF required its member states to eliminate capital controls as a condition for obtaining loans from the organization.

This hypothetical case is argued on behalf of the borrowing states and thus the thesis in part has the form of a legal pleading. This approach was deliberately taken in order to provide a practical example of how the ARIO could be applied to any case related to the responsibility of IOs, not just the one under consideration here. The case is first used to illustrate how the ARIO might be applied in order to determine whether an IO's conduct amounts to international wrongdoing and results in international responsibility. Secondly, the case is employed to demonstrate whether the ARIO provide remedies for parties injured as a result of international wrongdoing committed by IOs thereby bringing the latter to accountability.

At the end of the investigation it is apparent that conduct such as the IMF's fictional conduct in relation to its policy would amount to international wrongdoing by an IO in light of the ARIO and would incur international responsibility. However, in the course of applying the ARIO to this fictional case, it becomes evident that although the ARIO are effective for establishing the international responsibility of IOs, they are ineffective as a means of making them accountable for any responsibility they incur because they provide various escapes from the legal consequences for international responsibility. It is therefore concluded that IOs are free to continue to engage in international wrongdoing with impunity despite the creation of the ARIO.

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Abbreviations

AA	Articles of Agreement (for the IMF)
ARIO	Draft Articles on the Responsibility of International Organizations (2011)
ASR	Draft Articles on State Responsibility (2001)
CA	Court of Appeal
DC	District Court
ECtHR	European Court of Human Rights
ESA	European Space Agency
GA	General Assembly (of the United Nations)
GATT	General Agreement on Tariffs and Trade
GC	Grand Chamber
GTI	Global Transparency Initiative
IBRD	International Bank of Reconstruction and Development (World Bank)
ICESCR	International Covenant of Economic, Social and Cultural Rights
IDASA	Institute for Democracy in South Africa
IFI	International Financial Institution
IGO	Inter-governmental Organization
ICJ	International Court of Justice
IDI	Institut de Droit
IIL	Institute of International Law
ILA	International Law Institute
ILC	International Law Commission

ILO	International Labour Organization
ILOAT	International Labour Organization Administrative Tribunal
IMF	International Monetary Fund
IO	International Organization
ITO	International Trade Organization
KFOR	United Nations Kosovo Force
NGO	Non-governmental Organization
PCJ	Permanent Court of Justice
PCIJ	Permanent Court of International Justice
SC	Supreme Court
UK	United Kingdom
UN	United Nations
UNIA	Union of International Associations
UNSC	United Nations Security Council
WHO	World Health Organization
WTO	World Trade Organization

Preface

Until recently there was no codified international law which directly addressed the responsibility of IOs and their member states in the light of which one could investigate possible international wrongdoing by IOs and hold them accountable to wronged states. However, the legal means to do so materialized when the International Law Commission (ILC) completed and deposited the Draft Articles on the Responsibility of International Organizations (ARIO) with the General Assembly of the United Nations (GA) in November 2011. This research was undertaken to examine the ARIO in order to determine whether it is indeed an effective instrument for bringing international organizations (IOs) and their member states to accountability for international wrongdoing. Towards this end, a hypothetical case is utilized as a vehicle for 1) dissecting and applying the ARIO to determine whether or not an international wrongdoing has been committed, 2) assessing its efficacy in bringing those who are internationally responsible for wrongdoing to accountability, and 3) providing an example of how the ARIO might be applied to a case involving international wrongdoing committed by an IO and/or its member states.

The hypothetical case is based on a fictitious complaint by the borrowing states of the International Monetary Fund (IMF) against the Fund regarding the policy of requiring borrowing states to eliminate capital controls in order to obtain loans from it. It must be emphasized that this is an imaginary case because despite claims by various observers that the IMF did impose this policy on its borrowing member states, there is no primary evidence (such as documents written by the IMF requiring borrowing states to eliminate capital controls) available. Consequently, it is accepted that the IMF never

actually imposed this conditionality on its borrowing states and the case created in this paper is based purely on the imaginary scenario that it did impose the policy. The imaginary case is argued on behalf of the states and is grounded in the fictitious contention that the IMF enforced a policy against its borrowing states which was *ultra vires* its constitution and which caused injury to those states.

However, the present study, centred around this hypothetical case, will not be done only in light of the ARIO, but will also utilize the recognized sources of international law described in Article 38(1) of the Statute of the I.C.J. which provides that in deciding disputes submitted to it, the Court shall examine:

1. International conventions.
2. International custom, as evidence of a general practice accepted as law.
3. General principles of law recognized by civilized nations.
4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The format of this thesis is similar to that of a court decision. First the facts and law pertaining to IOs and the IMF are laid down, then, in light of these, a decision is reached or suggested as to whether the IMF or its member states would have incurred responsibility for international wrongdoing against borrowing member states if it had imposed the conditionality of requiring the elimination of capital controls on those states in order for them to obtain loans. The introduction immediately informs the reader of the basis of the fictitious complaint against the IMF and its member states and the nature of the alleged international wrongdoing against states for which they are to be

investigated, then explains the structure of the paper and the issues to be examined. The rest of the study expands on each of the issues adumbrated in the introduction and then, based on the findings that have been disclosed therein, a conclusion is made about the validity of the complaint against the IMF and its member states. Lastly, recommendations are made regarding perceived deficits that still exist in the present international law related to IOs.

If it seems to the reader that this paper is “long-winded”, and that certain topics, such as the international personality of IOs or the treaty-making capacity of IOs, are too extensively discussed, please understand that the aim of this study is to do more than simply examine and decide whether the IMF and or its member states have been responsible for international wrongdoing. Rather, the aim is to thoroughly research and record in one place all the foundational information that is presently relevant and necessary to any case involving the responsibility of IOs so that hopefully in future lawyers undertaking such cases could utilize this paper as a resource that saves them doing the footwork required for such cases and would only need to examine the facts peculiar to the new case in light of this information.

Valerie Leung

Introduction

Until November 2011 the development of codified international law in relation to IOs did not parallel the exponential growth in the number, size and influence of these entities since World War II. Perhaps the most troubling consequence of this dearth of international law which could regulate the conduct of IOs was that IOs could possibly enjoy immunity for wrongdoing perpetrated on the international plane just as they largely do in the municipal sphere. Of course, the major difference between immunity which could be enjoyed by IOs on the international plane and that which obtains domestically is that the former was possible due to an *absence* of law requiring accountability of IOs while the latter is the result of *existing* law which explicitly grants them immunity. For decades, aggrieved parties had no codified international law which could serve as the basis for holding IOs accountable for international wrongdoing and thus IOs have apparently been free to perpetrate such acts with impunity. In 2001 when the ILC adopted the Draft Articles on State Responsibility (ASR), the Commission appeared to draw attention to the need for regulation of IOs by the inclusion of Article 57 which emphasized that the draft articles were “without prejudice to any questions of the responsibility under international law of an international organization, or of any State for the conduct of an international organization”. Yet, the subject of the responsibility of IOs and their member states for international wrongdoing was not addressed by the ILC until relatively recently.¹

¹ When one considers how long it took the ILC to construct draft articles for the Vienna Convention on State Responsibility this can perhaps be viewed without surprise. The topic of state responsibility was initially listed for consideration by the ILC at its first session in 1949, but it was not until 1953 that the General Assembly formally requested the ILC to undertake the codification of law on this subject and 1955 before the ILC appointed a Special Rapporteur for the topic. Work on the draft articles commenced in 1956 and was completed forty years later in 2001.

In December 2000 the GA, responding to the ILC's earlier recommendation that the topic of "Responsibility of International Organizations" be included in the Commission's long-term programme of work, requested that the ILC commence work on this subject.² In 2002 the ILC included the topic in its programme of work, appointed Giorgio Gaja as Special Rapporteur, and established a Working Group for the topic.³ The work of the Commission proceeded and in 2011 the Commission adopted sixty seven draft articles together with commentaries on the topic and recommended to the GA that it take note of the articles in a resolution and that it should eventually conclude a convention on the basis of the draft articles.⁴

For the most part the Draft Articles on the Responsibility of International Organizations (ARIO) are an adoption of the ASR and modified only where it is obviously necessary in order for them to apply to IOs. Generally, they comprise rules for attributing internationally wrongful acts to IOs and states in general (not only member states of IOs) and for determining whether a breach of an international obligation has occurred; a catalogue of circumstances which preclude wrongfulness; principles of reparation; rules for invoking responsibility of an IO by a state or IO; and the object and limits of countermeasures which may be taken by an injured state or IO. As with the ASR, they do not deal with the primary rules of international law, i.e. the content and

² For the ILC's report see *Yearbook of the International Law Commission, 2000*, Vol. II (Part Two), paras. 726-728 and 729 in(1); for the General Assembly's resolution on this matter see *Official Records of the General Assembly, Fifty-sixth Session, 85th Plenary Meeting, December, 2001 (A/RES/56/82)*.

³ International Law Commission, *Report of the Fifty-fourth Session*, UN GAOR, 57th Sess., 2002, Supplement No.10 UN Doc. (A/57/10), para. 18, pp. 461-463, 517 and 519.

⁴ *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10 (A/66/10)*.

duration of international obligations, but rather with the secondary rules of international law, i.e. the legal consequences of not fulfilling the former.⁵

Scope of the Draft Articles

The scope of the ARIO includes the responsibility of IOs for internationally wrongful acts and also the responsibility of states for internationally wrongful acts where those acts are connected to the conduct of an IO.⁶ However, as is cautioned in the commentaries, this reference to the responsibility of a state for the internationally wrongful act of an IO does not necessarily mean that such a responsibility will always be found to exist.⁷ As with the ASR, the ARIO apply only to the responsibility for internationally *wrongful* acts and do not address responsibility for injurious consequences arising out of *lawful* acts.⁸

Case Study of the IMF and its Member States

Since the progressive development and codification of international law on this subject by the ILC the study of this imaginary case was undertaken to examine whether,

⁵ Draft Articles on the Responsibility of International Organizations, with Commentaries. (2011), in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two. p.1, para.3 [hereinafter referred to as ARIO with Commentaries]; James Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) (hereinafter Crawford 2002) pp.14-15; Kristen E. Boon, "New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International organizations" (Spring 2011) 37 Y. J. I. L. 1-10 at p.5, fn.26 [hereinafter Boon, "New Directions"].

⁶ Article 1

⁷ ARIO with Commentaries, p.4, para.1

⁸ The ILC submitted to the GA in 2001 and 2006 two separate sets of draft articles relating to international liability of states for injurious consequences arising out of acts *not prohibited by international law*. (See The Work of the International Law Commission, Seventh Ed. Vol.1. (New York: United Nations, 2007) pp. 214 – 222). These documents are: (1) *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, adopted by the ILC at its fifty-third session, (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*) and (2) *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, adopted by the ILC at its fifty-eight session. (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10, para.66)*) However, it must be emphasized that these articles apply to states and not IOs. It remains to be seen whether the ILC will eventually deem it necessary to also address the liability of IOs for injurious consequences arising out of acts not prohibited by international law.

in light of this new international law as well as other international law, the International Monetary Fund (IMF), and or its member states, by virtue of one of the conditionalities which the organization supposedly imposed on its borrowing member states, breached one or more of the international obligations owed to those member states and thereby incurred responsibility for international wrongdoing against those states.

The alleged wrongdoing by the IMF and or its member states in this case is based on an imaginary scenario in which the IMF imposed a conditionality on prospective borrowing member states whereby they were required to immediately or rapidly eliminate capital controls from their domestic economies before loans from the organization could be granted to them. The fictitious complaint against the IMF in this case has purportedly been made by borrowing member states of the IMF who contend that they suffered losses as a result of complying with this particular IMF conditionality. This case study is a response to that fictitious complaint and must therefore examine the IMF's supposed conduct in light of current international law in order to determine whether such conduct would constitute a violation of that law and would give rise to liability for damages.

What are Capital Controls?

Capital controls are regulatory measures employed by governments to control or limit the flow of capital in and out of the state.⁹ Specifically, capital controls are aimed at

⁹ Neal S. McKnight "Stepping Stones to Reforms: The User of Capital Controls in Economic Liberalization" (1996) 82 Va. L. Rev. 859; Williams, pp. 570-578 discussing the different types of capital controls and the reasons countries use them; Patrick Juillard, "Freedom of Establishment, Freedom of Capital Movements and Freedom of Investment" in eds., Sabine Schlemmer-Schulte & Ko-Yung Tung, *Liber Amicorum Ibrahim F.I. Shihata – International Finance and Development Law* (London: Kluwer Law, 2001) 449 at pp.451-453 and 461-463; Dan Huynh & Peter Sinclair, "What Type of Country

stabilizing the domestic exchange rate, correcting market information imperfections that occur in developing countries, controlling short-term speculative transactions, reducing financial market volatility, curtailing excessive risk-taking by economic agents, inducing capital formation, and giving the domestic financial system time to develop.¹⁰ Ultimately, all these factors are directed at protecting the state's balance of payments.¹¹ Typically, capital controls are imposed upon:

- 1) the purchase or sale of debt or equity securities, mutual funds, or money market instruments;
- 2) a financial loan or guarantee;
- 3) a deposit in a bank account;
- 4) the purchase or sale of real estate;
- 5) a direct investment such as the purchase of a majority interest in an enterprise.¹²

Any of these transactions may be subject to direct or indirect capital controls. Direct controls prohibit or limit transactions, or make them subject to rule-based or discretionary approval.¹³ Indirect controls utilize explicit or implicit taxation to discourage capital flows.¹⁴

Restricts International Capital Movements" in eds., Rebecca Driver et al. *Exchange Rates, Capital Flows and Policy* (London: Routledge, 2005) 301- 318.

¹⁰ Duncan E. Williams, "Note: Policy Perspectives on the Use of Capital Controls in Emerging Market Nations: Lessons from the Asian Financial Crisis and a Look at the International Legal Regime" (2001) 70 *Fordham L. Rev.* 561; Ross B. Leckow "Proceedings of the 1999 Symposium: Regulation of International Capital Markets: The Role of the International Monetary Fund in the Liberalization of Capital movements" (1999) 17 *Wis. Int'l L. J.* 515 [hereinafter Leckow "Proceedings"].

¹¹ McKnight, 861; Williams, 575-578; Leckow "Proceedings", pp. 516-517.

¹² *Ibid.*

¹³ Williams, pp. 570-575.

¹⁴ *Ibid.*

But what was the IMF's view and constitutional mandate regarding capital controls? In order to understand that it is necessary to review the economic philosophy which was an essential part of the foundation of the IMF.

The Economic Philosophy of the IMF in 1944

The architects of the Bretton Woods institutions were anxious to ensure that the economic disaster of the 1930's – The Great Depression – would not be repeated.¹⁵ In particular, one economist's theory regarding the cause of the Depression greatly influenced the policies that the IMF was originally directed to pursue.¹⁶ In brief, John Maynard Keynes postulated that a lack of sufficient aggregate demand resulted in economic downturns. Keynes proposed that Governments could help stimulate aggregate demand not only by employing effective monetary policies, but also by utilizing fiscal policies which embodied increasing expenditures, cutting taxes, reducing interest rates.¹⁷ At the same time, Keynes was also a strong proponent of states maintaining capital controls.¹⁸ He and other founders of the IMF shared the view that the uncontrolled flow of money had contributed significantly to the financial collapse of the 1920's and 1930's and they therefore espoused the use of capital controls to prevent capital flight.¹⁹ Consequently, the drafters of the AA included express provisions

¹⁵ Ibid; Richard N. Gardner, *Sterling Dollar Diplomacy* (New York: McGraw-Hill, 1969) pp. 71-79.

¹⁶ Joseph E. Stiglitz, *Globalization and its Discontents* (New York: W.W. Norton & Company, 2002) p.11 [hereinafter Stiglitz, *Globalization*]; Eric Helleiner, *States and the Reemergence of Global Finance – From Bretton Woods to the 1990s*, (London: Cornell University Press, 1994) pp. 33-50; see within section 6.1.1. of this paper for a more detailed description of John Maynard Keynes' position on capital controls in relation to the IMF.

¹⁷ Stiglitz, *ibid*, p.12.

¹⁸ Benjamin J. Cohen, "Capital Controls: Why Do Governments Hesitate?" in ed., Leslie Elliott Armijo, *Debating the Global Financial Architecture* (Albany: State University of New York Press, 2002) p. 93 at pp. 103-10. [hereafter Cohen, "Capital Controls"]

¹⁹ Ibid.

authorizing the use of capital controls by member states, or their imposition by the IMF on member states, subject only to the condition that controls not be used by states to restrict or delay payments due in settlement of commitments.²⁰ Importantly, the IMF was authorized by the AA to impose or approve the use of capital controls but not to eliminate them.

Thus, at the time of its establishment the IMF was mandated to prevent another global depression by exerting international pressure on states to adopt the above approaches in order to contribute to the maintenance or expansion of global aggregate demand.²¹ However, it was recognized that there would be states which would encounter economic downturns resulting from their inability to stimulate aggregate demand because of insufficient resources. In such cases, the IMF was authorized to provide liquidity in the form of loans.²² In a nutshell, the foundational economic philosophy of the IMF was that markets did not always perform as they should, and that collective global action which promoted expansionary economic policies was needed to ensure economic stability internationally and these would include the use of capital controls by states.²³

The Expansionary Economic Policies Advanced by the IMF

As said, the foundational economic theory of the IMF acknowledged that markets did not always perform efficiently and this could result in high unemployment and

²⁰ See IMF Articles of Agreement, Articles VI (1) (a); VI (3); VII (3) (b); XIV (2), (the condition that states not use controls to avoid making payments is found in Article VI (3)) [IMF Articles of Agreement hereinafter cited as AA].

²¹ Ibid.

²² AA, Article I (v).

²³ Stiglitz, *Globalization*, p.12; Cohen, 99-101.

insufficient domestic revenues to maintain a viable economy.²⁴ Consequently, the founders of the Fund endorsed the need for effecting expansionary economic policies internationally to promote prosperity. Measures such as increased expenditures, reduced taxes, decreased interest rates and the imposition of capital controls would serve this goal.²⁵ The IMF's philosophy was reflected in the purposes of the Fund expressed in Article I of the IMF's Articles of Agreement. Article I provides, *inter alia*, that the IMF would have as the primary objective of its economic policy the expansion and balanced growth of international trade; the promotion and maintenance of high levels of employment and real income; and the development of the productive resources of all members.²⁶ Further, the Fund would promote exchange stability,²⁷ and provide temporary funding to members to enable them to correct maladjustments in their balance of payments *without resorting to measures destructive to national or international prosperity*.²⁸ In conclusion, Article I declares that the Fund shall be guided in all its policies and decisions by the purposes set forth within that Article.²⁹ In addition, the AA mandates the Fund, in its function of overseeing the international monetary system, to "respect the domestic social and political policies of members", and in applying its policies, "to pay due regard to the circumstances of members".³⁰ With regard to capital controls, the AA expressly authorized the IMF or its member states to impose them in Articles VI (1) (a); VI (3); VII (3) (b); XIV (2). The details of these articles will be discussed fully in a later chapter.

²⁴ Ibid.

²⁵ Ibid.

²⁶ AA; Article I (ii)

²⁷ AA; Article I (iii)

²⁸ AA; Article I (v)

²⁹ AA; Article I

³⁰ AA Article IV Sec. (3) (b)

In the 1980's however, there was a change of approach to states' economic problems within the IMF.³¹ No longer were policies based on the perception that governments of developing countries needed assistance to improve markets and thereby reduce poverty. Instead, the IMF began to promote free markets as the solution to the problems of developing countries.³² Governments, with their controls and interventions into the economy of their states, were now portrayed by the IMF as the main obstacles to economic progress within developing states.³³ Accordingly, the Fund began to promote policies which emphasized capital and trade liberalization, combined with fiscal austerity.³⁴ This approach became known as the "Washington Consensus", so called because it was the result of a consensus between the IMF, the International Bank for Reconstruction and Development (IBRD - better known as the World Bank), and the US Treasury regarding the "right" policies for developing countries.³⁵

In order to force developing states to accept this free market ideology and effect liberalization measures, the IMF began to make the implementation of such measures a condition for States to receive much needed funding.³⁶ Thus began the practice of the

³¹ Stiglitz, *Globalization*, p.13; Sarah Baab, *Behind the Development Banks: Washington Politics, World Poverty, and the Wealth of Nations* (Chicago: University of Chicago Press, 2009) pp. 126-136; Leckow "Proceedings", pp. 518-522.

³² Ibid.

³³ Ibid.; Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, Press Release Number 97/22 April 28 1997 <http://www.imf.org/external/np/sec/pr/1997/pr9722.htm> (visited May 9th 2013) Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, section entitled "Statement of the Interim Committee on the Liberalization of Capital Movements Under an Amendment of the Articles" Press Release Number 97/44, September 21, 1997 <http://www.imf.org/external/np/sec/pr/1997/pr9744.htm> (visited May 9th 2013).

³⁴ José E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press 2005) pp. 242-244; Celine Tan, "Regulation and Resource Dependency: The Legal and Political Aspects of Structural Adjustments Programmes" in Daniel D. Bradlow & David B. Hunter, eds., *International Financial Institutions & International Law* (New York: Wolters Kluwer, 2010) pp.196.

³⁵ Jerome I. Levinson, "The International Financial System: A Flawed Architecture" (1999) 23 Fletcher F. World Aff. 1; Baab, 124-136.

³⁶ Catherine H. Lee, "Comment: To Thine Own Self Be True: IMF Conditionality and Erosion of Economic Sovereignty in the Asian Financial Crisis" (2003) 24 U. Pa. J. Int'l Bus. L. 875.

Fund imposing “conditionalities” [sic] on developing states which had to be fulfilled by them in order to access loans and grants.³⁷ In addition to conditionalities concerning macroeconomic indicators such as growth in Gross Domestic Product and an increase in foreign exchange reserves, the conditionalities imposed on borrowing states generally included:

- a) fiscal and monetary austerity, including tax increases, budget cuts, and increased interest rates;
- b) institutional reforms, including an independent central bank, closing “bad” private financial institutions, and accelerating the entry of foreign ones to the domestic financial sector;
- c) trade and financial liberalization;
- d) review of corporate and government structures with the goal of reforming them;
- e) labour market reforms.³⁸

These IMF conditionalities not only failed to “respect the domestic social and political policies of members” as required by Article IV Sec. (3) (b) but there was the spectre of coercion as well. As attested by Joseph Stiglitz, former senior economist of the World Bank, and other observers, borrowing states were often of the opinion that the removal of capital controls, as well as other IMF policies, would not be beneficial to their economies. Nevertheless, they complied with the IMF’s demands for fear of the loss of private lenders and investors which would result from “bad press” from the Fund,

³⁷ Ibid.

³⁸ Ibid; Rajesh Swaminathan, “NOTE: Regulatory Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights (1998) 37 Colum. J. Transnat’l L. 161; R. Barry Johnson et al, “Sequencing Capital Account Liberalization: Lessons from the Experiences in Chile, Indonesia, Korea and Thailand” (1998) International Monetary Fund, Monetary and Exchange Affairs Department.

and because the IMF made compliance with its policies a prerequisite for accessing funding when these states were in need of liquidity. In other words, states were prevented by the IMF from pursuing economic policies which differed to those of the Fund, by the threat, real or implied, that negative consequences would follow such choices.³⁹

In the view of the Nobel laureate economist Joseph Stiglitz the measures imposed by the IMF were not in themselves necessarily inimical to growth. Rather, it was the sequencing and pacing of their implementation, or the lack of it, as well as the disregard for the individual needs and circumstances of the states, the one-size-fits-all approach, which created severe problems within the states.⁴⁰

The IMF's Policy and Practice Regarding Capital Controls

The following section summarizes the opinions of various observers and academics regarding the IMF and conditionalities, in particular in relation to capital liberalization. In their view, for the IMF liberalization of capital markets really meant

³⁹ Joseph E. Stiglitz, *Globalization*, pp.23-52; Joseph E. Stiglitz, "Capital Market Liberalization, Economic Growth and Instability" (2000) *World Development* 28 (6) 1075-86 [hereinafter Stiglitz "Capital"]; Jagdish Bhagwati et al; "Opening Trade in Financial Services – The Chile and Singapore Examples", House Committee on Financial Services, Subcommittee on Domestic and International Monetary Policy, 1 April 2003 available at <http://financialservices.house.gov/>; C. Wyplosz, "How Risky is Financial Liberation in the Developing Countries?" (2000) *Comparative Economic Studies* 44 (2/3) Summer, 1-26; A Demirgüç-Kunt & E Detragiache, "Financial Liberation and Financial Fragility" in G. Caprio, P. Honohan, J.E. Stiglitz, eds. *Financial Liberation: How Far, How Fast?*, (Cambridge: Cambridge University Press, 2001) pp. 96-122; J.E. Stiglitz, "Capital Market Liberalization, Globalization, and the IMF" in J.A.Ocampo, ed. *Capital Market Liberalization and Development*, (New York: Oxford University Press, 2008) pp. 76-100.

⁴⁰ Stiglitz *Globalization*, p. 73, see "The Liberalization and Management of Capital Flows: An Institutional View" IMF Executive Summary, November 14 2012 <http://www.imf.org/external/np/pp/eng/2012/111412.pdf> in which the IMF does a complete about face regarding its view of capital liberalization. It admits the harmful effects to states' economies of removing capital controls, especially without careful sequencing and now advocates the use of them.

the elimination of capital controls. IMF arguments for the removal of capital controls were:

- 1) Free markets were more efficient and allowed for more rapid growth;
- 2) Without capital liberalization countries would not be able to attract foreign investment;
- 3) Liberalization would enhance stability by diversifying the sources of funding;
- 4) Capital controls which gave government officials the discretion to allow or prohibit particular investments can encourage “rent seeking behaviour” and corruption.⁴¹

Based on these beliefs, the Fund laid down the removal of capital controls by states as yet another requirement for access to funding. This, despite the fact that the Western governments did not abandon capital controls until the 1970's and the European Union still had provision for them at the time that the IMF was embarking on its capital control liberalization policy.⁴²

Ross Leckow, Deputy General Counsel of the IMF, stated that though the liberalization of capital movements was not identified as a purpose of the Fund in Article 1 of the Articles of Agreement, the IMF could *potentially* seek to promote capital liberalization within member states by:

1. Fund surveillance via the annual Article IV consultations which are conducted between the IMF and each member state and which provide the Fund with “the opportunity to advise members when and how to remove or maintain particular capital account restrictions.”⁴³ Leckow noted that in furtherance of this approach,

⁴¹ Stiglitz, *Globalization*, p. 17.

⁴² Williams, pp. 589-590.

⁴³ Leckow “Proceedings”, 518-522.

the Interim Committee of the Board of Governors called on the fund in 1998 to place greater emphasis on capital flow issues in its Article IV consultations.⁴⁴

2. Providing technical assistance to improve states' regulation and supervision of financial institutions in order to create the conditions for capital liberalization.⁴⁵
3. *Utilizing conditionality and making financial assistance available to members only after capital account liberalization has been implemented by them.*⁴⁶

The consequences of the Fund's insistence on the rapid elimination of capital controls by developing countries were generally devastating to their economies.⁴⁷ Without these controls, short-term foreign investment began to flow to developing countries (most significantly Mexico and Asian states) in search of higher returns and investment diversification in response to a decline on returns in the industrial economies in the early to mid-1990s.⁴⁸ Further, the successful performance of most of the economies involved made them attractive to investors from developed countries.⁴⁹

Large amounts of short term-capital flowed into cyclical assets such as real estate.⁵⁰ Further, increased capital inflows made credit more available to the private sector within these developing states which in turn contributed to inflated and artificial

⁴⁴ International Monetary Fund, Communique of the Interim Committee of the Board of Governors of the International Monetary Fund, p.3 (b) (April 16th 1998)
<http://www.imf.org/external/np/cm/1998/041698A.htm> Cited in Leckow, "Proceedings", p. 522.

⁴⁵ Leckow "Proceedings", pp. 519-520.

⁴⁶ Ibid.

⁴⁷ Importantly, Ross Leckow, Deputy General Counsel of the IMF, confirmed in a telephone conversation on September, 10th, 2015, that there are no IMF documents on record which evidence that the IMF required borrowing states to eliminate capital controls as a condition for obtaining loans, hence the writer relies on the testimony of the various persons cited below that this conditionality was indeed imposed by the IMF.

⁴⁸ See Williams in general, but pp. 564-567 explaining why the financial crises occurred in Asia especially, but also in Mexico and Argentina; see also references supra at fn.39.

⁴⁹ Ibid.

⁵⁰ McKnight, 862.

asset prices.⁵¹ The increased flow of money into these developing states overwhelmed official capacity to regulate the economy, as well as the ability of the private sector to use these funds efficiently.⁵² The availability of capital, combined with inadequate regulatory and supervisory systems in the financial sector, led to bad banking practices. Over-guaranteed and under-regulated banks, buoyed by the burgeoning capital inflows, made excessive and imprudent loans.⁵³

As asset-price bubbles began to burst and currencies began to depreciate, “hot money” (investments seeking high returns in the short term) flowed in and out of states, sometimes overnight, as investors speculated on currencies, and there was extensive capital flight out of states as investors lost confidence.⁵⁴ Again, overnight investments and capital flight were both possible because of the absence of appropriate capital controls. The so-called contagion effect followed. As the economy of one state began to unravel, investors looked to other states with similar economic profiles and concluded that they would also experience economic crises. On the basis of this assessment, investors began to withdraw funds from the states, thereby precipitating the spread of the economic crisis.⁵⁵

Finally, IMF “bail-out” loans were provided to desperate governments acting on IMF advice to defend currencies which nevertheless fell, leaving the citizens with massive official debt which had been incurred without benefit to the borrowing states.⁵⁶ Some critics are even of the view that these “bailout” packages were actually intended

⁵¹ Williams, 566-567.

⁵² McKnight, 863.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Mary C. Tsai “NOTE: Globalization and Conditionality: Two sides of the Sovereignty Coin” (2000) 31 Law & Pol’y Int’l Bus. 1317.

⁵⁶ Lee, 597.

by the IMF to promote and protect the interests of its major shareholders, particularly the United States, as the loan capital enabled foreign entities to retrieve their investments before a state's economy finally crumbled.⁵⁷

The complaint that the IMF's policy of eliminating capital controls was wrong and harmful has been prompted by the fact that those countries which rejected this policy were spared the extreme hardship experienced by those who complied with it.⁵⁸ Developing countries that have experienced strong economic growth, such as Chile and Malaysia, have used taxes on short term foreign loans and other measures to limit capital inflows and encourage long-term investments.⁵⁹ Notably, the IMF's first Deputy Director has since admitted that IMF policies with regard to capital controls and other issues were too extensive and restrictive.⁶⁰

The foregoing suggests that the IMF, an international organization, in its relationship with some of its member states, imposed policies upon them which were detrimental to those states and were *ultra vires* its constituent instrument, in particular, the policy of requiring borrowing states to rapidly eliminate capital controls in order to be granted loans. However, as said earlier, there is no primary evidence to support this

⁵⁷ Ibid.

⁵⁸ McKnight; even IMF personnel who were previously involved in formulating and implementing this policy of capital liberalization have since admitted that it was erroneous - see: E. Prasad et al, "Effects of Financial Globalization on Developing Countries: Some Empirical Evidence" IMF Occasional Paper No. 220, September 2003; K. Rogoff & E. Prasad, "The Emerging Truth of Going Global" Financial Times, 2 September 2003, p. 21; "The Liberalization and Management of Capital Flows: An Institutional View" IMF Executive Summary, November 14, 2012 <http://www.imf.org/external/np/pp/eng/2012/111412.pdf> ; David Felix, "The Economic Case against Free Capital Mobility" in ed., Leslie Elliott Armijo, *Debating the Global Financial Architecture* (Albany: State University of New York Press, 2002) pp. 126-158.

⁵⁹ Ibid.

⁶⁰ Stanley Fischer, the First Deputy Managing Director of the IMF, Remarks on Asia and the IMF at the Institute of Policy Studies (Singapore: June 1, 2001), at <http://www.imf.org.proxy.bib.uottawa.ca/external/np/speeches/2001/060101.htm> (visited May 20th 2013); Lee, p. 598; see also references supra at note 58.

claim, so this investigation will be based on the imaginary scenario that the IMF did impose this policy. Therefore, the seminal issue to be decided in this case study is whether the IMF, by virtue of this conduct, is responsible for international wrongdoing as defined in Article 4 of the ARIO i.e. the wrongdoing must be attributable to the IMF or its member states, and must constitute a breach of an international obligation owed to the borrowing states. In order to determine this there are several aspects of IOs and the law which applies to them which must be examined. These are as follows:

1. The historical and theoretical basis for IOs in general and the IMF in particular in order to understand why they were created and the overarching mandate and purpose that IOs were intended to fulfil. This information is provided at the outset to establish a standard for the results that IOs should achieve against which the IMF's conduct and the results it has brought about in member states can then be compared.
2. The system of decision making within IOs and the IMF in particular as this impacts how loans to member states are made.
3. Since Article 2 of the ARIO categorically states that it applies only to organizations that possess international legal personality and the constituent instrument of the IMF does not expressly state that it possesses international legal personality, this investigation cannot proceed unless such personality can be attributed to the IMF by precedent. In recent decisions the International Court of Justice (ICJ) has laid out certain criteria that must be satisfied before an entity can be said to possess international legal personality. Hence this case law will be reviewed to discover whether the IMF meets the necessary criteria for such personality.

4. Following on from the above, one of the key criteria of international legal personality that has been established by the ICJ is the ability of an IO to enter into treaties. It is therefore necessary to determine whether the IMF does possess the capacity to enter into treaties with states in order to satisfy this essential requirement for international legal personality. At the same time, the important questions of what are the role and obligations of member states, if any, in any treaty that is concluded by an IO, and whether any international responsibility consequentially accrues to the member states for the violation of a treaty obligation by an IO will be examined.

5. As said, Article 4 of the ARIO defines an internationally wrongful act of an IO as one which is *attributable* to the relevant IO *and* which *constitutes a breach of an international obligation* owed by the same IO.⁶¹ Since the policy of requiring borrowing states to eliminate capital controls as a condition for obtaining loans has already been clearly attributed to the IMF, it is the second component of the definition of an internationally wrongful act, i.e. whether this policy constituted a breach of the IMF's international obligations, which must be determined. In doing so, what must be investigated is whether the IMF had an international obligation *not* to require states to eliminate capital controls. Since the ARIO establish three sources of international obligations for an IO - the rules of the IO, peremptory norms, and treaties to which an IO is a party - the question of whether any of these sources gave rise to an international obligation for the IMF not to require states to remove capital controls will be examined and a conclusion made as to whether the imposition on borrowing states

⁶¹ Importantly, it is the attribution of *conduct* rather than the attribution of responsibility which comprises the first component of an internationally wrongful act. (ARIO with Commentaries, p.16, para.3) However, in accordance with the provisions of Chapter IV of the ARIO, *responsibility* for an internationally wrongful act may be attributed to an IO although the conduct which gave rise to the act was attributed to a State or another IO. (ARIO with Commentaries, p.16, para.2).

by the IMF of the policy that capital controls be eliminated in order to receive loans from the organization constituted international wrongdoing by the IMF.

6. However, even if it is found that an international obligation *not* to require states to eliminate capital controls had arisen under any of these three sources, this obligation could be countered if the IMF had an inherent or implied power to impose these requirements on states. Obviously, if it does have such a power there could be no possibility that the imposition of this requirement could constitute a violation of its international obligations. Therefore, before deciding whether the IMF breached any of its international obligations to its member states by requiring them to eliminate capital controls as a conditionality for receiving IMF loans, the question of whether or not the organization possesses an implied or inherent power to impose such a requirement on borrowing states must be decided.
7. If it is found that 1) under its rules, treaties binding on it, and peremptory norms the IMF had an international obligation *not* to impose the policy of eliminating capital controls on borrowing states and 2) the organization does *not* possess an implied or inherent power to require the elimination of capital controls, then it must be concluded that the IMF clearly breached its international obligations by imposing this particular policy and has incurred international responsibility for international wrongdoing against the states involved. But the investigation does not end there.
8. If international wrongdoing against borrowing member states by the IMF and or any of its member states is established, there should be reparation for the injured states. However, the separate legal personality of IOs and the immunities enjoyed by them may prove to be effective barriers to injured parties realizing any damages from either IOs or

their member states. Hence, these two aspects of the consequences of the responsibility of IOs will be examined at length.

9. Lastly, after seeking to apply the present law of responsibility to the IMF a conclusion will be drawn as to the efficacy of the ARIO not only for the IMF but for IOs in general and whether it actually provides a means for parties injured by IOs to access justice.

Part I – Why International Organizations?

Chapter 1

1.0. The Organizational Evolution of IOs

Traditionally, international society was viewed as the sum total of interstate relations, or from a “state-centric perspective”,⁶² but while it is certainly true that the primary actors on the international stage have been and remain nation states, IOs have also become very effective and influential vehicles for inter-state cooperation or internationalism.⁶³ However, though most of the IOs currently in existence were created in the last century, IOs are not a twentieth century invention of international society and were perhaps the inevitable offspring of internationalism.⁶⁴

Internationalism or global consciousness has been defined as the awareness between peoples that there were certain problems and interests which were common to each of them, and that these could be most effectively dealt with by cooperation and pooled resources.⁶⁵ In the application of this realization, two particular aspects of organized societies have most notably fostered the emergence of organizational structures amongst them.⁶⁶ The first aspect was the reality that trade which is circumscribed by a society or a state’s borders remains static or deteriorates for the lack of marketing opportunities and the want of the enhancement and expansion of products afforded

⁶² R. A. Mullerson, *Ordering Anarchy: International Law in International Society* (New York: Kluwer Law International, 2000) p.105.

⁶³ Jan Klabbers, *An Introduction to International Institutional Law* (New York: Cambridge UP, 2002) p. 28 [hereinafter Klabbers, *Introduction*].

⁶⁴ Lawrence T. Farley, *Change Processes in International Organization* (New York: Schenkman Books Incorporated, 1998) p.17.

⁶⁵ Akira Iriye, *Global Community - the Role of International Organizations in the Making of the Contemporary World* (New York: University of California, 2002) p.9.

⁶⁶ Phillip Taylor, *Nonstate Actors in International Politics: From Transregional to Substate Organizations* (New York: West View Pub, 1984) p.3 [hereinafter cited as Phillip Taylor 1984].

by wider exposure.⁶⁷ The second aspect was the age-old inability of societies or states to provide and maintain absolute security for their borders.⁶⁸ Recognition of these facts by societal units was a natural catalyst for the establishment of organized structures, however rudimentary, for creating, promoting, and monitoring cooperation and interdependence in the areas of commerce and security.

This recognized need for cooperation amongst groups, for whatever purpose, gave rise to the practice of negotiating and forming alliances and treaties between them in order to advance a particular goal.⁶⁹ In turn, the representatives from tribes and states which concluded these alliances were organized into units which were given labels such as councils or league.⁷⁰ Possibly, it was such councils that later provided the concepts and patterns of organization for the formation of political confederations by city-states.⁷¹ Such developments demonstrated that alliances and contracts between groups, whether clans, tribes, or city states, would inevitably require structures which would arrange and give effect to them. Hence, these alliances, with the units of representatives who negotiated and administered them, were the precursors of the

⁶⁷ Ibid. p. 3.

⁶⁸ Ibid.

⁶⁹ Alliances cemented by covenants and treaties are recorded in ancient literature. For example Greek literature describes alliances in Homer's *Iliad*, Herodotus' *Persian War*, and Thucydides' *Peloponnesian Wars*. Farley, p. 34; examples of trade and peace treaties are also recorded in The Bible in the books of Joshua, Chapter 9, verse 1; 1 Kings, c. 3, v. 1; c. 5, vv.1-12; c. 15, v.19; c. 20, vv.31-34; 2 Chronicles, c. 16, vv.1-3; *Holy Bible in the King James Version*, (Nashville: Thomas Nelson, 1984).

⁷⁰ Georges Abi-Saab, ed. *The Concept of International Organization* (Mahwah: Bernan Associates, 1981) p.28; Gerard J Mangone, *A Short History of International Organizations* (New York: McGraw Hill, 1954) p.18; examples of councils are small Chinese states which organized themselves into a council to formulate plans for military protection against the threat of the Kingdom of Ch'u in the 7th and 5th centuries BC and the amphictyonic councils of the ancient Greek world which were made up of representatives from various tribes and city states that were devotees of the same deities and were organized to establish rules pertaining to such matters as the protection of shrines and temples and the safety of pilgrims. Ibid; Mangone, p. 18.

⁷¹ Mangone, p. 19; one of the best-known examples of these was the Hanseatic League of the fourteenth and fifteenth centuries which consisted of about seventy German cities that had united to protect themselves from piracy and to address other issues which would enhance trade. Arthur Nussbaum. *A Concise History of the Law of Nations* (New York: Macmillan, 1962) p. 33-34; Abi Saab, p. 29. Mangone, p. 20-21.

complex and structured international organizations which later evolved over the centuries.⁷²

By the end of the nineteenth century the characteristics of IOs which were of special importance to future IOs were as follows:⁷³

- 1) They were generally established by a multilateral treaty.⁷⁴
- 2) They were permanent institutions comprised of membership from several states.⁷⁵
- 3) They had secretariats, and sometimes a council or other decision-making body to implement the broad decisions agreed to at the general conferences.⁷⁶
- 4) They convened regularly for formal, general meetings.⁷⁷
- 5) Each member had an equal vote and majority gradually replaced unanimity.⁷⁸
- 6) The concept of weighted voting based on budgetary contributions was introduced as a solution to the tension which existed between member states who were theoretically equal in sovereignty, but were experientially unequal in political influence for various reasons.⁷⁹
- 7) No longer was representation limited to the interests of the particular member states but attention was extended to the interests of other bodies and territories,

⁷² Farley, p. 34. Mangone, p. 14. See Mangone p. 14-17 for discussion of the history of treaties and several examples of ancient ones.

⁷³ Items 1-10 - J. C. Plano and R. E. Riggs, *Forging World Order* (London, Collier-Macmillan, 1967) cited in Paul Taylor and A. J. R. Groom. *International Organizations: A Conceptual Approach*. (New York: Nichols Pub..Co, 1978) pp.23-24.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ I. L. Claude. *Swords into Plowshares* (New York: Random House, Incorporated, 1988) pp. 36-7 [hereinafter Claude, *Swords*]. Harold K. Jacobson, *Networks of Interdependence: International Organizations and the Global Political System*. 2nd Ed., (New York: Alfred.A.Knopf, 1984) p.31..

⁷⁸ Ibid.

⁷⁹ D. W. Bowett. *The Law of International Institutions* 4th ed. (London: Published under the auspices of the London Institute for World Affairs by Stevens & Sons, 1982) p.1. [hereinafter Bowett 4th ed.] p. 9.

and this “injected a realism and degree of practicality which was of the utmost importance for future development”.⁸⁰

- 8) Some organizations had judicial or quasi-judicial powers and created specialized courts to settle disputes about administrative actions.⁸¹
- 9) The concept of legal personality for IOs was introduced, and IOs so recognized were consequently able to own property, sue and be sued, and have a measure of diplomatic immunity.⁸²
- 10) The function of IOs was usually to address one specific issue. Single IOs which simultaneously dealt with multiple issues – political, economic, and social – were creatures of the twentieth century.⁸³
- 11) Decision-making was by member states ratifying treaties or adopting resolutions.⁸⁴

Hence, by the turn of the century there were distinctive organizational concepts and structures which had developed for IOs. However, one functional aspect of IOs that continued to limit their efficacy on the world stage even up to the time of the First World War was their failure to cooperate and to co-ordinate their activities.⁸⁵ This was no doubt due at least in part to the reluctance on the part of states to create or join IOs, or endorse organizational structures which would give permanency to them for fear that IOs might undermine their sovereignty⁸⁶.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Bowett, 4th ed. p. 9. Claude, *Swords*, p. 46. Mangone, p. 128.

⁸⁶ Jacobson, p. 31. Example cited explains that the International Telegraph Union was created in 1865, but three years elapsed before a permanent bureau was set up.

1.1. The League of Nations and IOs in the Twentieth Century

In the wake of the devastation of the First World War, there was a widespread belief that it was the same lack of cooperation alluded to above that had led to the war, and that it could have been averted by discussion and negotiation at an international level.⁸⁷ Attention was now turned to the need for collaboration and not merely consultation on political affairs.⁸⁸ A proposal was therefore made for an international institution that would (1) facilitate reasoned discourse and cooperation between nations and international institutions, (2) constitute a tribunal for arbitration and pacific resolution of disputes between states, and (3) create a united body of states whose members would support each other in the event of an act of aggression against any other member by another state and as a means of discouraging wars.⁸⁹

In pursuit of this, at the peace conference which was convened in Paris in January 1919, a resolution was adopted whereby states undertook to complete all the necessary steps in order that a permanent international organization, eventually named the League of Nations, would be established for the purpose of uniting civilized states to advance the cause of peace and regulate international affairs.⁹⁰ The Covenant establishing the League and its world court (the Permanent Court of International Justice - PCIJ) was approved in April 1919 and later incorporated into the Treaty of Versailles.⁹¹

⁸⁷ Claude, *Swords*, p. 45 ; Zweifel, p. 43.

⁸⁸ Mangone, p. 128.

⁸⁹ Clive Archer, *International Organizations* (New York: Routledge, 2001) p. 1; Thomas D. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power* (New York: Lynne Rienner, Incorporated, 2005) p. 43.

⁹⁰ Leroy A. Bennett. *International Organizations: Principles and Issues* 6th ed. (New Jersey: A. Simon & Schuster, 1995) p.26.

⁹¹ *Ibid.*, p. 26.

The League and its world court embodied international optimism that in place of force, the cooperation which had thus far eluded nations would now be realized to solve international problems.⁹² The plan for peaceful co-existence between states included cooperation not only on political issues, but also areas such as health, economics, technology, and humanitarian work. This was to be achieved by collaboration not only between states, but also between IOs which would be under the direction of the League.⁹³ In addition, several auxiliary organizations and commissions were created around the main organs of the League to address a variety of issues more specifically.⁹⁴

However, in the long term both IOs and states proved that they were not prepared to subjugate their own interests for the sake of the universal good. Many of the administrative unions were unwilling to come under the direction of the League for fear of a loss of independence or out of concern that their support would contribute to the League becoming a world government.⁹⁵ On the part of states, although membership in the League was almost universal, (one significant exception was the United States which had refused membership in the League from its inception), by the 1930s there were withdrawals by major states who, in flagrant disregard of the spirit and letter of the Covenant of the League, were pursuing their own interests by engaging in acts of aggression against other members.⁹⁶ As a result of this lack of cooperation by members of the global community, by 1939 the League was effectively extinguished by the

⁹² Zweifel, p. 45.

⁹³ Bowett, 4th ed. p. 9; Article 24 of *The Covenant of the League*, see: <http://www.firstworldwar.com/source/leagueofnations.htm>

⁹⁴ Bowett, 4th ed. p. 34; *The Covenant of the League*, Article 23, Ibid. Examples are the Economic and Financial Organization, the Organization for Communications and Transit, the Health Organization, the Advisory Commission for Refugees, and the Advisory Committee on Opium and Other Dangerous Drugs.

⁹⁵ Abi-Saab, p. 44. Bowett 4th ed., p. 9.

⁹⁶ Bennett, p. 280.

outbreak of the Second World War and was formally dissolved in April 1946.⁹⁷ However, like the Concert System of the nineteenth century, despite the demise of the League, it provided lessons for future IOs that could be derived from its failures and its success.

By the time of its dissolution the League was the most ambitious experiment in multilateralism that had yet been tried and it aspired to three principles which would become important goals of future IOs.⁹⁸ The first was the principle of universality which permitted every independent state, even the smallest, to accede to membership if it so desired.⁹⁹ This was of particular importance to the twentieth century since during the life of the League self-determination had begun to be emphasized over colonialism, and in the ensuing decades this would result in an expansion in the number of sovereign states which would expect democratic representation on the world stage.¹⁰⁰ The second was the principle of perpetuity so that states would have a permanent forum for representation.¹⁰¹ The third, although the League failed in this aspect, was the concept of collective security whereby each state was committed to the preservation of the security of all other members, with emphasis on the responsibility of the stronger states for the weaker.¹⁰²

Further, besides having incorporated into its structure all of the organizational mechanisms of IOs which had accumulated by the end of the nineteenth century, the League added an important organizational innovation pertaining to relationships with

⁹⁷ Malcolm. N. Shaw, *International Law*, 4th ed. (New York: Cambridge UP. 1997) p. 892 [hereinafter Shaw 4th ed]. See also George W. Keeton. *National Sovereignty and International Order: An Essay upon the International Community and International Order*. (London: Peace Book Company, 1939) p. 9-32. It should be noted that Keeton offers a view of the reasons for the failure of the League that is contemporary to the League's existence.

⁹⁸ Watson, p. 284.

⁹⁹ Ibid.

¹⁰⁰ Zweifel, p. 43.

¹⁰¹ Bowett, 4th ed. p.21; Watson p.284.

¹⁰² Ibid.

other IOs. Although it had largely failed in securing political cooperation among States, the League had been very successful in securing itself among other organizations by converting them into organs of its own institution as envisioned in Article 24 of the Covenant.¹⁰³ In doing this, it became a “hub” for these organizations and established a paradigm for “institutional centralization”.¹⁰⁴ This proved to be an effective means of improving international cooperation in areas such as economics, finance, transport and communications, social and labour problems, and public health.¹⁰⁵ In fact, so effective was this approach that it was later employed by the United Nations in the form of a central organ responsible for all economic and social affairs - the Economic and Social Council.¹⁰⁶

On the negative side, there was a major constitutional defect in the League which was largely responsible for its failure in the area of collective security.¹⁰⁷ Besides the PCIJ, there were three principal organs in the League: the Council, the Assembly, and the Secretariat. The Council and the Assembly had exclusive jurisdiction for certain matters, but in the matter of maintaining peace they had concurrent jurisdiction.¹⁰⁸ Added to this was the fact that all members, in the Council and in the Assembly, had veto power in important matters.¹⁰⁹ The consequence of this “decentralized system of sanctions” was that there was often a gridlock amongst members regarding important decisions and this paralyzed the League.¹¹⁰ The United Nations later sought to remedy

¹⁰³ Evan Luard, *The Evolution of International Organizations* (New York: Frederick A. Praeger, 1966) p. 36-39; Abi-Saab, p. 44.

¹⁰⁴ Claude, *Swords*, p. 44.

¹⁰⁵ Abi-Saab, p. 44. Luard, p. 36-39.

¹⁰⁶ Luard, p. 38.

¹⁰⁷ Bowett, 4th ed.p. 20.

¹⁰⁸ Ibid., p.20. Jacobson, p. 40.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

this defect by granting veto power to the members of its Security Council only, but still this has failed to achieve collective security because of the age-old problem of differences in national interests and the unwillingness of members of the Council to act for the common good.¹¹¹

1.2. Establishment of the United Nations

Throughout the twentieth century the number of IOs continued to multiply, both governmental and non-governmental. After the dissolution of the League of Nations, IOs continued to be formed based essentially on the same organizational mechanisms and precepts that had accumulated by the end of the nineteenth century, along with those derived from the League experience.¹¹² However, the most significant of these post League IOs was undoubtedly the United Nations (UN).

As with previous wars, the Second World War created an impetus for the establishment of new IOs which it was hoped would solve the problems that either led to the war or those that resulted from the war.¹¹³ The United States, along with Britain, was one of the first visionaries for the establishment of the UN and had a leading role in its formation but in this instance it continued on with it and actually became a member of

¹¹¹ Abi-Saab, p. 47.

¹¹² Archer, p. 24; the one significant addition to the structure of IOs that has emerged since the mid-twentieth century has been the concept of regional organizations. Perhaps as a reaction to the failure of the United Nations to effect collective security, regional organizations began to appear in the configuration of IOs after the Second World War. They usually began as an alliance formed for economic or security purposes between a few states which evolved into a permanent institution. Organizations such as the Arab League, the North Atlantic Treaty Organization, the Western European Union, and the Organization of American States developed because of geographical proximity or other commonalities which bound them, such as ideology, culture, or economic structures. However, despite their regional identity, they are still recognized as IOs so long as their membership consists of three or more states, regardless of their location.

¹¹³ Michelle Sanson, *International Law and Global Governance* (London: Cameron May, 2008) p. 96.

the UN.¹¹⁴ From August to October 1944 China, the US, the USSR and Britain met at Dumbarton Oaks, a private mansion in Washington D.C, for preliminary planning regarding the structure and functions of the new organization whose primary purpose would be the advancement and maintenance of international peace. In the resulting document were proposals that besides the international court (which would be renamed the International Court of Justice - ICJ) and secretariat, the UN would also comprise the Security Council (SC), the General Assembly (GA). In addition, the Economic and Social Council (ECOSOC) which was to work under the auspices of the GA was also planned. Perhaps the most important concept to be incorporated into the structure of the UN was that member states would place armed forces at the disposal of the SC which would have ultimate responsibility for suppressing aggression and ensuring peace internationally. This function was included in the UN because it was felt that its absence from the League of Nations was one of the primary reasons that it had been unable to prevent World War I. One issue not addressed at Dumbarton Oaks was the voting structure to be utilized within the UN. This was settled later by the US, Britain and the USSR at the Yalta Summit Conference convened in Russia in February of 1945.¹¹⁵ However, the formula proposed included veto power for those states that emerged from World War II as the great powers and was designed to entrench and preserve their hegemony within the UN and would later prove the most troublesome matter at the conference which was convened to finalize the Charter.¹¹⁶

¹¹⁴ Ibid.

¹¹⁵ United Nations, *The History of the United Nations*, <http://www.un.org/en/aboutun/history/index.shtml>

¹¹⁶ Bennett, pp. 49-51; Helmut Volger, "History of the Foundation of the UN" in Helmut Volger, ed. *A Concise Encyclopedia of the United Nations 2nd rev'd ed.*, (Boston: Martinus Nijhoff, 2010) 216 at pp. 225 -229.

In April 1945 the UN Conference on International Organization was held in San Francisco to study and debate the Dumbarton Oaks proposals and hopefully finalize the Charter of the UN. The fruit of that undertaking was that on June 26 the Charter was unanimously adopted by the fifty Allied nations represented at the conference and later also signed by Poland which had been absent from it. Between April and October the Charter was ratified by a majority of the signatory states and on October 24 1945 the UN officially came into existence after four years of planning.¹¹⁷ But it came at the price of the smaller nations having to yield to the five dominant states in the matter of them having a permanently controlling role in the UN via the SC and the veto power as the choice placed before the weaker states at the Conference was to accept the veto or to have no Charter and no UN.¹¹⁸

At the inception of the UN the SC was made up of five permanent members and six non-permanent members which were to be elected by the GA for two-year terms but in 1965 the latter was extended to ten.¹¹⁹ The five permanent members comprise the four states that participated in the conference at Dumbarton Oaks plus France.¹²⁰ The SC has always been tasked with ultimate responsibility for preventing war and the five permanent members have always had a hegemonic role in the UN as all decisions on substantive matters can only be implemented by a unanimous vote among them, thus each of the five have veto power.¹²¹ Moreover, Article 25 of the Charter provides that

¹¹⁷ Muldoon, p. 108.

¹¹⁸ Bennett, p. 51; Sanson, pp. 96-97; L. Inis Claude, "The Security Council" in ed. Evan Luard, *The Evolution of International Organizations* (New York: Frederick A. Praeger, 1966) 68 at 69; Volger, pp. 225 -229.

¹¹⁹ UN Charter, Article 23.

¹²⁰ Ibid.

¹²¹ UN Charter, Articles 12, 24 (1); and 27 (3).

“[T]he Members of the United Nations agree to accept and carry out the decisions of the Security in accordance with the present Charter.”

The GA is composed of all the members of the UN and each member state is allowed one vote.¹²² It is mandated to investigate, discuss, and make recommendations related to international issues (in health, law, human rights, economics, social, humanitarian, education, and political fields), and supervise and coordinate the activities of the UN, but it may not make recommendations on any dispute or issue being considered by the SC.¹²³ Hence the hegemony of a few member states within the organization is again illustrated.

The seminal principles enshrined in the UN Charter to substantiate the UN's primary purpose of international peace keeping was sovereign equality (Art. 2(1)), as evidenced by each member having an equal vote in the GA and the stated rule of non-interference in the domestic affairs of sovereign members (Art. 2(7)); good faith (Art. 2(2)); and collective security (2(5)).¹²⁴ However, this has for the most part been merely theoretical since it was obvious from the outset that having five states (the permanent members of the SC) which exercised overriding authority in the decision-making of the UN did not constitute sovereign equality, and the fact that states voted first and foremost in their own interests rather than the best interests of all members undermined the principle of good faith and threatened collective security.¹²⁵

¹²² UN Charter, Articles 9 (1) and 18 (1).

¹²³ UN Charter, Articles 10 – 17.

¹²⁴ Sanson, p. 97; Margaret P. Karns & Karen A Mingst, *International Organizations: The Politics and Processes of Global Government* (Colorado: Lynne Rienner, 2004) pp. 99-100; Bennett, pp. 82-84.

¹²⁵ Ibid. Sanson, pp. 97-98,

1.3. Establishment of the IMF

The most significant IOs forged by the victors of the Second World War were the United Nations and the Bretton Woods Institutions. The latter originated in the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, in July 1944 and comprised the IMF, the IBRD, better known as the World Bank, and the International Trade Organization (ITO) but this never got off the ground and was replaced by the General Agreement on Tariffs and Trade (GATT) which eventually evolved into the World Trade Organization (WTO) in 1995.¹²⁶

The GATT was supposed to govern international trade relations, while the IDRB and the IMF were respectively charged with overseeing the fiscal and monetary policies of their member states.¹²⁷ The IDRB was intended to address structural issues such as the financial institutions of states, labour markets, and Government spending, while the IMF was mandated to monitor states' macroeconomic policies – budget deficits, inflation, trade deficits, and foreign debt.¹²⁸ It should however be noted early that these roles became blurred, with the IMF by its own admission, assuming primary jurisdiction over financial and structural policies.¹²⁹

¹²⁶ The World Bank, *The Bretton Woods Monetary Conference, July 1-22, 1944*: <http://go.worldbank.org/A5PNZYX5T0>; World Trade Organization, *The GATT Years, from Havana to Marrakesh*: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm; the International Trade Organization (ITO) was the original Bretton Woods trade body, but it was “stillborn” and thus the GATT was utilized by states to administer trade relations until the establishment of the WTO. See Gardner, pp. 101-109 on the birth of the ITO and pp. 348-378 on its demise.

¹²⁷ Gardner – the entire book, which provides an excellent history and analysis of the formation of the U.N. and the Bretton Woods IOs; Stiglitz, *Globalization*, p. 14; George Curzon & Victoria Curzon, “GATT: Trader’s Club” in eds., Robert W. Cox & Harold K. Jacobson, *The Anatomy of Influence* (London: Yale University, 1974) 298 at pp. 298-299; John W. Head, *Losing the Global Development War* (Leiden: Martinus Nijhoff, 2008) pp. 134-142.

¹²⁸ Ibid.

¹²⁹ Website, supra at note 126.

Administrative Structure of the IMF ¹³⁰

The Board of Governors is the highest authority governing the IMF. Each member state appoints a Governor (usually its Minister of Finance or the Governor of the Central Bank) to the Board.¹³¹ However, as will be discussed in greater detail in chapter three, within the Board each Governor can only exercise the voting share his state has so the representation of states is not equal and democratic. Furthermore, although the Board is the highest decision making body in the IMF, since it only meets annually to decide on major policy issues, it delegates its authority to the Executive Board to conduct the day to day business of the IMF.¹³²

The Executive Board consists of twenty-four Executive Directors (EDs) under the leadership of a Managing Director who serves as the Chairman and three Deputy Managing Directors.¹³³ EDs are either appointed by a State or elected for two-year terms by groups of countries known as constituencies.¹³⁴ Presently, there are only five States which each appoint their own ED – U.S, Japan, United Kingdom, France and Germany.¹³⁵ The remaining 183 Member States are represented by the nineteen other EDs.¹³⁶

In addition to these two administrative bodies, there is the International Monetary and Financial Committee (IMFC) which is a Committee of Governors¹³⁷. The IMFC

¹³⁰ IMF, *Governance Structure*: <http://www.imf.org/external/about/govstruct.htm>; IMF, *IMF Executive Directors Voting Power*: <http://www.imf.org/external/np/sec/memdir/eds.aspx>

¹³¹ Ibid., AA, Article XXX.

¹³² IMF website at note 129; AA, Article XII Sec. 3(a).

¹³³ AA, Article XII Sec. 3(b); Stiglitz observes that: “[e]ither by custom or tacit agreement” the Managing Director is always a European.” Stiglitz, *Globalization*, p.19

¹³⁴ AA, Article XII Sec. 3(b) (d)

¹³⁵ AA, Article XII Sec, 3 (b) (1)

¹³⁶ Ibid.

¹³⁷ IMF website supra at note 130.

convenes twice yearly to consider key policies relating to international monetary policy and is advised by a joint committee of governors of the IMF and the IBRD known as the Development Committee.¹³⁸

¹³⁸ IMF website *supra* at note 130.

Conclusion

It is apparent from the review of the evolution of IOs that despite the fact that states have resorted to war to resolve disputes innumerable times throughout history they have not been blind to the destructiveness of war and the primary concern in international relations has therefore always been the danger of hostility between peoples, whatever the cause, leading to war. Clearly, the overarching need and pre-occupation on the international plane has always been the avoidance of war by attaining and maintaining individual security for each community and peaceful relations between groups. Hence, the single most important catalyst for international organization is the promotion and preservation of peace. As Inis. L. Claude wrote:

“[t]he fact remains that the main impetus for international organization has been derived from the urge to avoid war, and the subjective basis for organizational efforts would be greatly weakened if the danger of war were eliminated. International organization must be regarded primarily as an expression of the quest for peace.”¹³⁹

¹³⁹ Claude, *Swords*, p. 216.

Chapter 2

2.0. The Theoretical Underpinnings of IOs and the IMF

As has already been explained in chapter one, the goal of achieving international peace was the primary impetus for the development of diplomatic relations amongst States and diplomatic relations led to the formation of IOs. Consequently, the various theoretical approaches to realizing peace among nations have also been the theoretical bases for the formation of IOs.¹⁴⁰

2.1. The Pacific Settlement Basis¹⁴¹

Perhaps the oldest of these approaches is the pacific settlement of disputes. This no doubt arose from a historical cognizance of the twin realities that war was the most destructive solution to disputes and potentially harmful to the entire international community, and conversely, that peaceful resolution of disputes was beneficial to the majority. The basic premise of the pacific approach was and still is that since the international community could be harmed by any war, it had a stake in avoiding war and therefore third parties to bellicose states were justified in intervening to persuade them to delay the onset of war and eventually settle disputes peacefully. Effecting delay is a key component of the pacific approach hence diplomatic intervention by neutral third parties is aimed at bringing about peace not only by negotiations but also by delaying the commencement of war in the hope that the passage of time would facilitate the subsidence of hostilities.¹⁴²

¹⁴⁰ Farley, pp. 39-49; Nigel D. White, *The Law of International Organizations*, 2nd ed. (Manchester: Manchester University Press, 2005) pp. 2-13; Karns & Mingst, pp. 35-62.

¹⁴¹ Karns & Mingst, pp. 277-354.

¹⁴² Ibid, pp.223, 229.

The historicity that mankind has employed this approach to subjugate his apparent proclivity for war to the peaceful settlement of disputes is evidenced by agreements between city-states in ancient Greece stating “if there be any dispute . . . whether about boundaries or anything else, the matter shall be judicially decided. But if any city of the allies quarrel [sic] with another, they shall appeal to some city which both deem to be impartial.”¹⁴³ Centuries later, it was obvious from the names of the treaties signed at the Hague Conferences (1899 and 1907) that States were still endeavouring, albeit through the embryonic forms of IOs, to promote peace by employing this approach. Both conferences produced a treaty entitled Convention for the Pacific Settlement of International Disputes which focused on the laws of war and established structures such as the International Commissions of Inquiry and the Permanent Court of Arbitration which were intended to be utilized by States to peacefully settle disputes between them.¹⁴⁴

Eventually, in place of neutral third party groups, whether clans, cities or States, IOs were established with the primary purpose of promoting and maintaining international peace and eradicating wars. In both the Covenant of the League of Nations and the United Nations Charter there were express provisions which showed that the pacific theory was foundational to the mandate and functions of these IOs.¹⁴⁵

2.2. The Federalism Basis

Rivalries and hostilities between communal units, whether clans, tribes, or States, developed whenever there was increased contact and relations between them

¹⁴³ J. B. Scott, *Law, the State, and the International Community* (New York: Columbia University Press, 1939), II, 264, cited in Claude, *Swords*, at p. 217.

¹⁴⁴ Claude, *ibid.*

¹⁴⁵ Respectively, Articles 1-3, 9, and 16 of the Covenant and Articles 10-15 of the Charter; Claude, *Swords*, 223.

as a result of trade, improved communication, and travel amongst them as these inevitably gave rise to other power struggles and disagreements stemming from social and political issues and self-interest in general. This became more apparent with the advent of city-States in the sixteenth and seventeenth centuries and with the industrial revolution of the nineteenth century for as trade and contact between them expanded States became more determined to protect their national interests and this led to a rise in nationalism.¹⁴⁶

One solution that was proposed to resolve these conflicts between States was the system of internationalism i.e. the amalgamation of all States into one entity with a single supra-national government working for the interest of the one constituency so that rivalries and conflicts between individual States would no longer exist.¹⁴⁷ However, the aforementioned nationalism, which was a natural by-product of the realist theory of the sovereignty of States, prevented this.¹⁴⁸ In other words, the concept of State sovereignty was the greatest obstacle to internationalism or international governance.¹⁴⁹

¹⁴⁶ See C.J.H Hayes, *The Historical Evolution of Modern Nationalism* (New York: Macmillan, 1961); Hans Kohn, *The Idea of Nationalism; a Study in its Origins and Background* (New York: Macmillan, 1961); Clyde Eagleton, *International Government* 3rd ed. (New York: Ronald Press, 1957) pp.24-27 [hereinafter Eagleton (1957)].

¹⁴⁷ Martin Wight, *International Theory, The Three Traditions* (New York: Holmes & Meier, 1992); Kenneth W. Thompson, *Fathers of International Thought: The Legacy of Political Thought* (Baton Rouge, La.: Louisiana State University Press, 1994).

¹⁴⁸ A.J.R. Groom, "The Advent of International Institutions" in Paul Taylor and A.J.R. Groom, eds., *International Organization: A Conceptual Approach* (New York: Nichols Pub. Co. 1978) p.19 [hereinafter Groom, "Advent"]; p. 19; Athena Debbie Efrain, *Sovereign (In)equality in International Organizations* (New York: Kluwer Law International, 2000) pp. 52-62; Sanson, p. 243; Scott Burchill, *The National Interest in International Relations Theory* (New York: Palgrave Macmillan, 2005) pp. 26-30; Jeremy. A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Oxford: Princeton University Press, 2005) c. 3, p.45; Hans J. Morgenthau "Introduction" in David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966) pp. 8-11 [hereinafter Morgenthau, "Introduction"].

¹⁴⁹ G.M. Lyons & M. Mastanduno, (eds) *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore: Johns Hopkins Press, 1995); Eagleton (1957), pp.21-24.

The position that States were sovereign was held by the realist school of thought and has been most famously expounded by Machiavelli in the sixteenth century and Thomas Hobbes in the seventeenth, although the latter could perhaps be said to be more well-known and influential in advancing this theory.¹⁵⁰ In his famous work commonly referred to as *Leviathan*, Hobbes, in a departure from the previously held belief that rulers governed by divine decree, proposed that they be appointed by means of a social contract. He advanced the view that rather than live in chaos men would prefer to surrender their freedom to a sovereign Commonwealth (Leviathan), a new form of political order which would be established by means of a social contract executed by those living under its rule.¹⁵¹ Once appointed, the governing authority of a State, whether an individual or a parliament, would enjoy absolute sovereignty and by extension, so would the State.¹⁵²

One of the logical consequences of the realist view that States were sovereign entities was that there would be “international anarchy”, or the absence of international governance, as sovereign States would resist any arrangement that would interfere with their inviolable independence.¹⁵³ Yet, while States were resisting any perceived infringement on their sovereignty, the self-interest which prompted protectionism and nationalism was countered by another consideration that was also motivated by self-interest. States understood that since external trade was essential to their prosperity

¹⁵⁰ N. Machiavelli, *The Prince* (1513) (New York: New American Library, 1952); Thomas Hobbes, *Leviathan*, edited by M. Oakeshott (New York: Macmillan, 1962); Rabkin, c. 4 p. 71

¹⁵¹ James P. Muldoon, *The Architecture of Global Governance: An Introduction to the Study of International Organizations*. (New York: West View, 2004), pp.39-40; Efraim, pp.52-53; Burchill, pp. 31-52; Archer, p. 116.

¹⁵² Ibid., Eagleton (1957), pp.42-46.

¹⁵³ Archer, p. 116; Karns & Mingst, p. 45; Hans Morgenthau, *Politics Among Nations* 4th ed. (New York: Knopf, 1967) pp. 219-220; K. Booth, “Security in Anarchy: Utopian Realism in Theory and Practice” (1991) 67: 3, *International Affairs*, 527; Peter Hay, *Federalism and Supranational Organizations* (London: University of Illinois Press, 1966).

protectionism must be balanced with freedom of movement for goods and persons through their borders. This knowledge presented a dilemma for each State – how was one to manage these two opposites of control and freedom to one’s best advantage without surrendering one’s sovereignty or resorting to war with other States?¹⁵⁴

As a solution to this dilemma and as a means of preserving peace, some States united to form federations. In truth federalism was really a concession to international governance but since it was still a long way from the one world governance of internationalism States that embraced it could perhaps still maintain their sense of autonomy and sovereignty, albeit within an enlarged “State” of which each formerly independent State was now a member. However, many States resisted being united into a federation for the same reason they resisted internationalism - to preserve their sovereignty.¹⁵⁵ But for these States, and indeed even for federations of States, tensions were still inevitable and the spectre of war erupting was always lurking so some means of maintaining peace was still desirable.

Rather than agree to internationalism or to being a part of a federation of States, the other possible solution to inter-State conflicts was for States to act through IOs to resolve conflicts and establish peaceful relations as this would allow States to preserve their sovereignty, or at least preserve the perception of sovereignty. As a compromise between the extremes of States retaining the absolute sovereignty (or international anarchy, as some refer to sovereignty) or completely surrendering their sovereignty as envisioned in the concept of internationalism, States were willing to accept the governance of IOs so that they could act to resolve divisive issues and hopefully avoid

¹⁵⁴ Groom, “Advent”, pp.15-19.

¹⁵⁵ Sanson, pp. 241-246, 319-326.

wars while retaining their sovereignty. Ironically, by doing this they were in fact agreeing to a form of federation of States as international organizations utilized the internal organizational paradigm of federalism for their own administrative and political structures.

At its most basic, the theory of federalism centers on the establishment of a supra-national government which will share power with its member States and which will serve to restrict the powers exercised by both the federal and the State governments.¹⁵⁶

The basic assumptions for the federalism proposal are:

- 1) Individual states are only partly able to perform certain tasks which are essential to the realization of mankind's welfare, for example, the maintenance of peace internationally;
- 2) The structures of government which have been developed for the administration of a State can be adapted for use supra-nationally;
- 3) The differences of each of the parts which make up a federation can be protected within this system of governance in a way that is healthy for the whole body;
- 4) Individuals within a State will understand and agree that the State is limited in its abilities to bring about certain benefits for mankind and will therefore support federalism as an alternative system that is advantageous to all.¹⁵⁷

From the above it can easily be seen that the theory of federalism was the basis for the organizational structure of IOs. Similar to a federation of States, IOs would be

¹⁵⁶ George A. Coddington, Jr. "Federalism: The Conceptual Setting" in Paul Taylor and A. J. R. Groom, eds., *International Organization: A Conceptual Approach* (New York: Nichols Pub. Co, 1978) 326 at pp.326-327; for an extensive examination of federalism see: Thomas O. Hueglin & Alan Fenna, *Comparative Federalism - A systematic Inquiry* (New York: Broadview Press, 2005).

¹⁵⁷ Ibid.

supra-national governing entities with autonomous States members which would have representation within this governing body. In turn, as the supra-national government of this “federation” of States, IOs would act to advance particular goals and policies of their members in a way that would hopefully be satisfactory and beneficial to not only the States members but to the international community in general.

By employing the organizational structure of federalism IOs would in fact be structures of internationalism, but acceptable nevertheless to States if they could be persuaded of the state-centric realist view that IOs were instruments of sovereign States rather than the reverse - that member States of IOs were instruments of IOs.¹⁵⁸ In reality however, by joining an IO and by agreeing to abide by its rules and decisions States were at least in part surrendering their sovereignty.¹⁵⁹

2.3. The Functionalism Basis

As said, the reality about IOs was that regardless of the express purpose for which an IO was set up, for example, to administer the use of a waterway or the international postal service, the underlying and most important purpose of each IO was always to facilitate peaceful relations between States.¹⁶⁰ However, in the wake of the failure of the League of Nations to prevent World War II by effecting a peaceful settlement of the disputes which supposedly led up to it, States were disillusioned about the value of IOs and this was well demonstrated by the dissolution of the League. States now questioned the benefit of continuing to establish and operate IOs if they would fail in their most essential function – peace keeping. Yet, following World War II

¹⁵⁸ Archer, p. 123.

¹⁵⁹ Efraim, p. 55; Rabkin, c. 8 p.193.

¹⁶⁰ Claude, *Swords*, pp. 215 – 217;

new IOs were being proposed, most notably the Bretton Woods trio of the IMF, the World Bank and the UN, but clearly another theoretical basis for IOs other than or in addition to the theory of pacific settlement of disputes was needed, one which would persuade war-weary and disillusioned States that IOs were indeed effective vehicles for maintaining peace, otherwise States were unlikely to support and participate in these IOs. The theory of functionalism apparently filled this need.

The essence of the theory of functionalism, of which David Mitrany is perhaps the best known proponent, is that international cooperation in economic and social matters is the vehicle to peace since it is the breakdown in these areas that leads to war.¹⁶¹ Therefore, if international co-operation was effected through IOs which were instruments of social and economic cooperation amongst States, those IOs would inevitably be international peace keepers as well.¹⁶² Professor Mitrany summed it up thus:

“Co-operation for the common good is the task, both for the sake of peace and of a better life, and for that it is essential that certain interests and activities should be taken out of the mood of competition and worked together. But it is not essential to make co-operation fast to a territorial authority, and indeed it would be

¹⁶¹ Ibid., p. 379, 381; Archer, p. 137; Muldoon, pp.88-89; Karns & Mingst, pp.40-42; David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organizations* (London: The Royal Institute of International Affairs, 1944); David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966) [hereinafter Mitrany 1966]; David Mitrany, *The Functional Theory of Politics* (London: St. Martin's Press, 1975); John Eastby, *Functionalism and Interdependence* (New York: University Press of America, 1985); Paul Taylor, "Functionalism: The Theory of David Mitrany" in Paul Taylor & A.J.R. Groom, eds., *International Organization* (New York: Nichols Publishing, 1978) 236; Farley, pp.7-8.

¹⁶² Karns & Mingst, pp. 355-412.

senseless to do so when the number of those activities is limited, while their range is in the world.”¹⁶³

However, implementing the functionalist approach for IOs would require States to agree that many of the functions hitherto considered to be the exclusive domain and responsibility of the sovereign State for their citizens’ welfare - economic, health care, scientific development, etc., could be better executed by IOs. Mitrany contended that the theory of sovereignty, which he considered “the most intractable and disruptive of international principles”,¹⁶⁴ had erected frontiers or barriers which were a hindrance to these functions being administered in a way that was most beneficial to society in general.¹⁶⁵ He argued that if States engaged in international cooperation, i.e. worked through IOs, these State-centric frontiers would gradually become blurred and eroded and functions essential to global welfare would be more effectively advanced and this would in turn be a solution to the problem of international peace and security being disrupted or destroyed by war.¹⁶⁶ IOs would be like administrative boards in various areas and specialization in their functions (for example, the specialized agencies of the UN such as the ILO or the World Health Organization - WHO) would be encouraged to enhance efficiency.¹⁶⁷

“The essential principle is that activities would be selected specifically and organized separately, each according to its nature, to the conditions under which it has to operate, and to the needs of

¹⁶³ Mitrany (1966) p. 55.

¹⁶⁴ Ibid., p.38.

¹⁶⁵ Efraim, p. 32; Claude, *Swords*, p. 382.

¹⁶⁶ Ibid., p. 33-34; Archer, p. 137.

¹⁶⁷ Ibid., Karns & MIngst, pp. 40-41.

the moment. It would allow, therefore, all freedom for practical variation in the organization of the several functions, as well as the working of a particular function as needs and conditions alter.”¹⁶⁸

Notably though, because functionalist theory sees the breakdown of social and economic structures within States as the primary cause of war, it encourages the establishment of IOs that are created with such functions as the alleviation of poverty, the minimization of economic instability, and the promotion of better health care.¹⁶⁹

Ironically, functionalism is in fact a proposal for effecting internationalism and diminishing sovereignty, the very thing that States had so strongly resisted previous to the twentieth century. But the proof that the theory of functionalism as a basis for IOs did persuade States to accept and participate in them can be found in the expansion of specialized agencies of the UN and the increase in IOs in general which have occurred since the middle of the twentieth century as well as the fact that most of these were created with functions aimed at solving those problems which functionalists believe lead to war.¹⁷⁰

¹⁶⁸ Mitrany (1966) p.33.

¹⁶⁹ Claude, *Swords*, p. 381.

¹⁷⁰ Claude *ibid.*, p. 393; a few examples of IOs whose functions are directed at social and economic improvement are: specialized agencies of the UN such as the UN Industrial Development Organization (UNIDO); the UN Educational, Scientific and Cultural Organization (UNESCO); the World Health Organization (WHO), the Food and Agriculture Organization (FAO), the International Financial Corporation (IFC), and intergovernmental organizations such as the International Monetary Fund (IMF); the International Bank for Reconstruction and Development (IBRD) better known as the World Bank; the General Agreement on Tariffs and Trade (GATT) and its successor the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), and the Asia-Pacific Economic Cooperation (APEC).

2.4. The Theoretical Basis of the IMF

Since the IMF was a creation of the mid-twentieth century when functionalism was the dominant theory of IOs, it was very likely the theory that prompted the IMF's establishment and informed its goals, purposes and mandates. Certainly, the IMF's mandate to monitor and regulate the macroeconomic policies and practice of states in order to alleviate economic difficulties and poverty would appear to fit with the functionalist goal of eliminating those conditions that were perceived as the cause of wars. As evidenced by Article 1 of the organization's Articles of Agreement, its primary purpose was to advance and implement policies which would result in stable and prosperous economies within member states.

Although the promotion or maintenance of international peace was not expressly stated as a purpose of the IMF anywhere in its AA, no doubt, in keeping with the theory of functionalism, there was a tacit understanding that this was the ultimate goal of all of its other undertakings. Regrettably though, it is clear that the IMF's policy of pressuring states to eliminate capital controls with its devastating results to the economies of compliant states did not serve or fulfill the functionalist goals and ideals which were apparently the theoretical impetus for the organization's establishment.

PART II – The Character of IOs and the IMF

Chapter 3

3.0. Decision Making in IOs and the IMF

Member states of an IO will obviously have their interests and policies advanced by representatives of the state within the organs of the IO. The number and identity of representatives for each member state are based on the criteria set by the constitutional instrument of the particular IO. Some IOs permit several representatives within each state's delegation while others permit only one.¹⁷¹ Generally there is no qualitative criterion for representatives but there may be exceptions to this rule if the function of the IO is very specialized.¹⁷² Hence, the World Health Organization requires that delegates be qualified in the medical field, and the World Meteorological Organization stipulates that one member of each state's delegation must represent the Director of the national meteorological service.¹⁷³ Similarly the International Labour Organization requires that the four representatives attending its conferences from each member state must comprise two from the government, and one each representing employers and employees.¹⁷⁴

With the exception of satisfying the type of requirements cited above, states are generally free to choose whom they please as their representatives to IOs without any interference from an IO or other states or individuals. However, when there are competing governments in a state this obviously gives rise to controversy in various arenas as to which of the parties claiming governing authority has a right to send

¹⁷¹ UN Charter Art.9 (2) and IAEA Statute Art.VB respectively.

¹⁷² Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, 6th ed. (London: Thomson Reuters, 2009) p. 557 [hereinafter Sands & Klein].

¹⁷³ WMO Art.7b; WHO Art.11

¹⁷⁴ ILO Article 2 (3).

representatives to an IO of which the state in question is a member.¹⁷⁵ A similar problem arises when the government of a state is not recognized as legitimate and consequently other member states of an IO may object to the representation of that state within the organization.¹⁷⁶

Besides the representation of the interests of an IO and its member states, there may be other interests originating with non-members who require or demand representation within a particular IO.¹⁷⁷ These non-members may be other states, territories that are not responsible for their international relations, national liberation movements, other IOs (including non-governmental organizations), private corporations and individuals. These demands for representation by non-members have been accommodated by IOs by amending their constitutions to permit associate or partial memberships or to grant observer status within the organization.¹⁷⁸ These allow a non-member to advance their own interests within an IO by limited participation in the work of the parent IO or possibly full membership in one of its organs. Associate or partial members and those with observer status may be permitted to participate in debates or to make written submissions to an IO, but do not normally enjoy the right to vote although they may be required to make financial contributions in proportion to their participation. Nevertheless, despite not having the right to vote, by use of these devices

¹⁷⁵ Examples are the competing claims for representation in the U.N between 1949-1971 by the People's Republic of China and the Republic of China (Taiwan), and starting in 1979 between the Khmer Rouge and People's Republic of Kampuchea for representation in the U.N of Kampuchea (Cambodia). C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge: Cambridge UP, 2005) pp.126-8 [hereinafter Amerasinghe, *Principles*]; Sands & Klein, pp.558-9

¹⁷⁶ For example the credentials of South Africa were refused by the General Assembly for several sessions of the U.N starting in 1970 and those of Israel have been challenged several times in the GA. *ibid.*, pp.128-130; p.559

¹⁷⁷ References for this entire paragraph: Henry G. Schermers & Niels Blokker, *International Institutional Law*, 4th ed. (Boston: Martinus Nijhoff, 2003) paras.166-198 [hereinafter Schermers & Blokker, 4th ed.]; Sands & Klein, pp.560-562; Klabbers, *Introduction*, pp.111-114

¹⁷⁸ FAO, Art. II, para.3; WHO, Art.8; UNESCO, Art.II, para. 3;ITU, Art.1, para. 3(b); UN, Art.93, para. 2.

for participation in IOs non-members can exert political influence on decision making within an IO. However, such participation in an IO by non-members can be met with robust objection from other states if the interests and policies being advanced by a non-member are in opposition to those of one or more of the member states. This was the case in 1974 when the U.N granted the Palestine Liberation Movement observer status in the General Assembly, and more recently in 2012 when the UN granted Palestine non-member observer state status.¹⁷⁹

3.1. Allocation and Exercise of Voting Power

Generally, within IOs each member of an organ is allowed one vote.¹⁸⁰ However, although it is an exception to general practice the rules of voting of some IOs dictate that votes be distributed on a basis other than one state one vote.¹⁸¹ For example, within the principal organs of the IMF, the World Bank, and the International Finance Corporation (IFC) weighted voting, or allotting votes to each state based on the size of its financial contribution to the organization, is constitutionally mandated.¹⁸² In contrast, within the International Coffee Organization, whose membership comprises producers and consumers of coffee, the number of votes exercised by each member is determined by its market share.¹⁸³ Yet again, in the ILO where, as it was mentioned above, the

¹⁷⁹ Participation of non-members in IOs can also create legal problems. For example, following the 1974 establishment of an office in New York by the PLO for its observer mission with the U.N a protracted dispute ensued between the U.N and the U.S about the interpretation of the U.S Foreign Relations Authorization Act Fiscal Years 1988-1989 (the terms of which required the closure of the PLO mission office in New York) and its applicability and compatibility with the U.N. Headquarters Agreement. Sands & Klein, p.562

¹⁸⁰ For example, in the UN General Assembly and the Security Council each member state has one vote; see UN Article 18(1) and Article 27(1) respectively.

¹⁸¹ Bob Reinaldo & Bertjan Verbeek, "The Issue of Decision Making Within International Organizations" in Bob Reinalda & Bertjan Verbeek, eds., *Decision Making Within International Organizations*, (New York: Routledge, 2004) p.15

¹⁸² IMF Article XII (5); IBRD Article V (3); IFC Article IV (3).

¹⁸³ International Coffee Agreement 2007 Article 12 (1-4); a similar system exists in the International Sugar Organization by virtue of Article 25 of the International Sugar Agreement 1992.

delegation of each state must comprise four representatives from various sectors, each of the four is permitted one vote rather than merely one vote for each state.¹⁸⁴ Another alternative is to allow plurality of votes for one member of an IO where that member represents several states.¹⁸⁵ This is most likely to occur when an IO is a member of another IO as is the case with the World Trade Organization (WTO) in which the European Community (EC) is a single member but represents all of its member states.¹⁸⁶ Thus the WTO's constitution specifically provides that when the EC votes within the WTO it shall have a number of votes equal to its member states.¹⁸⁷ Another means by which an IO can allow one state to exercise a plurality of votes is for the IO to recognize territories of a state as individual members.¹⁸⁸ One other method of IOs vesting greater voting power in member states is to recognize certain ones as having a greater interest and to expressly designate seats for them in non-plenary organs as has been done in the UN Security Council for China, France, UK, US, and Russia.¹⁸⁹

3.2. Veto Power

Perhaps it could be said that there is one other method of allocating voting power, albeit indirectly, and that is by vesting veto power in some of the members so that regardless of the number of votes cast in favour of a decision one of the members may overrule it. The best known example of this is of course the UN Security Council where the five permanent members each have veto power in votes on substantive

¹⁸⁴ ILO Article 4 (1)(2); Reinaldo & Verbeek, "The Issue", p.15

¹⁸⁵ Sands & Klein, p.272

¹⁸⁶ Ibid.,

¹⁸⁷ WTO Article IX (1)

¹⁸⁸ This was done by the UN for the USSR by permitting the soviet states of Ukraine and Byelorussia to be admitted as separate members. Schermers & Blokker, 4th ed. paras.75, 794

¹⁸⁹ Ibid., para. 282(c). For example, within the IMF, the percentage of the capital subscriptions which the US contributes results in it having 17.33 per cent of the vote on the Fund's Executive Board. Thus, for those decisions that require an 85 per cent majority of votes to be passed the US essentially has veto power.

matters by virtue of the fact that the Charter stipulates that in such matters “[D]ecisions of the Security Council on all other matters [other than procedural matters] shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members*;...”¹⁹⁰ (emphasis added)

Veto power can also be acquired by means other than being expressly granted in a constitutional instrument. In those IOs in which weighted voting is the practice the percentage of the total vote which a particular state exercises may be sufficient to constitute a veto if a large majority of the votes is required to affirm certain decisions. Perhaps the best known example of this method of voting, which is discussed below, is practiced by the IMF.

3.3. Abstention and Absence

Abstention or absence from voting are both means of influencing decision making within an IO and could therefore be said to be ways in which voting power is exercised, albeit in the breach rather than the observance. However, although the result of both is that a vote is not cast, they are viewed differently.

The practice of abstention, or withholding one’s vote while present in the voting group, presents an apparent contradiction for although a member neither votes for or against a decision it is nevertheless seen as having participated in the voting process. On the other hand, if the representatives of a member are absent at the time of voting that member is not considered to have participated in the voting process.¹⁹¹ More will be said below about the effect of abstention and absence on unanimous and majority voting.

¹⁹⁰ Ibid., para.813; UN Article 27(3).

¹⁹¹ See generally Schermers and Blokker, 4th ed. paras. 824-837.

3.4. Unanimity and Majority Voting

In the early years of the life of IOs, particularly in the nineteenth century, a unanimous vote was normally required for decisions, but after 1945 there was a move away from the rule of unanimity in voting towards one of majority.¹⁹² This shift is well illustrated by a comparison between voting regulations in the League of Nations and the United Nations.¹⁹³ In the League the rule of unanimity as stipulated in Article 5 of the Covenant was applied to “decisions” of both the Council and the Assembly of the League, although procedural matters could be decided within both bodies by a majority. Notably though, it appears that a unanimous vote did not comprise votes cast by all members of the League but rather by all members *present* at a meeting, unless this rule was premised on the assumption that representatives of each member state would always be present at all meetings. Article 5 provided *inter alia* that:

“[E]xcept where otherwise expressly provided in the Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.”

In contrast, Article 18(2)(3) of the UN Charter provides that:

¹⁹² See Williams, pp. 488; Efraim, pp. 114-115; a current exception to this practice is found in the Organization for Economic Co-operation and Development (OECD) where decisions are still taken unanimously, OECD Convention (1960), Article 6.1.

¹⁹³ Werner J Feld, and Robert S Jordan. *International Organizations: A Comparative Approach* (New York: Praeger, 1983) pp.113-114.

“[D]ecisions of the General Assembly on important questions shall be made by a two- thirds majority of the members present and voting.”

and

“[D]ecisions on other questions, [...], shall be made by a majority of the members present and voting.”¹⁹⁴

While Article 27(3) provides that:

“[D]ecisions of the Security Council shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”

What constitutes a majority varies from one IO to another or, as indicated by Article 18(2)(3) of the UN Charter cited above, may even vary within the same organization depending on the matter being voted on. A simple majority is one which requires more than half of the votes cast while a qualified majority requires a given percentage of the votes submitted, for example two-thirds or three-quarters. In addition, there are also relative and absolute majorities. The first is simply the highest number of votes cast in favour of one solution when two or more are options for the voters. If there are only two solutions for voters to choose from then a relative majority is the same as a simple majority, but if there are three or more then the largest percentage of votes garnered for one of the solutions constitutes the relative majority. The second, an

¹⁹⁴ In the *Voting Procedure Case*, (1955) I.C.J. Rep. 67 the Court held that in light of Article 18 the GA could not require unanimity when voting in relation to the administration of a mandate.

absolute majority, has two different definitions. On the one hand, it may simply be defined as the majority of those who are entitled to vote, (for example the total number of member states of an IO) whether they vote or not.¹⁹⁵ Alternatively, when it is employed in the context of a multiple election such as voting simultaneously to elect several members of a commission, it is defined as the number of votes which is greater than the number which can be obtained in that particular election for any other solution.¹⁹⁶ Lastly, there is also the category of a double majority which requires both a majority of the votes and of the members.¹⁹⁷

In one sense, majority voting is affected by abstention or absence of members from voting because with either one, although the vote is neither supported or negated, the number of votes cast is reduced hence the number required to make up a majority is also reduced.¹⁹⁸ However, where a majority vote of all members is required as opposed to merely a majority of those present, absence will have the same effect as a negative vote.¹⁹⁹ Absence also differs from abstention in its effect on a required quorum and the rule of unanimity. A required quorum is generally considered to be reduced by absence

¹⁹⁵ Bryan A. Garner, ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West Group, 1999); it is in this sense that the UN Security Council and General Assembly apply absolute majority. (Schermers & Blokker, 4th ed., para. 81)

¹⁹⁶ The FAO utilizes absolute majority in this sense. See FAO, General Rules of the Organization, Rule XII, para 3(b)

¹⁹⁷ For examples of this see IMF Article XXVIII; IBRD Article VIII (a); International Cocoa Agreement 2001, Article 2; International Coffee Agreement 2001, Article 2. References for this entire paragraph are Amerasinghe, *Principles*, pp.150-151 and Schermers & Blokker, 4th ed., paras.817-819.

¹⁹⁸ Schermers & Blokker, 4th ed. para. 824.

¹⁹⁹ Ibid., para.831.

but not by abstention, and similarly, unanimity is deemed to be prevented by absence but not by abstention.²⁰⁰

3.5. Decisions by Consensus

In recent years there has been a further shift in voting norms away from majority voting and towards consensus and this has become a not uncommon basis for decision making in IOs.²⁰¹ Consequently, some IOs that are required to take decisions by a two-thirds or simple majority have begun to substitute voting with consensus.²⁰² It has been submitted that the reason for this shift is that the expansion of the number of member states in IOs which followed decolonization had resulted in voting majorities residing with states that do not hold the reins of power globally and the ideological divisions amongst these majorities was hindering international law making decisions.²⁰³ However, the argument continues, since the solution to this problem, namely weighted voting, had already been strongly opposed by weaker states within the IMF, the IBRD, and other organizations utilizing it, IOs had turned to negotiation and consensus as an acceptable alternative to majority voting for decision making.²⁰⁴ Yet, it is difficult to see the difference in the problems which accompany decision making by unanimity and majority voting and those which attend decision making by consensus since the latter still

²⁰⁰ Ibid., paras. 834-836; in the *Namibia Case* Advisory Opinion, (1971) I.C.J. Rep., 16 at 22, the Court explicitly articulated the position that where concurring votes of members are required, or in other words, unanimous voting, (in this case the votes of the five permanent votes of the SC) abstention does not constitute a breach of the required unanimity.

²⁰¹ Ibid., see generally paras. 783-786 for a discussion of the use of consensus in IOs.

²⁰² Ibid., para.783; Efraim, p.204.

²⁰³ B.Buzan, "Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea" (1981) 75 AJIL. 324 at 326; Efraim, pp.11-12.

²⁰⁴ Ibid., pp.326-327; regarding the opposition of poorer states to their lack of representation in the financial organizations and the proposed reforms to voting in these IOs see S. Zamora, "Voting in International Economic Organizations" (1980) 74 AJIL. 566-607.

depends on the agreement of the majority of member states which obviously comprises the weaker states and thus it continues to be subject to the control of weaker states and their ideological differences.

3.6. Voting within the IMF

Voting within the IMF, or more specifically voting power or voting share to which each member state is entitled, is tied to the system of budgeting or financing of the organization.²⁰⁵ The Fund was established and is funded with money provided by the taxpayers of its Member States.²⁰⁶ Each State pays a quota to the IMF on its admission to the Fund, and then periodically if quotas are increased following a review.²⁰⁷ States' quotas are determined by the size of their economies,²⁰⁸ therefore the larger a country's economy in terms of output, and the larger and more variable its trade, the higher its quota tends to be.²⁰⁹ Once these quotas are paid into the IMF they are converted into Special Drawing Rights (SDRs) which are an international reserve asset for each member state of the IMF and determine the amount of withdrawals that each member state can make from the IMF.²¹⁰ Hence quota size is extremely important because it is not only the basis for calculating a country's subscription payments and SDRs, which in

²⁰⁵ For an extensive discussion of this subject see article by the General Counsel and Director of the Legal Department of the IMF from 1986-2004: Francois Gianviti, "Decision Making in the International Monetary Fund" in ed. IMF, *Current Developments in Monetary and Financial Law*, Vol. 1 (Washington, D.C: IMF, 1999) pp. 31-67.

²⁰⁶ Stiglitz, *Globalization*, p.12.

²⁰⁷ AA, Article III Sec. 2.

²⁰⁸ AA; Article III Sec 1 and Schedule A.

²⁰⁹ IMF, *Where the IMF Gets Its Money*: <http://www.imf.org/external/np/exr/facts/finfac.htm>

²¹⁰ IMF, *Special Drawing Rights*: <http://www.imf.org/external/np/exr/facts/sdr.HTM>

turn determine the amount of financing it can receive from the IMF,²¹¹ but as explained below, it is also the main determinant of countries' voting power within the IMF.²¹²

The percentage of total votes to which each member state of the IMF is entitled is derived from its quota size. A state's quota size is calculated using a quota formula which is a weighted average of GDP (weight of 50 percent), openness (30 percent), economic variability (15 percent), and international reserves (5 percent).²¹³ A state's quota determines the maximum contribution the state must make to the IMF's financial resources and the amount it may borrow from the IMF.²¹⁴ Presently, the ten States holding the highest percentages of voting power are the United States (16.75), Japan (6.23), Germany (5.81), France (4.29), the United Kingdom (4.29), China (3.81), Italy (3.16), Saudi Arabia (2.80), Canada (2.56) and Russia (2.39).²¹⁵ Remarkably, the first six of these states listed collectively hold 41.18 percent of the Fund's voting power, which means that the remaining 58.82 percent of the voting power is shared by the other 182 member states. Also of note, those countries which make up the Group of Ten (G10 nations – there are actually 10 states plus the Swiss National Bank in this group but the old nomenclature has remained) are amongst those states holding the ten largest quotas and together they have 49.04 percent of the voting power in the IMF.²¹⁶ This is important because the so-called Group of Ten are the states who participate in the General Arrangements to Borrow (GAB) whereby they lend additional funds to the IMF when the revenue collected from the quota contributions of each state are

²¹¹ Articles of Agreement; Article III Sec.1.

²¹² Articles of Agreement; Article III Sec.5.

²¹³ IMF, *IMF Quotas*: <http://www.imf.org/external/np/exr/facts/quotas.htm>

²¹⁴ Ibid., Articles of Agreement; Article XII Sec. 5.

²¹⁵ IMF, *IMF Executive Directors Voting Power*: <http://www.imf.org/external/np/sec/memdir/eds.aspx>

²¹⁶ The G10 nations (there are actually 11) are Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States.

insufficient to meet the demands placed on the Fund.²¹⁷ Hence, together the G10 states comprise the IMF's largest creditor. Needless to say, being the largest creditors of the IMF and exercising a collective voting power of 49.04 percent, the influence wielded by these eleven member states (out of 188 IMF member states) within the IMF is inevitably enormous.

Importantly too, the percentage of the capital subscriptions which the US contributes results in it having 16.75 percent of voting power on the Fund's Executive Board, which means that it holds effective veto for certain decisions which require an 85 percent majority of the total votes.²¹⁸ In contrast, the country with the next largest share of voting rights holds 6.23 percent (Japan) and there are some countries which each have as little as 0.03 percentage of the Fund's voting rights.²¹⁹ So, although the highest decision-making body in the IMF – the Board of Governors – is made up of one

²¹⁷ In the event that the cost of stabilizing the international monetary system exceeds the resources of the quotas deposited to the Fund, the IMF has two sets of standing arrangements that allow it to borrow funds from certain States. One is the General Arrangements to Borrow (GAB), which was established in 1962 and comprises the governments or central banks of the 11 states listed above. The other is the New Arrangements to Borrow (NAB) which has thirty-eight participating States and has been in effect since 1997. (IMF, *IMF Standing Borrowing Arrangements* <http://www.imf.org/external/np/exr/facts/gabnab.htm>)

²¹⁸ Some examples of such decisions are: Articles of Agreement Article III Sec. 2(c) – vote required for any change in quotas; Schedule D (1) (a), - vote required to change number of associates appointed to the Council; Art. XV, Sec. 2, - vote required to change the principle of valuation of special drawing rights; Article XXVI Sec. 2(c), - vote required to decide whether a State should withdraw from membership of the Fund having been deemed to have failed to have fulfilled its obligations laid down in Article III Sec.2(c); for a discussion of the influence of the US in IOs see generally the collection of essays in Rosemary Foot, S. Neil MacFarlane, & Michael Mastanduno, eds., *US Hegemony and International Organizations*, (New York: Oxford University Press, 2003); and more specific to the IMF see within the same collection of essays, *ibid.* Ngaire Woods, "The United States and the International Financial Institutions: Power and Influence Within the World Bank and the IMF"; p. 92; Efraim, pp.205-20.

²¹⁹ Countries such as Bhutan, Dominica, Grenada, and Palau; the complete list of member states and their voting shares, IMF, *IMF Members' Quotas and Voting Power and IMF Board of Governors*: <http://www.imf.org/external/np/sec/memdir/members.aspx>

representative from each member state,²²⁰ each one's influence on the decision-making process within the IMF is limited by the voting shares his or her state holds.

Another factor affecting influence on the decision-making process within the IMF is the arrangement concerning the executive directors who administer the day to day business of the Fund. There are twenty four of them, but of these only five are directly appointed by the individual states they represent and these appointing states happen to be the five states that hold the largest voting shares in the organization (U.S, Japan, Germany, France and Germany).²²¹ The remaining nineteen executive directors each represent several states and are elected by member states and the Managing Director of the IMF.²²² In most cases these executive directors represent several states which collectively hold only a small percentage of the Fund's voting shares and hence they exercise a small amount of influence in the decision-making within the organization. In the most extreme example, one director represents twenty one states which collectively hold only 1.55 percent of the Fund's voting shares.²²³ In contrast, as mentioned above, the U.S. as a single state holds 16.75 percent of the voting power.

3.6.1. IMF Decision Making Regarding Loans to Member States

Loans to member states by the Fund (which are generally referred to as financial arrangements or standby arrangements by the IMF) are individually negotiated.²²⁴ The terms of each loan are negotiated between the IMF and the borrowing state and then

²²⁰ Website – Ibid.

²²¹ Ibid.

²²² The following IMF website explains how the executive directors are appointed/elected and provides a complete list of the executive directors and the countries they represent: IMF, *IMF Executive Directors and Voting Power*: <http://www.imf.org/external/np/sec/memdir/eds.aspx>

²²³ Ibid.

²²⁴ Ross. B. Leckow, "The Stand-By Arrangement: Its legal Structure and Principal Features" in ed. IMF, *Current Developments in Monetary and Financial Law*, Vol.2 (Washington, D.C: IMF, 2003) pp. 33-49. [hereinafter Leckow, "Stand-By"]

submitted to the Executive Board for approval.²²⁵ Whether the loan is granted or not is determined by vote within the Board. Since the AA do not stipulate that decisions on loan agreements are to be made by a special majority (e.g. 85% or 75%), they fall under Article 12 Sec 5 (c) and are made, according to that article, by “a majority of the votes cast”. However, although how each Board member votes is recorded within the IMF, this information is not publicised.²²⁶ This policy of non-disclosure of a member state’s voting record applies to all matters determined by the Board, not just to loans. Thus, there is no way to know how member states voted on any issue, including loans to borrowing states. The consequence of this is that in the event that an international wrongdoing is committed by the IMF, it is very difficult or even impossible to determine whether one or more of its member states incurred responsibility for the wrongdoing by virtue of voting in favour of the conduct that resulted in it.

²²⁵ IMF, *IMF Lending*: <https://www.imf.org/external/np/exr/facts/howlend.htm>; Rosa M. Lastra, *Legal Foundations of International Monetary Stability* (Oxford: Oxford University Press, 2006) pp. 421-22.

²²⁶ Ross Leckow, (September, 10, 2015) Telephone Interview; in this interview the Assistant General Counsel of the IMF confirmed that the IMF keeps records of how each Executive Board member votes but it is not the policy of the organization to release those records; see also Leckow, “Stand-By” at p. 45-6.

Chapter 4

4.0. International Legal Personality of IOs and the IMF

In Article 1 (1) the ARIO stipulate that they apply to IOs and then Article 2 (a) defines an IO as an organization which has been established by a treaty or instrument governed by international law, possesses “its own international legal personality”, and which may include as members, in addition to states, other entities. The IMF was established by a treaty and came into formal existence in December 1945, when its first 29 member countries signed its [Articles of Agreement](#).²²⁷ It is an inter-governmental organization because its membership is confined to states.²²⁸ Hence it meets at least two of the three criteria for an intergovernmental organization stipulated in Article 2 (a) of the ARIO – it was established by an instrument governed by international law and has states as members. But, as already observed, the constituent instrument of the IMF (AA) does not expressly state that the organization possesses international legal personality. Thus, unless international legal personality can be attributed to it by other means, it cannot qualify as an IO according to the ARIO and the ARIO cannot be applied to it.

Over time judicial decisions have established certain criteria which have to be met in order for international legal personality to be implied although it is not expressly conferred in the constituent instrument of an IO. The development and establishment of implied international legal personality by the courts, and whether the IMF meets the

²²⁷ <http://www.imf.org/external/about/histcoop.htm>

²²⁸ AA Article 2 (1) (2); membership currently consists of 188 states.

criteria necessary to qualify for such personality, will therefore be examined in this chapter.

4.1. Legal Personality of IOs

Elihu Lauterpacht, writing in 1976, opined that in light of the expansion of entities accorded rights and duties at international law in the preceding century from solely states in the nineteenth century to individuals and an array of IOs in the twentieth, it was not possible to offer a definition of legal personality in international law which would accurately apply to all those entities contemporaneously occupying the international stage.²²⁹ This observation remains true today not only for the various subjects of international law, but also for the assortment of IOs which are currently in existence. The concept of legal personality for international institutions is not grounded in a formal definition but is generally understood to refer to the possession of rights, duties and liabilities, as well as immunities and the legal capacity necessary for an organization to fulfil the functions and purposes mandated by its member States. It is of course a fictive personality. It is no doubt an indication of how much this subject has grown in importance that the International Law Commission, in earlier conventions and draft articles related to IOs, defined the term international organization simply as an intergovernmental organization,²³⁰ but in its recently completed Draft Articles on Responsibility of International Organizations Article 2 it states that the term refers to “an

²²⁹ Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*. 152 Hague Recueil (1976 - IV) 403 at 407 [hereinafter E. Lauterpacht, 1976].

²³⁰ See 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character Part 1, Article 1(1)(1); 1986 Vienna Convention on the Law of Treaties Concluded between States and International Organizations or between Two or More International Organizations, Part 1, Article 2 (1)(i) [hereinafter 1986 Treaty Convention].

organization established by a treaty or other instrument governed by international law and possessing its own legal personality.”²³¹

The importance of IOs attaining legal personality is arguably derived primarily from the need for them to be more efficient in carrying out their duties and pursuing the goals for which they were instituted as they can obviously function more effectively as autonomous entities rather than through a complicated system of bureaucracy involving all member states.²³² However, another perspective, no doubt deemed cynical by some observers, is that member states create IOs and promote their legal personality so that they may advance policies and actions through them, but in the event of any claims of wrongdoing by other parties arising from the conduct of the IO, the IO will be held responsible while the member states will be shielded from liability.²³³ More will be said about the latter view in later chapters on the attribution of international wrongdoing to IOs and or to member states.

4.2. The Juridical Development of International Legal Personality

The proliferation of IOs in the first half of the twentieth century prompted debate about the international legal personality of these institutions.²³⁴ Generally, the League of Nations was viewed as possessing legal personality on the international plane, no doubt

²³¹ *Report of the International Law Commission on the Work of its Fifty-Eight Session*, UNGA, (2006) Sixty-First Session, Supplement No. 10 (A/61/10) p.253.

²³² Amerasinghe, *Principles*, pp.78-79.

²³³ Ralph Wilde, “Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake” 12 *ILSA J. Int’l & Comp. L.* 395 2005-2006 at pp. 411-413; Jean D’Aspremont, “Abuse of the Legal Personality of International Organizations and the Responsibility of Member States” *Int’l Orgs. L. Rev.* (2007) 91 at p.105 [hereinafter D’Aspremont, “Abuse”].

²³⁴ Schermers & Blokker, 4th ed. at paras. 1562-3; on the development of the theory of international legal personality in the first half of the twentieth century, see David J. Bederman, “The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte” (1996) 36 *VJIL*, 367.

because of its universal nature, but other IOs were either denied such personality or evaluated mainly in terms of their personality within national law.²³⁵

The first occasion on which the subject was given attention, albeit indirectly, was the case of *Interpretation of the Greco-Turkish Agreement of 1 December 1926*.²³⁶ The Permanent Court of Justice (PCIJ) was asked to decide whether, in the event of a dispute related to a Mixed Commission, it could make submissions to a tribunal for arbitration, or if, alternatively, its member states could also make submissions jointly or unilaterally to the tribunal. In addressing the question, the Court did not explicitly discuss the existence of international legal personality for the Commission, but apparently assumed its existence, simply stating that the Commission was an “organization constituted as a corporate body”.²³⁷ Nevertheless, the Court actually recognized the Commission as an autonomous entity, separate from its member states, by refusing to allow its member states constituted as a corporate body (i.e. the Mixed Commission) to act “outside the sphere of proceedings within that organization”.²³⁸ In the Court’s opinion, to have done so would have amounted to a contravention of an accepted principle of law.²³⁹

The issue of international personality was not given direct judicial attention until it was addressed in 1949 by the ICJ in its Advisory Opinion in the *Reparation for Injuries*

²³⁵ Amerasinghe, p. 66; for a discussion of the legal personality of Public Unions, see Clyde Eagleton, “International Organization and the Law of Responsibility” (1950) 76-I Recueil des Cours, 319. [hereinafter Eagleton (1950)]

²³⁶ *Interpretation of the Greco-Turkish Agreement of 1 December 1926* (1928) P.C.I.J., Series B, No. 16, 4 at p.29; See also Mahasen. M. Aljaghoub, *The Advisory Function of the International Court of Justice 1946-2005* (Berlin: Springer, 2006) Ch.VI entitled “The Contribution of Advisory Opinions to the Development of the Law of International Institutions and to Public Law” pp. 155-199.

²³⁷ *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, *ibid.*, at p. 25.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

Suffered in the Service of the United Nations case.²⁴⁰ The question put to the Court was whether the UN, in the event of one of its agents being injured in circumstances involving the responsibility of a state, had, as an international organization, the capacity to bring an international claim against the state involved. Before considering this question, the Court found it necessary to affirm the international personality of the UN. In determining whether the organization possessed such personality the Court examined those characteristics of the organization which would be considered indicia of legal personality. These included the privileges and immunities enjoyed by the UN in its member States, its capacity to conclude treaties, and its “detachment from its Members”.²⁴¹ In conclusion the Court reasoned that the legal personality of the UN was implied by the rights and functions vested in the organization by its member States since these could “only be explained on the basis of the possession of a large measure of international personality”, and since international personality was “indispensable” to achieve the purposes and principles of the Charter of the UN.²⁴²

Notably, the Court held that the UN was “[a]n entity possessing *objective* international personality, and not merely personality recognized by them [member States] alone, [...]”.²⁴³ (emphasis added) This meant that the nature of the legal personality ascribed by the Court was such that it had to be recognized by non-member States, as opposed to a *subjective* legal personality which would only be recognized by

²⁴⁰ *Reparations for Injuries Suffered in the Service of the United Nations* (1949) I.C.J. Rep. 74 [hereinafter *Reparations* case].

²⁴¹ *Ibid.*, p. 179.

²⁴² *Ibid.*, p. 179.

²⁴³ *Ibid.*, p. 185. For a discussion of the two perspectives on how legal personality is determined in the absence of an express treaty provision see Rama-Montaldo, Manuel, *International Legal Personality and Implied Powers*, (1970) 44 BYIL, 112.

member States.²⁴⁴ However, the Court expressly noted that the international personality which the UN possessed was not the same as that of a State.²⁴⁵ Perhaps it was for this reason that the Court, despite having recognized the legal personality of the U.N, still went on to determine whether the power to bring an international claim against a State for the particular injury and reparation under discussion could be attributed to the organization.²⁴⁶ On this question the Court concluded that the capacity to bring an international claim against a State was implied by the functions of the organization stipulated in its constituent instrument.²⁴⁷

In summary, the indicia of legal personality of an IO which the Court noted in the *Reparations* case were the duties, privileges and legal capacity with which the organization was vested, its existence as a separate entity from its Member States, its position as a subject of international law, and its capacity to enter into treaties and to bring international claims.²⁴⁸

However, despite the watershed decision of the *Reparations* case regarding legal personality on the international plane, at the municipal level states still differ in their approaches to recognizing the legal personality of IOs. In addition, there is the matter of how the legal personality of an IO should be determined in the absence of it being expressly conferred by its member States in its constituent instrument or where a state is a third party to an IO i.e. it is not a member state of the IO. Where either of these

²⁴⁴ Aljaghoub. p. 158; *Reparations Case*, *ibid.*, at p. 185; the ruling relating to objective personality and its recognition by non-member states was particularly important to this case since Israel, the State in which the injury to the UN agent had occurred, was not a Member of the UN at that time.

²⁴⁵ *Reparations case*, *ibid.*

²⁴⁶ *Ibid.*, Similarly, in *Re ERTA: E.C. Commission v. E.C. Council*, (1971), 47 I.L.R. 278, the Court of Justice of the European Communities found it necessary to determine whether the European Community had the power to conclude the treaty under discussion although the Treaty which established the Community had expressly vested it with legal personality.

²⁴⁷ *Reparations case*, p.180.

²⁴⁸ *Reparations case*, *ibid.*

scenarios exist the legal personality of an IO which must be determined is labelled as derived or objective personality and there are various legal approaches and theories as to how this type of legal personality ought to be dealt with in municipal law and at international law.

4.3. Legal Personality of IOs in Municipal Law

The question of the recognition of legal personality of IOs necessarily arises on the non-international plane as well as on the international one, and the fact that an IO has legal personality internationally does not automatically translate into it possessing the same municipally or vice versa. Whether a particular IO is accorded legal personality and standing within a State's courts is a matter for that State to independently decide and States may use different juridical means and criteria for recognizing or granting legal personality to an IO.²⁴⁹

The most straightforward situation for determining legal or juridical personality within national law is of course one in which the constituent instrument of an IO expressly invests it with legal personality within member States' territories to enable it to carry out its functions. Provisions within such constituent instruments usually confer on the particular IO, *inter alia*, legal standing as a party to legal proceedings in the domestic courts, or the ability to conclude contracts related to the acquisition of goods and services or the conveyance of property.²⁵⁰ The Articles of Agreement of the International Monetary Fund (AA) and the UN Charter provide examples of express provisions for legal personality within a constituent instrument. The AA declare that the Fund has full *juridical* personality (but not *international* legal personality) with capacity

²⁴⁹ Amerasinghe, *Principles*, p. 70

²⁵⁰ Shaw, 4th ed. p. 911.

to, *inter alia*, enter into contracts and initiate legal proceedings in its member states,²⁵¹ and invests it with privileges and immunities *within the domestic jurisdiction of its members* that are comparable to those of a state.²⁵² Similarly, Article 104 of the UN Charter states that the UN “shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”.²⁵³ A third example is Article 282 of the Treaty of the European Community which provides that “[i]n each of the member-States the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws.”

When these terms exist within the constituent instrument of an IO it appears that the member states are obliged as parties to the treaty to recognize it within their domestic jurisdiction.²⁵⁴ It has also been suggested that this obligation can be implied from “the relationship between the members and the organization and from the principle of good faith”.²⁵⁵ However, despite this rule, it does not follow that where there is such a constitutional provision all member States of an IO automatically grant legal personality to the relevant IO.²⁵⁶ The reason for this is that states differ in the process by which the terms of a treaty are established as enforceable in their national law.

In the United Kingdom and most Commonwealth states, notwithstanding the fact that the state is a party to an international treaty, the terms of the treaty must be

²⁵¹ Articles of Agreement (AA) IX Sec 2 (i) (iii).

²⁵² *Ibid.*, IX Sec 3.

²⁵³ See also Article VII (2) of the AA of the International Bank for Reconstruction and Development; Article 16 of the Food and Agriculture Organization; and Articles 6h and 12 respectively of the constitutions of the World Health Organization and UNESCO.

²⁵⁴ Amerasinghe, *Principles*, p.76; ILC, Report on the Work of its Fifty-fifth Session, (2003), Chapter IV, *The Responsibility of International Organizations*, in UNGA, Fifty-eight Sess. Supplement no. 10, A/58/10) p.41.

²⁵⁵ *Ibid.*,

²⁵⁶ Shaw, 4th ed. p. 911.

incorporated by legislation before it is acknowledged as law domestically.²⁵⁷ Consequently, in states which observe this rule, although the state is a party to a treaty which expressly grants legal personality to a particular IO, the recognition of the legal personality of that IO within the state must still be preceded by the incorporation of the relevant constituent instrument by appropriate legislation.²⁵⁸ In contrast, in the USA and some European states, a treaty to which they have acceded automatically forms a part of national law. Consequently, where these states are parties to a constituent instrument that expressly confers legal personality on an IO, recognition of that personality in their domestic legal systems is also automatic.²⁵⁹

4.4. Objective or Derived Personality of IOs in Municipal Law

Thus far, the practice relating to the recognition of legal personality within national law by member states of an IO that has been expressly invested with personality has been discussed. But the more complex situation in which a state which is *not* a member of a particular IO must decide whether that IO should be granted legal personality within its territory, or when a constituent instrument does *not* expressly confer legal personality in any state, must also be considered. In both these cases, legal personality that is referred to as derived or objective personality may be arrived at

²⁵⁷ See the House of Lords unequivocal statement on this point in *Rayner (JH) (JH) Ltd. V. Dept of Trade and Industry* [1990] 2 AC p.418 and in particular the dictum per Lord Oliver at p. 510 (hereinafter cited as Rayner). Also, all of the cases known collectively as the *Tin Council* cases: *Maclaine Watson & Co. v. Department of Trade and Industry* and related appeals; *Re International Tin Council*; *Maclaine Watson & Co Ltd v. International Tin Council*; *Maclaine Watson & Co Ltd v. International Tin Council (No 2)* [1988] 3 All ER 257 (Court of Appeal) (hereinafter *Tin Council* cases (CA)); [1990] 2 AC 418, [1989] 3 All ER 523, 81 I.L.R. 670 (1989) (House of Lords) (hereinafter *Tin Council* cases (HL)).

²⁵⁸ For a thorough discussion of the history and current UK law related to incorporation of treaties see: Geoffrey Marston, "The Personality of International Organizations in English Law" in Jan Klabbbers, ed., *International Organizations* (Burlington: Ashgate/Dartmouth, 2005) 241.

²⁵⁹ Amerasinghe, *Principles*, p.70; Shaw, 4th ed. p.913.

by similar routes traversed by a state in order to decide whether an IO should be recognized as a legal personality within its national jurisdiction.

Where a state is a third party to an IO, i.e. it is not a member state of the IO, the IO cannot independently decide that it holds legal personality in that state although its constituent instrument may expressly confer legal personality on it. This decision rests with the third-party state. This rule that IOs cannot impose rights or obligations on a third-party state without the express consent of the state involved is enshrined in Articles 34 and 35 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Hence, in the case of a non-member state, one option for the realization of legal personality for an IO in a third-party state is the use of a special agreement, such as a headquarters agreement, concluded between the organization in question and the relevant state. This approach was taken in *Re Poncet* where the UN, on the basis of an agreement with the non-member state of Switzerland regarding its headquarters, was accorded recognition as a legal personality in the Swiss Federal Court.²⁶⁰ Moreover, the International Law Commission apparently agrees that there is an obligation to recognize an IO as an international legal person where international personality is included as a term of a headquarters agreement.²⁶¹

In the absence of a special agreement, and when the constituent instrument of an IO is silent with regard to its existence as a legal personality within states,

²⁶⁰ *Re Poncet* [1948] 15 I.L.Rep. 346.

²⁶¹ ILC, Report on the Work of its Fifty-fifth Session, (2003), Chapter IV, *The Responsibility of International Organizations*, in UNGA, Fifty-eight Sess. Supplement no. 10, .A/58/10) p. 41 at footnote 45 states: "Thus in its judgment No. 149 of 18 March 1999, *Istituti Universitario Europeo v. Piette*, *Giuriscivile civile*, vol. 49 (1999), I, p. 1309 at p. 1313 the Italian Court of Cassation found that 'the provision in an international agreement of the obligation to recognize legal personality of an organization and the implementation by law of that provision only means that the organization acquires legal personality under the municipal law of the contracting states.' "

personality in national law may be implied by other legal mechanisms. Specifically, a domestic court may apply the rules of private international law (alternatively referred to as conflict of laws) in order to determine the proper law of an IO. The applicable law of an IO will of course be international law and if the IO has legal personality under international law this would be the basis for recognition of the same under national law.²⁶² However, in the scenarios where there is no special agreement between a third party state and an IO or where the constituent instrument is silent with regard to the legal personality of an IO, the courts of the United Kingdom and the courts of those states which subscribe to UK practice have thus far approached derived/objective personality in a way that differs significantly from that of other states.

As discussed above, it was established in the *Tin Cases* that even if the UK is a member of an IO, and even with a headquarters agreement in place, the legal personality of that IO is not recognized unless there is incorporation of the respective treaty into domestic law.²⁶³ Further, in *Rayner* the Court made it clear that this rule also applied to IOs of which the UK was not a member,²⁶⁴ and this was reiterated in *Arab Monetary Fund v. Hashim and Others (No.3)*²⁶⁵ which involved an IO (the AMF) of which the UK was not a member seeking to bring an action in English courts. Consequently, in the latter case the House of Lords did not recognize the legal personality of the AMF by application of the rules of private international law on the grounds that to do so would contravene the ruling in *Raymer* with regard to the

²⁶² *UNRAA v. Daan*, [1950] 16 I.L.R., 337; *Branno v. Ministry of War*, [1954] 22 I.L.R., 756; *Manzzanti v. HAFSE and Ministry of Defence* [1954] Tribunal of Florence, 22 I.L.R. 758; *International Tin Council v. Amalgamet Inc.*, 524 NYS 2d 971 (1988); Amerasinghe, *Principles*, pp.70-71; Shaw, p.912.

²⁶³ *Rayner (JH) (Mincing Lane) LTD. V. Dept of Trade and Industry* [1990] 2 AC p. 418, per Lord Oliver at p. 510.

²⁶⁴ *Ibid.*

²⁶⁵ *Arab Monetary Fund v. Hashim and Others (No.3)* [1990] 1 All E.R. 685.

requirement of incorporation. However, the Court nevertheless recognized the organization's legal personality on another basis. The Court reasoned that comity required that if an international organization is instituted and granted legal personality by a foreign state, and that state is recognized by the Crown, the UK courts should also recognize that organization as a separate legal entity.²⁶⁶

Hence, by virtue of the decision in the *Arab Monetary Fund (No.3)* case, the grounds for recognizing derived or objective personality for an IO within the domestic arena were expanded to include comity in addition to special agreements and incorporation.

4.5. Theories of Derived Legal Personality of IOs at International Law

The question regarding the determination of derived or objective personality also obtains on the international plane and has occupied academia and international tribunals and has given rise to a variety of theories.

4.5.1. The Status Theory

One view, labelled the status approach, offers that the legal personality of an IO is implied by the mere fact that it exists and has obligations under international law.²⁶⁷ This appears to be the approach taken by the ICJ in determining the legal personality of certain IOs in two cases which followed the *Reparations* case. In both cases the ICJ did not expressly recognize the legal personality of the IOs involved, but chose instead to

²⁶⁶ *Arab Monetary Fund v. Hashim and Others (No.3)* [1991] 1 All E.R. 87 (HL).

²⁶⁷ Rama-Montaldo, p 112; ILC, Report on the Work of its Fifty-fifth Session, (2003), Chapter IV, *The Responsibility of International Organizations*, in UNGA, Fifty-eight Sess. Supplement no. 10, A/58/10) p. 41; International Law Commission, Fifty-Fifth Session, Giorgio Gaja, (Special Rapporteur), *First Report on Responsibility of International Organizations*, (A/CN.4/532) [hereinafter Gaja, First Report, A/CN.4/532] International Law Association, Report of the Sixty-eight Conference, Taipei, Taiwan. 1998.p. 605 [hereinafter ILA, Taiwan, 1998].

focus on their status as subjects of international law and thereby apparently acknowledging that legal personality was derived from this status. First, in its advisory opinion on the *Interpretation of the Agreement of 25th March 1951 between the WHO and Egypt*, the Court merely stated:

“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”²⁶⁸

Then later, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court observed that “[T]he Court need hardly point out that international organizations are subjects of international law....”²⁶⁹

4.5.2. The Will or Function Theory

Another school of thought advocates the “will theory”²⁷⁰ or the function approach which was employed in the *Reparations* case. It entails the personality of an IO being accorded on the basis of the intention of the member States to invest the IO with legal personality. This intention is to be deduced from the rights, duties and legal capacity granted to the IO by its member States in the constituent instruments.²⁷¹

²⁶⁸ ICJ Reports , 1980, p.73

²⁶⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, (1996) I.C.J. Rep. 66 at p. 78, para. 25.

²⁷⁰ Jan Klabbers, *An Introduction to International Institutional Law* 2nd ed. (Cambridge: Cambridge University Press, 2002) pp.43-49. 53 [hereinafter Klabbers, *Introduction*].

²⁷¹ Rama-Montaldo, p. 112; Amerasinghe, *Principles*, p.79; ILA, Taiwan,1998, p. 605.

4.5.3. The Objective Theory

A third perspective, the objective theory, was devised by international lawyer Finn Seyersted. He proposed that the international personality of an IO should not be determined by the will of its founders, but should rather be based on whether it has at least one international organ which has been established by two or more sovereign states, and which possesses certain characteristics.²⁷² The first of these characteristics, which he argued was the only one that was essential to the recognition of the international personality of an IO, was that an international organ of an IO is subject only to the joint authority of its member states acting through their representatives on the said organs. The other two characteristics he considered to be only necessary for differentiating between various types of IOs. The first of these two was that an organ of an IO should, in its own name, “[p]erform ‘sovereign’ and/or international acts” which he defined as “acts of territorial, personal, or organic jurisdiction.” The second characteristic was that the organs are “[n]ot authorized by all their acts to assume obligations (merely) on behalf of the several participating states.”²⁷³ In other words, the acts of the organs should be on behalf of themselves as well as its member states, otherwise the IO is not an autonomous entity. Notably, Seyersted explicitly excluded the establishment of an IO by an international convention as a criterion for international personality because of the fact that some IOs have been established merely by resolutions or some form of agreement between states.²⁷⁴

²⁷² Finn Seyersted, *Common Law of International Organizations*, (Boston: Martinus Nijhoff, 2008), [hereinafter Seyersted] pp.43-46, and see footnotes 21 & 22 at p.44; Amerasinghe, *Principles*, p. 79

²⁷³ Seyersted, pp. 43-44.

²⁷⁴ Ibid., p.46.

Other legal scholars may not subscribe to Seyersted's objective theory, and the exact number and nature of the criteria which constitute legal personality remains the subject of academic debate.²⁷⁵ Klabbers has taken issue with Seyersted's theory on the grounds that it tends towards recognition of the international personality of an IO regardless of the intention of the member states and thus amounts to elevating the theory to *jus cogens* status. On his part he has offered some criteria of his own in determining "subjectivity".²⁷⁶ He submitted that at a minimum the criteria are the capacity to enter into treaties, the right to bring and receive claims, and the right to send and receive legations.²⁷⁷

4.6. Derived International Legal Personality of the IMF

In light of the above the IMF meets most if not all of the criteria of international legal personality laid down in the *Reparations* case as well as those of the various theories discussed above. It exists as a separate entity from its member states; it certainly needs international legal personality to perform its functions; and in view of the duties, privileges and legal capacity with which it was vested by its member states it would be unreasonable to think that its member states did not intend or will that it possess such personality. Moreover, it is a subject of international law and has the status of an international legal personality, and it has various organs though it is doubtful that these entities satisfy Seyersted's criteria since they were not formed only

²⁷⁵ Regarding the criteria for international personality see Ian Brownlie, *Principles of Public International Law* 5th ed. (New York: Oxford University, 1998) pp. 678-681.

²⁷⁶ Klabbers, *Introduction*, p. 55 - Klabbers attempts to differentiate between "subjectivity" and international personality for an IO while acknowledging that there is so much of an overlap as to make it sometimes difficult to distinguish.

²⁷⁷ *Ibid.*, p. 43; Sergei. A. Voitovich, *International Economic Organizations in the International Legal Process* (Dordrecht: Martinus Nijhoff, 1995), p. 21, in which the author bases the legal status of IOs on primary and secondary rights and obligations.

by states but by other entities such as the World Bank.²⁷⁸ However, whether the IMF possesses one other essential criterion of international legal personality - the capacity to enter into treaties – has not been settled in this chapter and will be separately examined in the next.

²⁷⁸ Such as the Joint Africa Institute, the Joint Vienna Institute, and the Singapore Training Institute.

Chapter 5

5.0. The Treaty-Making Capacity of IOs

This topic is treated at length and in a separate chapter of this study because the ARIO only applies to international organizations which possess international legal personality (Article 2 (a)) and the capacity to enter into treaties is an essential component of international legal personality. Thus, where such personality is implied instead of expressly granted by the constituent of an IO, as is the case with the IMF, the existence of this component must be ascertained. In addition, the topic is thoroughly discussed because of its importance to certain aspects of this case, particularly the international legal obligations of the IMF to which treaties may give rise, and the role and responsibility of both the organization and its member states in any treaties to which it is a party.

As has already been noted, on the subject of IOs concluding treaties with states the first question that has to be settled is whether IOs even possess the legal capacity to enter into treaties. Obviously, if they do not possess such capacity any treaty to which an IO is a party would be null and void and the particular IO could not be bound by the terms of the treaty. Historically, the question regarding this capacity centred around another, namely, was an IO a subject of international law, because the capacity to conclude treaties had been recognized as a right accorded at international law to subjects of international law.²⁷⁹ Since, as discussed in chapter 4, it was established in

²⁷⁹ Hungdah, Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded* (The Hague, Netherlands: Martinus Nijhoff, 1966) p. 34; Schermers & Blokker, 4th ed., p.1112, para. 1745.

the *Reparations* case and thereafter that IOs are entities which possess international legal personality, it followed that as such they were subjects of international law and were therefore to enjoy the rights granted to subjects of international law, which include the capacity to enter into treaties.²⁸⁰ In other words, treaty-making capacity was recognized as an inherent power of any entity possessing the status of international legal personality and as such IOs were thus entitled to it. Moreover, as was also previously discussed in chapter 4, as international legal personalities IOs were to be recognized as possessing by implication those powers that are necessary for them to fulfil their constitutionally mandated functions, and the capacity to enter into treaties was very likely to be one such power. These arguments constituted the theories that the treaty-making capacity of IOs derived from their inherent powers as an international legal personality and or from the powers implied by their functions.²⁸¹ But there were other schools of thought which were competing with these theories. One was that the treaty-making capacity of IOs had been established by custom, but the other more troublesome one was that this capacity only existed where it was explicitly granted in an organization's constituent instrument.²⁸²

²⁸⁰ Jenks argued that "if a body has the character of an international body corporate the law governing its corporate life must necessarily be international in character". Wilfred C. Jenks, *The Proper Law of International Organizations* (London: Stevens, 1962) p.3.

²⁸¹ D.W. Bowett, *The Law of International Institutions*, 2nd ed. (London: Stevens, 1970) pp.306-310 [hereinafter Bowett, 2nd ed.].

²⁸² Hungdah, p. 35; G.E. do Nascimento e Silva, "The 1986 Vienna Convention and the Treaty-Making Power of International Organizations" (1986) 29 German YIL. 68; D.W. Bowett, *The Law of International Institutions*, (New York: Praeger, 1963) pp.274-275, 277-278 [hereinafter Bowett, 1963]; D. M. McRae, "Co-operation Agreements and the Law Relating to Agreements Concluded by International Agreements" in K. Zemanek, ed., *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (New York: Springer-Verlag 1971 – Österreichische Zeitschrift für öffentliches Recht, Supplementum 1) p.1; G. Hartmann, "The Capacity of International Organizations to Conclude Treaties" in K. Zemanek, ed., *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (New York: Springer-Verlag 1971 – Österreichische Zeitschrift für öffentliches Recht, Supplementum 1) p.127.

The implied or inherent power of an IO to enter into treaties was arguably impliedly recognized by the ICJ since 1950 in its Advisory Opinion on the *International Status of South-West Africa*. In that case the Court opined that the Mandate on South West Africa was indeed a treaty in accordance with Article 37 of the Statute of the ICJ.²⁸³ Since the League was a party to the Mandate, but the Covenant of the League of Nations did not explicitly grant treaty-making capacity to the League, the Court therefore impliedly recognized the treaty-making capacity of this organization and moreover implied that this capacity derived from the League's implied or inherent powers as an IO.

Again in its Advisory Opinion on the *Reparations* case the ICJ could be said to have indirectly and impliedly recognized the treaty-making capacity of the UN on two grounds. First, in considering whether the UN possessed international legal personality, the Court highlighted the fact that the UN Charter had empowered the Organization to engage in many of the same activities as those entities which possessed international legal personality, *including the capacity to conclude agreements between the Organization and its Members*.²⁸⁴ Then, still on the question of international legal personality, the Court appeared to support the implied power or functional theory, concluding that the UN must be deemed to possess international legal personality since its Members, “[b]y entrusting certain functions to it, [...], have clothed it with the competence required to enable those functions to be effectively discharged”. Then, on the question of whether the UN had the capacity to bring a claim for reparation on the international plane, the Court again utilized the functional theory to grant this capacity,

²⁸³ [1950] I.C.J. Rep. 319 at 330.

²⁸⁴ *Reparations* case, [1949] I.C.J Rep, 174, 178-179.

declaring that “[U]nder international law, the Organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”²⁸⁵ Naturally, an extrapolation could then be made from this dictum that since treaty-making capacity was necessary for IOs to carry out their functions, the Court had by implication recognized that IOs possessed this capacity.

Following the *Reparations* case, in the 1962 *South West Africa* cases, the ICJ, again by implication, gave support to the theory that treaty-making capacity was an implied power of IOs by again recognizing the mandate for South West Africa as an international treaty and the League of Nations as a party to it.²⁸⁶ However, international lawyers continued to disagree about whether IOs had the capacity to conclude treaties and the basis for this capacity. Was this treaty-making capacity determined solely by the terms of the constituent instruments of IOs, was it an inherent power IOs possessed as international legal personalities, or was it a power implied from their constitutionally mandated functions or from custom?²⁸⁷

This controversy was apparent in the meetings of the ILC on the codification of treaties and was perhaps summed up in the words of Prof. George Scelle, Chairman of the Second Session of the ILC when he said that “[t]here were organizations whose capacity to make treaties was unquestioned, since their constitutions expressly gave them that capacity. In doubtful cases the International Court of Justice could decide.”²⁸⁸

²⁸⁵ Ibid., 182.

²⁸⁶ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21st December 1962 (1962) I.C.J. Rep. 330-332.

²⁸⁷ Bowett, 2nd ed., pp.306-310; P.K. Menon, *The Law of Treaties between States and International Organizations* (Lewiston: The Edwin Mellen Press, 1992) pp.21-25.

²⁸⁸ Yearbook of the International Law Commission 1950, Vol. 1, p.78 *et seq.*, quote from Prof. Scelle at p.81. para.72. cited in Nascimento (1986) p.69.

The ongoing debate about the treaty-making capacity of IOs led to indecisiveness on the part of the ILC as to whether treaties to which IOs were parties should be included in its preparatory work for the Vienna Convention on the Law of Treaties which it commenced in 1950.²⁸⁹

Initially the ILC agreed that the study of the treaty-making capacity of IOs should be included in the codification of the law of treaties but in 1962 it decided that this topic should be excluded.²⁹⁰ Eventually, the United Nations Conference on the Law of Treaties recommended that the ILC undertake the preparation of a separate set of draft articles to address the subject of treaties involving IOs.²⁹¹ However, notwithstanding the ILC's explicit refusal to include IOs as subjects of the 1969 *Vienna Convention on the Law of Treaties* (hereinafter the 1969 Treaty Convention), Articles 3 and 5 of that Convention impliedly gave recognition to them as legitimate parties to treaties.²⁹² Article 3, while stating that the Convention did not apply to international agreements to which "other subjects of international law" were parties, nevertheless granted "legal force" to such agreements and allowed for the application of the Convention to international agreements involving States and these "other subjects of international law". Further, Article 5 stated that the Convention applied to, *inter alia*, "any treaty adopted within an

²⁸⁹ Karl Zemanek, "Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations" Vienna, 21 March 1986 (United Nations Audiovisual Library of International Law, 2008) p.1, available at: <http://untreaty.un.org/cod/avl/pdf/ha/vcltsio/vcltsio-e.pdf> [hereinafter Zemanek, 2008]; G. Hartmann, p.127; and see generally Shabtai Rosenne, *Developments in The Law of Treaties 1945-1986*, (Cambridge: Cambridge University, 1989) and Felice Morgenstein, *Legal Problems of International Organizations* (Cambridge: Grotius Publications, 1986) at pp.13-36 and 104-134.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² The 1969 Convention came into force on 27th January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

international organization”.²⁹³ Nevertheless, in accordance with the recommendations of the 1969 Conference, the ILC undertook the task of preparing separate draft articles to address the law of treaties to which IOs were parties. In 1982 the draft articles for *The Law of Treaties between States and International Organizations or between International Organizations* were submitted to the United Nations General Assembly and subsequently, in 1986, the General Assembly arranged a Conference for the purpose of having the draft articles adopted as a convention.²⁹⁴

At the Conference the controversy regarding the basis for the treaty-making capacity of IOs continued. Socialist states maintained that IOs possessed this capacity only where it had been explicitly provided for in their constituent instruments, but given the reality that at that time the constitutions of most IOs were silent with regard to treaty-making capacity, and since the conclusion of treaties was highly likely to be an essential part of IOs realizing their goals and functions, this position would severely limit IOs in carrying out their mandated functions.²⁹⁵ In contrast to the Eastern European states, other states advanced a less restrictive view of the treaty-making capacity of IOs, contending that as international legal personalities IOs automatically possessed this capacity under international law, provided that the treaties that an IO concluded were

²⁹³ In view of Articles 3 and 5 it is perhaps not surprising that in 1973 the *Institut de Droit International* formally stated that the provisions of the 1969 Convention were “in principle applicable to international agreements concluded by international organizations either with other international organizations or with one or several States”. *Annuaire de L’Institut de Droit International* 55 (1973), 797, cited in Nascimento, p.71.

²⁹⁴ Zemanek, 2008; the 1986 Convention is not yet in force. Article 85 provides that it shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification by States (not IOs). As of September 7, 2014, 31 States and 12 IOs had acceded to the Convention.

²⁹⁵ Nascimento, pp. 74-75; UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna 1986 , *Official Records*, Vol. 1, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, UN Doc. A/Conf. 129/c. 1/SR 6. (1995).

not outside of its mandated functions.²⁹⁶ Yet, as Nascimento pointed out, the two positions were not exclusive of each other, for even if treaty-making capacity were recognized as an inherent right of IOs under international law, conclusion of a treaty by an organization would nevertheless be subject to the approval of its member states and to whether it was in accordance with its constituent instrument, whether explicitly or implicitly.²⁹⁷

In the end the ILC settled on a compromise between the two positions in the 1986 Treaty Convention, (the *The Law of Treaties between States and International Organizations or between International Organizations* will hereinafter be referred to as the 1986 Treaty Convention) recognizing both the functional theory and the constituent instrument of an IO as combined bases for the treaty-making capacity of IOs, although it may initially appear that the two were contradictory.²⁹⁸ The preamble of the 1986 Convention first states that “[i]nternational organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes”. In other words, treaty-making capacity is an implied or inherent power of an IO based on functional necessity. But the next paragraph stipulates that “[t]he practice of international organizations in concluding treaties with States or between themselves should be in accordance with their constituent instruments”. At first glance it appears from the juxtaposition of these two provisions that the treaty-making capacity of IOs is based on conflicting grounds, but they must be interpreted in conjunction with Articles 6 and 2 (j) of the Convention.

²⁹⁶ Ibid., Zemanek, 2008, p.2.

²⁹⁷ Ibid.

²⁹⁸ *Yearbook of the International Law Commission* (1982), vol. II (A/CN.4/SER.A/1982/Add.1 Part 2), p.24.

Article 6 provides that “[T]he capacity of an international organization to conclude treaties is governed by the *rules of that organization*.” (emphasis added), while Article 2 (j) defines “rules of the organization” as “[i]n particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.”²⁹⁹ Hence, Article 2 (j) reveals that the phrase “the rules of the organization” as employed by the ILC encompassed more than the constituent instruments. This wider interpretation of the term “rules” indicates that the ILC decided that the treaty-making capacity of an IO was to be based on not only its constituent instrument, but was also to be implied from several other aspects of an organization’s character and functions. Moreover, in its commentary on Article 6 found in the report to the General Assembly the ILC pointed out that while Article 2 (j) refers to “rules of the organization”, Article 6 states the treaty-making capacity of an IO is to be determined by “the rules of *that* organization”³⁰⁰ (emphasis in original text) thereby signalling that the extent of this capacity for each IO is to be individually determined from the particular rules and practice of each IO.³⁰¹ Hence, the question of whether an IO possessed the capacity to conclude treaties was answered in the affirmative by the ILC on the grounds of both the doctrine of implied powers and the constituent instruments of IOs.³⁰² But obviously, since the treaty-making capacity of an IO can be implied from “the rules of

²⁹⁹ The term “rules of the organization” is also similarly defined in Article 1.1 (34) of the 1975 *Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character*.

³⁰⁰ Yearbook of the ILC, 1982, vol. II, part 2, p. 24

³⁰¹ Schermers & Blokker, 4th ed. p. 1115, para. 1748. This same view of the basis of the treaty-making capacity of IOs had been expressed by the Court of Justice of the Communities in 1971 in the *ERTA* case: “[S]uch authority [the authority of the EC to enter into international agreements] arises not only from an express conferment by the Treaty ... but may equally flow from other provisions of the Treaty and from measures adopted, within the frameworks of those provisions, by the Community institutions” *ERTA Case (Commission v. Council)* (22/70), (1971) E.C.R., 274.

³⁰² Shaw, 4th ed., p.918; Sergei A. Voitivich, *International Economic Organizations in the International Legal Process* (Dordrecht: Martinus Nijhoff, 1995) p.39-41.

that organization”, which by definition include the established practice of an IO, it is possible for an IO to be empowered to conclude agreements by virtue of its past practice despite the absence of any express authorization to do so within its constituent instrument.³⁰³

The proof that the capacity of IOs to conclude treaties has been internationally recognized for some time can be found in the numerous agreements that IOs have concluded to date. However, it should be emphasized that because it is based on each IO’s individual constituent instrument and the powers implied by its functions and practice, treaty-making capacity is not an absolute power for IOs as it generally is for states and it can also evolve. Therefore, each time a new treaty is to be concluded the competence of any given IO to conclude that particular treaty must be individually assessed.³⁰⁴

With regard to the question of whether the IMF possesses treaty-making capacity it is apparent from the above that it does have such capacity as an IO but this is not based on all the grounds cited above. Rather, since this capacity is not expressly granted by its AA the basis of its existence is that it is implied by the IMF’s functions, since treaty-making is necessary for it to fulfil these functions, as well as its past practice of entering into treaties with its member states. Further, treaty-making capacity on these grounds is expressly recognized in the preamble of the 1986 Convention.

The finding that treaty-making capacity is an attribute of IOs and the IMF specifically gives rise to other questions regarding the rules which obtain in treaty relationships between IOs and other entities, but for the purpose of this study, only

³⁰³ Schermers & Blokker, 4th ed. p.1115, para.1748.

³⁰⁴ Ibid.

those rules and principles which apply to treaties between states and IO will be considered. Firstly, should a multilateral treaty to which both States and IOs are parties be governed by the 1969 Convention, the 1986 Convention, or general international law? Secondly, when an IO is a party to a treaty what are the rights and obligations which consequentially accrue to the member states of that IO? The latter topic is especially important for this study because it will impact the determination of the responsibility of the member states of the IMF for the international wrongdoing under consideration here.

5.1. Rights and Obligations of Member States under a Treaty Entered into by an International Organization

Article 13 of the Draft Declaration of the Rights and Duties of States (1949) provides that “Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.” The latter part of this article is based on a principle established in the case *Treatment of Polish Nationals and Other Persons of Polish Origin and Speech in the Danzig Territory*,³⁰⁵ and was eventually incorporated into the 1969 Vienna Convention on the Law of Treaties as Article 27 and later reiterated in Article 27 of the 1986 Convention. A similar principle is expressed in Articles 46 of both Conventions in the context of a reservation. Further, Articles 26 of both Conventions provide that the parties to a treaty that is in force are bound by it and must perform it in good faith.

³⁰⁵ (1932) P.C.I.J. Advisory Opinion, Series A./B. Judgments, Orders and Advisory Opinions, Fascicule No. 44, p. 24.

These principles and articles clearly apply to states and IOs which are direct parties to a treaty, i.e. contracting states and contracting IOs.³⁰⁶ But the controversial question is whether member states of an IO are automatically parties to a treaty to which the IO is a contracting party where the constituent instrument of the IO is silent on this subject.³⁰⁷ Put another way, when an IO enters into a treaty do rights and obligations arise from that treaty for the member states of the contracting IO? And more specific to this case, if the IMF is found to be responsible for international wrongdoing against its borrowing states because it violated its treaty with them, are its member states also responsible for this breach of obligations?

In initial discussions regarding this question the ILC had taken the position that member states of IOs could be bound by a treaty concluded by an IO without their express consent or the consent of the IO or other contracting parties.³⁰⁸ But in 1982 the ILC apparently changed its views on the matter. Most likely because of the recognition of IOs as international legal personalities and as such, separate and autonomous legal entities from their member states, the ILC indicated in its commentaries to the draft articles that it categorized member states of an IO as “third states”.³⁰⁹ Since third states

³⁰⁶ Contracting states and contracting IOs are defined in Article 2(f) of the 1986 Convention as states or IOs that have consented to be bound by the treaty, whether or not the treaty has entered into force.

³⁰⁷ For example, the constitution of the European Community states that agreements concluded by the EC “shall be binding on the institutions of the Community and on member states”. EC, Article 300.7.

³⁰⁸ Giorgio Gaja, “A ‘New’ Vienna Constitution on Treaties between States and International Organizations or between International Organizations: A Critical Commentary” (1987) 58 B.Y.I.L. 235 at p.263 and footnote 41; the Special Rapporteur’s Report, in *Yearbook of the International Law Commission*, (1977), vol. 2, Part 1, pp. 127-128, and the ILC’s response in *Yearbook of the International Law Commission*, (1978), vol. 2, Part II, p. 134.

³⁰⁹ ILC, 34th session, *Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations with Commentaries*, (1982), p.46. para. 10; the ILC’s view of member states as third states was confirmed by the Expert Consultant, Mr. Reuter, at the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, 1986, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, Vol.1, 25th Meeting of the Whole, UN Doc. A/Conf. 129/c. 1/SR 6. (1995) p.174. paras. 16 & 17.

are defined in Article 2(h) of the 1986 Convention as “a State not a party to a treaty” the ILC thereby appeared to confirm its position that member states of an IO are not parties to treaties to which the IO is a party.

Yet, in an apparent effort to give an opportunity within the 1986 Convention for member states of an IO, despite being third states, to share the rights and obligations arising from a treaty to which an IO was a contracting party, the ILC included article 36 (*bis*) which provided:

“[O]bligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:

(a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and

(b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations.”

This Article was included in the draft articles submitted by the ILC in 1986 to the General Assembly but at the U.N Conference which was convened in 1986 to consider

these articles several states objected to the inclusion of Article 36 (*bis*) in the final draft and at the twenty-eight meeting of the Committee of the Whole it was finally decided that it would be deleted.³¹⁰ The objections to Article 36 (*bis*) centered mainly on the view that since member states of IOs were duly recognized as third states in relation to treaties concluded by IOs, their position in this regard was sufficiently dealt with by Articles 34, 35 and 36 of the draft articles and therefore Article 36 (*bis*) was redundant and unnecessary.

Generally, Articles 34 to 36 provide that a treaty does not automatically create obligations or rights for third states or third IOs and can only do so if *the contracting parties* intend that the treaty accords rights and obligations to them and they (the third states) assent accordingly. Interestingly, with regard to obligations for third states, Article 35 provides that the assent by the third states to be bound by a treaty must be in writing, while with regard to rights that arise for third states, Article 36 states that the assent is presumed unless the contrary is indicated or the treaty provides otherwise. Clearly then, by virtue of Articles 34-36, and by classifying the member states of IOs as third states, even if Article 36(*bis*) had been retained, the ILC and the General Assembly had effectively exempted member states of IOs from the rights and obligations arising from treaties concluded by IOs unless the contracting parties intended that they be bound by the treaty and the member states assented to be bound. Consequently, without the intention of the contracting parties and the assent of the member states no

³¹⁰ Ibid., 28th Meeting of the Whole, p. 194.

responsibility for any violation of such treaties by the contracting IOs could accrue to the member states.³¹¹

Significantly though, having disposed of Article 36(*bis*), it was decided at the Conference that a third paragraph should be added to Article 73.³¹² (With a different title - *Questions not prejudged by the present Convention* - Article 73 now appears as Article 74 of the 1986 Convention because of the inclusion of a new article as Article 73 at the Conference.) Paragraph 3 of what is now Article 74 is a saving clause which is of special relevance to the subject under discussion in this section as it provides:

“[T]he provisions of the present Convention shall not prejudice any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.”

The inclusion of Article 74(3) suggests that although the General Assembly categorized member states of IOs as third states to a treaty to which the IO is a contracting party it nevertheless recognized the need to leave a door open for them to be treated differently in the future, perhaps even as parties to such treaties with rights and obligations. Further, Article 74(3) indicates that the Conference failed to resolve the question of the rights and obligations which arise for the member states of an IO from a treaty to which the IO is a contracting party.

Schermers and Blokker have argued against member states being categorized as third states and thereby being exempt from any responsibility for the international wrongdoing of an IO. They contend that treaties concluded by an IO should be binding

³¹¹ See Gaja, (1987) 58 B.Y.I.L. pp.263-264 for more discussion about the arguments put forward by various states regarding Article 36 (*bis*).

³¹² Ibid, 6th Plenary meeting, p. 19.

on its member states for once they have transferred powers to an IO they should be bound by any agreements concluded by the IO which are within the scope of those powers. Further, they posit that if member states are not bound by the treaties of an IO it would be disloyal to the organization and place a burden on it since it would probably be liable for any violations of the treaty by member states. Lastly, they observe that if member states were free to violate agreements concluded by an IO this would cause uncertainty among third parties.³¹³ Giorgio Gaja, Special Rapporteur for the ARIO, appears to hold an analogous view because he has observed that considering member states of IOs as third states is incongruous with the fact that IOs act under the direct control of their member states.³¹⁴

It is submitted that notwithstanding the fact that member states of an IO have been exempted from responsibility for the international wrongdoing of IOs as a result of being categorized as third parties to treaties executed between IOs and states or other IOs, there is other international law which may be applied that may result in member states indeed being responsible for the wrongdoing of IOs. In particular, the ARIO, Articles 5 of both the 1969 and the 1986 Conventions on treaties, other provisions of the 1969 Convention, and the Convention on State Responsibility. The application of these will be discussed in the later chapter that deals with the responsibility of member states for international wrongdoing by IOs.

5.2. Constituent Instruments of IOs and Treaties

Importantly for later discussions in this study, Articles 5 of both Conventions specify, *inter alia*, that they apply to any treaty which is the constituent instrument of an

³¹³ Schermers and Blokker, 4th ed. p. 1141, para. 1787.

³¹⁴ Gaja, (1987) 58 BYIL. p. 264.

IO and significantly, in both Conventions a separate article was used to express this rule.³¹⁵ The fact that rather than leave such treaties to be included in the Conventions by implication the ILC felt it necessary to explicitly recognize that the constituent instrument of an IO also functions as a treaty is perhaps evidence that the constituent instrument of an IO is a complex creature in the legal landscape and must be given special attention. The constituent instrument of an IO is created by its member states and in turn it creates the IO and dictates its legal order, purposes and functions. As observed by the ICJ in its Advisory Opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case:

“The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments.”³¹⁶

At the same time, the constituent instrument in its original form also serves as the treaty which is concluded between the IO and its member states and thereby establishes the rules and responsibilities applicable to the parties of that treaty.³¹⁷ Hence, the functions and purposes which an IO's constituent instrument mandates it to carry out are the same ones that it (the IO) is also bound by through the same instrument, functioning as a treaty, to perform in its relationship with its member states. Meanwhile, it is this constituent instrument/treaty that also determines the rights and obligations of member states in their relationship with each other and with the IO. For example, the Articles of Agreement of the IMF function as its constituent instrument, the treaty between the organization and its member states, and the treaty between the

³¹⁵ Articles 5 of 1969 and 1986 Treaty Conventions.

³¹⁶ [1996] ICJ Rep. 66 at p. 79 (para.25).

³¹⁷ Schermers & Blokker, 4th ed. paras. 1145 – 1149; Rosenne, pp.181-224.

states which established the IMF. However, although the ILC has, by virtue of Article 5, recognized the dual function of the constituent instrument of IOs, in keeping with their scope the two Conventions can obviously only govern these instruments in their treaty role. Article 5 of the two Conventions is a valuable addition to codified international law with regard to IOs and their member states because it provides a means of enforcing their constitutionally mandated responsibilities, albeit via treaty law, as will be demonstrated later.

**PART III – The Responsibility of the IMF and its Member
States for International Wrongdoing**

Chapter 6

6.0. IMF Responsibility for International Wrongdoing against States

In this chapter the hypothetical conduct of the IMF, namely, eliminating capital controls from member states by requiring those states to remove them in order to qualify for loans from the IMF, will be examined through the prism of the ARIO and those sources of international law that it identifies as giving rise to international obligations, in order to discover whether such conduct would have constituted a violation of international law and thus an international wrongdoing by the IMF against some of its member states. If, in this imaginary scenario, international wrongdoing by the IMF could be proved then it would obviously incur international responsibility for its conduct and would be liable for damages for the injury suffered by affected member states due to the elimination of capital controls.

Article 4 of the ARIO defines an internationally wrongful act as an action or omission by an IO that is attributable to the IO and also breaches an international obligation of the same IO.³¹⁸ Hence, in this chapter the provisions of the ARIO that relate to the international wrongdoing of IOs (some relate to the wrongdoing of states) will be examined to discover whether the IMF could be found liable under any of them for international wrongdoing against its borrowing member states if it had required them to eliminate capital controls in order to obtain loans from the organization. In other

words, could this conduct of the IMF constitute an international wrongdoing as defined by Article 4 of the ARIO? Since this case study is premised on the fiction that the IMF did require its borrowing states to eliminate capital controls that conduct has already been attributed to the IMF in accordance with Article 4 of the ARIO and thus that component of an internationally wrongful act will be treated as already established. Therefore it is the other component - the existence of a breach of an international obligation by the IMF – that this chapter will focus on discovering.

More specifically, what is to be determined in this chapter is whether the IMF's conduct of requiring its member states to eliminate capital controls can amount to a breach of an international obligation that it owed to its member states. In pursuit of that inquiry, the relevant provisions of the ARIO will be studied to identify the various sources of international obligations for the IMF and then each of those sources will be examined to see whether they gave rise to an obligation for the IMF *not* to require its borrowing states to eliminate capital controls. If such an obligation for the IMF can be identified, then it would follow that by requiring its borrowing states to remove capital controls it breached one of its international obligations to them. Thus the second component of an international obligation would be met and the international responsibility of the IMF will be engaged because Article 3 of the ARIO declares unequivocally that: "Every internationally wrongful act of an international organization entails the international responsibility of that organization."

6.1. International Wrongdoing of IOs under the ARIO

The provisions in the ARIO that deal with the responsibility of IOs arising for aiding or assisting (Article 14), directing and controlling (Article 15), coercing (Article 16), or accepting responsibility (18) for an internationally wrongful act will not be applied or considered in this chapter in relation to the IMF's conduct of requiring borrowing states to eliminate capital controls. The reason for this omission is that Articles 14, 15, and 16 have the requirement that the aiding, controlling, or coercing must be exercised over the commission of an internationally wrongful act carried out by the aided, controlled, or coerced state or IO. Similarly, Article 18 requires that responsibility will accrue to an IO if it accepts responsibility or leads an injured party to rely on its responsibility for the commission of an internationally wrongful act by a state or another IO. The common factor in each of these articles is that the act for which the responsibility accrues to the IO is wrongful, or potentially wrongful as with coercion, for the state or IO carrying out the act. Therefore these articles are not applicable in the present case because the act of eliminating capital controls is not an internationally wrongful act for a sovereign state so the IMF did not aid, control, or coerce their borrowing states to commit an act that was internationally wrongful for them. Likewise, Article 18 cannot be applied to the present case because the IMF cannot accept responsibility, or be said to have led its borrowing states to rely on its responsibility, for a wrongful act committed by those states because there was no wrongful act on their part.

The provisions of the ARIO that are applicable to the present investigation will be outlined in this paragraph. First, Article 10 (1) declares that a breach of an international

obligation occurs whenever an act of an IO does not conform to any one of the IO's international obligations, regardless of the origin or character of the obligation. The commentaries to this article and to Article 4 (which defines an internationally wrongful act) explain that an international obligation can arise from a customary rule of international law, a treaty, or general principles of international law.³¹⁹ They further explain that obligations of an IO may be owed to an international community, one or several states, whether or not they are members of the IO, another IO or several IOs, and any other subject of international law.³²⁰ Second, Article 10 (2) provides that an international obligation of an IO may also arise towards its member states from the rules of the organization and the commentary clarifies that these rules are to be understood as defined by Article 2 (b) of the ARIO.³²¹ Thirdly, Article 26 provides that any act of an IO that does not conform to an obligation arising under a peremptory norm of general international law will be a wrongful act. In addition to Article 26, Article 41 elucidates that the breach of an obligation arising under a peremptory norm will be considered serious if it involves a gross or systematic failure by the IO to fulfill such obligations. Importantly, Article 12 (3) notes that an international obligation can require an IO to *prevent* a particular event and provides that a breach will occur when the specified

³¹⁹ ARIO with Commentaries, Article 10 (1), p.31, para. 2 and Article 4, p.14, para. 2; Article 10 (1) echoes Article 38 (1) of the Statute of the ICJ which lists the sources of international law which the Court recognizes and applies; a similar list of sources of obligations which bind IOs was also given in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J Rep. (1980) pp. 89-90, para.37; see also discussions on the sources of law for IOs or of international law in general in: I Brownlie, *Principles of Public International Law*, 5th Ed., (New York: Oxford University, 1998) p. 287 [hereinafter Brownlie, 1998] pp.1-30; G. M. Danilenk, *Law-Making in the International Community*, (London: Martinus Nijhoff, 1993); Eagleton (1957), pp.28-54; H. Lauterpacht, *Private Law Sources and Analogies of International Law*, (United States: Archon Books, 1970) [hereinafter H. Lauterpacht, *Private*]; Sands & Klein, pp.448-473; Starke, pp.32-57

³²⁰ ARIO with Commentaries, Article 10, p. 31, para. 3.

³²¹ *Ibid.*, para. 4; the rules of the organization are defined in Article 2(b) of the ARIO as "in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization."

event occurs and will extend for as long as the event continues.³²² Lastly, according to Article 11 a breach of an obligation does not occur unless the obligation is in place at the time that the relevant act transpires.³²³

In summary, according to the ARIO the sources of international obligations for an IO are the rules of the IO, treaties, customary rules of international law, general principles of law applicable within the international order, and peremptory norms.³²⁴ These sources are perhaps necessarily recognized in the ARIO because they are the same as those established in Article 38 (1) of the *Statute of the International Court of Justice*. In order to establish whether the IMF breached an international obligation by imposing the policy of eliminating capital controls on states it must first be determined whether any of these sources of international obligations gave rise to the international obligation for the IMF *not* to impose this policy upon a member state. Thus, each of these sources will be examined accordingly.

³²² It is submitted that this provision, the fact that Article 4 allows that an *omission* can be considered conduct which constitutes an internationally wrongful act, and the requirement of Articles 41 and 42 that obligations arising under peremptory norms of international law be fulfilled, all combine to create serious implications for the responsibility of IOs in the future. If, for example, the United Nations fails to act to *prevent* genocide, has it not breached a peremptory norm as well as omitted to fulfill the international obligation which arises out of Article 1 of its Charter, namely to maintain international peace and security and to take measures to prevent and remove threats to the peace and suppress aggression? (Boon, "New Directions", p.6) As stated by the ICJ in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, IOs "are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties". (*ICJ Reports 1980*, pp.89-90, para.37) Recalling that once the commission of an internationally wrongful act has been established responsibility arises if 1) the act can be attributed to an IO, and 2) the act constitutes a breach of the IO's international obligation, in this scenario the UN would then be responsible for international wrongdoing and consequently for making reparations to the state or community which has been injured by it.

³²³ Article 11.

³²⁴ Peremptory norms are derived from customary international law (although not all customary laws are peremptory norms) and are defined in Articles 53 of the 1969 and 1986 Treaty Conventions as norms *which are accepted and recognized as norms* from which states may not derogate. Article 38 (1) of the ICJ statute does not expressly mention peremptory norms as a source of international law, but they are impliedly included in international custom (one of the sources) which the article defines as: "[...] *evidence of a general practice accepted as law* " para. (c) (emphasis added).

6.1.1. The Rules of the IMF as a Source of International Obligation for the IMF

The “rules of the organization” are defined in Article 2(b) of the ARIO as “in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.”³²⁵ Notably, according to Article 10 (2) the rules of an IO give rise to an *international* obligation for an IO towards its member states which is important because an internationally wrongful act of an IO is defined, *inter alia*, as one which breaches an *international* obligation owed by an IO.

The rules of the organization are given considerable weight in the ARIO as evidenced by Article 64 which provides:

“[T]hese articles [the ARIO] do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. *Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.*” (emphasis added)

Confirming the value accorded to the rules of an organization by the ARIO, the ILC states in its commentaries to Article 64 that:

³²⁵ See Sands & Klein, pp. 448-461.

“[S]pecial rules [which according to Article 64 may be contained in the rules of an IO] relating to international responsibility may supplement more general rules or may replace them, in whole or in part.”³²⁶

These provisions and statements make it immediately apparent that the constituent instrument of the IMF – the Articles of Agreement (AA) – are of considerable importance and influence in establishing whether or not the IMF has committed an internationally wrongful act and has incurred international responsibility as a result.

In determining what international obligations the AA create for the IMF it is essential to know what are the functions its member states mandated it to carry out at the time of its establishment. Article 1 of the AA lists what these are but only those that are relevant to the present case will be considered here. Article 1 provides that the functions of the IMF are, *inter alia*:

- (ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.
- (iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

³²⁶ ARIO with Commentaries, Article 64, p. 100, para. 1.

(vi) In accordance with the above, [sections (i) to (v)] to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

Lastly, Article I stipulates that “The Fund shall be guided in *all its policies and decisions* by the purposes set forth in this Article.” (emphasis added). This obligation is in keeping with the principle established in the *Reparations* case that:

“[...] the rights and duties of an entity such as the organization [the U.N.] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”.³²⁷

Clearly, the liberalization of capital accounts by the removal of capital controls is not identified as a specific purpose of the IMF in Article 1 of its constituent instrument. Further, according to Article 1, the overall purpose or mandate of the organization must not be deviated from in its policy making. In other words, the IMF, as does any other IO, has a constitutional obligation to implement *only* those policies which would achieve the purposes and functions for which it was established.

In addition to being absent from the purposes of the IMF expressed in Article 1, the elimination of capital controls from member states is not indicated as a function of the IMF in any other part of the AA. In fact, capital controls are only mentioned in the AA in terms of their imposition, rather than their elimination. Article VI (3) expressly states that “*members* may exercise such controls as are necessary to regulate international capital movements” (emphasis added) except “in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlements of

³²⁷ *Reparations* case, [1949] Advisory Opinion, I.C.J. Rep. 174 at 178-179; White, pp. 3-4.

commitments, ...”³²⁸ “Current transactions” are defined in the AA as payments which are not for the purpose of transferring capital but are for services, goods, and “moderate remittances for family living expenses”.³²⁹ Accordingly, member states are free to impose capital controls that relate to transfer of capital and even for current transactions providing that they are not so restrictive as to prevent payment obligations from being met. Article VI provides that the IMF may actually *require* a member *to exercise controls* to prevent the general resources of the Fund from being used to meet a large or sustained outflow of capital.³³⁰ The Article goes on to say that a member who fails to *exercise appropriate controls after being requested to do so by the Fund*, may be declared by the Fund as ineligible to use the general resources of the Fund.³³¹ Lastly, Article VII provides that in the event that the IMF adjudges that the currency of a member is scarce due to demand, the Fund may authorize members to “impose limitations on the freedom of operations in the scarce currency” and *the state* shall have “complete jurisdiction in determining the nature of such limitations”.³³² In summary, Articles VI and VII in combination clearly support the position, and even the desirability, that member states of the IMF have a right to establish and maintain capital controls as a part of their fiscal policies. More importantly, the Articles do *not* grant any authority to the IMF in relation to requiring member states to eliminate capital controls but only in relation to requiring them to *impose* them.

³²⁸ AA Article viii Sec. 2 (a).

³²⁹ AA Article xxx.

³³⁰ AA Article VI Sec 1 (a) Original Articles of Agreement.

³³¹ AA Article VI Sec 1 (a) Second Amendment 1978.

³³² AA Article VII Sec 3 (b).

Lastly, the introductory Article of the AA enforces the above with its stipulation that the IMF is to “operate in accordance with the provisions of [the AA] as originally adopted and subsequently amended”.³³³

Thus far the only “rule of the organization” that has been examined to discover what the IMF’s international obligation was regarding capital controls is its constituent instrument. However, Article 2 (b) of the ARIO also lists, *inter alia*, “decisions, resolutions, and other acts of the international organization adopted in accordance with those [constituent] instruments” as a rule of the organization from which an IO’s international obligations can be extrapolated. In this regard, it is submitted that a statement by John Maynard Keynes, one of the chief negotiators of the Bretton Woods agreement and the representative of the United Kingdom on the first Board of Governors of the IMF, was an act of the IMF which clarified and emphasized the IMF’s mandate relating to capital controls. Speaking of Article VI of the AA, Keynes said “[it is] a permanent arrangement [that] accords *to every member government* the explicit right *to control capital movements* It follows that our right to control the domestic capital market is secured on [a] firmer foundation than ever before.” (emphasis added).³³⁴ Keynes’ approval of Article VI confirmed: 1) the right of *member states* to control capital controls and 2) that the omission of any express authorization within the AA for the Fund to require members to eliminate capital controls was deliberate and reflected the intention of the founding members that these measures should never form a part of IMF policy but should be solely within the purview of each member state.

³³³ AA Introductory Article (i).

³³⁴ John M Keynes, unattributed, quoted in “Banking and Financial Reform at the Cross-roads of the Neo-Liberal Contagion.” Timothy A Canova 14. Am U. Int’l. L. Rev. 1612, cited in Williams at p.605, fn 379.

In addition to Keynes' statement there have been representations by the IMF which confirm that the organization did not have the authority to require states to eliminate capital controls. In 1997 the Interim Committee of the Board of Governors of the IMF, speaking on two occasions about the benefits of capital liberalization to states, essentially admitted that it had no mandate to require states to eliminate capital controls by virtue of the following statements:

“[T]he Committee emphasized that an open and liberal system of capital movements was beneficial to the world economy. It considered the Fund uniquely placed to promote the orderly liberalization of capital movements and to play a central role in this effort. *It, therefore, agreed that the Fund's Articles should be amended to make the promotion of capital account liberalization a specific purpose of the Fund and to give the Fund appropriate jurisdiction over capital movements,...*”(emphasis added)³³⁵

“[...] the Committee invites the Executive Board to complete its work on a proposed amendment of the Fund's Articles *that would make the liberalization of capital movements one of the purposes of the Fund, and extend, as needed, the Fund's jurisdiction* through the establishment of carefully-defined and consistently applied obligations regarding the liberalization of such movements. (emphasis added)³³⁶

³³⁵ Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, Press Release Number 97/22 April 28 1997 para. 7. available at: <http://www.imf.org/external/np/sec/pr/1997/pr9722.htm>

³³⁶ Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, section entitled “Statement of the Interim Committee on the Liberalization of Capital Movements Under an Amendment of the Articles” para. 4 Press Release Number 97/44, September 21, 1997 <http://www.imf.org/external/np/sec/pr/1997/pr9744.htm>

In light of the above it is clear that a constitutionally based international obligation for the IMF *not* to eliminate capital controls from member states' economies and therefore not to require states to eliminate capital controls arose primarily out of the fact that the AA gives the organization no authority or jurisdiction to remove capital controls but only authorizes it to impose them. The existence of this obligation is further evidenced by the fact that the IMF's imposition of the policy of requiring states to eliminate capital controls resulted in economic conditions which were completely opposite to those the IMF was mandated by Article 1 to bring about in a state whenever it intervened in its economy. Lastly, the statements made by John Keynes regarding Article 6 and the subsequent representations made by IMF agents suggesting that the authority to impose capital controls be added to the AA as a function of the IMF reveal that the organization had no mandate or authority to require the removal of capital controls but rather, that the IMF had an international obligation that arose under the AA *not* to eliminate capital controls from member states and consequently, not to require member states to remove them. Hence, by requiring its borrowing states to eliminate capital controls as a condition for obtaining loans from it the IMF breached this international obligation it owed to those states and thereby fulfilled the requirements for an internationally wrongful act under Article 4 of the ARIO and incurred international responsibility for its conduct.

6.1.2. IMF's Treaty with Member States as a Source of International Obligations for the IMF

According to Article 10 of the ARIO and the ILC's commentary to that article, treaties are one of the recognized sources of international obligations for IOs. In this

vein, Articles 5 of both the 1969 and the 1986 Treaty Conventions recognize the constituent instrument of an IO as a treaty, and more importantly for IOs and their member states, as a treaty between an IO and its member states. While Article 5 of the 1969 Treaty Convention confirms the treaty nature of the constituent instrument by confirming that it applies to “any treaty which is the constituent instrument of an international organization, ...”,³³⁷ Article 5 of the 1986 Convention expressly identifies the constituent instrument of an IO as a treaty between the IO and its member states:

“[T]he present Convention applies to any treaty between one or more States and one or more international organizations *which is the constituent instrument of an international organization* [...]”.

(emphasis added)

These statements in both articles recognise that the constituent instruments of IOs have a hybrid nature i.e. as constituent instruments and treaties.³³⁸ This hybrid character of constituent instruments has also been recognised by the ICJ in the case of *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. There the Court said:

“[F]rom a formal standpoint, the constituent instruments of international organizations are multilateral treaties to which the well-established rules of treaty interpretation apply.”.³³⁹

Similarly, the European Court of Justice (ECJ) opined that although the Treaty which established the EC was in the form of an international agreement, it was also the

³³⁷ Rosenne, pp. 137-179.

³³⁸ Anne Peters, “Membership in the Global Constitutional Community” in Jan Klabbbers, et al, eds. *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) 153 at pp.203-205.

³³⁹ Advisory Opinion, I.C.J. Rep. 1996, para. 19; Jan Klabbbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) pp.203-204.

constitutional charter of a legal community.³⁴⁰ In addition, this theory of the hybrid nature of the constituent instruments of IOs was embodied in the title of the *Treaty Establishing a Constitution for Europe 2004*.³⁴¹ But it is submitted that the multilateralism of these treaties/constituent instruments is reciprocal and exists on two planes.

First, the constituent instrument of an IO is actually the multilateral treaty which was entered into by states parties to create and establish the IO. This was expressly confirmed in the *Legality* case where the Court said:

“They [the constituent instruments of IOs] are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals.”.³⁴²

Second, once the IO is created and becomes a legal personality its constituent instrument also serves as a treaty between it and its creators whereby it has an international legal obligation to “realize [their] common goals” as expressed in the constituent instrument which in the present case comprises the AA of the IMF. In its role as a treaty between an IO and its member states the constituent instrument becomes the terms of the contract between the IO and its member states and it is in this sense that it again functions as a multilateral treaty.

As confirmed in chapter 6, IOs have the capacity to enter into treaties based on the 1986 Treaty Convention. Thus, once an IO is created and is deemed to have

³⁴⁰ *EEC*, Opinion 1/91, E.C.J., E.C.Rep. (1991) I-06079, para. 21.

³⁴¹ (16 December 2004) Series C, No 310, *Official Journal of the European Union*, available at: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_01_05_constitution.pdf; Peters, p. 204.

³⁴² *Ibid.*

entered into a treaty with its member states by virtue of its constituent instrument, its member states have a legal basis for requiring the IO to fulfill the purposes for which they created it and it has an international obligation to carry out the terms of this treaty in good faith. In fact, according to Articles 26 of both the Treaty Conventions both the member states and the IO have an obligation to perform all the terms of the treaty in good faith.

It has already been shown in detail in the previous section that one of the functions/purposes of the IMF as expressed in its treaty (its constituent instrument) with its member states was that it was not to eliminate capital controls from member states but only to impose them when necessary. Hence, the IMF had an obligation not to eliminate capital controls from member states that arose out of its constituent instrument (AA) functioning as a treaty with its member states as well as from the AA functioning as a component of the rules of the organization as already discussed. Therefore, by imposing the conditionality of eliminating capital controls on its member states, the IMF not only breached the rules of the organization, but also one of its treaty obligations that it owed to its member states and again incurred international responsibility for internationally wrongful conduct as defined by Article 4 of the ARIO.

In addition, there are other obligations to which the AA as a treaty gives rise under general principles of law which will be discussed below.

6.1.3. Customary International Law as a Source of International Obligations for the IMF

The commentaries to Article 10 of the ARIO expressly state that customary rules of international law are one of the sources of international obligations for an IO.³⁴³ In addition, Article 26 of the ARIO states that:

“[N]othing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.”

The commentaries to this article then refer to the commentaries to Article 26 of the ASR (which article is identical to Article 26 of the ARIO except that the latter applies to states) wherein it is stated that: “[...] circumstances precluding wrongfulness in chapter V Part One do not authorize or excuse any derogation from a peremptory norm of general international law.”³⁴⁴ These provisions of the ARIO and ASR echo Article 38 (1) (b) of the *Statute of the International Court of Justice* which states that in making its decisions the ICJ will take into consideration, *inter alia*, “[i]nternational custom, as evidence of a general practice accepted as law”.³⁴⁵

In light of these provisions of the ARIO, in this section the question that will be addressed is whether the right of states to sovereignty, even pertaining to national economic policies and practices, is a customary international law and whether, as such,

³⁴³ ARIO with Commentaries, Article 10, p. 31, para.2.

³⁴⁴ ARIO with Commentaries, Article 26, p. 53, para. 1, quoting from ASR with Commentaries, Article 26, p. 85, para. 4.

³⁴⁵ See *supra* at note 324 for an explanation and definition of peremptory norms versus customary international law.

it gives rise to an obligation for the IMF not to impose the policy of elimination of capital controls on sovereign member states.

6.1.3.1. The Principle of Sovereignty

The concept of state sovereignty has a long history in international law and now represents constitutional doctrine within international law.³⁴⁶ The evidence of the jurisprudence of the I.C.J, as well as states' consent to various international covenants and U.N. declarations support the contention that the right of states to exercise sovereignty by now constitutes a rule of customary international law.³⁴⁷

These rights were codified as early as 1933 in the Convention on Rights and Duties of States (the Montevideo Convention), of which Article 3 provides:

“[...] the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services
....”³⁴⁸

Furthermore, Article 8 unequivocally declares: “[N]o State has the right to intervene in the internal or external affairs of another.”³⁴⁹

The principles of state sovereignty and independence were affirmed in the ILC's *Draft Declaration on Rights and Duties of States* adopted in 1949, particularly in Articles 1- 3 which provide:

³⁴⁶ Brownlie, 1998, p. 287.

³⁴⁷ D J Harris, *Cases and Materials on International Law* 4th Ed. (London: Sweet & Maxwell, 1991) p. 116. See also V. D. Degan, *Sources of International Law* (Boston: Martinus Nijhoff Publishers, 1997) p. 84.

³⁴⁸ *Convention on Rights and Duties of States* (1933) Article 3 This treaty was signed at the Seventh International Conference of American States on December 26 1933 and later registered on January 8, 1936 in the *League of Nations Treaty Series* (vol. 165 pp.20-43) [hereinafter Montevideo Convention].

³⁴⁹ *Ibid.*, Article 8.

- 1) “[E]very State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.
- 2) Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.
- 3) Every State has the duty to refrain from intervention in the internal or external affairs of any other State.”³⁵⁰

Support for this principle was similarly expressed in the UN Charter in Article 2 (1) and (7). This provides that the UN is founded on, *inter alia*, the principle of sovereignty of all its members, and subject to the application of enforcement measures in Chapter VII, the Charter shall not authorize the U.N. to intervene in matters which are essentially within the domestic jurisdiction of any state, [...]”³⁵¹

The duty of states to refrain from intervention in the internal affairs of other states, which is the logical corollary of the independence of states, was reiterated in the U.N General Assembly resolution on *Granting of Independence to Colonial Countries and Peoples* (1960). In the context of colonies becoming independent states, this instrument provides, *inter alia*:

³⁵⁰ *Draft Declaration on Rights and Duties of States* (1949) Adopted by the International Law Commission at its first session in 1949 and submitted to the General Assembly as a part of the Commission's report covering the work of that session. available at:

http://legal.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf

³⁵¹ *Ibid* Article 2 (7).

“All peoples have the right to self-determination. By virtue of that right they freely determine their political status and a freely pursue their *economic*, social and cultural development.”³⁵² (emphasis added)

Further elaboration and support for the principle of state sovereignty can be found in the 1965 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty* and the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U.N.*³⁵³ Particularly relevant to this case study are the provisions in the *Declaration* which state:

“[N]o State may use or encourage the use of *economic* political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.” (emphasis added)

Moreover, the Declaration continues:

“Every State has an inalienable right to choose its political, *economic*, social and cultural systems, without interference in any form by another State.”³⁵⁴ (emphasis added)

³⁵² General Assembly Resolution 1514 (xv) of 14 December 1960 Article 2.

³⁵³ *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty*, GA Res. 2131 (XX) UN GAOR 20th Sess. (A/Res/20/2131) 1965, Articles 2 and 5 respectively; *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U.N.*, GA Res. 2625 (XXV) UN GAOR 25th Sess., (A/Res/25/2625) 1970.

³⁵⁴ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A Res. 2625 (XXV) 25th Sess. A/RES/25/2625 (1970) <http://www.un-documents.net/a25r2625.htm>

The ICJ referred to both these Declarations in the *Nicaragua* case when it confirmed that:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; [...], the Court considers that it is part and parcel of customary international law.³⁵⁵

Even more specifically, in 1974 the right of a state to construct and pursue its economic policies was expressed in the *Charter of Economic Rights and Duties of States*. Therein, the U.N. General Assembly affirmed that every state has the right to choose its economic system “without outside interference coercion or threat in any form whatsoever”.³⁵⁶ This principle was endorsed by the ICJ in the *Nicaragua* case where the Court stated unequivocally:

“[E]very State possesses a fundamental right to choose and implement its own political, economic and social systems.”³⁵⁷

In addition to all the above, the AA mandate the Fund, in its function of overseeing the international monetary system, to establish principles which “respect the

³⁵⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgments, [1986] I.C.J. Rep. p.14 at p. 96, para.202. {hereinafter *Nicaragua* case}

³⁵⁶ Charter of Economic Rights and Duties of States, Article 1, G.A Res. 3281 (XXIX) U.N. GAOR, 29th Sess. Supp. No. 31 2315th Plen. Mtg. at 52 U.N. Doc. A/9631 (1974) [http://www.un.org/ga/search/view_doc.asp?symbol=a/res/3281\(XXIX\)](http://www.un.org/ga/search/view_doc.asp?symbol=a/res/3281(XXIX)) Importantly, this Charter has not been implemented and is largely considered inefficacious, but it has nevertheless been included here as yet another example of how the belief that states have a right to self-determination, and that includes the right to decide their economic policies and practices, has become entrenched internationally as evidenced by the fact that the GA of the UN voted in favour of the Resolution that contained this Charter 115-6 with 10 abstentions. (See UN Audiovisual Library of International Law, available at: <http://legal.un.org/avl/ha/cerds/cerds.html>)

³⁵⁷ *Nicaragua* case, p. 131, para.258.

domestic social and political policies of members”, and “pay due regard to the circumstances of members”.³⁵⁸

In conclusion, as evidenced by various international instruments and case law, it appears that the principle of state sovereignty has been entrenched as a customary rule in international law for decades and this principle includes the right of a state to determine its economic policies. Clearly, where there is customary international law there arises an international obligation not to violate it. In the present case the customary international law which entitles states to sovereignty gives rise to an international obligation for all external governing or quasi-governing entities such as IOs not to violate it by interfering in the domestic affairs of states. As said, Article 4 of the ARIO dictates that there is a wrongful act of an IO when conduct which is attributable to it also constitutes a breach of an international obligation owed by the IO. The ILC’s commentary to this article is more specific and clarifies that a wrongful act occurs where “there is a breach of an obligation under international law.” This must be understood to mean that wherever there is an obligation arising under international law IOs are bound to act in accordance with it. Further, this requirement for IOs has been confirmed by the ICJ in its advisory opinion in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.³⁵⁹ So, since IOs are required to act in accordance with international law, and since international law dictates that states have a right to sovereignty, the IMF had an international obligation to ensure that its policies and practices that it imposed on member states did not constitute a breach of this particular international law. Thus, it had an international obligation grounded in international law

³⁵⁸ AA, Article IV Sec. (3) (b).

³⁵⁹ ICJ Reports 1980, pp.89-90, para. 37.

not to require states to eliminate capital controls if by doing so it would violate their sovereignty.

In addition to this general obligation under international law, the IMF has a specific obligation not to violate the sovereignty of its member states to exercise controls to regulate capital movements, albeit with some restrictions in relation to current payments, by virtue of Article VI (3) of the AA. This was confirmed by the General Counsel of the IMF who stated “[U]nder the Fund’s Articles, the sovereignty of members applies to both inflows and outflows [of capital].”³⁶⁰ It is therefore submitted that by making the removal of capital controls a condition for member states obtaining loans the IMF violated their right to sovereignty and thus breached one of its international obligations and again incurred international responsibility.³⁶¹

It may be argued that borrowing member states of the IMF invited the interference of the IMF into their domestic affairs and waived their right to self-determination of their economic practices and policies when they requested loans from it. However, if states invited the IMF’s interference in their national affairs and economy, this was done by virtue of the treaty they signed with the IMF, namely the AA. Consequently, the IMF’s conduct and policies within that member state would be circumscribed by the terms of that treaty and a member state’s permission for the IMF to intervene in its domestic economy would not authorize or legitimize the IMF’s use of a condition that is *ultra vires* the constituent instrument of the IMF and its treaty with its

³⁶⁰ Francois Gianviti, “Liberalization of Capital Movements: A Possible Role for the IMF” in ed. IMF, *Current Developments in Monetary and Financial Law*, Vol. 2 (Washington, DC: IMF, 2003) pp.217-31 at 218. [hereinafter Gianviti, “Liberalization”].

³⁶¹ Daniel Kalderimis, “IMF Conditionality as Investment Regulations: A Theoretical Analysis,” Soc. & Leg. Stud. March 2004, vol. 13, no. 1 pp. 103-131 at 113-119; Celine Tan, “Regulation and Resource Dependency: The Legal and Political Aspects of Structural Adjustments Programmes” in Daniel D. Bradlow & David B. Hunter, eds., *International Financial Institutions & International Law*, (New York: Wolters Kluwer, 2010) pp. 167-195.

member states and which violates its international obligations that arise from these two sources.

6.1.4. General Principles of Law as a Source of International Obligations for the IMF³⁶²

Article 38 (1) (3) of the Statute of the ICJ lists general principles of law “recognized by civilized nations” as one of the sources of international law along with treaties, customary law, judicial decisions and teachings of highly qualified publicists. General principles of law can be applied in conjunction with the other sources, or they can be relied on to fill the gap where there is no applicable treaty or customary law. There has been much controversy as to what exactly constitutes general principles of law, but essentially they are those principles which are so fundamental to justice that they are accepted as such in every legal system.³⁶³ Most commonly, those principles of law that relate to the approach and interpretation of legal relationships and to minimal standards of procedural fairness are those which have been considered as general principles of law.³⁶⁴ In the present investigation three of these general principles, namely, good faith in contractual relations, good faith in the interpretation of treaties, and the abuse of rights, will be examined in relation to the conduct of the IMF towards

³⁶² Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (New York: Cambridge University Press, 2006); ; Henry G. Schermers & Niels M. Blokker, *International Institutional Law*, 5th ed. revised, (Boston: Martinus Nijhoff 2011) pp. 1010-1117 [hereinafter Schermers & Blokker, 5th ed.]; Sands and Klein, (2009) pp.834-835; Shaw, 6th ed. pp. 93-105; Amerasinghe, *Principles*, pp. 288-290; Bernardo. M. Cremades, “Good Faith in International Arbitration” (2012) 27:4 Am. U. Int’l L. Rev. 761 at pp. 767-770; Friedmann, Wolfgang. *The Changing Structure of International Law* (London: Stevens & Sons, 1964); pp. 188-199 G.M. Danilenko, G.M. *Law-Making in the International Community* (London: Martinus Nijhoff, 1993), pp. 173-186; H. Lauterpacht, *Private*, pp. 60-67.

³⁶³ Mark Janis, *An Introduction to International Law* 4th ed. (Boston: Aspen Publishers, 2003) p. 56; see Danilenko, pp. 173-189 for a thorough discussion of the attendant controversies.

³⁶⁴ Friedmann, 196.

its borrowing member states in connection with capital controls. These will be applied because as already shown, the AA of the IMF are also recognized in international law as a treaty between the IMF and its member states, therefore the questions are raised whether the IMF acted in good faith in interpreting and performing this treaty, and whether the organization abused the rights it was invested with by its member states by virtue of this treaty.

6.1.4.1. Good Faith in the Interpretation of Treaties

The principle of good faith applies not only to the execution of treaties, but also in their interpretation. Again, Article 31(1) of both the 1969 and the 1986 treaty Conventions address this aspect:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.”(emphasis added)³⁶⁵

Good faith requires that contracting parties act honestly and reasonably,³⁶⁶ so that when interpreting a treaty, parties cannot be presumed to have intended that the fulfilment of the terms would produce an unreasonable,³⁶⁷ or absurd,³⁶⁸ or impossible result.³⁶⁹ The terms of a treaty are to be understood according to the general sense and

³⁶⁵ Ibid Article 31(1). The principle of good faith is also mentioned in both Conventions in Articles 46 and 69.

³⁶⁶ *Lighthouses Case between France and Greece* (1934) P.C.I.J. Rep. A/B 62, S.O by M. Seférides p. 47.

³⁶⁷ *Diversion of Water from the Meuse (Netherlands v. Belgium)* (1937) P.C.I.J. Series A/B. no. 70, 3, D.O. by M. Anzilotti at p. 46

³⁶⁸ *Polish Postal Service in Danzig* (1995) P.C.I.J. Advisory Opinion., Series B, no. 11, 4 at p. 39.

³⁶⁹ S.S. “*Wimbledon*” Case (1923) P.C.I.J., Series A, No. 1, 14, D.O. by MM. Anzilotti and Huber, at p. 36; 1969 Vienna Convention, Article 26.

meaning in which the other party would have understood them at the time of the conclusion of the treaty.³⁷⁰

6.1.4.2. Good Faith in Performance of Contracts

The duty to perform contracts in good faith (*pacta sunt servanda*) is a general principle of contractual law, and applies both municipally and internationally.³⁷¹ As was stated in the *Metzger & Co. Case* (1900):

“It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements.”³⁷²

Furthermore, the principle of good faith is a fundamental principle of international law as expressed in treaties. This was confirmed by the ILC in Article 13 of its draft *Declaration on the Rights and Duties of States*.³⁷³

“Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.”

This principle of good faith in performing treaties was reaffirmed by the ILC in its Commentary to the Draft Articles on the Law of Treaties:

“Pacta sunt servanda – the rule that treaties are binding on the parties and must be performed in good faith – is the fundamental principle of the law of treaties. Its importance is underlined by the

³⁷⁰ *Venezuelan Preferential Claims case* (1904) 1 H.C.R p. 55, at pp. 60 – 61.

³⁷¹ J.F. O'Connor, *Good Faith in International Law* (Vermont: Dartmouth, 1991).

³⁷² *Metzger & Co, Case (U.S. v. Haiti)* (1901) U.S.F.R, p.262 at p.271.

³⁷³ *Declaration on the Rights and Duties of States 1949* in *Yearbook of the International Law Commission 1949*, available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf

fact that it is enshrined in the Preamble of the Charter of the United Nations.”³⁷⁴

The principle of good faith is also considered to be a rule of customary international law as evidenced by state practice and codification, and as confirmed in the dicta of several cases.³⁷⁵ The UN Charter emphasizes this principle in Article 2 (2) which provides:

“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”

The Preamble and Article 26 of the 1969 and the 1986 Treaty Conventions also echo this principle. They respectively state:

“....[t]he principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.”

and

“Every treaty in force is binding on the parties to it and it must be performed by them in good faith.”³⁷⁶

Lastly, with regard to both the interpretation and the performance of treaties, the principle articulated in the *North Atlantic Fisheries* case applies:

³⁷⁴ *Yearbook of the ILC*, vol. II (1966) p. 211.

³⁷⁵ *North Atlantic Coast Fisheries Arbitration, Reports of International Arbitral Awards*, Volume .XI, 173; *.Netherlands Workers’ Delegates* (1922) P.C.I.J., Series B, No. 1, p. 19; *Factory of Chorzow (Jurisdiction) case* (1927) P.C.I.J., Series A No. 9, 1 at p. 21 *Rights of Nationals of the United States of America in Morocco* (Judgment of 27 August 1952) I.C.J. Rep.176 at p. 212; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, (1932) P.C.I.J. Series A/B., No. 44, 4 at p. 28; *Minority Schools in Albania*, (1935) P.C.I.J., Series A/B, No. 64, 4 at pp. 19 and 20.

³⁷⁶ 1969 Treaty Convention, Article 26.

"...[f]rom the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is *limited to such regulations as are made in good faith, and are not in violation of the Treaty*". (emphasis added)³⁷⁷

It is clear from the above that there is an international obligation to interpret and perform treaties in good faith. Applying these principles of good faith to the present case study the question is - did the IMF, by its imposition of the policy of capital controls elimination upon member states, fulfil its international obligation to interpret and execute its treaty with its member states (the AA) in good faith?

First, with regard to the requirement of good faith that a treaty be interpreted according to the ordinary meaning of the words, since the AA has no express authorization for the elimination of capital controls but only express authorization to impose them, the ordinary meaning of the words of the AA could not possibly have been interpreted to mean that the IMF had the authority to impose capital controls on borrowing states in order for them to access IMF funds and there is evidence that the IMF was aware of this. First, in 1997 the IMF's Board of Governors sought to have the AA amended so that the elimination/liberalization of capital controls would be expressly authorized thereby indicating that the IMF was aware this authorization was not within the ordinary meaning of the words of the AA.³⁷⁸ Secondly, statements made in 1999 by

³⁷⁷ *Reports of International Arbitral Awards*, Volume XI, P. 188, (the Tribunal was speaking regarding the right of Great Britain to regulate fisheries in Canadian waters and the fishing rights she had granted to certain US nationals by virtue of the Treaty of Ghent).

³⁷⁸ Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, Press Release Number 97/22 April 28 1997 para. 7. available at: <http://www.imf.org/external/np/sec/pr/1997/pr9722.htm> : Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, section entitled "Statement of the Interim Committee on the Liberalization of Capital Movements Under an Amendment of the Articles" para. 4

the then Senior Counsel of the IMF Ross Leckow and in 2003 by the then General Counsel and Director of the Legal Department of the IMF Francois Gianviti clearly demonstrate that the Fund was aware that the elimination of capital controls was not expressly authorized by the AA.³⁷⁹

Secondly, interpreting a treaty in good faith also requires that it be interpreted in light of its object and purposes. Article 1 of the AA establishes the macro object and purposes of the IMF while Articles VI (1) (a); VI (3); VII (3) (b); XIV (2) of the AA (which authorize the use of capital controls by states or the IMF) establish the purpose and object of the IMF in relation to capital controls, i.e. the Fund and/or its member states were to impose capital controls rather than eliminate them, subject only to the condition expressed in Article VI (3) that states not use controls to avoid making payments. The architects of the IMF had included the express provisions within the AA authorizing the *imposition* of capital controls by states or by the IMF upon member states (subject to certain conditions) because they believed that their elimination or liberalization would lead to financial crises such as had occurred in the 1920's and 1930's, the very opposite of the economic conditions the IMF was mandated by Article 1 of the AA to bring about in its member states.³⁸⁰ Hence, the economic theory that the imposition of capital controls helps to establish economic stability and prosperity was foundational to the

Press Release Number 97/44, September 21, 1997
<http://www.imf.org/external/np/sec/pr/1997/pr9744.htm>

³⁷⁹ Leckow, "Proceedings", pp. 521-22; Gianviti, "Liberalization", pp. 217-220. See section 7.2.1. for a further discussion of good faith in the interpretation of a treaty and an elucidation of the statements made by Leckow and Gianviti at pp. 137-38.

³⁸⁰ Cohen, "Capital Controls" at pp. 103-10. Articles VI (1) (a); VI (3); VII (3) (b); XIV (2) of the AA authorize the use of capital controls by states or the IMF while the condition that states not use controls to avoid making payments is found in Article VI (3).

IMF.³⁸¹ Moreover, in the statements by Leckow and Gianviti referred to above, each one confirmed that not only was the elimination of capital controls not authorized by the AA, but that it was not in keeping with the object and purposes of the IMF.³⁸²

In light of the above, it is concluded that the IMF knew what the words of the AA regarding capital controls meant and what were the object and purposes of the organization generally and in relation to capital controls. However, despite this knowledge the IMF did not interpret its treaty with its member states according to the ordinary meaning of its words and in keeping with the object and purposes that the treaty established for the Fund by imposing the elimination of capital controls as a condition for obtaining loans upon its member states, and this was a failure to interpret the treaty in good faith. The consequence of the IMF's failure to interpret the treaty in good faith was that the treaty was also not performed in good faith, viz, the IMF breached its treaty obligation not to eliminate capital controls from its member states by requiring them to do so in order to obtain loans from it. In summary then, the IMF failed to fulfil its international obligation to interpret and to perform its treaty with its member states in good faith and this caused it to violate the terms of the treaty which relate to eliminating capital controls from member states.

6.1.4.3. Good Faith in the Exercise of Rights³⁸³

³⁸¹ See pp. xxii – xxx of the Introduction of this paper for an expanded discussion of the IMF's founding philosophy regarding capital controls and how this changed in the 1980's.

³⁸² See supra at footnote 379.

³⁸³ Cheng, pp. 121-136; H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Grotius, 1982) pp. 162-165; M.. Byers, "Abuse of Rights: An Old Principle, A New Age", (2002) 47 McGill L. J. pp. 389-431; G.D.S. Taylor, "The Content of the Rule Against Abuse of Rights in International Law", (1972-1973) 46 B.Y.I.L. pp. 323-352; G. Schwarzenberger, "Uses and Abuses of the 'Abuse of Rights' in International Law" (1956) Transactions of the Grotius Society, pp. 147-179;

The requirement of good faith in the exercise of rights is another general principle of law which has been accepted as a principle of international law and has been referred to and applied by the PCIJ, the ICJ, and other international tribunals.³⁸⁴ As with the other sources of international law, it will be examined to determine whether it gave rise to an international obligation which the IMF owed to its member states.

The principle of good faith in the exercise of rights is more commonly referred to in negative terms, namely, the abuse of rights. The theory of abuse of rights focuses on the use of rights in a manner which is injurious to other parties, or in other words, rights exercised in bad faith. In essence, the principle of good faith in the exercise of rights demands that rights must be exercised in a manner that does not violate obligations to other parties and respects the rights of other parties. Consequently, a right may not be exercised in a manner that causes injury (maliciously); in an unreasonable or arbitrary way; or in violation of treaty and contractual obligations, or obligations arising from general law.³⁸⁵

The principle that a right may not be exercised in a way that causes injury to another was illustrated in the *Trail Smelter Arbitration (Canada v. United States)* case. The dispute arose between the two states as a result of the emissions from a smelter located in Canada which the US claimed were having a deleterious effect on its crops, forests and residents. Although Canada clearly had a right to the use of its territory, the

Odette Murray, "Piercing the Corporate Veil: The Responsibility of Member States of an International Organization" (2011) 8 Int'l Org. L. Rev. 291.

³⁸⁴ Taylor, p. 323: in the *Case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997) I.C.J. Rep. 7, para. 22, abuse of rights was referred to as a "well established area of law" by Judge Weeramantry, and in the World Trade Organization (WTO) case *United States-Import Prohibition of Shrimp and Certain Shrimp Products (Complaint by the United States)* (1998) WTO Doc. WT/DS58/AB/R at para. 158 (Appellate Body Report), the Appellate Body of the WTO, speaking of the principle of good faith, said: "[T]his principle, at once a general principle of law and a *general principle of international law*, controls the exercise of rights by states." (emphasis added)

³⁸⁵ Cheng, p. 132; Schwarzenberger, p. 167.

Arbitral Tribunal held that in keeping with the principles of international law no state had a right to use or permit the use of its territory in a manner that caused injury to another territory.³⁸⁶

The use of a right in an arbitrary or unreasonable way was considered in the *Admissions of a State to the United Nations* case.³⁸⁷ An Advisory Opinion of the ICJ was sought in relation to the use of the veto by members of the Security Council (SC) for preventing the admission of new members to the U.N. Article 4(1) of the Charter of the U.N. states that membership in the U.N. is open to all peace-loving states who are willing and able to carry out the obligations contained in the Charter, but members of the SC were citing legal and political considerations when voting on admissions. The question put to the court was whether members of the SC were entitled to take into account conditions other than those laid down in Article 4(1) when exercising their vote. The majority held that the conditions prescribed in Article 4(1) were the only ones to be taken into consideration, and that to do otherwise would result in adding new and irrelevant conditions not contemplated by the Charter.³⁸⁸ Notwithstanding this, the Court acknowledged that in voting, members of the SC exercised discretionary power but that this should be done in good faith i.e. in conformity with the spirit of the law and with due regard for the interest of others.³⁸⁹

Also integral to the exercise of rights in good faith or the abuse of rights is the principle that rights are restricted by treaty or contractual obligations, or put another way, a right may not be exercised in a way that violates a treaty or a contractual

³⁸⁶ *Trail Smelter Arbitration (Canada, United States of America)* Award, (1938 and 1941), Reports of International Arbitral Awards, Vol. III, 1905- 1982 at p. 1965.

³⁸⁷ *Admission of a State to the United Nations* (1948), Advisory Opinion. I.C.J. Rep, 57.

³⁸⁸ Ibid., at p. 65.

³⁸⁹ Ibid., pp. 63, 71, 79, 91, & 92

obligation.³⁹⁰ This principle was cited in the cases of the *North Atlantic Coast Fisheries* (1910) and the *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)* (1932). In the *Fisheries* case, Great Britain had entered into a treaty with the US to permit inhabitants of the US to fish in certain of its territorial waters but differences later arose between them as to the scope of this agreement. Britain argued that the rights of the US were subject to certain laws and regulations enacted by Britain that would protect and preserve the fisheries while the US contended that its right to fish in the designated waters was not subject to any limitations. On this issue the Permanent Court of Arbitration said that the rights of both parties were circumscribed solely by the express terms of the treaty. Hence, although the treaty expressly granted the right to the US to take, dry, and cure fish from British waters, since it did not stipulate any limitation on the exercise of legislation by Britain, this exercise of sovereignty by Britain could not be implied from other terms of the treaty.³⁹¹

Similarly, in the *Free Zones* case, France had a treaty obligation to maintain certain custom free zones on its frontiers with Switzerland. Switzerland contended that this obligation prevented France from imposing taxes on goods imported from Switzerland but this limitation was denied by France. However, in the course of deciding whether the treaty applied to import and export taxes, the PCIJ noted that:

“[A] reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation

³⁹⁰ Cheng (2006) pp. 123-127

³⁹¹ *North Atlantic Coast Fisheries Arbitration (Great Britain, United States)*, Reports of International Arbitral Awards, (7 September 2010) Volume XI, 167 – 226 at p. 188

to maintain the zones by erecting a customs barrier under the guise of a control cordon.”³⁹²

This principle that a right may not be exercised in a manner that violates treaty obligations is also enshrined in the *Convention on the Law of the Sea* (1982). Article 300 of the Convention states:

“[S]tates Parties shall fulfil in good faith the obligations assumed under this Covenant and shall exercise the rights, jurisdiction and freedoms recognized in this Covenant in a manner which would not constitute an abuse of right.”³⁹³

Evidently, the general principle of law relating to the abuse of rights is by now an established principle of international law and international legal personalities have an obligation not to abuse any right that has been conferred on them. But whether this principle is applicable in the present case is questionable because the IMF’s conduct of requiring states to eliminate capital controls may be seen from two perspectives. As has already been demonstrated, the AA did not authorize the IMF to impose the elimination of capital controls upon its member states as a condition for obtaining loans. So in the present context, since the AA did not confer a right on the IMF to require its member states to eliminate capital controls, there was no obligation to exercise the right in good faith nor was there the possibility of abusing a non-existent right. Hence, from this first perspective the general principle of law that rights must be exercised in good faith is not applicable to this case.

³⁹² *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Judgment, [June 7, 1932] P.C.I.J. (Ser. A/B), No. 46, para. 225

³⁹³ *Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3; 21 I.L.M. 1261. (entered into force 16 November 1994)

On the other hand, one could view the facts of this case from the perspective that since Article 1 of the AA vested the IMF with the responsibility of ensuring and facilitating monetary stability and prosperity in member states this gave rise to a right to advise and oversee the monetary policies and practices which they implemented, and by implication this included the imposition or elimination of capital controls. But in accordance with various decisions discussed above, there is an obligation to exercise a right in a manner that does not violate the obligations of a treaty and is not arbitrary or injurious. While the AA may have conferred a right on the IMF to oversee and perhaps even dictate monetary policy to its member states, at the same time it gave the IMF no explicit or implied right to eliminate capital controls but rather gave an explicit one to impose them. Further, Article 1 of the AA mandated the Fund to facilitate monetary stability and prosperity in member states as evidenced by expanded and stable international trade, increased employment and income, exchange stability, and reduced duration and disequilibrium of balance of payments. Hence, although the AA may have conferred a right on the Fund to intervene in national economic policies and practices and this impliedly included capital controls, it could not exercise this right in a way that violated any of the express terms of the AA related to capital controls, nor in a way that led to economic instability, decreased employment or exchange stability, or delayed balance of payments, because to do so would constitute an abuse of rights. But it appears that this is exactly what the IMF did. In its exercise of the right to intervene in the economic affairs of its member states the IMF violated the terms of the AA by requiring its borrowing member states to eliminate capital controls and thus bringing about results in their economies that

were the opposite of what it had been mandated by the AA to achieve. Thus, from this perspective, it can be fairly concluded that the IMF abused its right to intervene in the economic affairs of its member states because it was exercised in a manner that violated treaty obligations owed to those states and that was injurious to them.

6.1.4.4. The Principle of Fault

In international law, the principle of fault as a result of an omission of duty was recognized in the *Jamaica Case* (1798) by the Mixed Claims Commission set up by the Jay Treaty of 1794 between Great Britain and the United States.³⁹⁴ The facts were that a British ship was burnt at sea by a French privateer which had originally been outfitted in the U.S. At the time of the incident, Great Britain and France were at war. An earlier Commission had decided that responsibility for the act rested upon the finding of fault on the part of the U.S. The Mixed Claims Commission disallowed this claim, saying, *inter alia*:

“According to the principles of justice, on which is founded the law of nations, no government can be liable to compensate for an injury which they did not commit, or for not preventing a loss when out of their power to prevent it Where there is no fault, no omission of duty, there can be nothing whereon to support a charge of responsibility or justify a complaint.”³⁹⁵

³⁹⁴ 4 Int. Arb. M.S. p. 489, at p. 497 – 99, cited in Cheng at p. 218

³⁹⁵ Ibid.

Fault, arising out of an omission of duty, is identified with the concept of negligence.³⁹⁶ As defined by the British-Venezuelan Mixed claims Commission (1903):

“Negligence is ... ‘Such an omission by a reasonable person to use that degree of care, diligence, and skill which it was *his legal duty to use* for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter.’ (Bouvier, Vol 2, p.478)”³⁹⁷ (emphasis in the original)

The concept of negligence therefore, is not confined to domestic law, but is also recognized in international law and is the failure to perform a pre-existing legal obligation.³⁹⁸ Applied to the present case the question is whether the IMF had a particular obligation arising out of its mandated duties towards its member states which it failed to carry out.

The principle of fault as applied to the IMF in its relation to member states is seen as follows. The IMF was instituted as an organization specialized in the fields of economics and finances and thus can be reasonably expected to possess special or expert knowledge in these fields. The AA mandates the IMF to act in such a way as to achieve monetary stability internationally. By reason of this mandate, the IMF should consult with member states and advise them regarding their economic policies with the aim of promoting monetary stability. Thus, by an implied term of law, the IMF owed a duty of care or had an international obligation to its member states to advise and supervise them in establishing fiscal policies and practices which would result in

³⁹⁶ The concept of negligence as a prerequisite of fault was supported in the dissenting judgment of Krylove. J. (I.C.J Rep 1949 p.4, at p 68).

³⁹⁷ Davis Case, Ven. Arb. 1903, p. 402, at p. 406. Cited in Cheng p. 226.

³⁹⁸ Cheng, p. 226.

monetary stability. However, the IMF in fact advised states to implement a policy which was at least partly responsible for monetary destabilization. This is evidenced by the fact that states which rejected the IMF's advice to remove capital controls subsequently enjoyed a greater measure of monetary stability than those which implemented the IMF's advice.³⁹⁹ This was so despite the fact that both groups of states possessed similar financial structures and economic profiles prior to the IMF's policy of removing capital controls being implemented.⁴⁰⁰ Furthermore, the IMF has since reversed its position on capital controls, admitting the harm that their reckless removal causes to states and now advocating their imposition or at least removing them sequentially.⁴⁰¹ On the basis of these facts, it does not seem unreasonable to find that the IMF was negligent in its role as advisor to member states and as a result it failed to fulfill its function and international obligation to advance monetary stability in its member states and even globally.

In summary, according to Article 10 of the ARIO, there is a breach of an international obligation whenever an IO's conduct does not conform with its international obligations, regardless of the origin or source of those obligations. Thus far in this chapter the sources of international obligations that are identified in various provisions of the ARIO have been examined to discover whether they gave rise to the obligation for the IMF *not* to impose the policy of eliminating capital controls on its member states

³⁹⁹ McKnight, 862; even IMF agents have since admitted that this was indeed the case - see E. Prasad et al, "Effects of Financial on Developing Countries: Some Empirical Evidence" IMF Occasional Paper No. 220, September 2003; K. Rogoff & E. Prasad, "The Emerging Truth of Going Global" Financial Times, 2 September 2003, p. 21; "The Liberalization and Management of Capital Flows: An Institutional View" IMF Executive Summary, November 14 2012 <http://www.imf.org/external/np/pp/eng/2012/111412.pdf>

⁴⁰⁰ Ibid.

⁴⁰¹ "The Liberalization and Management of Capital Flows: An Institutional View" IMF Executive Summary, November 14 2012 <http://www.imf.org/external/np/pp/eng/2012/111412.pdf>

and it has been shown that these sources of law did give rise to this international obligation for the IMF. Therefore, the IMF's imposition of this policy on its member states was a breach of this obligation. According to Article 4 of the ARIO, a breach of an international obligation by an IO constitutes international wrongdoing and gives rise to international responsibility. Hence, the IMF's policy of requiring its member states to eliminate capital control was an internationally wrongful act and gave rise to international responsibility for the organization.

Conclusion

In conclusion, by virtue of the rules of the IMF, customary international law, the general principles of law and the IMF's treaty with its member states, the IMF had an international obligation not to eliminate capital controls from its member states and by requiring them to eliminate those controls it failed to fulfill that obligation. According to Article 10 of the ARIO whenever an IO fails to conform to an international obligation there is a breach of that obligation. Since Article 4 of the ARIO defines an internationally wrongful act of an IO as conduct which is attributable to the IO and constitutes a breach of an international obligation, it is determined that the IMF committed an internationally wrongful act by breaching its obligation not to eliminate capital controls from its member states and has therefore incurred international responsibility. However, despite these findings, if it can be shown that the organization had an implied power or authorization to require states to remove capital controls as a condition for receiving loans there would be no international wrongdoing on its part. Thus, in the next chapter the doctrine of powers will be examined in order to discover whether or not the IMF possessed such implied powers.

Chapter 7

7.0. The Doctrine of Powers

7.1. The Doctrine of Attributed or Express Powers

As the ICJ observed in the *Reparations* case, regardless of the criteria used to determine whether an IO possesses legal personality, “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights”.⁴⁰² Hence, an IO is not automatically invested with a fixed set of rights, liabilities and competences merely by being recognized as an international legal personality. These vary from one organization to another for though personality is granted to an IO the question of what powers it can exercise and the extent of these powers remains.⁴⁰³ Over a period of years this question of the varying capacities of IOs in the absence of being expressly accorded by a constitutive instrument has been dealt with by the courts by applying the doctrine of implied powers. Similarly, since the IMF has no provisions in its AA that expressly invest it with the authority to require member states to eliminate capital controls, this capacity could only exist by virtue of an implied power. Thus, how implied powers arise for IOs in general, and the question of whether such an implied power exists for the IMF in particular, is examined in this chapter.

The doctrine of attributed or express powers stipulates that IOs and their organs are to do only those things which are expressly permitted them in their constituent

⁴⁰² *Reparations* case, p.178.

⁴⁰³ ILA, Taiwan, 1998, p.605-606; Klabbbers 2002, pp.42-43.

instruments.⁴⁰⁴ It seems to be generally accepted that the first articulation of this doctrine is found in the 1926 advisory opinion of the PCIJ in *Jurisdiction of the European Commission of the Danube between Galatz and Braila*.⁴⁰⁵ In the course of its decision regarding the extent of the powers to be exercised by of the Commission, the Court said:

“[A]s the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute [the Commission’s constituent instrument] with a view to the fulfillment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.”⁴⁰⁶

It has been suggested that following this opinion, the doctrine of attribution of powers received further support as it was extrapolated from the principle which was emphasized in the *Case of the SS Lotus*,⁴⁰⁷ namely, that states are sovereign entities whose independence and exercise of free will must be respected. Thence, since IOs are creations of sovereign states they must function in accordance with the will of their member states as expressed in their constituent instruments, for to do otherwise would be to violate the sovereignty of those states.⁴⁰⁸ This interpretation of the doctrine of attributed powers also served to emphasize an important difference between states and IOs which has recently been highlighted by the ICJ in its advisory opinion on the

⁴⁰⁴ White, pp. 70-106 offers an extensive discussion of attributed or express, implied and inherent powers.

⁴⁰⁵ Advisory Opinion, [1926] Publ. PCIJ, Series B, no. 14.

⁴⁰⁶ Ibid., p.64.

⁴⁰⁷ [1927] Publ. PCIJ, Series A, no.10

⁴⁰⁸ Klabbbers, 2002, p.64.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, namely: "... [t]hat international organizations are subjects of international law which do not, unlike States, possess a general competence."⁴⁰⁹

The application of the principle of attributed powers is apparent in the constituent instruments of some IOs. Article 5EC of the Treaty on European Union provides that "[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein". Similarly for the Economic Community of West African States its organs "[s]hall perform the functions and act within the limits of the powers conferred upon them ..."⁴¹⁰, and the Food and Agriculture Organization shall "[p]erform any legal act appropriate to its function which is not beyond the powers granted to it by this Constitution."⁴¹¹ Another example is the Charter of the Organization of American States which provides that the General Assembly and the Permanent Council of the Organization of American States are to act in accordance with its provisions or within its limits.⁴¹²

It appears that the courts had set aside the theory of attributed powers in favour of the use implied powers for some years. However, some recent decisions may be evidence of a shift in judicial perspectives on the extent of powers being wielded by international organizations and a desire on the part of the courts to rein in IOs by returning to the more restrictive theory of attribution of powers.⁴¹³ In the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case⁴¹⁴ the World Health

⁴⁰⁹ ICJ Reports, 1996, p.66 at p. 78, para. 25.

⁴¹⁰ ECOWAS Article 4, para.2.

⁴¹¹ FAO Article XV para.1.

⁴¹² OAS Articles 54(h) and 82 respectively.

⁴¹³ Klabbbers, 2002, p.81.

⁴¹⁴ [1996] ICJ Rep. 66.

Organization asked the Court to decide whether the use of nuclear weapons by states would constitute a breach of the states' obligations under international law. Before the Court could address this question it first wanted to determine whether the WHO had the competence to request this opinion. The Court found that the constitution of the WHO clearly conferred on it the power to investigate the effects of the use of nuclear weapons on health and that such an inquiry would be in keeping with the organization carrying out its functions. However, the Court continued, a similar power to inquire of the Court regarding the *legality* of the use of nuclear weapons by states had not been expressly granted to the WHO, and furthermore, whether the use of these weapons was legal or not had no bearing on the organization's functions. Hence, the Court recognized the theory of implied powers as having become generally accepted by usage,⁴¹⁵ but it applied it in a restrictive manner in this case by denying that there was an implied power for the particular action taken by the WTO which could be derived from its functions as expressly stated in its constituent instrument.⁴¹⁶

More recently in 2000, in the *Tobacco Directive* case, the Court of Justice of the European Community employed a similar approach on the subject of implied powers. The question was whether the Community, in the absence of an express power to do so, could legislate a ban on the advertising of tobacco products. Apparently deviating from its approach in earlier cases of a similar nature, the Court did not find that there was an implied power for the Community to do this and ruled instead that the

⁴¹⁵ Ibid., at p. 79 (para. 25) for the Court's statement on this point.

⁴¹⁶ Ibid.; for further discussion regarding the restriction of implied powers see A.I.L.Campbell, "The Limits of the Powers of International Organizations" in Jan Klabbers, ed., *International Organizations* (Burlington: Ashgate/Dartmouth, 2005) p.283.

Community had no power to legislate on this matter since its powers were strictly confined to those expressly granted to it.⁴¹⁷

7.1.1. The IMF and Attributed or Express Powers

As pointed out earlier, the liberalization of capital accounts by the removal of capital controls is not expressly identified as a purpose of the Fund in Article 1, nor is it indicated in any other part of the AA. In fact, capital controls are only mentioned in the AA in terms of their imposition, rather than their elimination. Article VI (3) of the AA expressly states that “members may exercise such controls as are necessary to regulate international capital movements” except “in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlements of commitments, ...”⁴¹⁸ “Current transactions” are defined as payments related to trade in services and goods.⁴¹⁹ Article VI provides that the IMF may actually require a member to exercise controls to prevent the use of the general resources of the Fund being used to meet a large or a sustained outflow of capital.⁴²⁰ The Article goes on to say that a member who fails to exercise appropriate controls after being requested to do so by the Fund, may be declared by the Fund as ineligible to use the general resources of the Fund.⁴²¹ Lastly, Article VII provides that in the event that the IMF adjudges that the currency of a member is scarce due to demand, the Fund may authorize members to “impose limitations on the freedom of operations in the scarce

⁴¹⁷ *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] paras. 83, 107

⁴¹⁸ AA Article viii Sec. 2 (a)

⁴¹⁹ AA Article xxx

⁴²⁰ AA Article VI Sec 1 (a). Original Articles of Agreement.

⁴²¹ AA Article VI Sec 1 (a) Second Amendment 1978.

currency”, and the state shall have “complete jurisdiction in determining the nature of such limitations”.⁴²²

Moreover, John Maynard Keynes, one of the negotiators of the Bretton Woods agreement, said of Article VI: “[it is] a permanent arrangement [that] accords to every member government the explicit right to control capital movements It follows that our right to control the domestic capital market is secured on [a] firmer foundation than ever before”.⁴²³ Keynes’ approval of Article VI suggests that the absence of any express authorization for the Fund to require members to eliminate capital controls reflects the intention of the founding members that these measures should not be a part of IMF policy. However, it may still be asked whether there was an implied authorization for the Fund to impose the conditionality of the elimination of capital controls upon borrowing states within Articles 1 (v) and 5 (3) (a) of the AA.

7.2. The Doctrine of Implied Powers

In addition to the powers that are expressly conferred on an IO by its constituent instrument, the practice has evolved whereby additional powers are implied or derived from the same instruments insofar as they are deemed to be necessary or essential to the IO carrying out the functions that are stipulated in its constituent document.⁴²⁴ This

⁴²² AA Article VII Sec 3 (b).

⁴²³ John M Keynes, unattributed quoted in “Banking and Financial Reform at the cross-roads of the Neoliberal contagion.” Timothy A Canova 14. Am U. Int’l. L. Rev. 1612. cited in Williams at p.570, fn. 82.

⁴²⁴ Occasionally some IOs are expressly authorized in their constituent instruments to assume implied powers. See Article 308 (formerly Article 235) of the *Treaty Establishing the European Community*, 7 February 1992 (entered into force 1, 1993) 37 ILM 56, which provides: “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.”

approach can be traced to the principle of effectiveness which is applied in the interpretation of treaties, and which requires that the terms of a treaty must be interpreted so as to give the treaty its most efficacious application.⁴²⁵ In *Federation Charbonniere de Belgique v. High Authority of the European Coal and Steel Community* the European Court of Justice confirmed this rule, saying that implied powers are derived from the application of a “[r]ule of interpretation generally accepted in both international and national law, according to which rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied.”⁴²⁶ This rule can be recognized in Articles 31(1) of both the 1969 Vienna and the 1986 treaty Conventions which state that:

“[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose.*” [emphasis added]

In relation to IOs, courts will endeavour to apply the principle of effectiveness by giving the meaning to the constituent instrument which will best ensure that the purposes and objectives of the IO are realized.⁴²⁷ Moreover, when a court expressly refers to the purposes of an IO or confirms that an IO has the power to perform the functions mandated by its constituent instrument it is said to be applying the positive elements of the principle of effectiveness.⁴²⁸ The latter element of confirming the

⁴²⁵ E. Lauterpacht 1976, p.420; Klabbbers 2002 p.67.

⁴²⁶ Case 8/55, 1954-56, E.C.R. 245; 29 November 1956. 25 ILR, p. 425 (hereinafter *Fedechar* case.

⁴²⁷ Ibid.

⁴²⁸ Ibid.

organization's power to carry out its functions was evident in both the *Reparations* case and the earlier *Jurisdiction of the European Commission of the Danube*.⁴²⁹ Regarding the European Commission of the Danube the PCJ acknowledged that it only possessed the functions that had been expressly conferred upon it by its constituent instrument but emphasized that it had the power to implement those functions to their fullest extent.⁴³⁰ Later, the Court said of the UN in the *Reparations* case that not only had its member states entrusted certain functions to it, but they had also given it the competence to enable it to fulfill those functions.⁴³¹

The other element of effectiveness, namely identifying the object of the organization as a basis for implying powers, has been very evident in advisory opinions over the last several decades, but initially the Court applied this principle in quite an indirect manner. The advisory opinion issued in the *Greco-Turkish Agreement of December 1st, 1926*,⁴³² was an example of this indirect reference to powers being implied from express functions.

The facts of the case were that an agreement had been made between the states which established a mixed commission and provided that in the event that there was a dispute among members of the commission they could resort to arbitration. However, the agreement was silent as to exactly who could undertake arbitration and the PCIJ was therefore asked to decide. In its ruling that the commission was the only party which was authorized to enter into arbitration the Court said: “[f]rom the very silence of the article on this point, it is possible and natural to deduce that the power to

⁴²⁹ P.C.I.J., SER. B, No. 14, pp.6-146.

⁴³⁰ Ibid., at p. 64.

⁴³¹ (1949) I.C.J. Rep., 174 at p. 179.

⁴³² [1928] P.C.I.J. Series B, no.

refer a matter to the arbitrator rests with the Mixed Commission when that body finds itself confronted with questions of the nature indicated".⁴³³ Thus the Court did find that the Commission possessed a power which had not been expressly conferred by its constitutive instrument but was unclear about the basis for this deduction and apparently reached the rather absurd conclusion that the power was implied solely because it was not conferred. The Court made only a vague reference to the power being implied from the functions of the Commission when it observed that to find that other parties to the treaty had a right to initiate arbitration would result in the progress of the Commission being impeded and in so doing the spirit of the constituent instruments would be violated.⁴³⁴ However, in later decisions the principle of a power being implied by functional necessity became evident and was more clearly articulated by the Court.

In the case *Competence of the ILO to Regulate, incidentally, the Personal Work of the Employer*, the PCIJ was asked to decide whether the ILO, which had no express power to regulate the work of employers, could propose legislation which was aimed at protecting employees, but would consequentially regulate employers also. The Court responded that the power to do this was implied for the ILO since it was inconceivable that the contracting parties intended that the organization be prohibited from advancing protective measures for workers simply because those measures would also affect the work of employers⁴³⁵

Later, in the *Reparations* case discussed above, the ICJ used the same approach in deciding whether the UN had the capacity to bring an international claim with regard to an injury suffered by one of its representatives. The Court advised that

⁴³³ [1928] P.C.I.J. Series B, no. 16.

⁴³⁴ Ibid., p. 26.

⁴³⁵ PCIJ, Ser. B, No. 13, at p.18.

although the terms of the UN Charter clearly did not contain any explicit provision granting the organization possession of any such capacity, the required power must be deemed to exist by “[n]ecessary implication as being essential to the performance of its duties.”⁴³⁶ Moreover, the Court found that upon examination of the functions of the UN and of its agents the capacity of the organization to protect its agents arose by “[n]ecessary intendment out of the Charter”.⁴³⁷ Importantly, the Court, with regard to its finding that implied powers can be derived from the functions of an IO, went on to recognize it as a principle of law. The Court stated:

“[T]his *principle of law* was applied by the PCIJ to the Labour Organization ... and must be applied to the United Nations.”⁴³⁸
[emphasis added]

More recently in 1996 the ICJ restated this view of the exercise of implied powers by IOs as a principle of law but with less specific language. In its opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* the Court said “It is generally accepted that international organizations can exercise such powers, known as “implied” powers”.⁴³⁹

In the later advisory opinion of the *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*⁴⁴⁰ the argument that the implied powers of an IO arise out of “necessary intendment” was expanded by the ICJ. The question asked of the Court was whether the General Assembly, having established a tribunal to settle disputes between the UN and its Secretariat, then had the right to refuse to give

⁴³⁶ Reparations Case, ICJ Reports 1949, at p. 182.

⁴³⁷ Ibid., at p. 184.

⁴³⁸ Ibid., at p. 182.

⁴³⁹ [1996] ICJ Rep. p. 79, para. 25.

⁴⁴⁰ [1954] ICJ Rep. p. 57.

effect to an award granted by that tribunal to a staff member whose services had been terminated without his assent.⁴⁴¹ However, before deciding whether the Assembly was bound to give effect to awards of the tribunal the Court looked at whether the Assembly had the power to establish the tribunal. It opined that since the establishment of the tribunal was essential to the effective working of the Secretariat, the capacity to do so arose by “[n]ecessary intendment out of the Charter”.⁴⁴² But with regard to the initial question, the Court had to consider whether in addition to the implied power to set up the tribunal the General Assembly also had the power, also implied, to invest into that tribunal the power to make awards that were binding on its creator, namely the Assembly. The Court answered in the affirmative, thereby achieving the peculiar result of basing an implied power on the existence of another implied power.⁴⁴³

Almost twenty years later the International Court was asked a similar question in the *Falsa* Opinion.⁴⁴⁴ The Court had to decide, *inter alia*, whether the UN General assembly had the power, albeit implied, to set up a committee through which an employee could make a request that the International Court review a decision of the Administrative Tribunal. The Court, following the same reasoning it had applied in the *Effects of Awards* opinion to conclude that the Assembly had the power to establish a tribunal, again found that the Assembly had an implied power to set up the committee in question.

Meanwhile, concurrent to these opinions, decisions of other courts gave evidence that the concept of implied powers had practically become accepted as a

⁴⁴¹ Ibid.

⁴⁴² Ibid.

⁴⁴³ Ibid..

⁴⁴⁴ [1973] ICJ Rep. p. 173.

general principle of law.⁴⁴⁵ The Court of Justice of the European Coal and Steel Community in the *Fedechar* case had to decide whether the High Authority had the power, not expressed in its constituent instrument, to set the sale price for coal between the maximum and minimum prices.⁴⁴⁶ The Court said that “[a] rule of interpretation that is generally admitted in international law as much as in municipal law,” dictated that where an international treaty or law would be rendered senseless or useless without the implication of certain norms, those necessary norms would indeed be considered to be implied.⁴⁴⁷

This principle of implying powers where they are necessary for the exercise of express functions was again applied by the Court of the European Communities in the *ERTA* case.⁴⁴⁸ The particular aspect of the case which required the Court to decide if certain powers were implied by the Treaty was the dispute between the Commission and the Council as to whether the Community possessed the power to enter into agreements relating to transport with third parties although the EC Treaty was silent regarding this power. Although the Court in its reasoning did not expressly state that the Community had an “implied power” which arose out of the need to implement its policies, this principle was nevertheless evident in its decision. The Court ruled that the Community should be permitted to enter into treaties with third parties whenever they were necessary for the effective implementation of the Community’s common policy.

⁴⁴⁵ E. Lauterpacht, p. 426.

⁴⁴⁶ Case 8/55, 1954-56, E.C.R. 245; 29 November 1956. 25 ILR, p. 425.

⁴⁴⁷ *Ibid.*, at p. 431.

⁴⁴⁸ *Re ERTA: E.C. Commission v. E.C. Council*, 47 ILR 278; Common Market Law Reports [1971], p. 335.

In a later case involving similar facts to the *ERTA* case, namely *Re the European Laying-up Fund Agreement*,⁴⁴⁹ the Court had to again decide whether the European Community, in the absence of an express provision in the EC Treaty, had the power to enter into a treaty with parties which included a non-member state. This time the Court made a more direct reference to the concept of implied powers. It stated clearly that the authority to enter into international agreements did not only result from an express provision of the EC Treaty, “[b]ut equally may flow implicitly from its provisions”. Moreover, the Court reiterated that where certain actions, in this case entering into international agreements, were necessary for the attainment of the expressly created objectives of the organization, the Community had the implied authority to undertake those actions.

From the case law discussed thus far it is apparent that the test for implied powers which has become the most widely accepted is whether the exercise of the power that is being sought is necessary or essential to the fulfilment of the functions of the IO.⁴⁵⁰ Despite this however, the decision in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* made it clear that though the functional test may be applied, it would not be so wide as to accommodate the implication of powers where they are clearly inconsistent with those powers which have been expressly attributed by the constituent instrument of an IO.⁴⁵¹

⁴⁴⁹ [1977] 2 CMLR 279.

⁴⁵⁰ Shaw, 4th ed. p.916.

⁴⁵¹ Ibid., [1996] ICJ Rep. p.78, para. 25.

7.2.1. The IMF and Implied Powers

In light of the law regarding implied powers discussed above, could it be said that the IMF had an implied power by virtue of Article 1 (5) and Article V Sec (3) (a) to impose the conditionality of eliminating capital controls upon borrowing states?

Article 1 (v) provides that one of the purposes of the Fund is “[t]o give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards...”.

Article 5 (3) (a) provides that:

“[T]he Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members with their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.”

Importantly, Article XXIX of the AA provides that questions related to interpretation of the provisions of the AA must be decided by the Executive Board or further by the Board of Governors. Thus, whether the two articles of the AA cited above impliedly empowered the Fund to require borrowing states to eliminate capital controls as a condition for obtaining loans must be decided by one of these Boards.

However, it must be noted that in interpreting the AA, the Boards are bound by the rules of interpretation engendered in the 1969 and 1988 Vienna Conventions on the Law of Treaties since the AA comprise not only a constituent instrument but also a treaty

between the IMF and its members. Thus, in interpreting the AA in order to discover an implied authorization for the construction of a policy requiring the elimination of capital controls, the principle of *pacta sunt servanda* must be observed by the Boards. This requirement of good faith in interpreting treaties is codified in Articles 31 (1) of the 1969 and the 1988 Vienna Conventions on the Law of Treaties:

“[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose.*” (emphasis added).

For example, in the *Nicaragua* case the ICJ said that by declaring a general embargo on trade with Nicaragua the United States had committed an act calculated to deprive its *Treaty of Friendship, Commerce and Navigation* with Nicaragua of its object and purpose.⁴⁵² This rule of *pacta sunt servanda* coincides with the test for implied powers, discussed above, which has been established by the courts thus far, that the implied power being sought must be required to enable the IO to fulfil its purposes.⁴⁵³

In a nutshell, the object and purpose of the IMF, as expressed in Article 1 of the AA, is to ensure monetary stability, promote and maintain high levels of employment and real income, promote exchange stability and avoid competitive exchange depreciation, and make resources available to members in order to provide them with the opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity. Moreover, Article 1 emphasizes that “the fund shall be guided in all its policies and decisions by the

⁴⁵² *Nicaragua* case, p. 138, para.10.

⁴⁵³ Shaw, 4th ed., p. 916.

purpose set forth in this Article”. Consequently, if any policy impliedly provided for within the AA is to be deemed *intra vires*, it must serve to advance or fulfill the purposes of the Fund as expressed in Article 1.

However, the IMF policy of eliminating capital controls cannot be said to have advanced or fulfilled the purposes of the IMF because the results that this policy brought about were in complete contradiction to Article 1. According to the testimony of various experts cited in the introduction of this paper, what followed the implementation of the IMF policy of removal of capital controls was high unemployment as businesses failed; a decrease in real income as currencies were devalued; and the destruction of national and international prosperity (the latter because of the contagion effect of the particular economic crises).

Moreover, the fact that the elimination of capital controls is not a purpose of the Fund was confirmed in 1999 by Ross Leckow, then Senior Counsel of the IMF:

“[F]und conditionality is a potentially powerful tool available for the promotion of capital account liberalization. Through conditionality, the Fund could effectively press members using Fund resources to remove particular restrictions on capital movements. However, the Fund may not presently use conditionality for this purpose. *The Fund’s Articles provide that any condition imposed by the Fund on the use of its resources by members must be consistent with the purposes of the Fund. As capital liberalization is not a purpose of the Fund and as the Articles recognize the right of members to restrict capital movements, the Fund may not establish*

conditionality which would require members receiving financial assistance to remove particular capital account restrictions.⁴⁵⁴ (emphasis added).

The fact that the elimination of capital controls is not a purpose of the IMF was again confirmed by Francois Gianviti, then General Counsel and Director of the Legal Department of the IMF. Writing in 2003 he made it clear that the liberalization of capital movements was not a purpose of the Fund at the time of its establishment and remained so despite various amendments made to the AA up to the time of his writing.⁴⁵⁵ He emphasized that unless Article 1 of the AA, which expresses the purposes of the IMF, and Article VI (3), which provides for the sovereignty of member states in exercising controls over capital movements, were amended the IMF had neither jurisdiction over capital controls in member states nor could it utilize them within the framework of conditionality.⁴⁵⁶

Lastly, the fact that the IMF's Board of Governors urged that the AA be amended to make the liberalization of capital account a specific purpose of the Fund is further proof that the elimination of capital controls was not a purpose of the Fund.⁴⁵⁷

Hence, in accordance with Articles 31(1) of both VCLTs, Article 1 (5) and Article V Sec (3) (a) cannot be interpreted as granting an implied power to the IMF to impose

⁴⁵⁴ Leckow, "Proceedings", pp. 521-22.

⁴⁵⁵ Gianviti, "Liberalization", pp. 217-220.

⁴⁵⁶ Ibid., p. 221.

⁴⁵⁷ Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, Press Release Number 97/22 April 28 1997 para. 7. available at: <http://www.imf.org/external/np/sec/pr/1997/pr9722.htm> : Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, section entitled "Statement of the Interim Committee on the Liberalization of Capital Movements Under an Amendment of the Articles" para. 4 Press Release Number 97/44, September 21, 1997 <http://www.imf.org/external/np/sec/pr/1997/pr9744.htm>

the policy because the policy was not in keeping with the purposes of the Fund. Further, according to the case law regarding implied powers discussed above, the power to impose the policy cannot be implied from these articles because it did not pass the functional test, i.e. the power was neither necessary or essential to fulfil the purposes of the Fund which are articulated in Article 1 of the AA. In addition, in the case of the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* the Court emphasized that the functional test could not be successfully applied where the implied power sought was obviously inconsistent with those powers which have been expressly attributed by the constituent instrument of an IO.⁴⁵⁸ Clearly, an implied power to eliminate capital would be inconsistent with the express provisions within the AA that allow for the imposition of them.

7.3. The Doctrine of Inherent Powers

The doctrine of inherent powers was advanced by Seyersted in place of both attributed and implied powers which he emphatically rejected.⁴⁵⁹ Regarding the theory of attributed powers he argued that its application was unrealistic and impractical since most of the acts performed by IOs are not expressly approved in their constituent instruments. Hence, he said, writers “resort to the fiction of ‘implied powers’”.⁴⁶⁰ Although he acknowledged that implied and inherent powers both achieve the same result, Seyersted spurned the former on the grounds that it lacked any criteria other than the “fictitious intentions” of the architects of a constituent instrument and could thus be applied with apparently unlimited flexibility. He contended that his theory of inherent

⁴⁵⁸ Ibid., ICJ Reports, 1996. p.78, para. 25.

⁴⁵⁹ See generally Finn Seyersted, *The Common Law of International Organizations*, pp.65 – 72.

⁴⁶⁰ Ibid., p.66.

powers, on the other hand, defined limits for its application.⁴⁶¹ However, as explained below, in attempting to define these limits, Seyersted constructed a doctrine of powers which is more problematic in its application than either of its rival doctrines.

First, he distinguished between inherent powers and “extended jurisdiction”. In addition, he divided the former into “inherent internal jurisdiction [exercised] over organs and their members”, and “inherent external legal capacity to act as an equal partner”. “Extended jurisdiction” he defined as a power which has been conferred upon an organization to enable it to make decisions which are binding on other legal persons, whether states, IOs, or individuals. The inherent powers, he said, inhere from customary international law to IOs, states, and any other self-governing community, but in contrast, “extended jurisdiction” must have “a specific legal basis” which he defined as the authorization of the member states of the particular IO. It is perhaps this latter aspect of Seyersted’s theory which has generated the most debate because having admitted the need for the authorization of member states for the exercise of certain powers by IOs, he continues that this authorization need not be expressly stated in the constituent instrument but can be considered to exist i.e. be *implied*, so long as the powers in question are not expressly prohibited by the said instrument.⁴⁶² Hence, coming from another angle, he returns to the use of the very same implied intentions of the framers of a constituent instrument which he earlier rejected as “fictitious”.

Seyersted boasted, and White in particular supports his contention, that the theory of inherent powers was applied by the ICJ in its advisory opinion given in *Certain*

⁴⁶¹ Ibid., p.65-66.

⁴⁶² Ibid., p.65.

Expenses of the United Nations.⁴⁶³ However, this writer respectfully disagrees with this perception and contends that the Court's approach in answering the question before it in this case fits about halfway on the continuum between attributed powers and implied powers. The Court was asked to consider whether expenditures which were authorized by the General Assembly for the peace keeping operations of the UN in the Congo and Middle East qualified, within the meaning of Article 17 (2) of the Charter of the UN, as "expenses of the Organization" which the General Assembly was expressly allowed to approve. In order to answer the question the Court found it necessary to also consider the wider issue of whether the General Assembly had the power within the Charter to authorize expenditures related to international peace and security. Seyersted and White argue that the Court answered both questions in the affirmative because it found no prohibition within the Charter for the General Assembly exercising the power to approve such expenditures. Their argument appears to be based primarily on the statement of the Court "[T]he provisions of the Charter which distribute functions and powers to the Security Council and the General Assembly give no support to the view that such distribution excludes from the power of the General Assembly the power to provide for the financing of measures designed to maintain peace and security".⁴⁶⁴ But it is submitted that this position takes this statement out of the context of the Court's reasoning in its entirety.

Firstly, in deciding whether "expenses of the Organization" included all the expenses of the UN, the Court sought to give effect to the plain meaning of the Charter by refusing the view that "expenses of the Organization" were to be understood as

⁴⁶³ ICJ Report, 1962, p.151; White, p.132; Seyersted, 2008, p.66.

⁴⁶⁴ Ibid., p.163.

“regular” or “administrative” expenses by implication.⁴⁶⁵ In doing so, the Court not only took into consideration the practice of the UN and the express provisions within the Charter relating to the organization’s budget and expenditures, but contrary to the theory of inherent powers, it also weighed the intention of the drafters in relation to these subjects.⁴⁶⁶

Secondly, the Court also chose to examine whether the General Assembly had the power to authorize expenditures related to peacekeeping operations or whether all decisions related to this were to be rendered exclusively by the Security Council. In doing so the Court took into account the purposes of the UN in order to decide whether the expenses were *ultra vires* the Charter.⁴⁶⁷ In other words, in arriving at its decision the Court considered whether the GA had an implied power to authorize the expenses. Hence it appears from this case that even if one accepts that the theory of inherent powers was indeed applied, this theory still necessitates the use of the very legal mechanisms utilized to recognize implied powers which Seyersted rejected. Perhaps it is as Seyersted himself said: the two theories lead to the same results.

The application of Seyersted’s inherent powers theory could result in some rather absurd conclusions. To choose an extreme example, it would mean that all IOs, unless expressly prohibited by their constitutions, could be empowered via their “extended jurisdiction” to exercise territorial jurisdiction by administering territory in certain circumstances. Since this would obviously be an untenable status for all IOs, the

⁴⁶⁵ Ibid., p.159.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid., p.168.

alternative is ironically, as Klabbers has observed, that prohibitions on certain actions by IOs would have to be implied.⁴⁶⁸

7.3.1. The IMF and Inherent Powers

According to Seyersted, an inherent power could be implied only if it were not expressly prohibited in the constituent instrument. Applying this to the current case, although the AA of the IMF did not expressly prohibit the elimination of capital controls, by virtue of the fact that it expressly authorized the imposition of them, it cannot logically be understood to be implying the opposite at the same time. Thus, it must be concluded that the IMF did not possess an inherent power to impose its policy of eliminating capital controls.

Conclusion

In light of the current international law regarding the doctrine of powers the IMF possessed no power to require states to eliminate capital controls and by doing so it exceeded its constitutional authority and failed to fulfil its purposes and to meet its international obligations not to impose the elimination of capital controls on states. Moreover, since these purposes and obligations constitute essential elements of the AA, the failure on the part of the Fund to fulfil them amounts to a material breach of the AA as defined in Articles 60 (3) (b) of the 1969 and 1988 Vienna Conventions:

⁴⁶⁸ Klabbers, *Introduction*, p.76. Despite the controversy which Seyersted's theory of inherent powers has generated it does enjoy support among some legal scholars, most notably White. See White, pp. 38, 88.

“[...] the violation of a provision essential to the accomplishment of the object or purpose of the treaty”.⁴⁶⁹

Consequently, the IMF is responsible for international wrongdoing against those states of which it required the elimination of capital controls as a prerequisite for obtaining loans from the organization. However, whether the injured states will be able to obtain any reparations from the IMF is questionable for reasons to be discussed in the next two chapters.

⁴⁶⁹ 1969 Treaty Convention, Article 60 (b).

Part IV: The Problems with Obtaining Reparation from IOs and their Member States

Chapter 8

8.0. The First Problem with IOs making Reparation – the Immunities and Privileges of IOs

Having concluded that the IMF was responsible for international wrongdoing against certain IMF debtor states as a result of requiring them to remove capital controls as a condition for obtaining loans, attention must now be turned to how those injured states can go about invoking the responsibility of the IMF and or its member states and obtaining reparation for the losses they suffered.

8.1. *Invoking Responsibility of IOs or their Member States*

The legal basis for invoking the responsibility of an IO is provided in Articles 43-50 of the ARIO and closely resembles the grounds for invoking the responsibility of states for international wrongdoing which are covered by Articles 42-48 of the ASR.

According to the ARIO, an injured State or IO has the right to invoke the responsibility of an IO if the latter IO has breached an obligation that is owed to either entity or to a group of States or IOs which includes the former State or IO, providing that the obligation breached has specially affected the invoking State or IO, and is likely to radically affect the position of all the other states and IOs to which the obligation is owed with respect to the continued performance of the obligation.⁴⁷⁰ If several States or IOs are injured by the same internationally wrongful act of an IO, each injured party may individually invoke the responsibility of the IO which has committed the act.⁴⁷¹ Conversely, if an IO and one or more States or one or more IOs are jointly responsible

⁴⁷⁰ ARIO, Article 43; ASR, Article 42.

⁴⁷¹ ARIO, Article 47; ASR, Article 46.

for the same wrongful act, the responsibility of each party involved in the act may be separately invoked.⁴⁷² However, subsidiary responsibility may only be invoked if the invocation of primary responsibility has not resulted in reparation being made, or conditional on reparation not being made in the future, as an injured party may not recover more than it has lost.⁴⁷³ Further, this rule does not prevent the State or IO which is making reparation from seeking commensuration from the other responsible States or IOs.⁴⁷⁴

Notwithstanding the above, *a State or an IO* that has *not* been injured by the wrongful act in question may invoke the responsibility of an IO if the obligation breached is owed to a group of States or IOs which includes the invoking State or IO, and was established for the protection of a collective interest of the group.⁴⁷⁵ Secondly, *a non-injured State* may invoke the responsibility of an IO if the obligation that was breached is owed to the entire international community.⁴⁷⁶ On the other hand, *a non-injured IO* may only invoke the responsibility of another IO if the obligation breached is owed to the entire international community and ensuring the performance of that obligation for the protection of the interests of the international community is within the functions of the invoking IO.⁴⁷⁷ However, whether it is an injured or non-injured party that is invoking the responsibility of an IO, both are required to notify the responsible IO of the claim against it.⁴⁷⁸ Along with the notification, the invoking party may require that the responsible IO

⁴⁷² ARIO, Article 48(1); ASR, Article 47 (1).

⁴⁷³ ARIO, Article 48(2), (3)(a); ASR, Article 47 (2)(a).

⁴⁷⁴ ARIO, Article 48(3)(b); ASR, Article 47 (2)(b).

⁴⁷⁵ ARIO, Article 49(1); ASR, Article 48 (1)(a).

⁴⁷⁶ ARIO, Article 49(2); ASR, Article 48 (1)(b).

⁴⁷⁷ ARIO Article 49(3).

⁴⁷⁸ ARIO, Article 44 (1); ASR, Article 43 (1).

desist from the wrongful act if it is still continuing, and may advise what form of reparation is considered appropriate.⁴⁷⁹

However, although a State or an IO may be entitled to invoke the responsibility of an IO or its member states, there are certain requirements concerning the admissibility of claims which must also be observed. First, an injured State may not invoke the responsibility of an IO “[i]f the claim is not brought in accordance with any applicable rule relating to the nationality of claims.”⁴⁸⁰ This provision is in reference to the rules governing diplomatic relations, in particular, the rule that a State may only exercise diplomatic protection for its nationals.⁴⁸¹ Thus, in this regard, if a State wanted to invoke the responsibility of an IO for an injury suffered by someone within the invoking State’s territory as a result of an internationally wrongful act of the IO, the State could only do so if the injured person were a national of that State.⁴⁸² A second admissibility provision for claims is that where the rule of exhaustion of local remedies applies to a claim, an injured State or IO may not invoke the responsibility of an IO unless all local remedies have first been exhausted.⁴⁸³ Lastly, an injured State or IO may not invoke the responsibility of an IO if the former has waived the claim or is deemed to have acquiesced in the lapse of the claim.⁴⁸⁴

Applying these rules governing invocation of responsibility to the case under consideration, it seems reasonable to say that the debtor states which suffered losses as a consequence of the IMF and or its member states requiring them to eliminate

⁴⁷⁹ ARIO Articles 44 (2)(a)(b)& 49(4); ASR, Article 43 (2)(a)(b).

⁴⁸⁰ ARIO, Article 45(1); ASR, Article 44 (a).

⁴⁸¹ *Draft Articles on Diplomatic Protection*, UN GAOR, 61st Sess., Supplement No. 10, UN Doc. A/61/10 (2006) Article 3, para. 1, p.17; ARIO with Commentaries, Article 45 (1), p. 72, para. 2..

⁴⁸² ARIO with Commentaries, *ibid*.

⁴⁸³ ARIO, Article 45(2); ASR, Article 44 (b).

⁴⁸⁴ ARIO, Article 46 (a) (b); ASR, Article 45 (a)(b).

capital controls would qualify as injured states and have grounds for invoking the responsibility of the IMF and or its member states. According to the ARIO and the ASR the seminal requirement for invoking responsibility against an IO or a state is conduct which is attributable to the IO or the state which constitutes a breach of an international obligation owed to the invoking party by the acting IO or state.⁴⁸⁵ In previous chapters it was established that the IMF and its member states had an obligation stemming from various sources *not* to require borrowing states to eliminate capital controls but they required them to do so anyway and this resulted in injury to those states.⁴⁸⁶ Hence, the most important requirement for invoking responsibility - breach of an obligation owed - was fulfilled and the injured debtor states therefore have a legal basis for invoking the responsibility of the IMF and its member states for international wrongdoing against them.

8.1.2. Legal Consequences of an Internationally Wrongful Act

Once it is established that an IO or state has committed an internationally wrongful act there are certain legal consequences which obviously ensue. First, the responsible IO or state is required to terminate the wrongful act immediately (i.e. to resume performance of the international obligation that has been breached) and if necessary, to guarantee that there will be no reoccurrence of it.⁴⁸⁷ Second, full reparation must be made for the damage caused, whether moral or material, by the

⁴⁸⁵ ARIO, Articles 3 & 4; ASR, Article 1 & 2.

⁴⁸⁶ At pp. xxx – xxxii of the Introduction of the thesis the negative consequences or injuries that resulted from the implementation of the IMF's policy of rapidly eliminating capital controls are documented according to the testimony of various experts. Except for these testimonies, causation of injury is not dealt with in the thesis since this would require research and documentation by a team of economists and forensic accountants which is presently not available.

⁴⁸⁷ ARIO, Articles 29 & 30; ASR, Articles 29 & 30.

wrongful act of the IO or state.⁴⁸⁸ The responsible IO or state may not refuse to carry out these requirements on the grounds that its rules prohibit compliance, and it is obliged to perform them for all who have been injured and affected by the wrongdoing, whether it involves one or more States, one or more IOs, or the entire international community.⁴⁸⁹ However, there is a caveat to this provision, viz that it does not necessarily apply to a responsible IO and its member states and IOs.⁴⁹⁰

There are additional legal consequences which are entailed if the international responsibility of an IO or state has resulted from a “serious” breach of an international obligation which arises from a peremptory norm.⁴⁹¹ The breach is categorized as serious “if it involves a gross or systematic failure” to perform the particular obligation.⁴⁹² In this case States and IOs are forbidden to recognize the situation arising from such a breach as lawful or to assist in perpetuating that situation.⁴⁹³ Instead, both States and IOs are required to cooperate to bring an end to the breach by lawful means.⁴⁹⁴

⁴⁸⁸ ARIO, Article 31; the definition of injury as “damages, moral or material” was expressed in *Walz v. Clickair SA*, ECJ, Judgment of 6 May 2010, Case C-63/09, paras.27-28 (Cited in ARIO with Commentaries, p.56, para.2).

⁴⁸⁹ ARIO, Articles 32 (1) & (2); ASR, Article 32.

⁴⁹⁰ According to the ILC’s commentary to Article 32 of the ARIO, paragraph (1) primarily refers to a responsible IO not using its rules to avoid compliance with its obligations to third parties (non-member States or IOs), but paragraph (2) recognizes that the rules of an IO may indeed affect the terms of fulfillment of the obligations owed to member States and IOs as a result of international wrongdoing. (ARIO with Commentaries, Article 32, p.58, paras.3-4).

⁴⁹¹ ARIO, Article 41(1).

⁴⁹² ARIO, Article 41(2).

⁴⁹³ ARIO, Article 42 (2.)

⁴⁹⁴ ARIO, Article 42 (1). Although it is not expressly stated in this article, in the Commentaries accompanying this article it is implied that an IO acting to bring an end to a breach by another IO can only do so within its mandated functions, see p.67, paras.3-4. There are no cases which offer a precedent for an IO being called upon to deny recognition or to act towards the cessation of a situation resulting from a serious breach of an obligation arising out of a peremptory norm *by an IO*, but the duty to do so can be extrapolated from cases in which States and IOs were urged to do this in response to a similar breach *by a State*. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Reports, 136 at pp.200-204; Security Council Resolution 662 (1990) of 9 August 1990, para.2 urging states, IOs, and specialized agencies not to recognize the annexation of Kuwait by Iraq; and the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union”, European Community, *Declaration on Yugoslavia and on the*

Other legal consequences may arise for IOs or states from their breach of international law, namely, rights may accrue to persons or entities other than States or IOs, but the consequences to IOs in this regard are not covered by the ARIO.⁴⁹⁵

8.2. Forms of Reparation

An IO or state responsible for an internationally wrongful act is obliged to make full reparation to the parties injured as a result of that act by means of restitution, compensation and satisfaction, either singly or in combination.⁴⁹⁶ Restitution, unlike compensation, is the restoration of a situation to the state which existed before the internationally wrongful act was committed. It is to be accomplished by the responsible IO or state providing it is materially possible and its cost does not outweigh the benefit of restitution as opposed to compensation.⁴⁹⁷ Compensation, on the other hand, involves making reparation for the damage caused by the wrongful act to the extent that it was not undone by restitution and shall cover any pecuniary losses suffered by the injured party, including any interest due on the on a principal sum owed.⁴⁹⁸ Lastly, where restitution and compensation have not provided sufficient reparation, satisfaction is to be given by the responsible IO or state for the injury resulting from the wrongful

Guidelines on the Recognition of New States, 16 December 1991, reproduced in *International Legal Materials*, vol.31 (1992), p. 1485 at p.1487 wherein it is stated that the EC and its member states would not recognize entities which are the result of aggression. (Cited in ARIO with Commentaries pp.67-68, paras. 6 & 7).

⁴⁹⁵ ARIO, Article 33(2); ARIO with Commentaries p.59, para. 45.

⁴⁹⁶ ARIO, Articles 31 & 34; Crawford, *Brownlie's* 8th ed. pp. 569-579.

⁴⁹⁷ ARIO, Article 35.

⁴⁹⁸ ARIO, Articles 36 & 38; see the ICJ's advisory opinion on *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, (1999) ICJ Reports, pp.88-89, para.66 for a reference to the obligation on the UN to pay compensation. Also, the UN famously gave compensation to individuals and States in response to claims which arose from the UN's operation in the Congo. The UN's letters in this regard can be found in United Nations, *Treaty Series*, vol. 535, p.199; vol. 564, p.193, vol. 565, p.3, vol. 585, p. 147, vol. 588, p.197. (ARIO with Commentaries, pp.61-62).

act.⁴⁹⁹ It may take the form of simply acknowledging the wrongdoing, expressing regret, or making a formal apology, but it must be in proportion to the wrongful act and shall not be in a form that is humiliating to the responsible entity.⁵⁰⁰ Notably, in assessing the amount of reparation that is due from the responsible IO or state, any contribution to the injury by the injured entity as a consequence of wilful or negligent action or omission on the part of that entity shall be taken into consideration.⁵⁰¹

8.3. Funding for Reparation

The matter of how funding will be provided to make reparation for the international wrongdoing of a *state* is straightforward for states since they generally have control over all national means of generating revenue and also have full autonomy to decide how that revenue is to be expended. Hence they can simply utilize state funds to pay for reparations that are due to an injured party. But for an IO providing funds to make reparations is not so simple because they generally depend on their member states to finance all of their activities. Therefore, although an IO may, like a state, utilize assets it possesses to meet its obligations, in the absence of adequate assets it must look to its members to fund its obligations. However, there are obstacles to both options - the utilization of assets or the supply of funds by member states, which make it unlikely that an injured party will ever receive any reparation from a responsible IO. These obstacles are the privileges and immunities to which IOs are entitled and the international legal personality of IOs. These two problems will be examined respectively in this chapter and the next.

On the subject of reparation, in the *Factory at Chorzow* case the PCIJ declared:

⁴⁹⁹ ARIO, Article 37(1).

⁵⁰⁰ ARIO, Article 37(2)(3).

⁵⁰¹ ARIO, Article 39.

“[I]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”⁵⁰²

This principle was reiterated by the ICJ in its judgment in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* when it said:

“[I]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”⁵⁰³

In accordance with this principle of the obligation to make reparation and Article 31 of the ARIO, in any case involving wrongdoing by an IO an injured party can rightly look to the IO to make the reparations to which international law and the general principles of law entitle them. However, since IOs are funded by their member states and this funding is circumscribed by the normal expenditures incurred for the IO's administrative and operational activities, it is quite likely that an IO will have no money available to fund expenses that are accrued outside of its normal budgetary requirements. Hence, in the highly likely event that an IO responsible for wrongdoing does not possess the finances to make the necessary reparations to an injured party, money from the IO's member states, or the liquidation of the assets of the responsible IO, would seem to be the next obvious sources of funding. Funding by member states will be discussed in the next chapter, but this chapter addresses the latter source of funding. However, from the outset it should be said that it is unlikely that IOs would ever

⁵⁰² *Factory of Chorzow, (Jurisdiction)* Judgment, (1927) No. 9, P.C.I.J. (Ser. A) 1 at 21.

⁵⁰³ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* Judgment, (1997) I.C.J. Rep. p. 7 at 78, para. 152.

be required to liquidate their assets to pay damages to an injured party since the privileges and immunities to which IOs are entitled, and the IMF is no exception, generally create a barrier to them having to make reparation to an injured party and apparently shields them from any consequences of international wrongdoing.

8.4. Privileges and Immunities of IOs

Briefly, the privileges granted to diplomatic staff, agents of IOs, and IOs as legal persons are perhaps best understood as a status which allows exemption from the domestic legislation of a host state or being subject to a modified application of it therein, while immunity is generally accepted as referring to immunity from jurisdiction.⁵⁰⁴ The immunities and privileges granted to IOs have become generally known as international immunities while those granted to states are referred to as state immunities, and those to representatives of states as diplomatic immunities. The international immunities for IOs, which are the subject of this chapter, are often expressly identified in the constitutional document of an IO when describing its status within a host state and may include exemption from taxation or other civic duties, inviolability of the property of missions and their representatives, and immunity from suits in the courts.⁵⁰⁵ Specific to the IMF, by virtue of Article IX of the AA, within the territories of member states, the IMF and its employees and representatives are accorded the full range of immunities and privileges from taxation, judicial process, and other national restrictions such as travel or immigration, and the Fund's assets and income are immune from search or seizure by executive or legislative action.

⁵⁰⁴ Schermers & Blokker, 4th ed., p.323.

⁵⁰⁵ Examples: ILO, Art. 40; UNESCO, Art. 12; FAO, Art. 16; OAS, Art.133; CoE, Art. 40.

There are also agreements or treaties which exclusively address the establishment of privileges and immunities of an IO and which are binding on all the member states that are party to them. The best known of these are probably the *Convention on the Privileges and Immunities of the United Nations* and the *Convention on the Privileges and Immunities of the Specialized Agencies* [of the UN] which were concluded in 1946 and 1947 respectively.⁵⁰⁶ In addition, IOs may acquire privileges and immunities by means of headquarters agreements entered into with host states, or may be accorded them by national laws which codify privileges and immunities for IOs.⁵⁰⁷

8.5. History and Status of Privileges and Immunities of IOs⁵⁰⁸

In 1958, at the UN General Assembly's thirteenth session, the representative of France recommended that in view of the development of IOs which had taken place and the increased number of legal problems which were arising between states and IOs, the International Law Commission should undertake a study of relations between states and IOs. In response to this recommendation the Commission in its sessions of 1963 and 1964 began consideration of the scope and approach to the topic based on the reports of the Special Rapporteur of the topic who had been appointed in 1962. It was decided that the topic would be addressed in two parts, namely the study of the privileges and

⁵⁰⁶ Respectively 1 UNTS 15 and 33 UNTS 261.

⁵⁰⁷ Schermers and Blokker, 4th ed., p.325; Examples of national laws which codify privileges and immunities for IOs: the International Organizations Immunities Act of 1945 in the USA; the UK International Organization (Privileges and Immunities) Act of 1968; For examples of other national legislation see *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, UN.ST/LEG/SER. B/10 and 11.

⁵⁰⁸ For an informative review of the history of granting privileges and immunities to IOs and State diplomats see Josef L. Kunz, "Privileges and Immunities of International Organizations" AJIL, Vol.41, No.4 (Oct., 1947), pp. 828-862. Published by American Society of International Law Stable URL: <http://www.jstor.org/stable/2193092> Accessed:22/09/2009.

immunities of representatives of states to international organizations, and the status, privileges and immunities of international organizations.⁵⁰⁹

From 1964 to 1971 the Commission developed the Draft articles on the representation of states in their relations with international organizations. Notably, the scope of the organizations was limited to those having a universal character. In 1975 the United Nations Conference on the Representation of States in Their Relations with International Organizations was held and the Vienna Convention on the Representation of States in Their Relations with International Organizations of Universal Character, consisting of 92 articles, was opened for signature. Following this, in 1977 the Commission commenced work on the second half of the topic of relations between states and international organizations, namely “the status, privileges and immunities of international organizations and their officials, experts and other persons engaged in their activities who are not representatives of States”.⁵¹⁰ However, by 1992 the Commission observed that States had been slow to ratify or adhere to the 1975 Vienna Convention on the first half of the subject and that the 22 articles which had been presented to the Drafting Committee on the second half of the subject had not been acted on by the Committee. Hence it was decided by the Commission that the second half of the topic of relations between States and IOs should not be further considered and this decision was endorsed by the General Assembly in the same year.⁵¹¹

With regard to the subject of relations between States and IOs there was another aspect which was separately addressed by the ILC during the period of 1976-1989.

⁵⁰⁹ The Work of the International Law Commission, Seventh Ed., vol.1. (New York: United Nations, 2007). pp.153-154.

⁵¹⁰ Ibid., p.158

⁵¹¹ Ibid., pp.158-160

This other study by the Commission produced the text of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier and Draft Optional Protocols which was presented to the General Assembly in 1989.⁵¹² While sections A and B address the status of the diplomatic courier and diplomatic bag for States and the status of the courier and bag for special missions respectively, section C provides for the status of the courier and the bag of international organizations of a universal character.⁵¹³ The fact that the Draft accords to each of its three subjects the same privileges and immunities may indicate that at least some in the international community of States were at that time prepared to acknowledge that IOs needed similar treatment to states in order to carry out their functions. On the other hand, the fact that the Draft has never been adopted as a Convention *may* suggest, *inter alia*, a certain indifference or a certain resistance on the part of the majority of States to the idea of formal rules which would regulate their conduct in this area of international relations with IOs. However, despite the failure to codify privileges and immunities for IOs in a UN Convention, IOs and their representatives have nevertheless been traditionally accorded immunities and privileges within host countries that are similar to those enjoyed by states and their diplomatic staff.

8.6. The Theoretical Basis for Privileges and Immunities of IOs

While the privileges and immunities accorded to IOs may resemble those enjoyed by states, the theoretical basis for granting them to IOs differs from that which

⁵¹² Ibid., pp. 301-314; Yearbook of the International Law Commission, 1989, vol. II (Part Two); http://untreaty.un.org/ilc/summaries/9_5.htm (last visited August 1st 2009).

⁵¹³ Ibid.

informs state immunity.⁵¹⁴ The privileges and immunities accorded to the diplomatic missions of states are grounded in the theory of extraterritoriality, that is, that the property of a diplomatic mission in a foreign state is an extension of the territory of the sending state.⁵¹⁵ In addition, and in a similar vein, over a period of centuries the theory has become entrenched in customary international law that certain privileges and immunities are the prerogative of sovereign heads of states when outside of their own territories and by extension must also be accorded to foreign missions of states as representatives of those sovereign figures. This view of heads of states and their representatives evolved primarily from the historical insistence of states that there be reciprocity amongst them in recognizing and respecting their individual autonomy and sovereignty and their equality with each other.⁵¹⁶ Clearly though, neither of these theories are applicable to IOs or their officials as they neither possess an originating territory, they are not considered sovereign entities, nor are they capable of reciprocity with regard to privileges and immunities accorded to states.⁵¹⁷

⁵¹⁴ The brief for the United Nations as *Amicus Curiae* in the case of *Broadbent v. Organization of American States* provides a summary of the differences in the theoretical bases for privileges and immunities being granted to states and IOs. The brief can be found at 1980 UN Jurid. YB 224, and summary at pp.229-230, UN Doc. ST/LEG/SER. C/18 (1983); also, in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) at pp.136, 137, 143, 146, Chief Justice Marshall implied that the principles of comity, extraterritoriality and reciprocity were the bases for the mutual waiver of jurisdiction between sovereigns while peacefully present in each other's territories.

⁵¹⁵ Klabbbers, *Introduction*, p.147.

⁵¹⁶ Amerasinghe, *Principles*, p.315.

⁵¹⁷ International Law Commission, *Fourth Report on Relations between States and International Organizations*, UN Doc A/CN.4/SER.A/1989/Add.1 (Part 1) Yearbook of the International Law Commission, 1989, Vol II (Part One), 153, at 157, para.32 (hereinafter cited as ILC Yearbook 1989 Vol. II Part One at 157).

8.6.1. Functional Theory as a Basis for Privileges and Immunities of IOs

What then, is the justification for granting privileges and immunities to IOs? While for states it has been equality among states,⁵¹⁸ the most widely endorsed theory for IOs is that they are accorded privileges and immunities in order to shield them from undue interference from states and enable them to carry out their functions.⁵¹⁹ This is usually labelled as the functional theory and it should be pointed out that it encompasses not only protection for IOs from their host states, but from the national states of the officials of IOs as well. The latter was illustrated in the two ICJ cases commonly referred to as *Mazilu* and *Cumaraswamy* in which individuals who were agents of IOs were being hindered from carrying out their functions within the IOs by the governments of their national states.⁵²⁰ This theory appears to be the one which informs the privileges and immunities granted to the IMF by its constituent instruments. Article IX (1) states:

“[T]o enable the Fund to fulfill the functions with which it is entrusted, the status, immunities, and privileges set forth in this Article shall be accorded to the Fund in the territories of each member.”

⁵¹⁸ Ibid., at para. 28.

⁵¹⁹ Ibid., at para. 27; Amerasinghe, *Principles*, p.315; an explicit example of the support for this perspective may be found in Article 38.1 of the Agreement between the WTO and Switzerland which states regarding the privileges and immunities covered by the Agreement that their purpose “is solely to ensure, in all circumstances, the freedom of action of the organization and the complete independence of the persons concerned in the discharge of their duties in connection with the organization”.(WTO Doc. WT/GC/1) See also the cases *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, [Mazilu case] (Advisory Opinion, ICJ Rep. 1989, at 177, paras. 44-55) and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, [Cumaraswamy case] (Advisory Opinion, ICJ Reports 1999, at 62, paras. 31-37). See also Emmanuel Gaillard and Isabelle Pingel-Lenuzza, “International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass” in Jan Klabbbers, ed. *International Organizations* (Burlington: Ashgate, 2005) 351 at 352-353.

⁵²⁰ Ibid.

The IMF also contended that immunities were essential to allow IOs to carry out their functions in its submissions to the ILC on the subject of responsibility of IOs for wrongdoing:

“[A]n organization’s immunities may protect the assets of the organization from being used for any reason or by any means other than what is specifically authorized by the treaty that created it. Any judicial decision to the contrary would violate a fundamental protection that enables the organization to conduct its international responsibilities, as provided in the treaty that created it. For some international organizations the immunities provided for in their charters are essential to the ongoing viability of the organization because the immunities protect them from vexatious claims and potential financial destruction by courts of many different countries that would have differing or conflicting views about the organization’s international obligations.”⁵²¹

However, within the functional theory school there is some disagreement about the relationship between the legal status of IOs and the means by which they acquire privileges and immunities.

Some within the functional school contend that the possession of privileges and immunities by IOs is the logical consequence of them being international legal personalities as without them IOs would be hindered from fulfilling the purposes for

⁵²¹ International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN Doc. A/CN.4/545 (2004) p. 25.

which they were established.⁵²² Others argue that the privileges and immunities that IOs possess are one of the indicia of international legal personality rather than being the consequence of legal personality because they are derived from specific rules expressed in the particular legal instruments which apply to each IO, although they concede that these rules are deliberately constructed for the purpose of enabling IOs to carry out their mandated functions.⁵²³ This view is summed up by Dominić:

“None of the conventions on the privileges and immunities of such organizations, the headquarters agreements especially, would make any sense if the organization lacked international juridical personality. This is not to say, however, that immunities are a necessary attribute of such personality. They derive from the specific rules prescribing them...”⁵²⁴

The latter view appears to be the one that was supported by the ICJ in the *Reparations* case where the Court stated that the privileges and immunities which the United Nations possessed were expressly granted by the Charter of the United Nations, specifically Article 105, and that they were one of the indicia of that organization’s legal personality.⁵²⁵

However, while accepting that functional necessity is the *raison d’être* of privileges and immunities for IOs in both the approaches explained above, it is nevertheless important to further examine which of the two are employed in order for an

⁵²² Peter.H.F.Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, (Boston: MartinusNijhoff, 1994) p.94.

⁵²³ Ibid.

⁵²⁴ C. Dominić, “L’immunité de juridiction et d’exécution des organisations internationales”, *Collected Courses of The Hague Academy of International Law*, 1984-IV (Dordrecht, MartinusNijhoff, 1985), vol. 187, p.164, cited in ILC Yearbook 1989 Vol.II Part One at 157, para.32.

⁵²⁵ 1949 ICJ Report. 174.

IO to acquire privileges and immunities as the means of acquisition has implications for the political status of IOs and host states in their relationship with each other.

On the one hand, if privileges and immunities are viewed as “[a] right and not a courtesy”⁵²⁶ and therefore an obligatory and indispensable component of international legal personality, then it would follow that there should be a minimum or standard set of immunities and privileges recognized as being common to all IOs from the time their legal existence commences regardless of their individual functions. Further, if a standard set of privileges and immunities was accepted as being in the DNA of each IO, states would be bound to recognize them and concede them without exception to each IO which is resident in their territory for any length of time. It would seem that this approach to the acquisition of privileges and immunities by IOs would not only require states to acquiesce to IOs and thereby compromise their sovereignty, but it would also lend support to the notion that some degree of sovereignty may be exercised by IOs over states.

On the other hand, if a separate set of privileges and immunities, determined by the functions of each IO, is negotiated on an individual basis between each state and each IO and then formally accorded by the state to the particular IO by means of the legal instruments pertaining to it, this would signal a different posture between states and IOs in their relationship with each other. This approach would indicate a demarcation of the authority of IOs in relation to states as one would expect that in negotiating the privileges and immunities which they are to enjoy with states IOs would have to defer to them as sovereign entities who possess at international law an inviolable territory for which they have final authority to decide who may enter or reside

⁵²⁶ ILC Yearbook 1989 Vol.II Part One, para. 57 at p.161.

there and on what terms they may do so. Further, since states are tasked with the responsibility of balancing the need of IOs to have privileges and immunities which enable them to carry out their functions with the basic human right of individuals to have access to the courts, even against IOs, it is submitted that because the latter approach in determining privileges and immunities delimits IOs, protects human rights, and undergirds the sovereignty of states, it appears to be the more desirable one.⁵²⁷ Notwithstanding this, in the real world the political and economic influence and power wielded by some IOs in comparison to weaker states may render such states subservient to IOs because of their need, real or perceived, for the intervention of those IOs in their national affairs. Hence such states may be willing to negotiate with those IOs from a position of weakness and consequently to accommodate the demands of the IOs even if it appears that those demands violate the sovereignty of the state.

If the approach of negotiating a distinct set of privileges and immunities for each IO based on its functional necessity is accepted as the normative one, the obvious difficulty which immediately arises is which functions necessitate which privileges and immunities and who decides this. This problem gave rise to the case *Re International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables & Radio, Inc. and other cable companies*⁵²⁸ which came before the US Federal Communications Commission (FCC) in 1953. Both the World Bank and the IMF argued that they were entitled to lower rates for their official telecommunications because the rates they were being charged were so high as to constitute unreasonable

⁵²⁷ For an extensive discussion of the tension between international financial institutions carrying out their mandated functions and preserving human rights see generally Bahram Ghazi, *The IMF, the World Bank Group and the Question of Human Rights* (Ardsley: Transnational, 2005).

⁵²⁸ 22 ILR 705-12.

interference in the fulfillment of their functions and that they were protected from such interference by virtue of the privileges and immunities which they possessed as IOs. In response the cable companies countered that there was no evidence that the two IOs required lower rates in order to fulfill their functions. The difficulty of resolving the question of which functions justify which privileges and immunities was perhaps illustrated by the fact that the Commission's decision, which was in favour of the IOs, was not grounded in functional necessity.

8.6.2. Customary International Law as a Basis for Privileges and Immunities

Another theoretical question raised in regard to privileges and immunities for IOs is whether they have now become established by customary international law in addition to being based in conventional law.⁵²⁹

Well before the establishment of large, well-known twentieth century IOs such as the League of Nations and the United Nations, the practice of according privileges and immunities by way of constitutional instruments, even though it may have been more limited than the current practice, was not unknown to intergovernmental entities. River commissions such as the European Danube Commission and administrative unions such as the International Congo Commission which were established in the latter half of the nineteenth century enjoyed privileges and immunities which were enshrined in their constitutions.⁵³⁰ However, this practice clearly did not translate into states accepting customary international law as a basis for automatically granting privileges and immunities to officials of IOs in the twentieth century. This was apparent in an opinion

⁵²⁹ Amerasinghe, *Principles*, p.344-345

⁵³⁰ Jacques Secretan, "The Independence Granted to Agents of the International Community in their Relations with National Public Authorities" (1935) p. 16. B.Y.I.L.56.<http://www.heinonline.org.proxy.bib.uottawa.ca/HOL/Page?handle=hein.journals/byrint16&id=1&size=2&collection=journals&index=journals/byrint>

paper issued in 1929 by the United States Department of State in response to an enquiry from the British Embassy as to the status of officials of the League of Nations in the US, in which the US government unequivocally disagreed with this position. The paper stated that under US law the League's officials were not entitled to the same privileges and immunities as those accorded by customary international law to diplomatic personnel sent by one state to another, but that they would instead only be granted such privileges and immunities as were provided for in the League's constitutional documents, and further, these would only be recognized and granted to them within those states which were members of the League.⁵³¹ Later, the US government amended its position on this subject in relation to IOs other than the League as it saw fit to pass a law, namely the *International Organizations Immunities Act* of 1945, whereby the officials of IOs of which the US was a member would be accorded "[t]he same immunity from suit and every form of judicial process as is enjoyed by foreign governments" and not just the privileges and immunities provided for in their constituent instruments.⁵³²

Some contend that the history of according immunities and privileges to IOs as well as the uniformity of treaties and domestic legislation related to granting privileges and immunities to IOs support the argument that immunities and privileges are grounded in customary international law.⁵³³ However, if customary international law were accepted as the basis for granting privileges and immunities to IOs this would

⁵³¹ U.S. For. Rel., 1929, Vol. I. p.414, cited in Lawrence Preuss, "The International Organizations Immunities Act" (Apr., 1946) 40 :2 A.J.I.L.332.

⁵³² Preuss, *ibid.*, International Organizations Immunities Act of 1945, 22 U.S.C. Sec. 288a(b).

⁵³³ For a discussion of the customary law basis for privileges and immunities for IOs see: August Reinisch, *International Organizations before National Courts*, [electronic resource] (Cambridge: Cambridge University Press, 2000) pp.145-157.
<http://orbis.uottawa.ca/search/t?SEARCH=international+organizations+before+national+courts&sort>

entail some serious implications in relation to the sovereignty of host states in particular. IOs could rely on customary international law to provide them with privileges and immunities in the absence of headquarters agreements, or where they consider that the headquarters agreements or conventions which are in effect grant insufficient privileges and immunities. Additionally, it is pointed out that in those states in which the terms of a treaty have to be incorporated into domestic law before they can be applied in the courts, it may be possible to claim privileges and immunities based on customary international law where a relevant treaty has not yet been incorporated or where the domestic law which was enacted to give it effect nationally does not fully reflect the terms of the treaty. In fact, there have been only a few cases where the courts have been willing to grant privileges and immunities to IOs on the basis of general or customary international law although they had not been expressly provided for in a legal instrument and incorporated where necessary.⁵³⁴

Jenks, in his authoritative work on the subject of privileges and immunities published in 1961, appeared unsupportive of the idea that privileges and immunities derive from customary international law. While he acknowledged that privileges and immunities had made an appearance in the constitutional instruments of the river and administrative unions, he observed that until 1945 there was “little systematic practice on the subject” either in international agreements or case law.⁵³⁵ His position was that international privileges and immunities, as known at the time of his writing, were instead

⁵³⁴ Ibid., *International Tin Council v. Amalgamet Inc.* (1988), 524 NYS 2d p. 971; *Branno v. Ministry of War* (1955), 22 ILR p.756; *ESOC Official Immunity Case* (1973), 73 ILR p. 683. In the first case a New York Court indicated that in the absence of a specific agreement between the ITC and the United States the IO would not be entitled to immunity in that country; while in the latter two cases the Court appeared to support the idea that immunity for IOs was derived from international law.

⁵³⁵ C.Wilfred Jenks, *International Immunities* (London: Stevens and Sons, 1961). p. 2.

derived from that which evolved out of the combined wartime experiences of the League of Nations and the International Labour Organization and were ultimately crystallized in Article 105 of the Charter of the United Nations in 1945.⁵³⁶ This view certainly seems to be supported by the fact that since the establishment of the League of Nations states and IOs appear to have consistently deemed it necessary to expressly provide for granting privileges and immunities to officials of IOs in various instruments rather than rely on customary international law to provide them.

8.7. Abuse of Privileges and Immunities

While it may be generally recognized that host states need to accommodate IOs in their functions by granting privileges and immunities to them, a tension exists between this necessity and the possibility of IOs abusing their privileged status. Obviously the need for IOs to carry out their functions without undue interference from states must be balanced with the responsibility of states to ensure that IOs are not permitted to violate international humanitarian law, the rights of individuals or corporations nationally, or possibly even the sovereignty of states under cover of the immunities and privileges that have been granted to them. Recognition of the need to balance these competing interests was clearly articulated in *A.S v. Iran – United States Claims Tribunal* where the Dutch Supreme Court said:

“[O]n the one hand there is the interest of the international organization having a guarantee that it will be able to perform its tasks independently and free from interference under all circumstances; on the other there is the interest of the other party

⁵³⁶ Ibid.; p.12-13.

in having its dispute with an international organization dealt with and decided by an independent and impartial judicial body”⁵³⁷

In the 1935 case of *Avenol v. Avenol* the problem of how immunities may be abused by IOs, albeit by one of their officials, was exemplified. The case involved the Secretary General of the League of Nations who, in response to an action brought against him by his estranged wife for maintenance payments, claimed absolute diplomatic immunity from the French courts. In the French Court's view the immunity of League Officials was functionally and territorially limited and thus applied only to acts "in the exercise of their functions at Geneva and in Switzerland." In its rejection of his claim the Court gave an excellent and robust summation of the consequences of abuse of immunities by officials so privileged:

"If we were to decide that Avenol is covered by diplomatic immunity before the courts of the sixty States, Members of the League, we should have reached a decision which is [...] palpably contrary to all notions of law which have been gradually imposed on the human conscience since the ages of barbarism [...]. It is not possible that the Covenant of the League of Nations, which Avenol summons to aid his contention, the Covenant which governs the highest moral and judicial authority in the world, entrusted with the establishment of the law of nations, should provide the world with

⁵³⁷ *A.S. v. Iran – United States Tribunal*, Supreme Court of the Netherlands, 20 December 1985, [1994] ILR at p.329.

an astonishing example of a provision which is in such flagrant contradiction to the sacred and profound sentiment of justice”⁵³⁸

The problem of abuse of privileges and immunities may also arise in the context of diplomatic relations between states as the ICJ recognized in *United States Diplomatic and Consular Staff in Tehran*:

“The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.”⁵³⁹

However, the position between states and IOs with regard to the abuse of privileges and immunities differs significantly from that which obtains between states for various reasons. As mentioned earlier, IOs lack absolute sovereignty and the capacity for reciprocity since they do not possess a territory. Further, officials of IOs represent their organization only and not their national state or any other state. The consequence of this on an individual basis is that whereas national diplomats who enjoy immunity from suit in foreign states may nevertheless be sued in their national courts, officials of IOs are generally not subject to such national jurisdiction.⁵⁴⁰ Then, on the

⁵³⁸ *Avenol v. Avenol* 8 Annual Digest of Public International Law Cases (1935-7) pp. 395–7 at 396.

⁵³⁹ *United States Diplomatic and Consular Staff in Tehran*, Judgment, (1980) ICJ Rep. 3 at 40, para.86.

⁵⁴⁰ Finn Seyersted, “Common Law ...” p.210. However, as noted by Seyersted, in the case of *Avenol v. Avenol*, a civil action was successfully brought against an international official in his national State.

organizational or state level, states are subject to the doctrine of state responsibility and can be brought before the ICJ *and* national courts for binding decisions, but the constitutional documents of most IOs invest them with immunity from the jurisdiction of municipal courts,⁵⁴¹ to date the ICJ only has competence to issue advisory opinions with regard to matters in which one or more of the parties is an IO and these opinions are not legally binding on the parties involved.⁵⁴²

Some eighty years ago an international agreement was drawn up which gave some indication, albeit a small one, that its framers were already alert to the need to protect against such abuse of privileges and immunities by IOs. The *Modus Vivendi* of 1926 with the Swiss Federal Council concerning the diplomatic immunities to be accorded to the staff of the League of Nations and of the International Labour Office, having granted officials of the League various privileges and immunity from civil and criminal jurisdiction, endeavoured to impose some limitations on the organization. Article VII stated certain categories of staff would remain subject to local laws and jurisdiction in relation to acts performed by them in their private capacity, and furthermore, that it was expected that the organizations of the League of Nations at Geneva would "...endeavour to facilitate the proper administration of justice and execution of police regulations at Geneva."⁵⁴³ Later, in 1946, in an agreement between the Swiss Federal Council and the International Labour Organization to regulate the legal status of the ILO after the dissolution of the League of Nations, this issue of abuse

⁵⁴¹ See Sec.10.4. and note 729.

⁵⁴² Statute of the International Court of Justice, Article 34(1), regarding competence of the Court, and Articles 65-68, regarding advisory opinions.

⁵⁴³ Jenks, 1961. pp. 41-42. The "Modus Vivendi" of 1926 with the Swiss Federal Council, reproduced in Martin. Hill, *Immunities and Privileges of International Officials – The Experience of the League of Nations* (New York: Kraus Reprint Co. 1972) Annex II p.138.

was much more extensively addressed and countered by means of several measures which were expressly included in the agreement. The Agreement accorded standard privileges and immunities to the ILO, but with a caveat. Article 21(1) emphasized that the privileges and immunities granted were to ensure the free and independent functioning of the ILO and its agents but were not to be used for the personal benefit of its personnel. Paragraph 2 of the same article provided that in any case where the immunity of an ILO official would impede the course of justice the Director of the ILO has “the right and duty” to waive it so long as the waiver was not prejudicial to the interests of the ILO. Article 22 required that the ILO always co-operate with Swiss authorities and police regulations to ensure “the proper administration of justice” and prevent the abuse of the privileges and immunities granted to it. Lastly, Article 23 mandated the ILO to make provisions for methods of settlement for private law disputes in which the ILO was involved or disputes involving ILO officials whose immunity had not been waived by the Director of the ILO.⁵⁴⁴

It seems that the ILO was a forerunner on this issue as the terms of this agreement aimed at countering abuse of privileges and immunities were later repeated, although sometimes in a modified form, by many other IOs in their constitutional instruments.⁵⁴⁵ One of the most notable examples is Section 21 of the 1946 *Convention on the Privileges and Immunities of the United Nations* which provides that:

“The United Nations shall cooperate at all times with the appropriate authorities of Members to facilitate the proper

⁵⁴⁴ *Agreement between the Swiss Federal Council and the International Labour Organisation concerning the legal status of the International Labour Organisation in Switzerland*, (1946). Available at: <http://www.ilo.org/public/english/bureau/leg/agreements/switz.ht>

⁵⁴⁵ Jenks, 1961. p.43.

administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.”⁵⁴⁶

Hence, with apparent concern for the injustices which can be perpetrated as a result of the abuse of privileges and immunities by IOs, headquarters agreements or general conventions on privileges and immunities for IOs frequently provide for a voluntary waiver of the immunities of its officials by the IO, or alternatively, for internal settlements within an IO when one of its officials whose immunity has not been waived is involved in a dispute related to contracts or disputes of a private character to which the IO is a party.⁵⁴⁷ The latter could involve an internal court or an administrative tribunal set up by an IO to address private claims against its personnel who possess diplomatic immunity, or, as in the case of the United Nations in response to reports that its personnel had committed criminal acts while carrying out their UN functions, an Ad Hoc Committee on criminal accountability.⁵⁴⁸ Exceptionally, the *Convention on the Privileges and Immunities of the Specialized Agencies* provides that if a dispute related

⁵⁴⁶ Other examples are: the Convention on the Privileges and Immunities of the Specialized Agencies, Sec.23; the Agreement on Privileges and Immunities of the Organization of American States (1949), Art. 11; Agreement on the Privileges and Immunities of the North Atlantic Treaty Organization, National Representatives and International Staff (1951), Art.3; the General Agreement on Privileges and Immunities of the Council of Europe (1949), Art.2; However, the absence of any such provision is noteworthy in the Protocol on the Privileges and Immunities of the European Economic Community (1957) and the Protocol on the Privileges and Immunities of the European Union (2004)

⁵⁴⁷ Headquarters Agreement between Switzerland and the WHO, Article 23 (b); General Convention on the Privileges and Immunities of the Specialized Agencies, Section 22 (waivers), and Sec.31 (internal settlements); Notably, Sec. 22 of this Convention provides that “...Each specialized agency shall have the right *and the duty* to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the specialized agency.” (emphasis added).

⁵⁴⁸ Finn Seyersted, “Common Law ...” pp.210-211; *Criminal Accountability of United Nations Officials and Experts on Missions*, GA Res.61/29 (4th December 2006) UN GAOR, 61st Sess. UN Doc. A/RES/61/29 (2006). Examples of such tribunals are the Administrative Tribunals of the United Nations, the International Monetary Fund, the World Bank, or the Council of Europe.

to the abuse of privileges and immunities is not settled between the parties involved by means of consultation the question of whether an abuse has indeed occurred shall be referred to the International Court of Justice for an advisory opinion.⁵⁴⁹

From the foregoing it is apparent that the international community has been quite aware of the need to put in place procedures which counter the protection which IOs enjoy by virtue of the privileges and immunities accorded to them. Notably though, the greatest concern has been not so much with the possible abuse of privileges granted to IOs such as tax exemptions, but with the scope of their immunity from domestic jurisdiction as this can potentially insulate IOs from any accountability or liability for their wrongdoing and leave victims without recourse for the execution of justice. Yet, the case law thus far indicates that the courts support the right of IOs to immunity from jurisdiction over the principle of access to the courts, even going so far as to say that the right of access to the courts was not an absolute one.⁵⁵⁰ Even where the courts have chosen to consider the human rights of plaintiffs rather than the functional necessity of IOs as the basis for deciding whether an IO's immunity should be upheld, this approach has generally failed to yield favourable results for plaintiffs as it is premised on the court's assessment as to whether the IO involved has provided sufficient internal "alternative" mechanisms for the plaintiff to obtain a remedy.⁵⁵¹ Where

⁵⁴⁹ 1947 Convention - Secs. 24 and 32.

⁵⁵⁰ *Mendaro v. World Bank*, 717 F.2d 610 (DC Cir 1983); *Beer and Reagan v. Germany*, European Court Human Rights, Judgment of 18 Feb. 1999, Case No.28934/95, at para. 49, unpublished, available at the Council of Europe's website <http://www.echr.coe.int>; *Waite and Kennedy v. Germany*, Judgment of 18 Feb.1999, Reports of Judgments and Decisions 1999-I, at 393; Gaillard and Pingel-Lenuzza, pp.355-357.

⁵⁵¹ *Ibid.*, The European Court of Human Rights seems to be the forerunner of this approach as seen in the cases cited above at fn. 897; Cedric Ryngaert, "The Immunity of International Organizations before Domestic Courts: Recent Trends" (December 2009) Working Paper No 143, The Institute for International Law of the Katholieke Universiteit Leuven, available at: <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP143e.pdf>

the courts have adjudged that sufficient mechanisms for access to a remedy have been made available to the complainant by the IO the immunity of the IO has been upheld.⁵⁵² Further, where the mechanism of internal tribunals is purportedly used to provide access to justice for claimants against IOs the questions of how the independence of these entities can be guaranteed, whether appeals can be made against the rulings of such tribunals, and how decisions can be enforced are important, and perhaps troubling ones, which remain unresolved.⁵⁵³ Lastly, although constitutional instruments or headquarters agreements may provide for the waiver of immunity by the IO, this is discretionary and is in reality rarely done by IOs.⁵⁵⁴

8.8. Restrictive Immunity

In an apparent reaction to the realization that comprehensive immunity from jurisdiction for IOs can result in a denial of justice to other parties there has been some relatively recent discussion about the possibility of international organizational immunities being restricted in a similar way to that of states.⁵⁵⁵ Historically most states had enjoyed absolute immunity from jurisdiction in domestic courts. Such complete immunity was justified by the argument that since a state's activities constituted an exercise of its sovereignty, to bring a state before a domestic court was to infringe on

⁵⁵² Ibid.

⁵⁵³ Gaillard and Pingel-Lenuzza, pp.361-362.

⁵⁵⁴ Ibid., p.352; perhaps the best known cases involving organizational immunity from jurisdiction in which the IOs involved refused to waive their immunity at great cost to the litigants were the *Tin Council* cases. With the exception of one of the ITC's creditors who had included a specific waiver of immunity in its contract with the ITC, (see *Standard Chartered Bank v. ITC* [1987] 1 W.L.R. 641), the legal actions of all of the ITC's creditors were dismissed on the grounds of its jurisdictional immunity.

⁵⁵⁵ I. Seidl-Hohenveldern, *Corporations In and Under International Law* (Cambridge:Grotius, 1987) at pp.109-112 [hereinafter Seidl-Hohenveldern, *Corporations*]; Romana Sadurska & C.M Chinkin, "The Collapse of the International Tin Council: A Case of State Responsibility?" in Jan Klabbers, ed., *International Organizations*, (Burlington,VT: Ashgate,2005) at pp.374-377; Peter H.F. Bekker, (1994) pp.156-179.

this sovereignty and to humiliate it.⁵⁵⁶ However, this view of sovereignty and the privileges to which states are entitled evolved during several disputes involving states and as a result of an increased emphasis on the principle of legality and eventually gave way to the theory of restrictive immunity for states.⁵⁵⁷ In a nutshell, the theory dictates that the activities of states can be categorized as either *jure imperii* (international public acts) or *jure gestionis* (commercial activity), the former being the ones to which immunity attaches and the latter being those for which states can be brought before domestic courts in the event that a dispute related to them arises.⁵⁵⁸

With regard to applying this concept to IOs, Seidl-Hohenveldern proposed that if the activities of an IO would be categorized as *jure imperii* if carried out by a single state they should be similarly categorized for an IO. On the other hand, those activities which constitute a commercial enterprise for a state, such as a state airline, if carried out by an IO, should be classified as *jure gestionis*. He further suggested that the IO constituted to conduct the latter activities should be labelled as a common inter-state enterprise comprised of the member states of the IO.⁵⁵⁹ But he added an important caveat to this,

⁵⁵⁶ Gaillard and Pingel-Lenuzza, pp.351-352.

⁵⁵⁷ Ibid., Kerr LJ, referring to the traditional view that states were entitled to absolute jurisdictional sovereignty said “ [T]he position changed radically with the two landmark authorities *Philippine Admiral (owners) v. Wallen Shipping (Hong Kong)Ltd.* [1976] 1 All ER 78 [1977] AC; and *Trendex Corp Ltd v. Central Bank of Nigeria* [1977] 1 All ER 881, [1976] QB 529. They drew a distinction between acts *jure imperii* and acts *jure gestionis* which led to the State Immunity Act 1978.” *MacLaine Watson & Co. v. Dept of Trade*, [1988] BCLC 404 at p.32.

⁵⁵⁸ Seidl-Hohenveldern, *Corporations*, pp109-112; this theory was also utilized in *A.S. v. the Iran-United States Claims Tribunal*, Local Court (Kantongerecht) of the Hague, 8 June 1983, De Praktijkids (1983) No. 2022, English Summary in 15 N.Y.I.L. 429-432 (1984); and *The Iran-United States Claims Tribunal v. A.S.*, District Court (Rechtbank) of the Hague, 9 July 1984, De Praktijkids (1984) No. 2206, English Summary in 16 N.Y.I.L. 471-472 (1985); see also *Broadbent v. Organization of American States* 628 F2d 27. U.S App. D.C 27 No. 78-1465. Examples of the codification of this theory can be found in the *U.S. Foreign Sovereigns Immunity Act* of 1976 which provides that foreign sovereigns shall not be immune from the jurisdiction of U.S courts in any case based upon their commercial activity. S. 1605, (*Foreign Sovereigns Immunities Act* of 1976, P.L. 94-583, 90 Stat. 2891, 28 U.S.C. Ss. 1602-1611), and the *U.K State Immunity Act* 1978 Chapter 33 which has similar provisions.

⁵⁵⁹ Seidl-Hohenveldem, *ibid.*, at p. 109.

namely, that only those IOs whose activities qualify as *jure imperii* should be accorded separate legal personalities, while those whose functions were viewed as *jure gestionis* should be denied such legal identity. In addition, he advocated that since the latter were to be viewed as no more than inter-state enterprises member states would consequently remain liable for any debts incurred by them.⁵⁶⁰

The application of this concept of restrictive immunity to IOs has thus far posed some problems, most notably with international commodity associations.⁵⁶¹ These hybrid associations present a difficulty for although the IO has been constituted by its member states to carry out what appear to clearly be commercial activities, there is nevertheless a governmental aspect to their functions which leads to ambiguity about whether their activities are to be distinguished as *jure imperii* or *jure gestionis*.⁵⁶² The courts have wrestled with this dichotomy in the case of *International Association of Machinists and Aerospace Workers v. OPEC* and the *Tin Council* cases.

In the OPEC case, the District Court for the Central District of California took the position that the extraction of a state's natural resources and the fixing of the price for them were essentially governmental activities the nature of which could not be rendered merely commercial by the fact that two or more states had come together to carry out these activities.⁵⁶³ The Court of Appeal approved this finding that the activities of OPEC were *jure imperii* although it went on to dismiss the case not on the basis of the doctrine

⁵⁶⁰ Ibid., at p.112.

⁵⁶¹ Judging from the decisions in the cases of *Broadbent v. OAS*, 628 F.2d 27, (D.C. Cir. 1980); *Mendaro v. World Bank*, 717 F.2d 610 (DC Cir 1983); and *Boimah v. United Nations Gen. Assembly*, 664 F.Supp.69 (E.D.N.Y.1987), it would appear that the U.S. courts are unwilling to say decisively whether IOs are subject to restrictive immunity.

⁵⁶² Sadurska & Chinkin, p.375.

⁵⁶³ *International Association of Machinists and Aerospace Workers v. OPEC* 477 F. Supp. 553 (C.D. Cal. 1979).

of sovereign immunity but rather on the grounds of the act of state doctrine that prohibits a court from judging the legality of a sovereign act of a foreign state.⁵⁶⁴

In the *Tin Council* appeal cases the court acknowledged the inherent difficulty of categorizing commodity trading international organizations. Nourse LJ, although in his final assessment he conceded that the activities of the International Tin Council were primarily *jure imperii* because they were not done for profit,⁵⁶⁵ he nevertheless opined that the ITC was a hybrid because its principal activity of trading large amounts of tin would undoubtedly be labelled *jure gestionis* if viewed in isolation.⁵⁶⁶ In a similar vein, Kerr LJ observed that:

“[I]n the traditional terms of international law the objectives of the member states of the ITC fail to be regarded as *jure imperii*. But the attainment of its objectives also necessarily involved trading ... on a massive scale which would in themselves clearly be regarded as operations *jure gestionis*.”⁵⁶⁷

Both Ahluwalia and Bekker, in apparent support of these decisions, have argued that IOs cannot be treated like states with regard to restrictive immunity and should not be subject to it, because unlike states, the basis of their immunity is functional necessity.⁵⁶⁸ Recalling that the activities of an IO are in fact ordered and restricted by its member states via its constitutional instruments, they contend that in deciding whether an activity of an IO should be accorded absolute jurisdictional immunity it must first be determined whether it is required by its functions. They argue that once it is

⁵⁶⁴ 649 F.2d 1354 (US C.A. 9th Cir. 1981).

⁵⁶⁵ *MacLaine Watson* [1988] BCLC 404 at p. 86.

⁵⁶⁶ *Ibid.*, at p.80.

⁵⁶⁷ *Ibid.*, at p.19.

⁵⁶⁸ K. Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other Organizations* (The Hague: M. Nijhoff, 1964) at p. 66; Bekker, (1994), at pp.156-159.

determined that an activity of an IO is mandated by its functions, even if it is one which would be considered commercial if undertaken by a state, it should be protected by absolute immunity so that the organization can be shielded from interference while carrying out its functions.⁵⁶⁹ This brings us back to the traditional view that functional immunity is synonymous with absolute immunity.⁵⁷⁰

While IOs and their member states obviously prefer the benefits of absolute immunity and have thus far demonstrated their unwillingness to waive it or to accept a restrictive immunity, the constitution of the International Bank for Reconstruction and Development (IBRD) appears to present an exception to this practice. Article VII, Section 3 of the Articles of Agreement of the IBRD provides:

⁵⁶⁹ Ibid.

⁵⁷⁰ August Reinisch and Ulf Andreas Weber, "In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, The Individual's Right of Access to The Courts and Administrative Tribunals as Alternative Means of Dispute Settlement" *Int'l Org. L. Rev.* 1: 59-110, 2004 at p.63. In the United States there has been an ongoing debate since the passage there of the Foreign Sovereign Immunities Act (FSIA) in 1976 as to whether this Act supersedes the International Organizations Immunities Act (IOIA) of 1945. The IOIA provides in Art. 288a (b) that certain IOs are granted "the *same* immunity from suit and every form of judicial process as is enjoyed by foreign governments" [emphasis added], therefore it has been argued that since the later FSIA restricted the immunity of foreign governments in a commercial setting, IOs should also be similarly restricted since the IOIA stipulates that they be accorded the *same* immunity as foreign sovereigns. For further discussion on this controversy see cases cited supra at fn 560, and journal articles: NOTES: "Jurisdictional Immunities of Intergovernmental Organizations" (1982) 91 *Yale L.J.* 1167; Frances Wright Henderson, "How Much Immunity for International Organizations: *Mendaro v. World Bank*" (1985) 10-2 *N.C.J. Int'l L. & Com. Reg.* 487; Richard J. Oparil, "Immunity of International Organizations in United States Courts: Absolute or Restrictive" (1991) 24-2 *Vand. J. Transnat'l L.* 689; Mark J. Shapiro, "A Search in The Heavens: Should INTELSTAT Be Subject to U.S. Antitrust Laws" (1985-1986) 24-1 *Colum. J. Transnat'l L.* 133; Ernestine E. Meijer, "The International Institutions of the Clean Development Mechanism Brought before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice," (2006-2007) 39-4 *N. Y. U. J. Int'l. & Pol.* 873; Kevin M. Whiteley, "Holding International Organizations Accountable under the Foreign Immunities Act: Civil Actions against the United Nations for Non-Commercial Torts" (2008) 7-3 *Wash. U. Global Stud. L. Rev.* 619; Steven Herz, "International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity" (2007-2008) 31-3 *Suffolk Transnat'l L. Rev.* 471; Joseph W. Dellapenna, "Refining the Foreign Sovereign Immunities Act" (2001) 9 *Willamette J. Int'l L. & Dis. Res.* 57; Antoinette A. Farrugia, "Boimah v. United Nations General Assembly: International Organizations Immunity is Absolutely Not Restrictive" (1989) 15-2 *Brooklyn J.I.L.* 497.

“[A]ctions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.”⁵⁷¹

However, on closer inspection it becomes apparent that this exception to jurisdictional immunity is limited as the same section continues: “No action shall be brought by members or persons acting for or deriving claims from members.” The interpretation and application of this section were addressed in *Mendaro v. The World Bank*. The US Court of Appeal for the DC Circuit found in that case that these provisions amounted only to a waiver of immunity with respect to the Bank’s external commercial contracts and activities, but were not a waiver of immunity from actions brought against the Bank by its employees.⁵⁷² Hence it appears that the IBRD does indeed have a restrictive immunity which sets it apart from other IOs. Bekker has suggested that this restrictive immunity has been permitted by monetary organizations such as the IBRD because without this security potential creditors and bondholders may be deterred from entering into commercial contracts with it.⁵⁷³ However, the extent of enforcement that is possible in the event that a court rules against the Bank should be approached with caution since Section 3 of Article VII of the AA of the Bank further provides that: “[T]he property and assets of the Bank shall, wheresoever located and by

⁵⁷¹ Art. VII, Ss 1-10 of the Articles of Agreement of the International Bank for Reconstruction and Development, 2 U.N.T.S. 134, at 180-184. The same provision can be found in Art. XI. 3. Para.1, of the Agreement Establishing the Inter-American Development, April, 8, 1959, 389 U.N.T.S.70.

⁵⁷² *Mendaro v. IBRD* 717 F. 2d (DC Cir. 1983) 610 at 620.

⁵⁷³ Bekker, *The Legal Position*, (1994) at p. 159.

whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank” But hopefully, litigants who obtain a judgment against the Bank will find that the latter part of the sentence “before the delivery of final judgment against the Bank” will protect them from the Bank claiming that its property is protected by complete immunity.⁵⁷⁴

However, although these internal tribunals of IOs do restrict the immunities of participating IOs to some degree, their function thus far has been to address claims relating to violations of domestic law only. As observed by the ILO in its comments to the ILC on the subject of IOs making reparation, internal tribunals and the reparations they have effected thus far should not be discussed in the context of the ARIO because they have no jurisdiction in matters of international law and are therefore not relevant to the law governing international responsibility.⁵⁷⁵

8.8.1. Does the ARIO Restrict the Immunity of IOs?

Part Three of the ARIO is entitled “Content of the International Responsibility of an International Organization” and deals with the legal consequences of an internationally wrongful act for an IO. These consequences include (but are not limited to) the obligation of a responsible IO to make full reparation for any injury (material or moral) caused by its internationally wrongful act.⁵⁷⁶ Having laid out the consequences

⁵⁷⁴ Bekker states that the IBRD’s property and assets are protected by complete immunity from seizure and execution [Bekker, (The Legal Position, 1994) at p. 159] but it is difficult to see how this portion of Article VII Section 3 of the Bank’s Articles of Agreement can be construed thus when it plainly states that the Bank’s complete immunity is only in effect *before* the delivery of a final judgment against the Bank.

⁵⁷⁵ International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 63rd Sess. (2011) UN Doc. A/CN.4/637, p. 29, para. 13 (1).

⁵⁷⁶ ARIO, Article 31.

for international wrongdoing, Article 32 (1) states: “[T]he responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.” Recalling that according to Article 2 (b) the rules of an IO comprise its constituent instrument amongst other things, Article 32 (1) immediately raises the possibility that by virtue of it an IO cannot rely on the immunities granted to it by its constituent instrument to avoid submitting to judicial jurisdiction or funding reparations, even if the latter entails use of its revenue or liquidation of its assets. Hence, Article 32 (1) suggests that it may be a means of restricting the immunities of an IO. However, other provisions of the ARIO and the commentary of the ILC in the ARIO appear to negate this possibility, at least in relation to the obligations owed by an IO to its member states or international organizations.

The first provision that appears to negate any possibility that Article 32 (1) of the ARIO can be utilized to restrict the immunities employed by IOs to shield them from any legal consequences for wrongdoing is Article 32 (2) which states that:

“[P]aragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.”

The ILC’s commentary to paragraphs 1 and 2 of Article 32 explains that although the principle expressed in paragraph 1 clearly applies to the relations between an IO and a *non-member* state or IO, it does not necessarily apply to its relations with its member states or IOs as the rules of an IO may in fact affect the rules and principles set out in Part Three (of the ARIO).⁵⁷⁷ The ILC then specifically refers to the rules on the forms of reparation that a responsible IO may owe to its members as one of the aspects of Part

⁵⁷⁷ ARIO with Commentaries, Article 32, p. 58, para. 3.

Three that the rules of an IO may modify.⁵⁷⁸ Moreover, the ILC adds, the “without prejudice” provision in paragraph 2 was included to avoid any inference that may be drawn from paragraph 1 that the rules of an IO are irrelevant. It does not expressly state irrelevant to what, but its next statement implies that it means that the rules of an IO are not irrelevant to an IO’s obligations to its member states.⁵⁷⁹ The ILC states:

“[T]he presence of such a “without prejudice” provision will serve as a reminder of the fact that the general statement in paragraph 1 may admit exceptions in the relations between an international organization and its member States and organizations.”⁵⁸⁰

The Commission then goes on to further emphasize that the provision in paragraph 2 of Article 32 relates to the international responsibility that an IO may have to its member states and organizations, but that it cannot affect the obligations an IO may have towards a non-member state or IO as a result of an internationally wrongful act, or the obligations that arise for an IO if it breaches a peremptory norm.⁵⁸¹ These comments appear to be a reiteration of a principle expressed earlier by the ILC in connection with Article 10 (ARIO) where the ILC, referring to the special rules (*lex specialis*) that according to Article 64 (ARIO) overrule the ARIO, states:

“[T]hese special rules do not necessarily prevail over principles set out in the present draft articles. For instance, with regard to the existence of a breach of an international obligation, a special rule of the organization would not affect breaches of obligation that an

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid., para. 4.

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid., para. 5.

international organization may owe to a non-member State. Nor would special rules affect obligations arising from a higher source, irrespective of the subject of the identity of the subject to whom the international organization owes the obligation.”

Hence, any hope that Article 32 (1) may have prevented IOs from using the immunities accorded to them by their constituent instruments to avoid the legal consequences that arise in relation to international wrongdoing against a member state or IO appears to be extinguished by Article 32 (2) and the ILC’s related commentary.

This perception is further reinforced by the second provision of the ARIO that cancels the possibility of the ARIO restricting the immunities enjoyed by IOs, namely, Article 64. This article states that the ARIO do not apply to the extent that its content and implementation are governed by special rules (*lex specialis*) of international law, and that these special rules include the rules of an IO that apply to its relations *with its member states or IOs*. In support of this position the ILC cites several cases that have upheld the special rule of the European Union that when its member states implement binding acts of the EU that conduct by the member states is attributed to the EU and therefore considered to be the conduct of the EU.⁵⁸² Applying Article 64 and its interpretation by the ILC it must be concluded that the special rules of IOs which grant them various immunities will take precedence over the ARIO.

⁵⁸² *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Complaint by the United States (“EC Trademarks and Geographical Indications (US)”)*, (20 April 2005) WTO Panel Report, WT/DS174/R, para. 7.725; *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, Application No. 45036/98, Decision, (13 September 2001) E.Ct.H.R. para. A; *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, Application No.45036/98, Judgment, (30 June 2005) E.Ct.H.R. Rep. 2005-VI, p. 152, para. 137; *Kokkelvisserij v. Netherlands*, Application No. 13645/05, Decision, (20 January 2009) E.Ct.H.R. para. 3; however, a different view was taken by the European Commission of Human Rights in *M & Company v. Germany*, Decision, (9 February 1990) Application No. 13258/87, E. Com. H.R. Decision and Reports, vol. 64, p. 138.

Based on Articles 32 (2) and 64 of the ARIO and the ILC's related commentary it is apparent that the ARIO does not restrict the use of immunities by IOs against injured member states or IOs. Despite the ARIO, or rather, because of the ARIO, member states and IOs are still prevented from being able to obtain reparation from a responsible IO by virtue of the rules of the IO which permit it to use its immunities as a shield from the legal consequences of international wrongdoing. Although in its commentary to the ARIO the ILC does not explicitly acknowledge the immunities that will generally accrue to IOs by virtue of their special rules, since the Commission must be aware of this benefit to IOs that is usually embedded in their special rules, by excluding IOs in their relations with member states from Article 32 (1) and by giving the special rules of an IO precedence over the ARIO in Article 64, it impliedly permits and approves the use of immunities by IOs to protect themselves from the legal consequences of wrongdoing against member states or IOs. On the other hand, by virtue of the same articles and commentary, the ARIO does offer some restriction on immunities for non-members and IOs of an IO. By virtue of the ARIO non-member states and IOs are much better placed than member states and IOs to obtain reparation from an IO as they can employ Article 32 (1) to argue that since IOs cannot use the rules of their organizations to avoid their obligations to them they cannot claim any of the immunities granted to them by those rules.

Conclusion

On the subject of IOs making reparation for international wrongdoing, Special Rapporteur for the ARIO, Giorgio Gaja, expressed the view that the *Chorzow Factory*

principle that reparations should be made by states for wrongdoing should apply equally to IOs.⁵⁸³ He stated unequivocally:

“It would be absurd to exempt international organizations from facing reparation as the consequence of their internationally wrongful acts. This would be tantamount to saying that international organizations would be entitled to ignore their obligations under international law.”⁵⁸⁴

The European Commission shared the view that IOs should have the same duty of reparation for breaches of international obligations as states do. It reasoned that since IOs are allowed to participate in the conduct of international relations as subjects of international law they should fulfil the duties and obligations that are commensurate with this privilege and bear the responsibility as well as the power of international personality. It argued that it would indeed be absurd for one category of international personalities, namely states, to face greater consequences for international wrongdoing than the other category which comprises IOs, and that the nature and function of international law was to regulate the conduct of its subjects in a non-discriminatory way.⁵⁸⁵ But in fact, precisely the opposite of the views advanced by Giorgio Gaja and the European Commission is the present reality for IOs because of the immunities they possess.

⁵⁸³ *Factory of Chorzow, (Jurisdiction) Judgment*, (1927) No. 9, P.C.I.J. (Ser. A) 1 at 21.

⁵⁸⁴ Giorgio Gaja, Special Rapporteur, *Fifth Report on Responsibility of International Organizations*, UN ILCOR 59th Sess., (2007) UN Doc. A/CN.4/583, para. 22, p.8.

⁵⁸⁵ International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 60th Sess. (2007) UN Doc. Sec. C, A/CN.4/593, p. 6;

Although IOs are now subject to the law of international responsibility by virtue of the ARIO, because of Articles 32 and 64, injured parties, particularly member states and IOs, are still prevented from obtaining reparations from IOs whose special rules invest them with immunity from jurisdiction, render their archival documents inviolable, and their revenue and assets immune from seizure. To start, if by virtue of an IO's immunity from jurisdiction no court can rule on a matter involving the IO there obviously can be no possibility of obtaining a court order for the IO to make reparations for injuries it caused. Second, if documents relevant or essential to proving the responsibility of an IO cannot be accessed because they are categorized as archival and are therefore inviolable, then the investigation of any complaint by an injured party will be thwarted from the inception.⁵⁸⁶ Lastly, if by some means an IO were ordered by a court to pay damages to an injured party, (for example, in the unlikely event that an IO waived its immunity to judicial jurisdiction), if the revenue and assets of an IO are immune from seizure by virtue of its constituent instruments and headquarter agreements, there would be no way of enforcing such an order and realizing the reparations that were ordered unless the IO chose to waive these immunities also. The *Mothers of Srebrenica* cases provide particularly disturbing examples of how an IO's immunity to judicial process can prevent victims' access to justice and reparation. In the related cases both the Dutch District Court and the Court of Appeal in The Hague denied the request of relatives of victims of the massacre of Srebrenica that the UN be indicted for its failure to prevent the massacre on the grounds that the UN possesses immunity from action by national

⁵⁸⁶ For example, Article 34(2) of the Statute of the ICJ provides that: "[T]he Court, subject to and in conformity with its Rules, may request of any public international organizations information relevant to cases before it, and shall receive such information presented by such organizations *on their own initiative*." (emphasis added). This provision confirms that even the ICJ does not have jurisdiction to compel an IO disclose information or submit documents to it.

courts and hence the courts lacked jurisdiction.⁵⁸⁷ To date, immunities have also been utilized by the IMF in the courts to its advantage.

In *Kissi v. de Larosière* someone who had unsuccessfully applied for a job with the IMF brought an action against the Managing Director of the IMF in the U.S. District Court for the District of Columbia in which he claimed that he had been wrongfully denied the job and had not been permitted to reapply. The Court dismissed the case for lack of jurisdiction because of the immunities enjoyed by the IMF as well as its Managing Director while acting in an official capacity.⁵⁸⁸ In the second case of *Polak v. International Monetary Fund*, the same District Court for the District of Columbia dismissed an action brought directly against the IMF for injuries sustained while on the organization's premises, again because of the immunities which the IMF possesses.⁵⁸⁹ On a more international plane, a complaint was brought against the IMF before the Seoul District Court by the Korean Federation of Bank and Financial Labor Unions in 1998 because it claimed that it had suffered damages due to the policies that the Government of the Republic of Korea had implemented because of its agreement with the IMF, but the Court dismissed the complaint for lack of jurisdiction.⁵⁹⁰ The IMF also reported that a trade union in Romania had named it as a defendant in a lawsuit on the grounds that it had impoverished Romanians with the economic policies it had imposed

⁵⁸⁷ *Mothers of Srebrenica et al. v. The State of the Netherlands and the United Nations (Incidental Proceedings)*, (10 July 2008), District Court of the Hague, Case No. 295247/HA ZA 07-2973; *Mothers of Srebrenica et al. v. The State of the Netherlands and the United Nations (Appeal)*, (30 March 2010) Court of Appeal at the Hague, Case No. 200.022.151/01.

⁵⁸⁸ *Kissi v. de Larosière*, (1982) No. 82–1267 (D.D.C.) cited by the IMF in International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN Doc. A/CN.4/545 (2004) p. 33.

⁵⁸⁹ *Polak v. International Monetary Fund*, (2009) 657 F. Supp. 2d 116 (D.C.C.).

⁵⁹⁰ International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN Doc. A/CN.4/545 (2004) p. 33.

on that state but this was action was also discontinued because of the court's lack of jurisdiction.⁵⁹¹

Clearly, the protection afforded to IOs by immunities applies equally to the IMF since Article IX of the AA provides it with the full range of immunities for the organization and its personnel, in particular, from judicial jurisdiction and from search and seizure of revenue and assets. Hence, in the present case study, although it has been shown that the IMF violated the law of responsibility, the reality is that no reparation could ever be forthcoming for the injured states for two reasons. One, there is presently no tribunal that has jurisdiction to apply the ARIO to the IMF and to issue a binding decision against it (the ICJ may only issue an advisory opinion which is non-binding) because of the immunity from judicial process that the IMF possesses.⁵⁹² Two, if by some means a binding order for reparations were ever issued the order would be unenforceable because the revenue and assets of the IMF are immune from seizure. Consequently, the only other possible source of reparations for an injured state would be the member states of the IMF, but as will be seen in the next chapter, this source is also unlikely to be fruitful.

⁵⁹¹ Ibid.

⁵⁹² Article 34(1) of the Statute of the ICJ declares that only states may be parties before the Court. Articles 65-68 of the Statute authorize the Court to issue advisory opinions to other parties.

Chapter 9

9.0. The Second Problem with IOs Making Reparations – the International Legal Personality of IOs

9.1. Case Law and Member State Responsibility for Obligations of IOs

If the means of making reparations to an injured party cannot be realized from the IO because of its immunities, the next obvious source of funding for reparations would seem to be the member states of the IO. However, this source of funding has historically been inaccessible to injured parties because of the theory that since IOs are separate international legal personalities, if they lack the necessary funds to compensate a party that has been injured due to their conduct, member states have no responsibility to provide these funds. This dilemma was most famously brought to judicial attention in two cases - *Westland Helicopters Ltd. V. Arab Organization for Industrialization* and the *Tin Council*. The primary issue in these cases was whether or not member states had a responsibility to make reparation for the obligations of an IO in light of the separate legal personality of the IOs involved, in the event that the IOs had no means of doing so. Both cases engaged the attention of various domestic courts which disagreed on the question of member state responsibility to make reparation for an IO's obligations in light of the fact that an IO is a separate legal personality, but ultimately in the later *Tin Council* cases the English Court of Appeal (per Lord Kerr) ruled that it could not:

“[f]ind any basis for concluding that it has been shown that there is any rule of *international law*, binding upon the member States of

the ITC, whereby they can be held liable – let alone jointly and severally – in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name.”⁵⁹³ (emphasis added)

The Court of Appeal majority judgment was later upheld by the House of Lords on the basis that an IO is “a separate legal personality distinct from its members”, and that no evidence was produced to show that there was a rule of international law whereby member states of an IO were jointly and severally liable for the default of the IO in payment of its debts unless the treaty which established the IO expressly excluded this liability.⁵⁹⁴ However, it is noteworthy that in the Court of Appeal case Justice Nourse in his dissenting opinion found that there was an intention on the part of the member states who were parties to the relevant agreement that the member states should be liable for the organization’s obligations and stated that:

“[t]he ITC has separate personality in international law, but its members are nevertheless jointly and severally, directly and without limitation liable for debts on its tin and loan contracts in England, if and to the extent that they are not discharged by the ITC itself.”⁵⁹⁵

Subsequent to the House of Lords ruling, the IIL in its 1995 Lisbon resolution on *The Legal Consequences for Member States of the Non-fulfillment by International*

⁵⁹³ Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. V. Department of Trade and Industry, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, 80 ILR 47 at 57.

⁵⁹⁴ *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and others and related appeals; Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; Maclaine Watson & Co. Ltd. v. International Tin Council*, [1989] 81 ILR 670 at p. 678 (H.L.).

⁵⁹⁵ Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, Judgment of 27 April 1988, per Lord Nourse, Dissenting Opinion, ILR, vol. 80, p. 47, at p. 147.

Organizations of their Obligations toward Third Parties, reiterated this view. Article 5 of the Resolution provides that, except in special circumstances, the rules of an IO determine the liability of members of an IO for its obligations and moreover, according to Article 6:

“Save as specified in article 5, there *is no general rule of international law* whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members.”⁵⁹⁶
(emphasis added)

9.2. The ILC, Governments, IOs and Member State Responsibility for Obligations of IOs

In the course of drafting the ARIO the ILC elicited the views of IOs and states on the subject of member state responsibility for the obligations of IOs as it did for every article of the document.⁵⁹⁷ Generally, states shared the view that there was no subsidiary obligation for member states for the obligations of IOs to an injured party simply by virtue of their membership in the IO.⁵⁹⁸ China was apparently the only state to take the bold position that the responsibility of member states for the obligations of IOs should be derived from the influence and control that they exercise in IOs. China said that:

⁵⁹⁶ *Annuaire de l'Institut de Droit International*, Lisbon Resolution, vol. 66-II (1996), p.445

⁵⁹⁷ International Law Commission, *Report on the Work of its Fifty-Seventh Session*, in UN GAOR 60th Sess. (2005) Supplement No. 10, (A/60/10), Chapter III, sect. C, para. 26, p. 9.

⁵⁹⁸ See ARIO with Commentaries, Article 40, p. 64 at footnote no. 261 for a list of the various states who took this position or a modified version of it; see also in this regard the comments of Austria, Germany, and Portugal in International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from Governments* 63rd Sess. (2011) Doc. A/CN.4/636, pp.24-27.

“[s]ince the decisions and actions of an international organization were, as a rule, under the control, or reliant on the support of member States, those member States that voted in favour of the decision, recommendation or authorization should incur a corresponding international responsibility.”⁵⁹⁹

Although the Republic of Iran said similarly that IOs should not be allowed to avoid their obligation to compensate for damages due to their conduct and that member states should finance those obligations because:

“the brunt of responsibility in such cases should be borne by those members which, on account of their decision-making role or overall position within the organization, had contributed to the injurious act.”⁶⁰⁰

it qualified this statement by saying that a member state should furnish the IO with the necessary funds to compensate the injured party “in accordance with its [the IO’s] internal rules”.⁶⁰¹

The IMF, from the perspective of an IO, held a similar view to that of most states but expressly grounded its position on the separate legal personality of IOs. It submitted that unless there is an express provision in the rules of the IO which create a derivative liability for member states for the wrongdoing of an IO, there is no general rule that member states were liable to provide for the obligations of an IO if the IO could not do so because 1) IOs were independent legal personalities; 2) attribution was a necessary

⁵⁹⁹ International Law Commission, *Report on the Work of its Fifty-Seventh Session*, UN GAOR, 60th Sess., (2005) A/C.6/60/SR.11, p. 10, para. 53.

⁶⁰⁰ International Law Commission, *Report on the Work of its Sixty-first Session (continued)*, UN GAOR 60th Sess. (2009) A/C.6/64/SR.16, para. 53, p. 10.

⁶⁰¹ Ibid.

requirement for a state to be responsible for a wrongful act; and 3) liability to compensate can only be based on state responsibility or another rule that is binding on the IO, such as the rules of the IO.⁶⁰²

In contrast to the IMF, the Organization for the Prohibition of Chemical Weapons (OPCW) was more open to member state responsibility for funding reparations owed by IOs. In fact, it opined that:

“[...] the inclusion in the draft articles [the ARIO] of an obligation of member States to take all appropriate measures to provide the organization with the means for effectively fulfilling its obligations would amount to *progressive development of international law*.”
(emphasis added).

The OPCW then went on to consider what “appropriate measures” should be put in place, especially if there were no express provision for them in the constituent instrument of an IO. It suggested that IOs be given the right to request that member states contribute to IOs when necessary to enable them to make reparations, and that explicit reference be made [in the ARIO] to an obligation on the part of member states to cooperate financially to enable IOs to make reparations for wrongful acts committed by them.⁶⁰³

The ILO similarly appeared to support the view that member states should contribute to the funding of reparations by IOs. In its comments regarding the proposal that under the ARIO IOs should be required to make full reparation for their wrongdoing, it stated:

⁶⁰² ILC, *Responsibility of International Organizations – Comments and Observations Received from International Organizations*, [Agenda item 3] 59th Sess. (2007) UN GAOR A/CN.4/582, U.1 at p. 29.

⁶⁰³ International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 60th Sess. (2007) A/CN.4/593, p. 8.

“The criterion of “full reparation”, may lead to ideas requiring international organizations to maintain a contingency fund or have an insurance of large amount in order to ensure solvency in the event of such liabilities, *or another type of mechanism for member States to contribute to pay such liabilities when and if they arise.*” (emphasis added).⁶⁰⁴

However, objections were raised in the ILC to the widely held view that there is no subsidiary responsibility of member states for the obligations of IOs in the event that an IO lacks the funds to fulfil these obligations. The late Sir Ian Brownlie, in his role as a member of the ILC, disagreed with this view and said that there is no general principle of non-responsibility of States members of an international organization in connection with an internationally wrongful act of that organization. His main concern was that if the non-responsibility principle were accepted its application would give states the opportunity to circumvent their international obligations by establishing IOs.⁶⁰⁵ Moreover, he opined that a third state could not be requested to bear the damage caused by an organization without having any possibility of recourse against member States of the organization if the necessary measures had not been taken.⁶⁰⁶

⁶⁰⁴ International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 63rd Sess. (2011), UN Doc. A/CN.4/637, p. 30, para. 3.

⁶⁰⁵ ILC, *Responsibility of International Organizations*, Provisional Summary Record of the 2892 Meeting, 58th Sess. (second part) 2006, A/CN.4/SR.2892 (2007) p.9.

⁶⁰⁶ Ibid., p. 11.

9.3. Legal Scholars and Member State Responsibility for Obligations of IOs

Scholars have been somewhat divided on the subject of member state responsibility for the obligations of IOs who have separate legal personality from their members. Some are of the opinion that the responsibility of member states to provide funds to enable IOs to fulfil their obligations to third parties is simply an extension of their obligation to contribute to the budget of the IO.⁶⁰⁷ While this may seem to contradict the I.C.J.'s view that a member state is only responsible for the expenses of the IO to the extent that these expenses relate to the purposes,⁶⁰⁸ those who hold the extension view counter this by saying that all expenses of an IO are inevitably related to its purposes so their members should pay for them.⁶⁰⁹ Nevertheless, even those who share this perspective concur with the view of the ILC and the IIL that the obligation of member states to fund the outstanding obligations is circumscribed by the rules of the organization.⁶¹⁰

Yet another view on the subject of member state responsibility is that, in keeping with the finding of the House of Lords in the *Tin Council* cases, what determines the responsibility of the member states is the intention of the member states with regard to the obligations that an IO might incur, but this comes back to the rules of the IO as it is the intention of the states as evidenced in the rules of the IO.⁶¹¹ Hence it has been said

⁶⁰⁷ Sands & Klein, p. 531; Schermers & Blokker, 5th ed. pp. 1010-1117; Sands and Klein, (2009) p. 531, paras. 105-110; p. 1011, paras. 1585-1586.

⁶⁰⁸ *Certain Expenses of the United Nations*, Advisory Opinion, (1962) I.C.J. Rep.151 at 167.

⁶⁰⁹ Sands & Klein, p. 531, para. 15-110; Amerasinghe, *Principles*, p. 374.

⁶¹⁰ *Ibid.*; Schermers & Blokker, 5th ed., p. 1011, para. 1585.

⁶¹¹ Alexander Orakhelashvili, "Division of Reparation between Responsible Entities" in James Crawford et al, eds. *The Law of International Responsibility* (New York: Oxford University Press, 2010) 647 at 655-

that “all relevant provisions and circumstances” must be studied and taken into account in order to determine the intention of the member states, whether express or implied, with regard to accepting responsibility for obligations an IO might incur in any given circumstance.⁶¹²

Meanwhile, the tension between preserving the autonomy of an IO as a separate legal personality and securing the rights of parties injured by them via member states’ responsibility continues to generate controversy among academics.⁶¹³ Some are primarily concerned with maintaining the independence and autonomy of IOs and have asserted that since the act for which the IO is liable is strictly its act, to say that member states are simultaneously liable for them would be to “unduly and unnecessarily dismantle the organization’s personality”.⁶¹⁴ Other legal scholars stress the need to ensure that injured parties are not left without any possibility of recovering damages, and that IOs are not permitted to commit wrongful acts with impunity.⁶¹⁵ Sir Ian Brownlie

656; Mosche Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles*, (Boston: Martinus Nijhoff 1995) pp. 160-16.

⁶¹² I.F.I. Shihata, “Role of Law in Economic Development: the Legal Problems of International Public Ventures”, 25 *Revue égyptienne de Droit international*, (1969) 119 at 125; I. Seidl-Hohenveldern, “Liability of Member States for Acts or Omissions of an International Organization” in S. Schlemmer-Schulte & Ko-Yung eds., *Liber Amicorum Ibrahim F.I. Shihata* (The Hague: Kluwer Law International, 2001) 727 at 739; C.F. Amerasinghe, “Liability to Third Parties of Member States of International organizations: Practice, Principle and Judicial Precedent”, 40 *Int’l & Comp. L. Q’tly*, (1991) 259 at 280 [hereinafter Amerasinghe, “Liability”].

⁶¹³ T. Grant, ‘International Responsibility and the Admission of States to the United Nations’, (2009) 30 *Michigan Journal of International Law*, pp. 1095-1185, at 1136; Wilde, “Enhancing Accountability” (2005-2006); Andrew Stumer, “Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections” (2007) 48 : 2 *Harvard Int’l L. J.* 553 at pp. 564-580; Schermers & Blokker, 5th ed., pp. 526-531.

⁶¹⁴ Schermers & Blokker, 5th ed., p. 1011, para. 1585.

⁶¹⁵ Supra at note 552; Ian Brownlie, “The Responsibility of States for the Acts of International Organizations” in M. Ragazzi, ed., *International Responsibility Today: Essays in Memory of Oscar Schacter*, (Boston: Martinus Nijhoff 2005) 355 [hereinafter Brownlie, “Responsibility”]; Cedric Ryngaert. & Holly Buchanan. Holly, “Member State Responsibility for the Acts of International Organizations” (2011) 7:1 *Utrecht Law Review*, 131; Kazuhir Nakatani “Responsibility of Member States towards Third Parties for an Internationally Wrongful Act of the Organization” in Maurizio Ragazzi, ed., *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, (Boston: Martinus Nijhoff, 2013) 293 at 295; Paola Palchetti, “Exploring Alternate Routes: The

has expressed this view strongly. He has said emphatically: “A State cannot avoid responsibility by creating an international organization.”,⁶¹⁶ and further:

“[...] it cannot be reasonable to create a licence to harm the interests of third States by creating an international organization.

There is surely a presumption, based upon public interest and ordinary logic, that, if the organization is not empowered to make reparation to third States, the member States are under such a duty.”⁶¹⁷

As a compromise between the two perspectives it has been proposed that IOs be entitled to request the assistance of member states in the event that they themselves lack the necessary funds to make reparation to an injured party, but in response to this request member states are to be seen solely as providers of the needed funds to the IO to enable it to fulfil its obligations and not as debtors of the injured third party.⁶¹⁸

9.4. The IIL and Member State Responsibility for Obligations of IOs

Clearly, the preponderant view regarding member state responsibility for the obligations of an IO is that it does not accrue merely by virtue of membership but must be evident, expressly or impliedly, in the rules of the IO. It is assumed that in the

Obligation of Members to Enable the Organization to Make Reparation” in Maurizio Ragazzi ed., *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, (Boston: Martinus Nijhoff, 2013) 303; Kenneth W. Abbott & Duncan Snidal, “Why States Act through Formal International Organizations” (1998) 42 : 1 *Journal of Conflict Resolution* 3.

⁶¹⁶ Ibid. Brownlie, “Responsibility” p. 361.

⁶¹⁷ Ibid., p. 359.

⁶¹⁸ Schermers & Blokker, 5th ed. p. 1011, para. 1586; see also Sands & Klein, (2009), p. 531, para. 15-110, who point out that in the settlement of the *Tin Council* cases by ITC members, the members “[w]hen they replenished the organization’s resources to enable it to settle the standing claims, took great care to insist on the fact that those payments could not be considered as a discharge of any direct obligation owed by them to third parties”, cited in Schermers & Blokker, 5th ed. Ibid.

present context the “rules of the organization” must be defined either according to Article 2 (b) of the ARIO or Article 2 (c) the IIL’s Lisbon Resolution, or according to a combination of both definitions. Thus, applying these definitions to the most widely accepted view of member state responsibility, whether or not a member state is responsible for the obligations of an IO must be determined from the constituent instrument of an IO, its regulations, binding decisions, resolutions or other acts that are done in accordance with the constituent instruments, and the established practice of the organization. In its Lisbon Resolution the IIL states in its preamble that the Resolution is being adopted because, *inter alia*, the IIL is mindful of the tensions existing between the importance of the independent responsibility of IOs and the need to protect third parties dealing with such IOs, and is cognizant of the existing uncertainty of the present international practice attending these tensions and wishes to clarify the existing law on this matter and make recommendations for future practice. Then, in Section B of the Resolution, which includes Articles 3-7, it proceeds to codify its assessment of the existing law on the subject. Article 5 states:

“(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization.

(b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as acquiescence or the abuse of rights.

(c) In addition, a member State may incur liability to a third party

- (i) through undertakings by the State, or
- (ii) if the international organization has acted as the agent of the State, in law or in fact.”

Further elucidating what it considers to be the present law on the subject of member state responsibility for obligations of IOs, the IIL continues in Article 6 that member states are not concurrently or subsidiarily liable for the obligations of IOs due solely to their membership, or because they participated in the establishment of an IO, or because the act of the IO that has given rise to the liability is claimed to be *ultra vires*. However, the IIL goes beyond this in Section C of its Resolution, which comprises Articles 8-12 and which is entitled “Desirable Developments”. In Article 8 the IIL recommends that out of concern for the credibility and independence of IOs and the establishment of new ones, “no general or comprehensive rule of liability of member States to third parties for the obligations of international organizations” should be developed. Furthermore, the Institute continues in Article 9, since third parties are entitled to know that the financial liabilities that may ensue from a particular transaction with an IO are those of the organization alone, IOs should expressly specify their position regarding liability in their rules and contracts, in their communications with the third party prior to the transaction with the third party, and in their responses to any specific requests made by the third party for information on the question of liability. But the IIL goes even further in Article 9 stating that unless the rules of an IO prohibit it, member states of IO may exclude or limit their liability for the obligations of an IO,

providing that they do it prior to any relevant dealings with third parties, and providing that such limitations or exclusions be done in appropriate detail.⁶¹⁹

9.5. The ARIO and Member State Responsibility for Obligations of IOs

The controversy over the responsibility of member states to provide their IOs who have separate legal personality with funds to enable them to fulfil their obligations to an injured party has also dogged the ILC in its drafting of the ARIO. First, apparently in keeping with the principle articulated in the *Factory at Chorzow* case,⁶²⁰ Article 31 of the ARIO unequivocally provides for the responsibility of an IO to make full reparation for any injury it causes by the commission of an internationally wrongful act. Moreover, this article clarifies in paragraph 2 that injury includes “any damage, whether material or moral”. However, the ILC hastens to point out in its commentaries to this article that:

“[I]t may be difficult for an international organization to have all the necessary means for making the required reparation. [due to] the inadequacy of the financial resources that are generally available to international organizations for meeting this type of expense.”⁶²¹

⁶¹⁹ An example of an IO expressly limiting the liability of its member states can be found in The International Cocoa Agreement, 2001 (TD/COCOA.9/7 and Corr.1) “[A] Member’s liability to the Council and the other Members is limited to the extent of its obligations regarding contributions specifically provided for in this Agreement. Third parties dealing with the Council shall be deemed to have notice of the provisions of this Agreement regarding the powers of the Council and the obligations of the Members [...]”. In contrast, an example of an IO expressly providing for the responsibility of its member states for its debts can be found in the *Convention on the International Liability for Damage Caused by Space Objects* of 29 March 1972, in which Article XXII, para. 3 (b) states: “[O]nly where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the member which are States Parties to this Convention for the payment of that sum.” A similar provision can be found in Article XI of the *Operating Agreement on the International Maritime Satellite Organization* of 16 July 1979.

⁶²⁰ Supra at note 502.

⁶²¹ ARIO with Commentaries, Article 31, p. 57, para. 4

In an apparent attempt to address this potential obstacle to IOs fulfilling their obligations to injured parties which was identified in the commentary to Article 31, the ILC proceeds to make provision for member states to provide the necessary funds for an IO's compensation, but with a proviso. With the promising title of "Ensuring the fulfilment of the obligation to make reparation" Article 40 of the ARIO states:

1) The responsible international organization shall take all appropriate measures *in accordance with its rules* to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter. (emphasis added)

2) The members of a responsible international organization shall take all the appropriate measures that may be required *by the rules of the organization* in order to enable the organization to fulfill its obligations under this Chapter. (emphasis added)

On the face of this article it initially appears that member states are only required to fund reparations owed by an IO if this is *expressly* provided for in the rules of the organization. But the provisions of this article and their strict interpretation are modified by the ILC by virtue of its statements in the commentaries to Article 40 which bear reproducing in their entirety here:

"(1) International organizations having a separate legal personality are in principle the only subjects that bear international responsibility for their international wrongful acts. When an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility *because of their membership of a responsible organization* only according to the conditions stated in *articles 17, 61 and 62*. The

present article does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members. (emphasis added; see footnote 2 below regarding the ILC's reference here to Articles 17, 61 and 62)

- (2) Consistent with the views expressed by several States that responded to a question raised by the Commission in its 2006 report to the General Assembly, no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation. [...] *This approach appears to conform to practice, which does not show any support for the existence of such an obligation under international law.* (emphasis added)

(3) Thus, the injured party would have to rely on the fulfilment by the responsible international organization of its obligations. *It is clear that if no budget line is provided for the event that the organization incurs international responsibility, the effective fulfilment of the obligation to make reparation will be at risk.* Thus paragraph 1 stresses the need for an international organization to take all appropriate measures so as to be in a position of complying with its obligations should it incur responsibility. *This [paragraph 1] will generally imply that the members of the organization be requested to provide the necessary means.* (emphasis added)

- (4) Paragraph 2 [of Article 40] is essentially of an expository character. It intends to remind members of a responsible international organization that they are required to take, *in accordance with the rules of the organization*, all appropriate measures in order to provide the organization with the means for

effectively fulfilling its obligation to make reparation. (emphasis added)

- (5) In both paragraphs, the reference to the rules of the organization is meant to define the basis of the requirements in question. While the rules of the organization do not necessarily deal with the matter expressly, an obligation for members to finance the organization as part of the general duty to cooperate with the organization *may be implied* under the relevant rules. [...]" (emphasis added)⁶²²

In support of the latter statement the Commission goes on to cite the dictum of Justice Fitzmaurice in his separate opinion in the *Certain Expenses of the United Nations advisory opinion*, in which he said that even if the rules of an IO (in that particular case the UN) do not expressly stipulate that member States have an obligation to finance it, the fact that the organization cannot fulfil its mandate without the necessary funding implies that its members have a duty to collectively finance it.⁶²³ Furthermore, the ILC states in paragraph 3 of the above cited commentaries that paragraph 1 of Article 40 "[w]ill generally imply that the members of the organization be requested to provide the necessary means [of reparation]." However, in light of the rest of the commentaries, it appears that what the ILC means here is that though paragraph 1 of Article 40 by implication entitles IOs responsible for international wrongdoing *to request* their member states to provide the funds needed for the IO to make reparations to an injured party, the member states have no legal obligation to comply with such requests unless they are expressly or impliedly

⁶²² ARIO with Commentaries, Article 40, pp. 64-65.

⁶²³ *Certain Expenses of the United Nations*, Advisory Opinion, [1962] I.C.J. Rep. 151 at 182; cited in ARIO with Commentaries, Article 40, pp.65-66, para. 5.

required to do so by the rules of the organization, or if the conditions stated in Articles 17, 61 and 62 apply to the member state(s).⁶²⁴

The conditions in Articles 61 and 62 which are referred to are that international responsibility arises for a member State of an IO if it (1) circumvents an international obligation by causing the latter IO to commit an act which, if committed by the member, would have constituted a breach of the obligation,⁶²⁵ or (2) has accepted responsibility of the wrongful act towards the injured party,⁶²⁶ or (3) has led the injured party to rely on its responsibility.⁶²⁷ The ILC also made reference to Article 17 as providing one of the grounds on which a member state incurs responsibility for the obligations of an IO. Article 17 is essentially the same as Article 61 except that it refers to an IO circumventing an international obligation by acting through its members, and in addition that the IO will incur responsibility if it adopts a decision binding its members to commit an act that is internationally wrongful for the IO.⁶²⁸

However, the reference to Article 17 in the ILC's commentary to Article 40 appears to be an error for two reasons. First, Article 17 deals with *responsibility accruing to an IO* because the IO, by a decision binding its members or by acting through its members to circumvent one of its international obligations, causes its member states or member IOs to commit and act that is internationally wrongful for the IO (whether or not it is wrongful for its member states or member IOs). The

⁶²⁴ ARIO Commentaries, Article 40, p. 64, para. 1.

⁶²⁵ ARIO, Article 61 (1); the ILC elucidates in paragraphs 6, 7, and 8 of its commentaries to this article that this act has three components which must all be present in order for a member state to be found to have circumvented its international obligation: 1) the IO must have competence in relation to the subject matter of the international obligation of the state; 2) there must be a significant link between the conduct of the circumventing member state and the IO; 3) the act committed by the IO must be one which, if committed by the state, constitutes a breach of the state's obligation.

⁶²⁶ ARIO, Article 62 (1)(a).

⁶²⁷ ARIO, Article 62 (1)(b).

⁶²⁸ ARIO, Article 17 (1).

commentaries to Article 17 make no mention of the member states or member IOs incurring a concurrent or secondary responsibility for committing the act which is wrongful for the binding or circumventing IO so it is unclear why the ILC said in paragraph 1 of its commentaries to Article 40 that Article 17 describes one of the circumstances in which responsibility arises for member states or member IOs. The second reason that the ILC's reference in this vein to Article 17 appears to be an error is that the ILC refers to Article 17 alone and not to Articles 14-16 as entailing circumstances in which member states or member IOs can incur responsibility. Article 18, which deals with the responsibility of an IO *that is a member of another IO*, states that it is "without prejudice to Articles 14 - 17" (these describe how an IO, *not a member of another IO*, incurs responsibility for international wrongdoing) and the ILC in its commentaries to Article 18 explains that the without prejudice clause in Article 18 was included because responsibility can arise for an IO *that is a member of another IO* if it acts in accordance with the conduct envisaged in articles 14-18. Consequently it seems that the ILC should have included Articles 14-16 and excluded Article 17 in its statement identifying the circumstances which cause IOs to incur responsibility because of their membership of a responsible organization.⁶²⁹ In addition, Article 18 states that member IOs will incur responsibility for the wrongdoing of the IO if it acts in accordance with Articles 61 and 62 which set out the conditions for member States of IOs incurring international responsibility for the internationally wrongful act of an IO.

Similarly, it is also difficult to see why the ILC, again in paragraph 1 of its commentaries to Article 40 of the ARIO, only pinpoints the conduct described in Articles 61 and 62 as that which causes a state to incur responsibility "because of their

⁶²⁹ ARIO with Commentaries, Article 18, p.43, para. 1.

membership of a responsible organization” when Articles 58 – 60 provide for conduct which gives rise to responsibility for states for the internationally wrongful act of an IO, and paragraphs 2 of Articles of 58 and 59 even expressly stipulate that “An act by a *State member of an international organization* done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.” (emphasis added) It means therefore that if a member State of an IO acts in accordance with Articles 58 and 59 and this conduct is *not* in accordance with the rules of the IO the member State *will* incur responsibility for the conduct of the IO who actually committed the internationally wrongful act. The consequence of all the above is that there are other circumstances other than those described in Articles 17, 61 and 62 which would render member IOs or member States responsible for providing funds to an IO which committed a wrongful act in order for it to fulfill its obligation to make reparation for damages caused by that act..

However, notwithstanding the observations above, according to Article 40 and the commentaries thereto the position in the ARIO with regard to member states or member IOs financing the obligations of an IO can be summarized as follows. Outside of an obligation to do so arising out of the rules of the organization or those circumstances described in Articles 17, 61 and 62, “[T]he present article [Article 40] does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members.”,⁶³⁰ and “[n]o subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make

⁶³⁰ ARIO Commentaries, p. 64, para.1.

reparation”,⁶³¹ and lastly, that practice “does not show any support for the existence of such an obligation under international law.”⁶³² The latter statement no doubt refers mainly to the *Westland* and *Tin Council* cases (discussed earlier) which have to date been the two most significant cases which have dealt with the contentious subject of member states not being responsible for providing the means for an IO to fulfil its obligation to an injured party because IOs are separate legal personality.⁶³³

9.6. *Ultra Vires* Acts of IOs and Member State Responsibility

Lastly, there is the question of whether member states can be responsible for the obligations of an IO that result from the wrongful conduct of an IO if the act in question is *ultra vires* the rules of the organization. The ILC was urged to take this into consideration when drafting the ARIO but it only addressed the question of attributing an *ultra vires* act of an organ or agent of an IO to the IO. Article 8 of the ARIO states that if an organ or agent of an IO acts outside of its authority or instructions the act will still be considered an act of the IO providing it is carried out by the agent or organ acting in its official capacity or within the overall function of the IO. This provision conforms to the ICJ's ruling that an IO can be responsible for the *ultra vires* acts of its organs if they

⁶³¹ Ibid., p. 64 para. 2.

⁶³² Ibid., p.65, para.2; Commentaries, p.65; ironically for this case study, in the course of drafting the ARIO the ILC elicited comments from governments and IO on various subjects and with regard to the question of the liability of member states or member IOs for funding the obligations of an IO the IOs in support of the view that member States and IOs do *not* have an obligation to provide for reparation by responsible IOs were the **International Monetary Fund** and the Organization of Chemical Weapons. A/CN.4/562, sect.II.U.1; for the opposite view see A/CN.4/637.sect. II.B.17; perhaps the most notable supporter of the latter view was the Republic of Iran which said, *inter alia*, that “the brunt of responsibility in such cases should be borne by those members which, on account of their decision-making role or overall position within the organization, had contributed to the injurious act.” (A/C.6/64/SR.16, para.53) Giorgio Gaja, “Fourth Report on Responsibility of International Organizations”, 2006, pp. 8-9 A/CN.4/564/Add. 2; ARIO with Commentaries, pp.64-65, para. 2, and footnotes 261-263.

⁶³³ Iran made specific mention of *ultra vires* acts committed by an IO as a result of the undue influence of a certain member states. Ibid., (A/C.6/64/SR.16, para. 53.

are within the scope of the functions of the IO, but on the other hand, if the acts (in this case making expenditures) were not for one of the purposes of the IO they could not be considered acts of the IO.⁶³⁴ Notably, the IMF in its submissions to the ILC on the topic of attribution, endorsed the position that is articulated in the *Certain Expenses* case and in Article 8.⁶³⁵ The ILC opined in its commentaries to Article 8 of the ARIO that the ruling by the ICJ reflects a policy consideration in relation to wrongful conduct that denying attribution of the conduct of an agent or organ to an IO may deprive injured parties of redress.⁶³⁶ But this policy consideration does not appear to have informed any of the provisions of the ARIO that relate to member state responsibility for the obligations of an IO. In fact, the ARIO are silent on the subject of member state responsibility for making funds available to fulfill the obligations of an IO that arise from an *ultra vires* act of the IO.

It has been suggested that in the absence of any provision in the ARIO on this subject the responsibility of member states to fund the obligations that arise from the *ultra vires* acts of IOs can be justified in two ways. First, this responsibility can be treated as an extension of their responsibility to fund the IO to enable it to fulfill its functions.⁶³⁷ Alternatively, the ICJ and Article 8 (ARIO) principle that IOs are responsible for *ultra vires* acts of organs or agents performed in an official capacity or within the overall function of the IO, but not if the conduct is carried out in a personal capacity, should be applied to *ultra vires* acts of IOs. Hence member states would be responsible for funding obligations that arise from an IO's *ultra vires* acts that meet the Article 8

⁶³⁴ *Certain expenses of the United Nations*, Advisory Opinion, I.C.J. Rep. 1962, 151 at pp.167- 168.

⁶³⁵ ILC, *Responsibility of International Organizations – Comments and Observations Received from International Organizations*, (2004) (A/CN.4/545) p. 33, para. 5.

⁶³⁶ ARIO with Commentaries, Article 8, pp. 27-28, para. 6.

⁶³⁷ Palchetti, p. 308; Hirsch, pp. 160-163.

criteria.⁶³⁸ While this seems reasonable it should be pointed out that since it is impossible for an IO to act in a personal capacity it is always acting in an official capacity, but it is possible that it can act outside of its overall functions or purposes as is the case in the present study. How will the Article 8 rule be applied then? When an IO acts in an official capacity but outside of its functions would the latter aspect of the conduct cancel out the former and free member states of any responsibility for funding obligations that result from its *ultra vires* conduct? Clearly, these questions and indeed the entire subject of member state responsibility for *ultra vires* conduct of an IO were not addressed by the ILC and this is regrettable since the obvious consequence of this omission is that parties injured by *ultra vires* acts of IOs can remain uncompensated for damages suffered.

9.7. Member States Responsible for Funding Reparation Owed by the IMF?

The ILC has said that if a member state is complicit in an international wrongdoing of an IO by virtue of Article 17, 61 or 62 of the ARIO it will be responsible for the damages an IO incurs because of that conduct.⁶³⁹ While Article 17 will not be applied here for reasons explained above, whether the member states of the IMF have incurred responsibility for its conduct on the basis of Articles 61 and 62 has already been examined and it was determined that at least under Article 61 they are responsible for wrongful conduct, albeit their own although they acted through the IMF, and will therefore be liable for any damages that result from it.

⁶³⁸ Ibid.

⁶³⁹ ARIO with Commentaries, Article 40, p. 65, para. 1.

On the other hand, the member states of the IMF may also be responsible for aiding, controlling or coercing the IMF in the commission of a wrongful act. If they are, although the ILC did not include the articles that relate to these (ARIO - Articles 58, 59 and 60) in the circumstances it says will give rise to the member states being responsible for funding the damages that result from the acts committed, since aiding, controlling or coercing incurs the responsibility of the member states for the conduct of the IO, they will obviously be responsible for any damages that result from the aided, controlled or coerced conduct. But this is not the essential issue under consideration in this chapter. Rather, the focus is on whether the member states of the IMF have a subsidiary responsibility to finance its obligations if it is unable to do so for itself for the wrongdoing involved in this or any other case.

First, there is the question of whether the member states of the IMF can be held responsible for its wrongful conduct of requiring borrowing states to eliminate capital controls for although this conduct was carried out in an official capacity, it was outside of the functions of the organization as described in its constituent instrument. As has been said, there is no clear rule on the subject of member state responsibility for *ultra vires* acts of an IO and more so if the conduct is done in an official capacity but is outside of the IO's functions. Therefore, whether the member states of the IMF have any responsibility for any obligations it may incur in the present case is uncertain.

However, if the IMF's conduct qualified as that which gives rise to member state responsibility for its obligations, in accordance with Article 40 (2) of the ARIO, IMF member states would be responsible to pay the debts of the IMF only if the rules of the IMF expressly or impliedly require them to do so. The rules of the IMF, according to

Article 2 (b) of the ARIO, are “[i]n particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted *in accordance with those instruments*, and established practice of the organization.” (emphasis added)

The AA of the IMF contain no express provision that engenders the responsibility of its member states for any obligations it may fail to fulfil, and in this writer’s opinion, neither is there any provision in the AA from which this can be implied. Further, since Article 2 (b) of the ARIO provides that beside the constituent instruments of an IO only those decisions, resolutions, and other acts that accord with the constituent instrument comprise the rules of an IO, it would be futile to examine any decisions, etc. of the IMF in search of an implied responsibility of member states because even if one could be found it would be negated by the argument that by virtue of implying responsibility it did not accord with the AA and was thus not a rule of the IMF.

This leaves the possibility of an “established practice of the organization” comprising a rule of the IMF. But does the IMF have any established practice which evidences that its member states are required to pay its debts in the event that it is unable to do so? The term “established practice” denotes that the IO has a history of responding a certain way to a particular situation but this does not obtain with regard to IMF member states being required to fulfil its obligations. There is no precedent for this in IMF practice because there has never been an occasion on which the responsibility of its member states for its conduct was called into question. This was confirmed in the IMF’s submissions to the ILC on the subject of attribution of conduct of IOs:

“To the best of the Fund’s knowledge, IMF has not had a case in which there was a claim that a member State was legally responsible for the acts of the organization.”⁶⁴⁰

Hence it cannot be said that the IMF has an established practice, i.e. a rule, that its member states are required to finance its obligations when it cannot do so.

It is by now apparent that applying Article 40 of the ARIO to the IMF it cannot be shown that its member states are impliedly or expressly required by any of the rules of the IMF to finance any obligations that the IMF may owe to an injured third party. The consequence of this is obviously that states or other IOs who are injured by the wrongful conduct of the IMF in the present case or any other case can expect to have no recourse for obtaining compensation if the IMF claims that it lacks the funds to pay for damages.

Conclusion

From the discussion in this chapter it is clear that the separate legal personality of IOs is an almost impenetrable veil behind which member states can and do hide and thus avoid responsibility for the wrongful conduct and obligations of the IOs that they created and through which they act. The ARIO has done so little to pierce this veil that it seems merely cosmetic as it relates to the subject of member state responsibility for the obligations of IOs and the reparations available for parties injured by the wrongful conduct of IOs. The architects of the ARIO had to be well aware that funding for IOs is primarily provided by their member states and in the event that one is liable for damages to an injured party if the member states do not choose to provide additional

⁶⁴⁰ ILC, *Responsibility of International Organizations – Comments and Observations Received from International Organizations*, (2004) (A/CN.4/545) p. 33, para.6.

funds above the regular budgetary needs of the IO it will inevitably lack the resources to fulfil its obligations. Yet the requirement in Article 40 that IOs elicit funds from member states to meet their obligations *in accordance with the rules of the IO*, and likewise that member states take measures as required by *the rules of the IO* to enable it to fulfil its obligations ensures that member states can avoid responsibility for the conduct and obligations of the IO if they so desire. It is the member states that make the rules of an IO and why would they create rules that potentially expose them to responsibility for the obligations of the IO when they can so readily avoid that exposure by remaining behind the veil of the separate legal personality of the IO? Clearly, Article 40 of the ARIO and the ARIO in general leave parties injured by IOs at the mercy of the member states of IOs and with no assurance that they will receive damages from a responsible IO even if a court orders the payment of such damages. It is submitted that Sir Ian Brownlie rightly diagnosed that this injustice is caused by the illogical process of a group of states manufacturing an immunity from responsibility towards third parties by establishing an IO and by the responsibility of member states for the obligations of IOs being governed by the law of international organizations instead of the law of state responsibility.⁶⁴¹

Conclusion

The purpose for undertaking this hypothetical case study was twofold. First, to investigate whether a policy of requiring borrowing member states to eliminate capital controls as a condition for obtaining loans from the organization, if it had indeed been

⁶⁴¹ Brownlie, "Responsibility", pp. 359 and 362.

imposed by the IMF, would have amounted to international wrongdoing by the Fund and attracted international responsibility according to the ARIO. But more importantly, the study was conducted for the wider purpose of discovering whether the ARIO had indeed corrected the mischief it was intended to – preventing IOs and their member states from committing international wrongdoing with impunity and providing injured parties with a means of holding both accountable for the wrongful acts of IOs. This study has confirmed that based on the ARIO the IMF would have been responsible for international wrongdoing against some of the IMF's borrowing states if it had engaged in such conduct. The investigation and finding on this first subject was possible because the ARIO codifies the law relating to the substantive law of international responsibility (international duties and rights of IOs and states, violations of these, and remedies for violations) against which the conduct of IOs and their member states can be measured to determine whether their duties to states and IOs have been fulfilled or violated and whether they are responsible for effecting any remedies for international wrongdoing. However, despite the fact that the ARIO provide for these aspects of the law of international responsibility and thus make it possible to establish the responsibility of an IO or its member states, it was concluded as a result of this study that the ARIO does not effectively deter IOs and their member states from international wrongdoing because it does not provide states or IOs injured by IOs with the legal mechanisms for holding them accountable or obtaining reparations from them. This failure of the ARIO is the result of first, certain provisions and interpretations of its provisions by the ILC which shield IOs and their member states from legal consequences, and second, the omission from the ARIO of any procedural law which provides the means of enforcing the rights

of injured parties. The result of both of these aspects of the ARIO is that a finding of international responsibility for an IO is of little or no value to injured parties because the remedies the ARIO prescribe are in fact unenforceable. Consequently, instead of making IOs accountable for violating their international obligations to states and IOs, the ARIO has preserved and perpetuated the status quo ante of IOs as the “spoiled-child” amongst subjects of law by providing them with lacunae through which they can escape from legal consequences for wrongdoing that other subjects of law are not generally privileged to have.⁶⁴²

The first example of this preferential treatment accorded by the ILC to IOs is the failure to either establish a separate judicial forum which is not restricted by the judicial immunities that most IOs possess and which would therefore have jurisdiction over IOs, or to expand the competence of the ICJ so that it has the same jurisdiction over IOs as it does over states.⁶⁴³ The obvious consequence of this omission on the part of the ILC is that there is no court invested with the authority to enforce the ARIO and to issue binding judgments related to IOs rather than just the non-binding advisory opinions which the ICJ issues and thus parties who are victims of international wrongdoing perpetrated by an IO have no access to justice. In fact, the impotence of courts, both national and international, against IOs was boldly pointed out by the IMF to the ILC:

“[I]n considering what is intended by “responsibility” one issue to be addressed is how would an international organization be held responsible for a finding by a national court or international tribunal

⁶⁴² Wilde, p. 408 regarding the lack of remedies against IOs.

⁶⁴³ This is said to be preferential treatment accorded to IOs by the ILC since in comparison to when the ASR was drafted by the Commission, the ICJ was already in place as a judicial forum which could enforce the ASR and issue binding decisions against states responsible for international wrongdoing.

that it had failed to fulfil the mandate for which it was established (which the court considered a breach of obligation and an internationally wrongful act of the organization)? Could the court order the organization to cease conducting its business? Could the court award damages that would financially bankrupt the organization? Could the failure of an organization to achieve its stated goals result in court orders that would cause its member states to lose the capital that they contributed or guaranteed – if so, to whom?”⁶⁴⁴

The IMF asks the question “[...] how would an international organization be held responsible for a finding by a national court or international tribunal that it had failed to fulfil the mandate for which it was established?”, but the correct question is - how would an international organization be held responsible if it had failed to fulfil the mandate for which it was established without a court that has jurisdiction over IOs? Obviously, without a tribunal that has jurisdiction over IOs and which could therefore administer the ARIO, the law of responsibility cannot be applied to IOs and no restitution or reparation can be realized by injured parties⁶⁴⁵ Clearly, the ILC knew this but chose to ignore the need for some judicial forum before which various legal persons have standing to bring actions against IOs and which has jurisdiction to

⁶⁴⁴ Ibid., at p. 25.

⁶⁴⁵ Wouters, Jan. et al, eds. *Accountability for Human Rights Violations by International Organizations* (Oxford: Intersentia, 2010) pp. 11-14, regarding the obstacles to IO accountability and the need to create mechanisms to ensure accountability; Karel Wellens, *Remedies against International Organizations* (Cambridge: Cambridge University Press, 2002) in Chapter 20, entitled “An Inevitable Role for the International Court of Justice” contends that the removal of the limitation on the competence of the ICJ found in Article 34 (1) of the Court’s statute and overcoming the jurisdictional immunities within domestic courts are essential to “establishing a comprehensive and adequate accountability regime” for IOs.(p.225).

undertake legal review of the conduct of IOs in a way that satisfies “the most basic requirements of fairness, independence, and due process in each case”.⁶⁴⁶ Until such a tribunal is in place, the ARIO will remain nothing more than a theory of responsibility for IOs that is unenforceable.⁶⁴⁷

The next example of how IOs have been protected from the consequences for wrongdoing and are treated differently to other subjects of law relates to the rules of IOs. As explained in chapter eleven, the importance of these rules in the context of obligations is that they imbue IOs with immunities from judicial jurisdiction, seizure of revenue and assets, and review of their archival documents. Thus, if a responsible IO is allowed to rely on its rules to avoid its obligations, and its rules invest it with these particular immunities, it can invoke those rules to escape fulfilling its obligations to an injured party. The protection that these immunities provide to IOs should not be underestimated. In fact, so effective is this defence of immunities that IOs possess that because of them the IMF has boasted that: “[T]he IMF has never had to take a position in court in response to an alleged violation by it of international law.”⁶⁴⁸

Article 32 of the ASR provides that a responsible state may not rely on its internal law as a justification for not complying with its obligations. In its commentary, the ILC states that Article 32, along with Article 3 of the ASR, which provides that the characterization of an internationally wrongful act of a state is governed by international

⁶⁴⁶ Matthew Parish, “An Essay on the Accountability of International Organizations” (2010) 7 Int’l Org. L. Rev. 277 at 341.

⁶⁴⁷ Hugh Thirlway, “Responsibility of International Organizations: What Role for the International Court of Justice?” in Maurizio Ragazzi, ed., *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, (Leiden: Martinus Nijhoff, 2013) p. 351; Wilde, pp. 408-409.

⁶⁴⁸ UN Doc. A/CN.4/545 (2004) supra at note 521, p. 34.

law and is not affected by the characterization of the same act as lawful under a state's internal law -

“[...] give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.”⁶⁴⁹

Still in the context of Article 32, the ILC then goes on to state unequivocally in its commentary:

“[...], international law does not recognize that the obligations of a responsible State [...] are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.”⁶⁵⁰

However, when Article 32 of the ASR was transposed to the ARIO, albeit with the word “rules” in place of “internal law”, an important change was made to its interpretation and application which was instrumental in IOs being permitted to continue to act with impunity as they had apparently done in the *Westland Helicopter* and *Tin Council* cases. As shown in chapter 9, while Article 32 (1) of the ARIO initially appears to enforce for IOs the principle that the internal rules or laws of an international legal personality cannot be used to avoid an international obligation to make reparation to an injured party, the addition to it of Article 32 (2) (which has no equivalent in the ASR) and the ILC's interpretation of it as expressed in the commentary to the article, effectively allow IOs to violate this principle because they inform that the rules of an IO can be applied to

⁶⁴⁹ ASR with Commentaries, Article 32, p. 94, para. 1.

⁶⁵⁰ Ibid., para. 3.

its member states to restrict or prevent it from making reparation to them. Thus Article 32 of the ARIO, unlike Article 32 of the ASR, enables responsible IOs, unlike responsible states, to rely on their internal rules (and thus their immunities) to avoid their obligations that arise under the ARIO, particularly if these are owed to member states, and potentially renders the ARIO unenforceable.

The ARIO also enables IOs to use their internal rules to avoid their obligations to injured parties under the guise of *lex specialis*.⁶⁵¹ Whereas Article 55 of the ASR states that the ASR do not apply to the extent that internationally wrongful conduct or responsibility are governed by special rules of international law, Article 64 of the ARIO makes a similar statement but then goes on to say that such special rules of international law may be contained in the rules of the IO. Thus, the ARIO is again rendered secondary to the rules of an IO and potentially unenforceable if the rules of an IO contradict the ARIO.

Thirdly, Article 40, which has no equivalent in the ASR because it relates to member states, was added to the ARIO and again makes IOs less accountable than states by giving special weight to the rules of IOs. Whereas by virtue of Article 32 of the ASR responsible states cannot rely on their internal rules as an excuse for not making reparations to an injured party, responsible IOs can do so by virtue of Article 40 of the ARIO. This article provides that an IO shall take all appropriate measures *in accordance with its rules* to ensure that its member states provide it with the means to fulfil its obligations and that member states shall take all appropriate measures *required by the rules of the IO* to ensure that an IO fulfils its obligations. In short, by virtue of Article 40

⁶⁵¹ Kristen. E. Boon, “The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations” in Maurizio Ragazzi, ed., *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, (Leiden: Martinus Nijhoff, 2013) 135. [hereinafter Boon, “Role”].

of the ARIO, if a responsible IO lacks the funds to fulfil its obligations to an injured party, and if the rules of an IO do not require its member states to fund its obligations, then an injured party has no basis in the ARIO for enforcing its rights against the responsible IO.

Hence, even if an IO is found to be responsible for international wrongdoing under the ARIO, by allowing IOs to invoke their rules, and hence their immunities, the ARIO expressly provide loopholes for IOs and their member states through which they can escape the consequences for the wrongdoing that are prescribed by the ARIO. So despite the ARIO, or rather because of the ARIO, the armour that immunities provide to IOs and indirectly to their member states will continue to shield them from accountability and responsibility for wrongdoing and injured parties will have no possibility of obtaining any form of reparation from them. Again, as with the failure to institute a tribunal to enforce the ARIO, the ILC's failure to construct legal mechanisms within the ARIO that would supersede or circumvent the immunities of IOs has reduced the ARIO to nothing more than a lengthy definition of international wrongdoing by IOs and their member states by which it can be determined whether or not they are internationally responsible, but for which they cannot be held accountable.

Finally, IOs and their member states have also been exempted from legal consequences for their international wrongdoing via the ARIO because they (the draft articles) were premised on the separate legal personality of IOs. The theory that this creates a barrier from responsibility for the member states of IOs was embodied in Article 6 of the IIL's 1995 Resolution:

“[...] there is no general rule of international law whereby States are, due solely to their membership, liable concurrently or

subsidiarily, for the obligations of an international organization of which they are members.”⁶⁵²

The ILC expressly endorsed this view in its commentary to Article 40 of the ARIO which deals with the obligation of IOs and their member states to make reparation:

“[...] no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation.”⁶⁵³

As shown in chapter 12, the logical consequence of making this theory foundational to the ARIO is that the financial reparation prescribed by the ARIO is not forthcoming for injured parties since IOs are unlikely to possess the funds needed for making reparation and if member states have no obligation to provide these funds then there is no recourse for injured parties. Article 40 of the ARIO, which initially appears to place an onus on member states to finance the obligations of IOs, on closer inspection does nothing to protect injured parties from the injustice that the theory of separate legal personality of IOs engenders for them as it merely provides that member states should provide the funds needed to finance the obligations of IOs *in accordance with the rules of the IO*. Since member states construct the rules of an IO, why would they create rules that would make them responsible for the obligations of the IO when the reason for acting through the IO in the first place was to shield them from responsibility? Again, even if the conduct of an IO can be identified as wrongful in light of the ARIO this finding is made of little or no value to an injured party by yet another loophole in the ARIO that

⁶⁵² Higgins, “Resolution”.

⁶⁵³ ARIO with Commentaries, Article 40, para. 2, p. 63.

allows a responsible IO to avoid the consequences of wrongdoing and renders the remedies prescribed in the ARIO unenforceable.

The overall consequence of the ILC's failure to make the remedies for international wrongdoing enforceable is that IOs and their member states can continue to engage in international wrongdoing with impunity and consequently the ARIO are inefficacious because they have not corrected this injustice. The reality is that the ARIO have not taken us past the *Westland Helicopter* and *Tin Council* decisions, which is this writer's view wrought injustice for third parties, and the words of Professor Seidl-Hohenveldern remain true: "[..] there seems to be no doubt that an international organization is a 'worse debtor.'".⁶⁵⁴

⁶⁵⁴ Seidl-Hohenveldern, *Corporations*, p. 87.

Appendix I – Matters that Require 85% Majority Vote in the IMF*

Adjustment in quotas, Art. III, Sec. 2 (c)

Allocation and cancellation of special drawing rights, decisions, Art. XVIII, Sec. 2 (a)–(c), 4 (a), (d)

Change in rates or intervals of allocation or cancellation or change in length of a basic period or start of a new basic period, Art. XVIII, Sec. 3, 4 (a), (d)

Compulsory withdrawal of member, Art. XXVI, Sec. 2 (c)

Council, change in number of Associates, Sched. D, par. 1(a)

Council, establishment, Art. XII, Sec. 1

Decisions to engage in certain gold operations or transactions, Art. V, Sec. 12 (b)–(e)

Exchange rates for certain transactions, Art. XIX, Sec. 7 (b)

Increase or decrease in number of Executive Directors to be elected, Art. XII, Sec. 3 (b)

Interpretation of Fund Agreement, overrule of decision of Committee on Interpretation, Art. XXIX (b)

Introduction of par values, Art. IV, Sec. 4

Maintenance of number of elective Executive Directors, Art. XII, Sec. 3 (b)

Margins for spot exchange transactions, adoption, Art. XXVII, Sec. 1(a) (iv); Sched. C, par. 5

Objection to termination of par value, Sched. C, par. 8

Policies on use of Fund's general resources, exclusions of purchases and holdings for purpose of calculating member's reserve tranche, Art. XXX (c) (iii)

Prescription of other holders of special drawing rights, Art. XVII, Sec. 3 (i)

Provision for general exchange arrangements, Art. IV, Sec. 2 (c)

Repurchase, change of periods or adoption of other periods pursuant to special policy on use of general resources, Art. V, Sec. 7 (c), (d)

Temporary suspension of certain provisions, Art. XXVII, Sec. 1 (a), (b)

Temporary suspension of operations and transactions in special drawing rights, Art. XXIII, Sec. 1

Transfer of part of excess from sale of gold to Investment Account, Art. V, Sec. 12 (g)

Use of assets of Special Disbursement Account for operations and transactions not authorized by other provisions and for distribution to developing members, Art. V, Sec. 12 (f) (ii), (iii)

Valuation of special drawing right, change in principle or in application of principle in effect, Art. XV, Sec. 2

Adjustment of votes, waiver of conditions and ineligibility to use Fund's general resources, Art. V, Sec. 4, 5; Art. XII, Sec. 5 (b)

Alternate Governor, Art. XII, Sec. 2 (a)

Amendment of the Agreement, Art. XXVIII (a)

Basic votes, Art. XII, Sec. 5 (a) (i); Sched. L, par. 2

Board of Governors, matters pertaining exclusively to Special Drawing Rights Department, Art. XXI (a) (i)

Board of Governors, meetings called by Executive Board, Art. XII, Sec. 2 (c)

Cast by Councillor for member whose votes cannot be cast by an Executive Director, Sched. D, par. 3 (b), 5 (b)

Council, matters pertaining exclusively to Special Drawing Rights Department, Sched. D, par. 5 (b)

Decisions, General Department, Special Drawing Rights Department, Art. XXI (a) (iii)

Election of Executive Director to fill vacancy, Art. XII, Sec. 3 (f)

Election of Executive Directors, changes in proportion of votes required to elect, Art. XII, Sec. 3 (d); Sched. E

Election of Executive Directors, procedures, Sched. E

Executive Board, matters relating exclusively to Special Drawing Rights Department, Art. XXI (a) (ii)

Majority of total voting power of Executive Board for termination of suspension of operation of certain provisions, Art. XXVII, Sec. 1 (c)

Majority of votes cast for Fund decisions unless otherwise provided for, Art. XII, Sec. 5 (c)

Number of votes, appointed and elected Executive Directors, Art. XII, Sec. 3 (i)

Number of votes, Councillors, Sched. D, par. 3 (b), 5 (b)

Number of votes, Governors, Art. XII, Sec. 2 (e)

Number of votes, members, Art. XII, Sec. 5

Quorum for meetings of Board of Governors, Art. XII, Sec. 2 (d)

Quorum for meetings of Executive Board, Art. XII, Sec. 3 (h)

Quota-based votes, Art. XII, Sec. 5 (a) (ii)

Special majorities; see 70 percent majority requirement; 85 percent majority requirement; Majority of total voting power . . . , *above*

Suspension of voting rights, Art. XII, Sec. 3 (i) (v); Art. XXVI, Sec. 2 (b); Sched. D, par. 5 (f); Sched. L

Weighted voting, Art. XII, Sec. 2 (e), 3 (i), 5

Without meeting, Council, Sched. D, par. 5 (c)

Without meeting, Governors, Art. XII, Sec. 2 (f); Sched. D, par. 5 (a)

Waiver of conditions governing use of general resources, Art. V, Sec. 4

Withdrawal from membership; see Members

* IMF Articles of Agreement, Index, available at: <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf> (items relating to obtaining and repaying IMF loans in bold italics.)

Appendix II – Matters that Require 70% Majority Vote in the IMF*

Authorization to agree on exchange rates for certain transactions, Art. XIX, Sec.7(b)

Charges, determination of rates, Art. V, Sec. 8 (a), (b), (d)

Distribution from general reserve, Art. XII, Sec. 6 (d)

Imposition of charges on failure to repurchase, Art. V, Sec. 8 (c), (d)

Increase in percentage of quota as level for remuneration, Art. V, Sec. 9 (c)

Investment Account, adoption of rules and regulations for administration, Art. XII, Sec. 6 (f) (vi)

Investment Account, adoption of rules and regulations for investment of currencies, Art. XII, Sec. 6 (f) (iii)

Investment Account, reduction of amount or termination, Art. XII, Sec. 6 (f) (vi)

Postponement of repurchase, Art. V, Sec. 7 (g)

Prescription of medium of payment for additional subscription, Art. III, Sec. 3 (a), (d)

Prescription of operations between participants, Art. XIX, Sec. 2 (c)

Publication of report on member's monetary conditions and developments, Art. XII, Sec. 8

Rate of interest and charges on special drawing rights, Art. XX, Sec. 3

Reconstitution rules, adoption, modification, or abrogation, Art. XIX, Sec. 6 (b)

Remuneration rate, determination, Art. V, Sec. 9 (a)

Repurchase of Fund holdings not acquired as result of purchases, adoption of policies, Art. V, Sec. 7 (e)

Special Disbursement Account, adoption of rules and regulations for investment of currencies, Art. V, Sec. 12 (h)

Special Disbursement Account, rules and regulations for administration and for termination prior to liquidation of Fund, Art. V, Sec. 12 (j)

Suspension of voting rights, Art. XXVI, Sec. 2 (b)

Termination of suspension of voting rights, Art. XXVI, Sec. 2 (b)

Transfer of currencies in General Resources Account to Investment Account, Art. XII, Sec. 6 (f) (ii)

Transfers of assets from Special Disbursement Account to General Resources Account for immediate use, Art. V, Sec. 12 (f) (i)

Uniform proportionate changes in par values, Sched. C, par. 11

Valuation of special drawing rights, determination of method, Art. XV, Sec. 2⁶⁵⁵

*IMF Articles of Agreement, Index, available at: <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf> (items relating to obtaining and repaying IMF loans in bold italics)

⁶⁵⁵ IMF Articles of Agreement, Index, p. 121, available at: <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>

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Telephone Interview

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