Reparation for Injuries Suffered in the Service of the United Nations, advisory opinion, [1949] ICJ Reports 174

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Relevance of the case

The fact that this collection of case notes starts with the *Reparation* case will not come as a surprise to most of our readers. Ever since the International Court of Justice delivered its opinion in 1949, the case featured in most introductory lectures on the law of international organizations and in the leading textbooks. Indeed, the relevance of the case cannot be underestimated as it deals with the recognition of international organizations (in this particular case the United Nations) as entities enjoying a legal position in the international legal order in distinction from their Member States. The question of the legal status of international organizations did recur in later opinions and judgments (see the other cases reviewed in this section as well as for instance *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion, [1980] ICJ Reports 73), but the ground rules were clearly laid down in *'Reparation'*.

Despite the fact that questions on the legal status had previously been addressed (for instance in relation to the League of Nations (Cf. J.F. Williams, 'The Status of the League of Nations in International Law', *Chapters on Current International Law and the League of Nations*, London, 1929), the mainstream view on subjects of international law was that these could only be states. So, not just the question of legal personality, but also the notion of international organizations being more than a structure "for harmonizing the actions of nations" can be seen as having influenced the further development of the law of international organizations. And, finally, the *Reparation* case has become known for its clear acceptance of the existence of *implied powers*.

I. Facts of the case

Count Folke Bernadotte, the UN mediator officially charged with bringing peace to the Palestinian region at the time of the creation of the state of Israel was shot by Israeli militants belonging to a Zionist group on 17 September 1948 when his small convoy was stopped. The chief UN observer Colonel Andre Serot was also wounded and both men were dead on arrival at the hospital. Bernadotte was a Swedish aristocrat and diplomat who acted as a United Nations Security Council mediator in the Arab-Israeli conflict of 1947-1948. Ironically, Bernadotte was known for his negotiation of the release of about 31,000 prisoners from German concentration camps during World War II, including 450 Danish Jews from Theresienstadt released on 14 April 1945.

II. The legal question

In Resolution 258 (III) of 3 December 1948 the UN General Assembly submitted the following legal questions to the ICJ for an advisory opinion:

"I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the

responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?

II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

III. Excerpts of the judicial decision

When the Organization brings a claim against one of its Members, this claim will be presented in the same manner, and regulated by the same procedure [as in the case of States].

But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.

The Charter has not been content to make the Organization created by it merely a centre "for harmonizing the actions of nations in the attainment of these common ends" (Article 1, para. 3). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members. Practice – in particular the conclusion of conventions to which the Organization is a party – has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its Members it employs political means. The 'Convention on the Privileges and Immunities of the United Nations' of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant

duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication. as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, [p183] 1926 (Series B., No. 13, p. 18), and must be applied to the United Nations.

Having regard to the foregoing considerations, and to the undeniable right of the Organization to demand that its Members shall fulfil the obligations entered into by them in the interest of the good working of the Organization, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him.

Accordingly the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.

[On question II] In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim.

Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.

IV. Commentary

Legal personality has become a key – and much debated – issue in the law of international organizations. This should not come as a surprise as the popular narrative presents the possession of legal personality as a necessary requirement for international organizations to act in a legal sense. Also in the classic case under review here, the Court basically argued that in order for it to be able to assess the possibility of bringing a claim, it should first establish whether the Organization has legal personality. At the same time, these days international personality is seen as a characteristic of an international organization (see also the WHO-Egypt case mentioned above). In that narrative it only makes sense to talk about an international organization when it occupies a distinctive legal position from its founders; and it is this distinct legal position that is often equated with possessing legal personality (or, what amounts to the same thing: being a legal person). It is the latter narrative that seems to be dominant these days and the 'autonomy' of international organizations (and the related constitutional questions) have started to spark new debates (Cf. Colllins and White, *International Organizations and the Idea of Autonomy*, Routledge, 2011).

In fact, the notion of international institutions not being merely centres "for harmonizing the actions of nations" (in the words of the Court) seems to be at the root of most current debates on postnational rule-making, global administrative law, the exercise of public authority, informal international lawmaking and global constitutionalism. The (in)famous *volonté distincte* of international organizations (well-known as the idea by Schermers and Blokker that international organizations have "a will of their own"), triggered debates on how to control these creations (cf. the reference to Mary Shelley in Klabbers' *An Introduction to International Institutional Law*, Cambridge, 2009). This reveals that legal personality is not just about the capacity to bring claims or to engage in other legal actions; it is part of the defining nature of international organizations.

In 1949 the International Court of Justice well understood the importance of the concept of legal personality. While the question arose out of a practical problem (is the UN legally competent to bring an international claim), the legal-philosophical dimension was clear from the outset. The Court no doubt knew Kelsen's argument that, if we talk about rights and duties, "[t]here must exist something that 'has' the duty or the right." (Kelsen, Russell & Russell, 1945, at 93). The Court, at least at first, thus enquires "whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect." It directly relates legal personality to the subjective will of the creators of the UN to endow the organization with certain rights, duties and functions and even seems to equate this to its separate legal status ("In other words, does the Organization possess international personality?"). Since legal personality was not explicitly mentioned by the founders of the UN, it is derived from the (perceived) objectives ("it could not carry out the intentions of its founders if it was devoid of international personality") and even from subsequent practice ("It is difficult to see how such a [concluded] convention could operate except upon the international plane and as between parties possessing international personality"). The idea of a legal personality as a threshold (the organization cannot act legally when it is devoid of legal personality, so we first have to establish or construct it) has been contested ever since (see for instance Klabbers, 'The Concept of Legal Personality', *Ius*

Gentium, 2005, 35-66). The main point of criticism seems to be that international organizations *do* act and that these actions can or should have legal consequences irrespective of whether or not the legal personality problem has been solved.

In a way, the approach of the ICJ in the *Reparation* case (let's look at what the organization is supposed to do and what it is actually doing and derive legal personality from that) has become quite common in legal doctrinal approaches to the question of legal personality. A similar approach was used by the European Court of Justice in the *ERTA* case (Case 22/70), and also by scholars attempting to define the international legal status of other international organizations, such as the European Union (cf. Wessel, 'The International Legal Status of the European Union', *EFAR*, 2007, 109-129).

In legal scholarship the tendency to construct or prove legal personality on the basis of the (implied) will of the founders, met with objections from those with a preference for objective facts. Yet, it has been noted that both approaches to the legal status of international organizations are flawed and difficult to work with in practice (cf. Gazzini, 'Personality of International Organizations' in Klabbers and Wallendahl (Eds.), *Research Handbook on the Law of International Organization*, Edward Elgar, 2011, 33-55). The intention of the founders may not only be difficult to establish, but it may also have changed since the creation of the organizations. In the case of the UN, any reference in the Charter was even deliberately omitted as it was considered superfluous. It was held that the international personality of the UN "will be determined implicitly from the provisions of the Charter taken as a whole." (13 U.N.C.I.O. Doc. 803, IV/2/A/7 (1945), at 817). Taking "the objective fact of its existence" (Seyersted, 'International personality of Intergovernmental Organizations. Do Their Capacities Really Depend Upon Their Constitutions?, *Indian Journal of International Law*, 1964 pp. 1-121) as proof of international legal personality equally meets with some problems. After all, if legal personality implicitly follows the establishment of a legal entity, how do we deal with organizations in which the 'distinct will of its own' is virtually absent because of a largely intergovernmental set-up? And, can we really assume legal personality when the only thing states meant to do was to create a light international framework to facilitate their cooperation (and would this not violate the fundamental rule of international law that states are in principle free to decide what they wish to agree on)?

In practice – and despite their flaws – both theoretical approaches play a role in the establishment of the legal status of an international organization and a more pragmatic approach seems to have become dominant, phrased by Klabbers as: "as soon as an organization performs an act which can only be explained on the basis of international legal personality, such an organization will be presumed to be in possession of international legal personality." (Klabbers, 'Presumptive Personality: the European Union in International Law', in M. Koskenniemi (Ed.), *International Law Aspects of the European Union*, The Hague: Kluwer Law International, 1998, pp. 231-253).

All in all, the present author would maintain that the concept of legal personality is first and foremost relevant to settle the separate status of the international entity in the international legal order. And this is indeed what the ICJ started with. More in general, Bekker once defined legal personality as "the concrete exercise of, or at least the potential ability to exercise, certain rights and the fulfilment of certain obligations" (Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, Dordrecht: Martinus Nijhoff Publishers, 1994 at 53). Earlier, I have argued that it is in particular about the *potential* ability rather than about the concrete exercise of powers (Wessel, 'Revisiting the Legal Status of the European Union', *EFAR*, 1999, 507-537). The distinction between *legal personality* and *legal capacity* is illuminating in this respect: the first concerns a *quality*, the second is an *asset*. Where international personality thus means not much more than being a subject of public international law, capacity is

concerned with what the entity is potentially entitled to do (and where *implied powers* may come in). The rather formal approach is apparent in the work of a number of other authors as well who have stressed that "the concept of personality does not say anything about the qualities of the person" and that "it is a mistake to jump to the conclusion that an organization has personality and then to deduce specific capacities from an *a priori* conception of the concomitants of personality" (Detter, *Law-Making by International Organizations*, Stockholm: Norstedt & Söners Förlag, 1965, at 21). It follows from this approach that there is not much sense in speaking of a 'partial legal personality' of international organisations. Neither can we say that a particular international entity 'to some extent' possesses legal personality. The possession of legal personality ('being a legal person') is a binary phenomenon: you either have it or you do not. Competences, on the other hand, seem to depend on what was attributed to the organization, although a case could be made for the existence of competences inherent to the enjoyment of legal personality, such as perhaps the conclusion of certain international agreements or (at least in the eyes of the ICJ) bringing an international claim.

The idea that international organizations by definition are legal persons (and that this in fact would distinguish them from less-institutionalised phenomena such as international conferences) seems to have become more accepted. Not only can this notion be derived from case law of the ICJ (see the *WHO-Egypt* case, *supra*: at 90: "international Organisations are subjects of international law and, as such, are bound by any obligations incumbent upon the under general rules of international law"), but is has also become part of the definition of an international organization in the ILC's 2011 Articles on the Responsibility of International Organizations as: "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality".

Indeed, and returning to the *Reparation* case, this may also explain the link between legal personality and the other notion contributing to the fame of the case: *implied powers.* The Court argued that: "Whereas a State possesses the totality of rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified *or implied* in its constituent documents and developed in practice". As Rama-Montaldo held, "It is very important to note the objective manner in which the Court proceeded in determining the personality of the organization. The personality could not be implied from the functions; its foundation was not a by-product of functional necessity but a logical relationship between certain presuppositions and certain legal effects." (Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', *British Yearbook of International Law 1970*, 1971, pp. 111-155 at 126).

This latter observation on the objective existence of international legal personality seems to be in line with some views on the question of a need for recognition by third states. According to the Court, "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality". While the Court relates the objectivity to an acceptance by 'the vast majority', a (later) judge held that it would seem that recognition by other international actors is never a prerequisite for the possession of international legal personality: "If the attributes are there, personality exists. It is not a matter of recognition. It is a matter of objective reality". (Higgins, *Problems & Process: International Law and How We Use It*, Clarendon Press, 1994, at 48). The practice of dealing with third states may be the proof of an (implicit) attribution of international competences by the member states, rather than the source of legal personality. On the other hand, the practical value of capacities on the international plane can only be established in case third states are

willing to enter into a legal relation with the international entity at stake – underling the clear political dimension of all this.

The conclusion may be that – apart from cases where the separate legal personality of organs of international organizations is being discussed – the question of legal personality has perhaps come quite close to the question of whether an international entity could be regarded an international organization. In fact, in the *Reparation* case, the International Court of Justice seemed to have followed the same line of reasoning. It based its conclusions on a number of criteria, which were regrouped by Amerasinghe (*Principles of the Institutional Law of International Organizations*, Cambridge, 2006, at 83) in a helpful way:

1 The entity must be an association of states or international organisations or both (a) with lawful objects and (b) with one or more organs which are only subject to the authority of the participants in those organs acting jointly. Brownlie (*Principles of Public International Law*, Oxford, 1990 at 681) pointed to the additional requirement that the association needs to be 'permanent'.

2 There must exist a distinction between the organisation and its members in respect of legal rights, duties, power and liabilities, etc. on the international plane as contrasted with the municipal or transnational plane, it being clear that the organisation was 'intended' to have such rights, duties, power and liabilities.

Indeed, 65 years after *Reparation for Injuries*, not only the question of the international legal personality of the UN, but of international organizations in general seems outdated. At the same time, the acceptance of legal personality as a key element of the separate legal position of an international organization, both *vis-à-vis* its own members as well as towards non-members and individuals has never been more important, as for instance reflected in debates on the accountability and responsibility of international organizations, on the legislative functions of international organizations and on their role in global governance in general.