

HOW THE LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS
AFFECTS THE UNITY OF INTERNATIONAL LAW: ON MUTUAL RELATIONS
AMONGST THEIR RESPECTIVE LEGAL ORDERS

「(訳) 国際組織の国際法人格が国際法秩序の統一性に与える影響：
法秩序の間の相互関係について」

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ABSTRACT AND EXECUTIVE SUMMARY

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ABSTRACT

International organizations being subjects of international law implies in itself the coexistence of several international legal orders. While scholarly debates mainly focus on whether organizations should be acknowledged as being subjects of international law, this study takes it as a starting point. Based on an examination of customary law as reflected in the jurisprudence of international courts and on the practice of an extended panel of organizations, it explores consequences of a legal personality of international organizations over the purported unity of the international legal order.

First, the study analyses how each international organization appear in itself as an autonomous legal order operating according to a functional legality. While the former property—autonomy—is found as basing subjectivity of organizations amid international law, the latter—functionalism—is found as defining how this subjectivity operates. Therefrom, it is observed that organizations being not defined by accurate criteria as a class of subjects of international law and their operation inherently contradicting fundamental principles of international law prevents them from being subjects of international law on the same grounds as States. To solve this contradiction, hypotheses of distinct international legal orders specific to legal relations entertain by organizations are explored and tested. It is concluded that acknowledgment of international personality or international organizations in positive law gives rise to several international legal orders that complement that of relations among States.

The study contributes in the long-standing debate over unity of international law. Instead of following a norm-oriented approach to the international legal order, following a subject-based approach allows it to identify another type of fragmentation that results from introducing within the international legal order new subjects—international organizations—that are fundamentally alien to it. It is suggested that these new subjects and legal relations they entertain ought to be considered as falling under a legal framework that is distinct, and fundamental principles of which drastically differ, from the States-based international legal order.

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要約

本来的に、国際組織が国際法主体であるということは、いくつかの国際法秩序が共存していることを示唆する。学界での議論は一般的に国際組織が国際法人格を有すると認めるべきかどうかを検討するが、本研究は国際組織の国際法人格という概念を掘り下げて議論を深める。国際裁判所の判例及び様々な国際組織における委員会の慣行に反映されている国際慣習法の検討を基に、本研究は国際組織の国際法人格がいわゆる国際法秩序の統一性に与える影響を検討する。

まず、どのようにして個々の国際組織を、「機能的な」合法性に基づく「自律的な」法秩序と見ることができるのかを分析する。後者の自律性という特徴は国際法において国際組織の主体性を基礎づけるものである一方で、前者の機能主義という特徴はこの主体性がどのように作用するのかを決定するものである。国際組織が国際法主体の一類型として明確な基準によって定義されていないことから、また、その活動が本来的に国際法の基本原則に矛盾するということから、国家が国際法主体と認められる根拠と同じ根拠に依拠して国際組織の国際法主体性を認めることができないのだと考えられる。この矛盾を解決するために、国際組織が関与する法的関係に特有の国際法秩序が存在するという仮説を検討する。この検討の結果、実定法における国際組織の国際法人格を認めることは、国家間の関係を補足するいくつかの国際法秩序を認めることになると結論づける。

本研究は国際法の統一性をめぐる議論に貢献する。法秩序の概念について、規範的なアプローチではなく、主体中心的なアプローチを採用することによって、これまで議論されてこなかった種類の国際法の断片化として、国際法秩序に国際組織という新しい法主体を認める結果生じる断片化を見出すことができる。この新しい法主体とそれに伴う法的関係は、国家中心の国際法秩序から区別される固有の法的枠組みの中で、そして根本的に異なる基本原則の中で理解すべきだということが明らかになる。

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EXECUTIVE SUMMARY

This study intends to examine the nowadays widely acknowledged international personality of international organizations with a view to expounding characteristics of such a personality and evaluating its impact on international law. Unlike a number of works on this issue, this study takes organizations being subject of international law not as a goal but as a starting point. In so doing, it departs from both pseudo-federalist theories of international organizations and the old fashioned conception of these as being primarily treaties and instead follows the most recent approach to the field that considers organizations as being 'ordinary' subject of international law, which thus interact with States from a position that is neither above nor below States but on a seemingly equal footing.

A first concern of this study is to provide the reader with a consistent approach to international organizations that does not stem from a given theory but inferred from positive law, which is mostly manifested, and dispersed, in the case law of international courts. Second, the study confronts the view that there be a single international legal order with the emergence of international organizations as a new class of subjects of international law that radically differs from other subjects of this legal order. It does so by relying on a definition of the concept of legal order, supplemented by criteria for identification, that functions herein as a test.

Accordingly, the first part of the study ascertains inherent proper features of international organizations considered as legal orders, assuming that whereas legal personality of entities flow from their being legal orders understood as a manifestation of autonomy, then characters of their legal personality are directly affected by specifics to their functioning as legal orders. In so doing, the study first examines main objections to autonomy of organizations, which are their supposed dependence to 1) their constituent instruments, supposedly treaties, and 2) their member States. Then, the study investigates the intrinsic functioning of organizations considered as legal orders and focuses mostly on the functional paradigm that prevails therein.

Having ascertained its object and expounded its proper features, the study thence investigates in a second part how acknowledging international organizations as a class of subjects of international law contrasts the assumption that there be but a single international legal order. Two antinomies that results from combining the two aforementioned premises are successively identified and analyzed: 1) the lack of positive criteria of 'organization-hood', and 2) organizations arguably not being subjected to most

fundamental and general rules of international law. This leads to a contradicting statement, the terms of which are: 1) international organizations are subjects of international law, and 2) international organizations are seemingly not subjected to norms of the international legal order. A third part then attempts to dissolve these antinomies by postulating that, instead of a single international legal order, there be several of those that each relate to different kinds of legal relations: 1) inter-States relations, 2) inter-organizations relations, and 3) relations between organizations and States (hereinafter styled as 'mixed relations'). While the first of these international legal orders does not concern the study, the two other legal orders so postulated are then tested in their existence and nature.

PART ONE - PROLEGOMENA: INTERNATIONAL ORGANIZATIONS AS AUTONOMOUS LEGAL ORDERS

Following the view adopted in the study that, if international personality of organizations flows from them being legal orders, then attributes of their personality are directly connected to their specifics when considered as legal orders, this part deals with ascertaining international organizations as being specific legal orders *per se* and defining their proper features. This is done by strongly relying on customary rules and principles identified by international courts, including the PCIJ and ICJ case law, certain arbitral sentences, and cases law of administrative tribunals (namely the UN Administrative Tribunal, the ILO Administrative Tribunal, and the World Bank Administrative Tribunal). Since it is usually admitted that a legal order stems from two features, which are 'autonomy' and 'unity', this part examines if legal orders of organizations possess these and how they do so.

In the first and second chapters, organizations are assessed as autonomous legal orders, by investigating two aspects that are usually problematic: 1) the relation of organizations with their constitutive instrument, often claimed to be a treaty, and 2) their relation with their member States. In the third chapter, the study expounds the functional paradigm that seemingly prevails in proper legal orders of international organizations and its functioning.

II. Autonomy from Founding Treaties

One of the criteria for identifying legal orders is that autonomy is required; hence, if

organizations are to be assessed as being inherently legal orders, they should show autonomy. Since one element on which organizations dependence is often stated by authors is their so-called founding treaties, autonomy needs first to be ascertained in this regard.

The relation between organizations and their founding instrument is first examined from a formal perspective. It is found that such treaties are not binding over organizations, either on the plane of international law or within their proper legal orders, since there are no grounds allowing to assess such binding character. In addition, cases of organizations created without any formal instrument support the view that a formal treaty is not an element on which an organization is dependent. From a material standpoint autonomy of proper legal orders of organizations from their founding treaties is reflected by the development of a customary law therein that may differ from the provisions of their founding treaties. This view is also supported by specific modalities for interpretation and validity of norms of international organizations.

Hence, the "founding treaty" does not have any legal value *per se* within the legal order of an organization. And yet the substantial content of such treaties is given, as a whole or partially, a constitutional value therein. The treaty—formal instrument—thus appears to be an indirect source of the proper law of an organization that acquire its normative value through its enforcement by the organs concerned. Although its provisions may—or may not—be enforced within the proper legal order of the organization to which it is related, this enforcement is conditioned by the domestic interpretation and practice of the organization and its organs. The material content of the "founding treaty" thus receives normative validity within the proper legal order of an organization, neither as a treaty nor as being a norm such as a constitution itself, but through repeated enforcement (or not) of each of its provisions, which means that such process partakes of customary law.

III. Autonomy From Member States

Another element on which dependence of organizations is often asserted in the scholarship is their member States, in particular the contradiction between the autonomy conferred upon organizations and their dependence to their member States. This study finds that, although organizations are factually dependent on their member States, such is not the case from a legal perspective. Whereas there is a contradiction, it is that which opposes factual and legal realities and is

induced by the fiction of international organizations being corporate entities endowed with a separate international personality; this fiction nevertheless turns real when supported by a legal construction aiming to ensure independence of organizations.

Autonomy of organizations and their legal orders from their member States is first characterized by recognition in law of proper interests of each organization that are distinct from those of their member States, for existence of interests is the basis of any subsequent legal capacity. These proper interests are given a special protection that is realized through statutory independence, supplemented by immunities, of organizations, their organs and their agents. This statutory independence of organizations plainly shows their autonomy toward members States, as it implies that performance of the powers resulting from their legal capacity is free from external interference and benefits from a certain amount of discretion.

Whereas international organizations are endowed with independence and acting on behalf of interests that are distinct from the interests of their member States, it matters to investigate how their internal structures operate, as it affects the performance of their powers. This internal structure is characterized by a proper and distinct organization, which lies in both organic and normative hierarchy governed through an autonomous power of self-organization. International organizations, being governed in independence on the grounds of their proper authority and in the behalf of their proper interests, therefore qualify as self-governing communities susceptible to give rise to a separate and distinct legal order on their own.

IV. The Concept of Function as Substratum of Unity

This chapter examines how the second character of a legal order, unity, is manifested in proper legal orders of organizations. In this regard, the concept of function is found as being the basis of such unity. This chapter thence examines how the function of each organizations acts as the thread that ties together the components of its proper legal order. Additionally, contradictions and issues affecting this functional paradigm are considered and analyzed.

Although proper legal orders of international organizations are made of various components, mainly organs, officials and agents that are endowed with autonomy and sometimes perform their tasks in isolation, they are connected and incorporated within the same unity. The support of this unity lies in

the function of each organization, by the token of which all their components are conceived and defined; it is therefore the prism for self-representation of an organization. Conversely, it implies that legal orders of organizations are inherently defined by their functions, which thus allows to identify the elements that belong thereto.

While the function of organizations is the basis of their unity, it suffers from some contradictions, which show in its implementation. First is the contradiction between the view that organizations be 'attributed' their functions and the resulting powers in order to promote interests that are not theirs but those of their member States, and the positive legal framework described in the previous chapter that construes organizations acting independently on behalf of their proper interests. A second contradiction lies in the opposition between describing the function of organizations as a principle of legality within their proper law and its actual implementation, wherein function seems to generate no obligations for organizations considered as corporate entities. In spite of its contradictions, the functional paradigm nevertheless remains the framework amid which proper legal orders of organizations operate.

PART TWO - ANTINOMIES:

INTERNATIONAL ORGANIZATIONS AS SUBJECTS OF INTERNATIONAL LAW

This second part examines international organizations as a class of subjects of international law by taking into account their intrinsic characteristics when considered as legal orders exposed in the first part of the study. There are, in particular, two main antinomies that result from acknowledging an international personality of organizations while assuming that there is but a single international legal order, which leads to the contradicting conclusion that organizations are simultaneously 'subjects of international law' because so says the law, but on the other hand these are 'non-subjects of international law' because they neither behave as such nor show usual attributes of international personality.

It is concluded that, either organizations are no subjects of international law, which is the case if assumed that there is but a single international legal order, or they are subjects of an international law that fundamentally differs from the one prevailing in relations among states, which means that there are not a single but several international legal orders.

V. First Antinomy: The Lack of a Positive Definition of International Organizations in International Law

This chapter expounds the first antinomy pertaining to the international personality of international organizations, which lies in their receiving no definition as a class of subjects. A significant feature that results therefrom is that, while the three traditional criteria for defining subjects of international law (territory, people, and sovereignty) clearly not apply to organizations, there are no alternative criteria for organization-hood, and this makes organizations the only class of subjects of international law that cannot, by nature, be practically identified. Yet, organizations being subjects of international law is supported by the development of a regime in their regard in the case law of the ICJ and in the work of the ILC.

The rules progressively developed in connection to international organizations in these two fora tend to recognize, although in an evolving fashion, organizations as legal units, hence demonstrating their international personality is not a theoretical issue but is an actual feature implemented in specific mechanisms. This mainly arises in two ways: first, by attributing acts and behaviors of organizations, their organs, and their agents, to organizations themselves; and further by preventing that these acts and behaviors be attributed to their member States. However, in spite of the development of such a *regime* intended to framing international organizations, this *regime* lacks a direct connection with its object by not defining international organizations with clear and sufficient criteria.

Investigating positive international law and practice, there are fewer elements to be found than in the scholarship. A lone criterion may be found in an intergovernmental basis of organization-hood, provided that it is understood broadly. Although such a criterion may be ascertained as arising from a customary rule of international law, it remains insufficient for practically identifying an organization. Additionally, the hypothesis of a psychological criterion, stemming from the proper will of a candidate to organization-hood to achieve the status as an international organization, is also considered; yet it is not found to be based on a positive rule of international law. It is thus concluded that international organizations, considered as a class of subjects of international law, lack a definition that impede the application of the rules developed in their regard.

VI. Second Antinomy: Subjects of International Law not Submitted to the Norms of the International Legal Order

This chapter aims at verifying if most fundamental norms of international law are usually implemented by international organization. After considering a source-oriented approach that proves insufficient for ascertaining international organizations as submitted to norms of the international legal order, the study moves onto a material approach. In so doing, principles of international law are found to be the norms of international law that are both general in scope and relevant for testing organizations with norms of the international legal order.

It is found that such is not the case, which is due to proper features of international organizations not fitting in the traditional framework of international law. Being non-territorial and non-sovereign entities, a significant number of norms of international law are irrelevant to international organizations and thus cannot be expected to apply in their regard. In addition, as intrinsically requiring mutual interference for their operation, international organizations can plainly not be expected to behave according to patterns that yield to traditional principles of international law, for such principles have been designed on the grounds of sovereignty that prevents interference. This leads to a second antinomy that pertains to their being subjects amid a purported single international legal order, which terms are: 1) international organizations are subjects of the international legal order; and, 2) international organizations are not bound by the rules of the international legal order.

Yet, while organizations may not benefit from principles of international law that proceed from concepts of sovereignty, territory and people, they may hopefully abide by these principles in their relations with States by refraining from infringing on rights and obligations of the latter that result from principles of international law. This is tested by focusing upon three principles of international law: the principle of non interference, the principle of non intervention, and the principle of territorial integrity. Result is found to be negative, as international organizations do not seem to abide by the above mentioned principles in their relations with States. Instead, their very functioning suggests that such principles can neither grant rights nor generate obligations for organizations in their relations with other subjects of international law.

**PART THREE - HYPOTHESES:
INTERNATIONAL LEGAL ORDERS SURROUNDING THE RELATIONS INVOLVING
INTERNATIONAL ORGANIZATIONS**

This third part attempts to solve the antinomies exposed in the preceding chapter by challenging one of their premises, which is the postulated unity of the international legal order. To do so, it expounds the hypotheses of two additional layers of international law, which are both examined as being legal orders, resulting from the relations organizations have with other subjects of international law, either States or other organizations. It is found that although the current development of international law may not be sufficient to decide for sure upon the validity of these hypotheses, those nevertheless have some value as an analytical framework and allow to identify additional international legal orders *de nascendi* that complement the traditional international legal order framing relations among States.

VII. Mixed Relations:

The Hypothesis of an International Legal Order *bis*

A first hypothesis is that mixed relations are underlaid by an international legal order that separates from the one that pertains to relations among States. In order to either confirm or infirm such an hypothesis, nature of the relations between States and organizations is first ascertained. Second, characters of this hypothetical international legal order are examined with the view to verify whether the requirements necessary for identifying it as a legal order are met.

The main argument for the existence of an international legal order specific to relations between organizations and States lies in the necessity for such relations to happen amid the framework of a given legal order. For relations among subjects of law are based upon agreement, such an agreement needs to be preceded by empowerment through recognition as subjects of law, which is the main function of a legal order. Hence, whereas States and organizations alike are subjects of law as it is observed in practice, it can only happen through a given legal order, which at the same time is not that which surrounds inter States relations, for the reasons exposed earlier. Such a legal order partakes of international law as it is not internal in any regard and relates to legal relations that extend beyond and upon national borders, but separates from the international legal order that encompasses relations

among States in the way it recognizes and guarantee subjects.

Relations of international organizations with either members or non member States are defined as being bilateral, personal (*intuitu personae*), and synalagmatic in nature, which is shown in modalities for defining rights and obligations to which these relations give rise. This view is supported by customary rules and principles of international law identified by the ICJ in its case law. The framework surrounding such relations is then tested with criteria for identifying legal orders expounded in the introduction of the study, which consist in the way a legal order defines those it recognizes as subjects and guarantee this quality in their mutual relations.

It is found that in the case of mixed relations the subjects are defined by the token of a referral to the proper law of each organization, which thus gives to the proper law of each organization, and in particular to their functions, the role of defining properties through which the subjects are recognized in each bilateral relation between an organization and a State. Actual rules defining the way subjects are recognized within an international legal order framing mixed relations are consequently variable, first in respect of each organization and second in respect of each State considered from the standpoint of each organization.

Yet, although such rules are specific to each relation between an organization and a State, they all stem from the same principle that purports a referral to the proper law of the organization involved. Since in this respect practice is uniform and seemingly supported by all actors, such a principle is found to be a potential principle of customary law. From this single principle, which realizes the basic functions of a legal order, it is induced that the hypothesis of a legal order of international law specific to mixed relations that separates from that related to inter States relations is probable, although such a legal order is not yet fully developed.

VIII. Inter-organizations Relations: The Hypothesis of an International Legal Order *ter*

The second hypothesis examined is that of an international legal order specific to relations among international organizations. Inter organizations relations are found to show strong similarities with relations between organizations and States in the way they are framed while showing behavioral patterns similar to those that can be observed in States behaviors. These patterns of behavior, especially these consisting in aggregating several organizations on a permanent basis, generate specific legal

orders for the mutual relations of the organizations concerned that are thus somehow 'internalized' and clearly made separate from the traditional framework of international law.

Inter organizations relations, as well as the surrounding framework, show features similar to those of relations between organizations and States in their synalagmatic nature and follow similar principles. Yet, the technique of a referral to the proper law of organizations that was observed in mixed relations can not be reproduced amid inter organizations relations, which prevents observing a similar rule of general scope for the definition and guarantee of the subjects, and therefore prevents identifying a single legal order pertaining thereto. However, a multiplicity of specific legal orders framing the relations among several organizations can be observed.

Existence of such inter-organizational legal orders, which come in between the proper legal orders of each of the organizations concerned and international law, is supported by a number of examples, among which the most notorious is undoubtedly the UN system that aggregates the UN proper and specialized agencies, found in actual practice of organizations and by rulings of international courts. From such an observation it is inferred that, although it is not possible to identify a single international legal order dedicated to inter organizations relations, it is nevertheless possible to identify several legal orders that, while surrounding relations between several organizations, are separate from both proper legal orders of the organizations involved and the sphere of their relations with other subjects of international law.

These legal orders, dedicated to the relations between several organizations having each their own international personality and proper legal order, are characterized by distinctive features such as norms and organs proper. The rules defining and guaranteeing subjects of these legal orders manifest in a distribution of powers among participating organizations. Further, existence of a hierarchy, at which top stands a given organization or a given organ of a given organizations shows mechanisms able to produce a common will. Therefore, while a single international legal order framing inter organizations relations can not be identified, multiples legal orders, specific to certain 'families', or 'systems', of organizations can be observed.

IX. Conclusion

It is concluded that, since it ultimately results in generating additional layers of international law that can each be characterized as being an international legal order, acknowledging an international

personality of international organizations has a fragmenting effect over international law, which differs from other sorts of fragmentation already observed by its nature and scale. It is found that formulating a clear definition of organization-hood that be supported by accurate criteria may help in clarifying the surrounding legal framework but will not remedy to such a fragmentation. Yet, acknowledging this phenomenon allows for conceiving the legal framework surrounding organizations in separation from the traditional framework of international law based on inter States relations and that may enable some progress in considering current issues related to international organizations by providing an alternative analytical basis.

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