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International legal personality – an assessment of the International Committee of the Red Cross and its legal status

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1 Introduction

1.1 Presentation of the topic

The topic to be addressed in the thesis is to what extent the International Committee of the Red Cross (hereafter ICRC) possesses international legal personality. The thesis will primarily focus on two main issues. The first issue concerns the question of whether the ICRC has international legal personality and possible grounds for such an acquisition. The second issue relates to the legal consequences of an attribution of the legal status to the ICRC.

During the 20th century, the historical scope of international legal personality has been extended and challenged. The concept of international legal personality is “a doctrinal expression, which has sometimes given rise to controversy”.¹ The statement holds true for ICRC, when its legal status occasionally is up for discussion. With the establishment of ad hoc tribunals for prosecution of war crimes, the tribunals have from time to time been faced with legal questions regarding submission of evidence versus the right to confidentiality, which has necessitated an explanation of ICRC’s legal status.

ICRC has on several occasions claimed to possess international legal personality. Documents deriving from ICRC tend to emphasize that the entity “is recognized as having an international legal personality” due to its hybrid nature.² Nevertheless, no unambiguous answer to the international status of the ICRC is to be found in its constitutional instruments. The organization’s indistinct statements leave a complex picture regarding the reasons for ICRC’s alleged possession of international legal personality and the significance of the legal status. As ICRC plays an important role in armed conflicts and humanitarian disasters, a clarification of its legal status could be important for its present and future role in the international legal community.

¹ ICJ *Reparations for Injuries* p 178

² Rona (2004) p 1

1.2 Sources of law

The thesis addresses an issue of international character. The international legal methodology is thus applicable. The Statute of the International Court of Justice (hereafter ICJ) article 38 is the “traditional starting point” for the examination of the sources of international law.³ The provision is formally only binding upon the Court itself. However, it is generally recognized that it is the “authoritative statement of the sources of international law”.⁴

Article 38 identifies the primary and secondary sources of law. According to the provision, the most relevant sources in international law are international conventions and customs, “the general principles of law”, “judicial decisions” and judicial teachings insofar as they derive from “the most highly qualified publicists of the various nations”. Although the sources explicitly are formulated as separate sources, they will in practice affect each other and not be used hierarchically.⁵ International convention is the “most important source of obligation in international law”.⁶ When interpreting the Conventions, the Vienna Convention on the Law of Treaties (hereafter VCLT) section 3 expresses the general guidelines. VCLT section 3 is regarded as customary international law, thus binding on all nations.⁷

With the general foundation in place, the issue in question gives rise to specific methodological challenges. The general concept of international legal personality is not subject to comprehensive and detailed regulation in either international treaties or customary international law. To a large extent, the question of whether international organizations can be subjects of international law is today based on the Court’s considerations in the ICJ *Reparations* case from 1949. Following the decision, international literature and case law have contributed to the shaping of certain guidelines based on ICJ’s statements, and thus given the advisory opinion precedent effect on the area. Despite the growing tendency for international organizations to include a clause in their internal constitutional documents regarding their international legal

³ Crowe and Weston-Scheuber (2013) p 24

⁴ Crawford (2012) p 22, Crowe and Weston-Scheuber (2013) p 25

⁵ Crawford (2012) p 20 and 22

⁶ Ibid p 30

⁷ Evans (2006) p 120

personality, there is still no codification of the concept, indicating a certain degree of uncertainties in legal circuits.

As for ICRC and whether the organization possesses international legal personality, a large part of the analysis will be based on an analogy of the approaches applied to other international organizations. Besides analogies, the major sources of the analysis have been international conventions, international decisions, international agreements, particularly headquarter agreements, and legal literature in the form of books and articles. Due to a lack of specific sources which directly concerns the ICRC's legal status, the thesis will focus on gathering the threads and make a comprehensive assessment of the organization's legal status and the consequences this entails.

An additional difficulty with the research question is the issue of confidentiality. The confidentiality practice of the ICRC has resulted in a difficulty to obtain certain sources of relevance for the research question. Both headquarters and co-operation agreements fall within the scope of ICRC's right to confidentiality, which will affect the thesis as there will be a limited reference to these legal sources.

1.3 Delimitations

The thesis essentially provides the basis for two main delimitations. First, the thesis will delineate against treatment of national law. The thesis will not account for either national law regarding the concept of legal personality, or regarding ICRC's rights or obligations under a nations own regulation, as these topics are irrelevant for the issue in question.

Secondly, the thesis will only address international organizations. I choose to delimit against treatment of States and individuals as subjects of international law, besides to the extent it is a natural result of the treatment of international organization's legal status. As ICRC is an organization, a treatment of the international legal personality of States and individuals would be redundant.

1.4 Structural overview

The thesis is divided into five parts. The structure of the thesis is as follows. Part two provides a brief overview of ICRC. The purpose is to place the organization in the context of international law. In order to explain ICRC's legal status in the international community, it is natural and appropriate to initially briefly portray the background of the ICRC and its historical basis. The section will affect the research question as it contains a presentation of the organization's mission and role in the international community which in turn will have significance for the question of international legal personality.

In the third part, the thesis provides a framework of the concept of legal personality in terms of definition, scope and the consequences of the attribution. In order to evaluate whether ICRC possesses international legal personality, the thesis will first address the concept in regards to international organizations as such. The main focus of the thesis will be on part four. In this part, the thesis applies the legal doctrine of international legal personality to ICRC, and also covers the consequences of a possible attribution of international legal personality. The fifth and final part will contain a possible conclusion on the overall issue.

2 ICRC – a unique actor in international law

2.1 The creation of the ICRC

During the Battle of Solferino in the Second Italian War of Independence between Austria and France 24 June 1859, the Swiss businessman Jean-Henri Dunant found himself in the midst of the battle. Based on his recorded impressions and willingness to care for the wounded and sick soldiers, he published *A Memory of Solferino* in 1862.⁸ The book was revolutionary for its time and included, as part of Dunant's vision, two proposals for the international community; the establishment of relief societies to care for wounded soldiers and the formulation of "some international principle, sanctioned by a Convention inviolate in character".⁹

Inspired by his experiences and the tremendous positive response of the book, Dunant together with four other Swiss citizens formed the International Committee for Relief to the Wounded in 1863 in Geneva, Switzerland. The Committee was later renamed the International Committee of the Red Cross and lay the foundation for the Red Cross movement. A year after the organization's establishment, Dunant's entire vision materialized with the adoption of the first Geneva Convention, a treaty aiming to improve the situation for soldiers injured during armed conflict.¹⁰

Despite its early creation and long-lasting efforts in times of conflict, the ICRC has not always been as present in the public eye as seen today. During the 21st century, the ICRC received more attention from the press, due to the organization's involvement in humanitarian tragedies, such as the civil war in Somalia in the 1990s.¹¹ The new attention must also be seen in context with ICRC's presence and efforts in the wars involving Afghanistan and Iraq. It

⁸ ICRC (28-12-2004)

⁹ *A Memory of Solferino* (1986) p 126

¹⁰ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864

¹¹ Hassan (2012) p 3

was particularly the “ICRC protection efforts for prisoners” which brought them renewed attention and interest by the press.¹²

ICRC has not only gained a tremendous attention from the press, but also from the international community as a whole. The granting of four Nobel Peace Prizes during the 20th century signalizes faith and support of the activities the ICRC has embarked upon.¹³

As part of the largest humanitarian movement worldwide the ICRC is bound to “act at all times in accordance with the Fundamental Principles”.¹⁴ The movement as a whole is founded on seven fundamental principles: humanity, impartiality, neutrality, independence, voluntary service, unity and universality.¹⁵ The principles permeate and govern the organization’s activities and development. However, only the first four are relevant in regards to ICRC.¹⁶ In order to reach ICRC’s goal to bring humanitarian protection in times of armed conflict, the principles of impartiality, neutrality and independence are means to reach this goal. Impartiality is an important aspect of humanitarian protection in the sense that ICRC should not make any distinction amongst the individuals in need.¹⁷ When it comes to neutrality, the organization must not let itself be guided by political powers, but rather focus on their humanitarian goal.¹⁸ As for the principle of independence, ICRC must be independent from States and “other power centers”, especially from “western liberal democracies”, in order to maintain neutrality and impartiality.¹⁹

¹² Forsythe (2005) p 3

¹³ Libæk (2003)

¹⁴ The Statutes of the International Red Cross and Red Crescent Movement art. 1 no. 2

¹⁵ Preamble of the Statutes of the International Red Cross and Red Crescent Movement

¹⁶ Forsythe (2005) p 161

¹⁷ Ibid p 163

¹⁸ Ibid p 169, 173

¹⁹ Ibid p 182

2.2 ICRC's mandate and role under international law

Following the first Geneva Convention of 1864, Dunant's vision to establish international principles in times of conflict has developed into a body of rules known as the International Humanitarian Law (hereafter IHL). The main instruments of IHL are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. With a total of 194 ratifying States, the Geneva Conventions are today regarded universally applicable, whereas the two Additional Protocols are on their way to becoming universal.²⁰ The ICRC is given a wide mandate by the community of States under the Geneva Conventions.

ICRC's mandate further stems from the Statutes of the International Red Cross and Red Crescent Movement. The Statutes were adopted at the 25th International Conference of the Red Cross in 1986, with the participation of the High Contracting Parties to the Geneva Convention. The Statutes thus "reflect the states' views on the activities of the ICRC".²¹

The mandate of ICRC can roughly be divided in two parts. First, ICRC is mandated to protect and assist the victims of armed conflict and internal disturbance. Second, the organization acts as a promoter and guardian of IHL.²² It is first and foremost the second part of the mandate that sets ICRC apart from other organizations, giving it a unique position in IHL.²³ The founding of ICRC marked the beginning of international humanitarian law, and through the Geneva Conventions and its Protocols, the function to act as a guardian for IHL was "formally entrusted" to ICRC by the international community, as an act of faith.²⁴

²⁰ ICRC website <<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>>, Lavoyer and Maresca (1999) p 502

²¹ Lavoyer and Maresca (1999) p 504

²² Sandoz (1998)

²³ Lavoyer and Maresca (1999) p 504

²⁴ Sandoz (1998)

2.2.1 Protect and assist victims of armed conflicts

Initially, the ICRC focused its work “on the wounded soldier in international war”.²⁵ Today its scope has evolved, and the focus is no longer solely on the conditions of the belligerents, but on humanitarian issues in general in times of armed conflict. Still, the protection and assistance of victims of armed conflict is the “principal purpose” of ICRC.²⁶ The mandate is in line with ICRC’s mission statement clarifying that the organization’s:

“...exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.”²⁷

The organization is given the right to perform several activities in order to fulfil this part of their mandate.

On a general basis, protected persons have the right to seek humanitarian assistance from the ICRC when the occupying power fails to care for the inhabitants.²⁸ The organization “shall be granted all facilities for that purpose” by the authority in concern.²⁹ The humanitarian assistance will often include food and water, medical care and other basic needs.³⁰ During the civil war in Somalia, with its massive starvation from 1991-1993, the humanitarian operations by the ICRC proved to be the largest humanitarian intervention since the Second World War, signaling the importance of ICRC’s humanitarian assistance.³¹

The ICRC has received under the Geneva Conventions a mandate to exercise duties usually granted to the Protecting Powers when a State for different reasons is not appointed.³² Under this mandate, the ICRC will act as a substitute for a Protecting Power. Protecting Powers is defined as “a neutral or other State not a Party to the conflict which has been designated by a

²⁵ Forsythe (2005) p 2

²⁶ Fleck (2008) p 713

²⁷ The ICRC’s Mission Statement (19-06-2008)

²⁸ GC IV art. 30 (1)

²⁹ GC IV art. 30 (2)

³⁰ Fleck (2008) p 269

³¹ Hassan (2012) p 3

³² AP I art. 5 (4)

Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to” it under the Geneva Conventions. The function normally assigned to such State is the “duty of safeguarding the interests of the Parties to the conflict”.³³

As one of its core tasks, the ICRC has a formal right to visit and interview prisoners of war (POW) and civilian internees to make sure the belligerent parties are treating them humanely.³⁴ ICRC has performed the task long before it was enshrined in a written legal text, as the organization responded to humanitarian needs during both World Wars, without authorization in the Geneva Conventions.³⁵ Today, the ICRC “plays a role alongside the Protecting Powers”, in what has become “a benchmark for the requisite minimum of civilized behaviour” in armed conflict.³⁶ By illustration, one can mention the visitation by ICRC delegates to the Guantanamo Bay and Robben Island during Nelson Mandela’s imprisonment.³⁷ The ICRC is the sole entity with a conventional right to visit prisoners of war. Other organizations, such as Amnesty International, are dependent on the consent of States in order to perform such an action. During 2012, the ICRC visited an overwhelming 540,669 detainees.³⁸

Through its Central Tracing Agency, the ICRC serves as an intermediary between belligerent parties. The agency was established in order to provide a range of neutral tracing services in times of conflict.³⁹ Although the need to stay in touch with family members is both basic and essential, history has shown that the authorities often fail to report and keep the families of soldiers updated on the situation both during and after the war is terminated.⁴⁰ Its mandate under the Geneva Conventions gives ICRC the right to perform services roughly divided into two categories. The agency is mandated to transmit information on POW or civilian internees

³³ AP I art. 5 (1)

³⁴ GC III art. 126 and GC IV art. 143

³⁵ Forsythe (2007) p 67

³⁶ Gazzini (2009) p 9, Forsythe (2007) p 67

³⁷ Forsythe (2007) p 75, Duffy (2005) p 382

³⁸ ICRC Annual Report 2012 p 85

³⁹ ICRC website <<http://www.icrc.org/eng/resources/documents/interview/centra-tracing-agency-interview-070410.htm>>

⁴⁰ Ibid

to the other party of the conflict in order to inform their families.⁴¹ Secondly, the agency works under a mandate to inform families of soldiers died in the battlefield.⁴² In 2012, 720,128 people contacted ICRC offices worldwide in the need for services “related to protection and restoring family links”.⁴³

2.2.2 Promoter and guardian of IHL

The first task granted to the ICRC in order to fulfil this part of their mandate is to monitor compliance with IHL. This is generally recognized, even though the ICRC has no “express supervisory authority in this respect”.⁴⁴ Through its field delegates, the ICRC has devoted its work to make sure belligerent parties comply with the applicable rules of IHL. As part of the task, ICRC helps with the enforcement of IHL, though mostly through “cooperation in application of services and programs”, rather than “public denunciation and shaming”.⁴⁵

Besides monitoring compliance with IHL, ICRC works towards promoting and disseminating IHL.⁴⁶ Spreading the message about IHL permeates the organization’s work and is directed towards every group of the society. Dissemination takes place in various forms; from radio and TV shows to courses by ICRC delegates.⁴⁷ In order to gain acceptance within the military communities, the ICRC has specialised courses for “armed and security forces”, often led by former military officers, now under ICRC employment.⁴⁸

The third and final aspect of this mandate concerns the development of IHL, a task performed by ICRC from the very beginning. With a humanitarian goal to protect the victims of armed conflict, ICRC was the initiator for the first Geneva Convention, and has had a leading role in the development of IHL ever since. The Movement’s Statutes article 5 (2) litra g confirms

⁴¹ GC III art. 123 and GC IV art. 140

⁴² GC I art. 16

⁴³ ICRC Annual Report 2012 p 86

⁴⁴ Fleck (2008) p 714

⁴⁵ Forsythe (2005) p 274

⁴⁶ The Movement’s Statutes art. 5 (2) litra g

⁴⁷ Forsythe (2005) p 273, Lavoyer and Maresca (1999) p 505

⁴⁸ I.c.

ICRC's mandate to "prepare any development" of IHL. The mandate enables ICRC to "initiate, inspire and facilitate the strengthening and development of" IHL.⁴⁹ ICRC has had a unique and persistent role in the expansion of "humanitarian protection from international to internal wars".⁵⁰ Both GCs common article 3 and the Additional Protocol II, applicable in non-international armed conflicts, are inspired by the field work and drafting performed by the ICRC.⁵¹ The organization has also had a leading role in the strengthening of IHL placing limitations on means and methods used in warfare. A classic example is ICRC's leading role in the development of the 1997 Ottawa Treaty on landmines.⁵² The organization put pressure on the Canadian government which eventually submitted the issue of landmines for the international community. Leading up to the Convention, the ICRC worked as an active pioneer based on the experiences the organization had made in terms of the consequences of landmines.⁵³

2.3 Legal nature and status

The ICRC was originally a private organization established under the Swiss Civil Code by the initiative of individuals. Despite still having its roots in Swiss law, the organization now operates in over 80 countries with employment beyond the Swiss borders.⁵⁴ The fact that the individual, national based organization operates under an international mandate has resulted in debates regarding the categorization of the organization, whether it is an IGO or an NGO. The debate will be elaborated under section 4.1.1. Regardless of the categorization, ICRC is granted a wide international mandate giving it a unique status in the international community. According to the organization's Statutes, the "ICRC has legal personality", whereas the Movement's Statutes states that the ICRC "is an independent humanitarian organization having *a status of its own*".⁵⁵ ICRC's Statutes article 2 does not clarify whether it has national or inter-

⁴⁹ Nobel (1993) p 81

⁵⁰ Forsythe (2007) p 66

⁵¹ I.c.

⁵² *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti Personnel Mines and on Their Destruction*, 18 September 1997

⁵³ Forsythe (2005) p 265

⁵⁴ Lavoyer and Maresca (1999) p 508, ICRC website <<http://www.icrc.org/eng/where-we-work/index.jsp>>

⁵⁵ ICRC Statute art. 2 and The Movement Statutes art. 5 (1) (author's emphasis)

national legal personality in mind, creating a diffusing picture. However, in internal documents and claims against ad hoc tribunals, ICRC has portrayed itself as being in the possession of international legal personality.⁵⁶

Despite the seemingly internal consensus, the Geneva Conventions and its Additional Protocols are silent in regards to the legal status of ICRC. Nor do the conventions or protocols impose upon the contracting Parties an obligation to recognize ICRC as a subject of international law.⁵⁷ Still, this peculiar organization holds a special role in the international community. Legal scholars, international organizations and national governments have from time to time acknowledged the international legal status of ICRC. Some have recognized ICRC as a legal person based on an analogy to IGOs, whereas others attribute the status in line with the organizations special role and recognition by the international community.⁵⁸

The thesis will hereinafter examine whether the international community as a whole grants the ICRC international legal personality in accordance with the organization's own perception, and the possible basis for such an attribution. The legal personality of the ICRC will to a certain extent depend upon the communities' acceptance of international organizations as legal persons on a general basis.

⁵⁶ Eg. Rona (2004) p 1

⁵⁷ Gazzini (2009) p 3

⁵⁸ Rona (2002) p 209, Rossi (2010) p 40

3 International legal personality – a complex issue

3.1 The doctrine of legal personality

3.1.1 The notion

The doctrine of legal personality exists in both national and international law. The concept is in international law used “in analogy to municipal law”, although the entities possessing legal personality is not the same within the two different legal systems.⁵⁹ It is a legal concept enabling the community to distinguish between the entities that are capable of acting with legal effects in a given legal system.⁶⁰ The possession of international legal personality thus enables an entity to act in the international legal system.

The term ‘international legal personality’ is used synonymously with the term ‘subject of international law’.⁶¹ They are usually regarded as interchangeable concepts in the sense that those entities possessing international legal personality are subjects of international law, and visa versa.⁶² It will be alternated between the two terms in the thesis, whichever falls naturally.

3.1.1.1 Definition

The notion of legal personality is often described as a philosophical and abstract topic as there is an “absence of an established international law of persons”.⁶³ There exists no treaty or customary law establishing an international law of persons or the criteria set out for granting the status. As a result, most guidelines in respect of international legal personality come from

⁵⁹ Portmann (2010) p 5

⁶⁰ I.c.

⁶¹ Rossi (2010) p 29, Portmann (2010) p 1, Schermers and Blokker (2011) p 985

⁶² Rossi (2010) p 29

⁶³ Portmann (2010) p 10

general considerations of international law. The debate, however, is not groundless or without legally acceptable sources. The “developments in international practice”, in terms of State practice and the practice of international tribunals are taken into account in the international debate on legal personality.⁶⁴ However, the interpretation on State practice and case law can differ with the theoretical standpoint of the interpreter, making it difficult to reach a consensus.

The International Court of Justice (hereafter ICJ) stated in *Reparation for Injuries* that having international legal personality means that an entity:

“...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.”⁶⁵

The quote from ICJ is the most “authoritative statement on international personality” to this day and is often cited as the definition of international legal personality.⁶⁶ The disadvantage with the definition is that it does not address which entities are to be regarded as international persons, or what criteria must be met before the status can be attributed. These issues will be addressed later in the thesis.

A second, heavily debated problem with the definition from the *Reparation* case is its circularity. After a further analysis, one notices that it is not clear what comes first: the possession of international legal personality or the possession of international rights and duties. As Brownlie stated it, the definition is circular because:

“while the indicia referred to depend in theory on the existence of a legal person, the main way of determining whether the relevant capacity exists in case of doubt is to inquire whether it is in fact exercised”.⁶⁷

⁶⁴ I.c.

⁶⁵ ICJ *Reparations for Injuries* p 179

⁶⁶ Portmann (2010) p 9, Rossi (2010) p 31

⁶⁷ Crawford (2012) p 115

An entity cannot, based on the definition from the *Reparation* case, possess international legal personality unless it is “already capable of acting at the international level”.⁶⁸ The circular problem is still relevant and not finally clarified by the international community.

3.1.1.2 Significance

Regardless of the debates and controversial aspects of the concept, it is commonly being used and attributed to new entities. So what exactly is the significance of possessing international legal personality?

Again, there is a wealth of different opinions amongst the legal scholars. Klabbbers considers the concept merely as an “academic label”, arguing that “a subject of international law is a legitimate subject of international research and reflection”.⁶⁹ Some legal scholars even go to the extent of claiming the notion to have “no credible reality” or “functional purpose”.⁷⁰ Others are of the opinion that the concept is more than just a label of interest. Amerasinghe submits several practical reasons for the concept’s significance in international law. In his view, the concept enables organizations to have a right of its own, which in turn grants them with the capacity to have “rights, duties, powers... distinct from its members or its creators...”⁷¹ Similarly, Shaw regards the status as “crucial” as it is essential for the organization’s ability “to maintain and enforce claims”.⁷²

Generally speaking, the notion is used to “distinguish between those social actors the international legal system takes account of and those being excluded from it”.⁷³ In this sense, the status is necessary in order to participate at the international level in a legal context. The sta-

⁶⁸ Clapham (2006) p 64

⁶⁹ Klabbbers (2002) p 43

⁷⁰ Clapham (2006) p 63

⁷¹ Amerasinghe (2005) p 68 and 78

⁷² Shaw (2008) p 195

⁷³ Portmann (2010) p 5

tus enables entities to function in the legal order, and is thus to a certain extent a prerequisite for legal capacity.

3.1.2 Historical limitation

In the traditional sense, the status of international legal personality has been limited to States.⁷⁴ The limited acknowledgment of legal personality in international law reflects the history of international law. States created public international law for States, to regulate the relations between nations.⁷⁵

Within international law, the principle of sovereignty prevails to a great extent. The sovereign State system is generally said to have been introduced with the signing of the Peace Treaty of Westphalia in 1648, a treaty ending the Thirty Years War.⁷⁶ The Treaty of Westphalia is regarded as an enactment of the States' status as sovereign. This means that the States have full authority over their own territory.⁷⁷ Externally, the principle implies a prohibition to interfere with a nation's internal affairs and State detachment to international regulation unless it occurs by its own free will.⁷⁸

3.1.3 Expansion of the legal doctrine

Even though States are still the primary subjects of international law, the 20th century allowed for an expansion of the doctrine. New legal actors have entered the international plane, leading to a development consequently recognizing that entities other than States *can* be subjects of international law.⁷⁹ It is no longer viable to consider States the only natural subjects of international law. The ICJ in the *Reparations* case supported this view when they stated that:

⁷⁴ Klabbers (2013) p 67

⁷⁵ Rossi (2010) p 29

⁷⁶ D'Anieri (2011) p 28

⁷⁷ I.c.

⁷⁸ I.c., Klabbers (2013) p 69

⁷⁹ Rossi (2010) p 30, Bisaz (2012) p 37

“Throughout its history... the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States”.⁸⁰

However, it is still an unresolved issue which entities that can obtain international legal personality and the criteria required for the attribution. It does not seem to be a clear pattern signifying the status, but rather that the subjects of international law’s “nature depends upon the needs of the community”.⁸¹

3.1.3.1 International governmental organizations (IGOs)

VCLT article 2 (1) (i) defines international organizations as “an intergovernmental organization”. The definition thus excludes non-governmental organizations. The definition is short and vague, and comprises all intergovernmental international organizations. ILC’s 2011 Draft Articles on the Responsibility of International Organizations article 2 (a) on the other hand defines IGO as:

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

The definition is new and developed “in the context of international responsibility”, an obligation which presupposes legal personality.⁸² The definition does not change the fact that IGOs can be an international organization without having legal personality. The different definitions give us two of the basic characteristics of an IGO; it is established by an international instrument and is primarily composed of States.

IGOs can roughly be divided into three different categories. There are the global organizations, such as the United Nations (hereafter UN), regional organizations, like NATO and supranational organizations. The latter is characterized by the ability to possess authority at the

⁸⁰ ICJ *Reparations for Injuries* p 178

⁸¹ I.c.

⁸² Crawford (2012) p 167

expense of the State's own authority. The European Union (hereafter EU) is the prime example.

IGOs have existed since the nineteenth century.⁸³ However, the attribution of international legal personality to these entities was not a serious question until after 1919 with the founding of the League of Nations.⁸⁴ Despite the lack of a reference to the organization's status in its Covenant, Switzerland recognized "its separate existence on the international plane" in 1926.⁸⁵

In 1949, the ICJ *Reparation* case settled that international organizations *can* possess international legal personality. The Court was asked to give an advisory opinion on UN's capacity to bring an international claim against the responsible government for injuries to its personnel. The advice was made on the background of an assassination of Count Folke Bernadotte, a Swedish diplomat appointed as a mediator by the United Nations Security Council.⁸⁶ During his mediation in the Arab-Israeli conflict in 1948, Jewish Zionist nationalists shot the diplomat.⁸⁷ The advisory opinion did not only deal with UN's capacity to bring an international claim against a state, but was also concerned with "the objective personality of the United Nations" given that Israel as the defendant was not a member of UN at that time.⁸⁸ In order to answer the submitted question, the Court first had to examine whether the organization possessed international legal personality.

The UN Charter did not expressly confer legal personality to the UN. The Court thus continued with an examination of the organization's characteristics, stating that:

"...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 posses-

⁸³ Amerasinghe (2005) p 66

⁸⁴ Crawford (2012) p 167

⁸⁵ I.c.

⁸⁶ UN General Assembly Doc A/648. Part one, section IV, paragraph 6

⁸⁷ S/RES/57 (1948), Crawford (2012) p 167

⁸⁸ Clapham (2006) p 63

sion of a large measure of international personality and the capacity to operate upon an international plane.”⁸⁹

ICJ emphasized that in order for the UN to fulfil its tasks “the attribution of international personality is indispensable”.⁹⁰ With this in mind, the Court found that “the Organization is an international person”.⁹¹

Despite the fact that the remarks from the ICJ are limited to the UN, legal scholars and practitioners have used the conclusion analogously, claiming that the same arguments are valid for other IGOs.⁹² The following statement from the ICJ in its advisory opinion from 1980 is an example of this view:

“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law...”⁹³

Following the advisory opinions from ICJ, several other IGOs have been granted legal personality. The Lisbon Treaty article 46 A states that EU “shall have legal personality”.⁹⁴ The provision is intended to cover both national and international legal personality.⁹⁵ As for NATO, it is generally recognized that the entity is an international legal person.⁹⁶ It is safe to say that it today is generally accepted that IGOs can possess international legal personality.⁹⁷

⁸⁹ ICJ *Reparations for Injuries* p 179

⁹⁰ Ibid p 178

⁹¹ Ibid p 179

⁹² Rossi (2010) p 45, Schermers and Blokker (2011) p 990, Sands & Klein (2001) p 472

⁹³ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p 89-90

⁹⁴ European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01

⁹⁵ Schermers and Blokker (2011) p 992

⁹⁶ Ibid p 1013, Amerasinghe (2005) p 72

⁹⁷ Crawford (2012) p 115, Klabbers (2013) p 67, Shaw (2008) p 259, Schermers and Blokker (2011) p 991

3.1.3.2 International non-governmental organizations (NGOs)

To this day, there is no consensus around a universal definition of NGO.⁹⁸ The UN Charter does not contain a definition, despite the statement of the Economic and Social Council's right to attribute consultative status to NGOs under article 71. Regardless of the lack of a universal definition, specific features give NGOs its characteristics. As the name indicates, NGOs are created without the involvement of States and without States as their members.⁹⁹ They are rather established at the initiative of individuals. Besides the non-governmental interference, general features of NGOs are their non-profit making aim, volunteer work and the fact that they often have their grounds in goals of humanitarian value.¹⁰⁰ To illustrate, one can mention Amnesty International and Greenpeace.¹⁰¹

The attribution of international legal personality is a current and debated issue. The international community disagrees on the existing and future status of NGOs. Compared to IGOs such as the UN, the identification of the functions and rights of NGOs is a demanding task, as they are scattered in various international instruments.¹⁰² The difficulty in reaching a conclusion in regards to the possession and exercise of rights and duties by NGOs, have led scholars to argue that international legal personality could be conferred to NGOs based on recognition by the international community. To date, no States have explicitly recognized NGOs as entities in the possession of international legal personality.¹⁰³ However, a small number of States have ratified the European Convention of the Recognition of the Legal Personality of International Non-Governmental Organizations (Convention 124), imposing an obligation to recognize the qualified international legal personality of NGOs.¹⁰⁴ The convention was adopted in 1986 and has still not entered into effect, indicating a limited success.¹⁰⁵ Despite their important influence in the international community, NGOs "remain outside the international legal system" as

⁹⁸ Ryfman (2007) p 26, Rossi (2010) p 1

⁹⁹ Rossi (2010) p 1

¹⁰⁰ Nobel (1993) p 77

¹⁰¹ Klabbers (2013) p 68

¹⁰² Rossi (2010) p 51

¹⁰³ Ibid p 55, Klabbers (2013) p 68

¹⁰⁴ Ryfman (2007) p 26, Convention 124 article 2

¹⁰⁵ I.c.

private legal entities.¹⁰⁶ However, this could be a temporary state. The ICJ stated in the *LaGrand* case in 2001 that individuals are subjects of international law due to their possession of individual international rights.¹⁰⁷ Some argue that the Court in this case laid the foundation for future recognition of NGOs' legal status because:

“The Court stated in the *LaGrand* case that individuals are also subjects of international law. This approach may lead the Court to assert the legal personality even of non-governmental organizations. It would be difficult to understand why individuals may acquire rights and obligations under international law while the same could not occur with any international organization, provided that it is an entity which is distinct from its members”.¹⁰⁸

3.2 Approaches to the legal doctrine

As mentioned in section 3.1.1, the conditions or indicia required for international legal personality is an issue which has brought international concern and debate. To date, it is still unresolved according to what criteria non-state actors can become subjects of international law.¹⁰⁹ This section will address the most relevant theories and the conditions they accentuate.

3.2.1 Two competing theories

There are seemingly two competing theories based on an analysis of the ICJ *Reparation* case. According to international legal scholars, the two theories can be deduced from the advisory opinion, even though they are not expressly mentioned in the text. The two theories are based on the ICJ ruling regarding the UN's legal status, but are applicable to other IGOs.

¹⁰⁶ Ibid p 25, Rossi (2010) p 50

¹⁰⁷ ICJ *LaGrand* Case paras. 77 and 89

¹⁰⁸ ILC First Report 2003 para. 17

¹⁰⁹ Portmann (2010) p 1

3.2.1.1 The subjective theory

The subjective theory is also referred to as ‘the will theory’. According to the theory, the will of the founders is the decisive criteria for the possession of legal personality. The will of the founders is the will of the members or member States in respect of IGOs. The proponents of this theory identify:

“...certain rights, duties and powers expressly conferred upon the organization and derive from these the international personality of the organization”.¹¹⁰

The theory is based on the assumption of “freely expressed consent of states” in international law.¹¹¹ The assumption enables the member States to “breathe personality into an organization” by expressly conferring legal personality to the organization in its Constitution, in what is known as the *doctrine of delegated powers*.¹¹² The idea is that the members can choose to expressly include a section relating to the legal personality of the organization in its constitutive document. In the *Reparations* case, the UN Charter did not expressly confer legal personality to the organization. It is today becoming more prevalent for international organizations to expressly include international legal personality in their constitutive documents.¹¹³

Despite the lack of an expressed recognition of legal personality, the ICJ concluded in the *Reparations* case that the UN “could not carry out *the intentions of its founders* if it was devoid of international personality”.¹¹⁴ The statement indicates that a lack of an expressed intention to possess legal personality is not decisive, as the status can be granted if the intention is implied. The *doctrine of implied powers* advocates that international legal personality can be granted by reviewing the rights and obligations assigned to the organization.¹¹⁵ For instance, if the organization is empowered with the capacity to conclude treaties, the proponents of the theory suggest that such powers cannot be exercised without the organization having the sta-

¹¹⁰ Amerasinghe (2005) p 79

¹¹¹ Crawford (2012) p 168

¹¹² I.c., Seyersted (2008) p 375

¹¹³ E.g. Rome Statute of the International Criminal Court art. 4 (1)

¹¹⁴ ICJ *Reparations for Injuries* p 179 (author’s emphasis)

¹¹⁵ Seyersted (2008) p 375-376

tus as a subject of international law.¹¹⁶ The organization's practice can also provide guidance – one must assess whether the entity has acted with the intention of being a subject of international law. The common feature is that the constitutional provisions undergo an “extensive interpretation” to either cover aspects beyond their original meaning or be supplemented by the organization's subsequent practice.¹¹⁷

3.2.1.2 The objective theory

The objective theory is based on the view that organizations can attain legal personality “by performing certain functions on the international plane”.¹¹⁸ The organization's intention is not decisive according to this theory, as fulfilment of certain objective criteria is the essential requirement for the possession of international legal personality. The foundation of legal personality is, according to the supporters, “identified in general international law”.¹¹⁹ The international community shapes the relevant criteria, until now mainly by case law and the legal scholars.¹²⁰

Finn Seyersted originally developed the theory in 1964. He suggested the following criteria for IGOs in the context of legal personality:¹²¹

1. “International organs... which are not all subject to the authority of any other State or organized community” other than the participating nations;
2. “which are not authorized by all their acts to assume obligations (merely) on behalf of the several participating communities”.

¹¹⁶ Schemers & Blokker (2011) p 989

¹¹⁷ Seyersted (2008) p 375

¹¹⁸ Crawford (2012) p 169

¹¹⁹ Amerasinghe (2005) p 79

¹²⁰ Clapham (2006) p 71, Bisaz (2012) p 33

¹²¹ Seyersted (1964) p 47

The theory and its criteria have developed over time. Ian Brownlie formulated his three-part test applicable to international organizations based on the different views on international legal personality in the international community:

- “1. a permanent association of states, with lawful objects, equipped with organs;
2. a distinction, in terms of legal powers and purposes, between the organization and its member states;
3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.”¹²²

When addressing the issue of international legal personality, Brownlie emphasizes the importance of existing organs. Organizations will usually be equipped with a variety of plenary, executive and administrative organs.¹²³ According to Brownlie, organizations can exist “but lack the organs and objects necessary for legal personality”, indicating that its structure provides a guideline for the question of legal personality.¹²⁴ As long as the organization has “at least one organ with a will distinct from that of the member states”, it will according to the objective theory possess international legal personality.¹²⁵ Furthermore, the organization’s independence from its members is highly relevant. An organization in the possession of international legal personality must be able to perform its functions independent and separate from its members. As a final criterion, the organization must be in the possession of functions and powers intended to be exercised within the international legal system.

Based on the previous, slightly indistinct formulations, Rossi accounts for three objective criteria; the entity in concern must have the capacity and actual possession of international rights and duties and in addition obtain recognition by the general community.¹²⁶

¹²² Brownlie (1998) p 679-680

¹²³ Klabbers (2013) p 86

¹²⁴ Crawford (2012) p 169

¹²⁵ Schermers and Blokker (2011) p 989

¹²⁶ Rossi (2010) p 32

3.2.1.3 A leading theory?

There is an ongoing debate between international legal scholars in regards to the two theories. The legal scholars have not yet been able to reach a consensual opinion on what theory that prevails in public international law.

The advisory opinion is not clear in its choice of approach to the legal doctrine, and thus “leaves a very unclear picture” in regards to when and how an organization possesses legal personality.¹²⁷ The Court did not specifically or exclusively refer to the individual objective criteria established in the international literature. They may be implied in the judgement, but were not articulated clearly.¹²⁸ At the same time, the Court emphasized the importance of the intentions of the founders in regards of the UN’s legal status. Sands and Klein claim the approach by the Court “essentially” was subjective.¹²⁹ Others interpret the Court’s statements as a mixture of the two theories, in the sense that the decisive is an examination of the organization’s purpose and its rights and functions, looking at whether these elements can only be explained on the basis of the status as a subject of international law.¹³⁰ Ultimately, it appears that the Court made an overall judgment based on the specific organization and its purpose and intent in the international community. The ambiguity of the ICJ in the *Reparations* case implies that it is appropriate to conclude that there is no leading theory in either legal literature or in practice.

3.2.2 The decisive criteria - conflicting opinions in the literature

It remains to consider whether one can conclude on certain applicable criteria for international legal personality.

Klabbers believes that there is “no formal criteria” for international legal personality.¹³¹ Instead, he offers what he calls a “practical checklist” for legal personality:

¹²⁷ Amerasinghe (2005) p 81

¹²⁸ Ibid p 82

¹²⁹ Sands and Klein (2001) p 472

¹³⁰ Amerasinghe (2005) p 81, Evans (2006) p 282

¹³¹ Klabbers (2013) p 68

“...one may ask oneself whether an entity enjoys direct rights or obligations under international law. If so, it is probably safe to say it ranks as a subject of international law, at least to the extent... of those same rights or obligations”.¹³²

Other scholars are still off the impression that legal personality relies on the fulfilment of certain basic objective criteria. Alongside Seyersted and Brownlie, prominent scholars emphasize the organization’s existence of lawful organs and independence from its members in regards to “legal rights, duties, power and liabilities” as basic objective criteria for international legal personality.¹³³ Likewise, Shaw believes the question of whether international legal personality can be attributed to an organization depends upon “its constitutional status, its actual powers and practice”.¹³⁴ The argumentation from legal scholars seems to indicate the same view as ICJ in regards to UN in the *Reparations* case; the decisive criteria is that the organization is granted rights and functions that it is unable to perform without the possession of legal personality.

In addition, it is debated whether the possession of legal personality requires more than the fulfilment of objective criteria. Amerasinghe argues that the attribution of international legal personality to international organizations is not as simple “as identifying certain objective criteria which confer personality in general international law”.¹³⁵ The criteria must be “tested in relation to the ‘intention’ behind the establishment of the organization”.¹³⁶

Acceptance by the community in terms of recognition is still a doctrinal controversy.¹³⁷ Klabbbers argues that the insufficient criteria for legal personality make recognition the “key word”.¹³⁸ Recognition will provide an entity with a full-fledged legal position. Shaw is of the same impression, stating that legal personality is “participation plus some form of community

¹³² I.c.

¹³³ Amerasinghe (2005) p 82, Rossi (2010) p 45

¹³⁴ Shaw (2008) p 260

¹³⁵ Amerasinghe (2005) p 81

¹³⁶ Ibid p 83

¹³⁷ Rossi (2010) p 32-33

¹³⁸ Klabbbers (2013) p 90

acceptance”.¹³⁹ He claims that legal personality can be acquired “by a combination of treaty provisions and recognition... by other international persons”.¹⁴⁰ Like Amerasinghe, Shaw considers the decisive requirement for legal personality the possession and exercise of international rights and duties alongside with an element of recognition from the community.

Roland Portmann launched his comprehensive analysis on the concept of legal personality in 2010, where he made the observation from international legal arguments leading towards five different conceptions on international legal personality.¹⁴¹ Despite its newly arrival, it is already being cited by other qualified international authors.¹⁴² According to Portmann, the different conceptions attribute legal personality to different entities, include different mechanisms and result in different consequences.

The ‘states-only conception’ is characterized by its condition of statehood in order to possess international legal personality. Contrary to the ‘states-only conception’, the ‘recognition conception’ has allowed for other entities than States to acquire international legal personality as “derivative or secondary international persons”.¹⁴³ As the conception indicates, “explicit or implicit recognition by states” is a condition for legal personality for secondary international persons.¹⁴⁴ The third conception, the ‘individualistic conception’, is characterized by the presumption of individuals possessing legal personality “when international norms of fundamental importance are concerned”.¹⁴⁵ The classic examples are fundamental human rights and criminal law. The ‘formal conception’ declares “international law an open system”, indicating that no specific entity is presumed to possess legal personality, nor is there any consequences attached to the status¹⁴⁶. The fifth and final conception is the ‘actor conception’. The decisive

¹³⁹ Shaw (2008) p 197

¹⁴⁰ Ibid p 261

¹⁴¹ Portmann (2010)

¹⁴² E.g. Crawford (2012) p 167 footnote 4

¹⁴³ Portmann (2010) p 13

¹⁴⁴ Ibid p 13

¹⁴⁵ Ibid p 21

¹⁴⁶ Ibid p 13

factor for this conception is that all legal actors “are relevant for the international legal system”, and thus possess legal personality.¹⁴⁷

3.3 Consequences of the attribution of legal personality

The concept of international legal personality is a relative one. Possessing legal personality only entails the *capability* to have rights and duties. As a result, the consequences of legal personality will vary depending on the entity possessing the status. ICJ stated the following in the *Reparations* case regarding the consequences of the attribution of international legal personality to the UN:

“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”.¹⁴⁸

Pursuant to the statement, organization’s legal personality is limited, as opposed to States who possess “the totality of international rights and duties recognized by international law”.¹⁴⁹ Besides the full legal capacity, States have the same rights and duties in international law regardless of their size, number of inhabitants or influential position, whereas other entities have different capacities based on their functions and powers.¹⁵⁰ This entails that one must undertake an analysis of the legal instrument granting each entity certain functions in order to find its implicit capacities.

¹⁴⁷ Ibid p 14

¹⁴⁸ ICJ *Reparations for Injuries* p 180

¹⁴⁹ Amerasinghe (2005) p 94

¹⁵⁰ Rossi (2010) p 31

3.3.1 Qualified vs. objective legal personality

The concept of legal personality gives rise to the question of the validity of the status to non-member States unconditional of their recognition. There is an important distinction between objective and qualified legal personality.

Qualified personality is only binding upon “the consenting subject”.¹⁵¹ Member States of an organization will thus be bound by the status if legal personality is attributed to the entity. The ICJ in the *Reparations* case elaborated that the possession of legal personality implied the capability for an entity to avail itself “of obligations incumbent upon its Members”.¹⁵² Non-member States may also choose to be bound if they recognize the organization’s legal personality. In practice, any legal person may recognize the legal status of another entity, but only with binding effect upon itself.¹⁵³

The advocates of the subjective theory attribute qualified legal personality to international organizations, in the sense that only member States are bound by the legal status, as opposed to objective personality.¹⁵⁴ Basing its theory on the constitution and the intention of its founders, there is an underlying assumption that an organization’s constitution is only binding upon its ratifying members.¹⁵⁵ The only way the legal status of an organization can become valid in regards to non-member States is by explicit recognition.

The objective personality is said to be “harder to achieve” as it depends upon the efforts of a substantial part of the international community.¹⁵⁶ However, the effect of the status is of greater importance as it is effective upon any “international person with which it is conducting relations”, unconditional of membership.¹⁵⁷ In this sense, an organization with objective legal personality operates *erga omnes*.

¹⁵¹ Shaw (2008) p 261

¹⁵² ICJ *Reparations for Injuries* p 178

¹⁵³ Shaw (2008) p 261

¹⁵⁴ Sands & Klein (2001) p 475

¹⁵⁵ Seyersted (1964) p 10

¹⁵⁶ Shaw (2008) p 260

¹⁵⁷ I.c.

It is debated whether international organizations can attain objective legal personality in the sense that the status is “valid vis-à-vis non-member States which has not recognized the Organization”.¹⁵⁸ Seyersted argues that the question of objective international legal personality has been answered affirmatively by the ICJ in the *Reparations* case in regards to the UN.¹⁵⁹ Besides possessing qualified personality, the Court concluded that the UN’s legal personality was valid in relation to all other subjects of law, and thus possessing objective international legal personality:

“...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”.¹⁶⁰

Certain legal scholars argue that the same reasoning should apply for similar organizations.¹⁶¹ In order to possess objective legal personality, the organization should have a “universal character” in the sense that so-called “closed international organizations”, for example regional organizations, cannot attain objective legal personality.¹⁶² However, the number of member States should not be the decisive factor, but must be seen in context with the character and functions of the organization.¹⁶³ However, there are also those who claim that it is far from obvious that the argument of the ICJ is applicable towards other IGOs, due to UN’s exceptional importance which cannot be transferred immediately to other organizations.¹⁶⁴

The ICJ *Use of Force* cases illustrate that international legal personality attributed to an IGO not necessarily entails objective legal personality.¹⁶⁵ The case concerned claims for responsi-

¹⁵⁸ Seyersted (1964) p 7

¹⁵⁹ Ibid p 9

¹⁶⁰ ICJ *Reparations for Injuries* p 185

¹⁶¹ Crawford (2012) p 171, Schermers and Blokker (2011) p 990

¹⁶² Schermers and Blokker (2011) p 990, 1191

¹⁶³ Amerasinghe (2005) p 90

¹⁶⁴ Sands & Klein (2001) p 476

¹⁶⁵ ICJ *Use of Force* (2004)

bility for the use of force by NATO against former Yugoslavia. Instead of bringing a lawsuit against the organization as such, Yugoslavia brought claims against the individual NATO member States who directly contributed to the use of force. The actions by Yugoslavia, as a non-member State of NATO, suggest that NATO is not in the possession of objective international legal personality. As NATO is a regional organization, non-member States should in principle not be bound by the organization's international personality, unless it voluntarily recognizes the status.

3.3.2 Inherent capacities

Despite organization's various functions, and thus different capacities as a consequence of their possession of legal personality, some question whether international legal personality "implies a minimum number of international rights and duties".¹⁶⁶ It is unclear whether the rights and duties flow from the international personality, or whether international organizations only have powers expressly or implied granted to them in its constitution.¹⁶⁷ The question is whether international legal personality implies inherent capacities regardless of the organization's purpose or functions granted by the constitution.

There are different opinions in the literature in regards to possible inherent capacities flowing from the concept of legal personality. Some are of the impression that the attribution of legal personality does not authorize certain capacities because of the diversity of functions by international organizations.¹⁶⁸ On the contrary, other scholars recognize that there may exist a presumption for inherent capacities as long as the IGOs are in a practical position to perform them.¹⁶⁹

Despite the uncertainties by the legal scholars, the question of legal personality is often mentioned in some formal contexts, providing a basis to wonder if certain rights and duties are regarded as consequences of international legal personality.

¹⁶⁶ Rossi (2010) p 33

¹⁶⁷ Amerasinghe (2005) p 93

¹⁶⁸ Sands and Klein (2001) p 473, Rossi (2010) p 33

¹⁶⁹ Amerasinghe (2005) p 101, Seyersted (1964) p 28, 55-56

3.3.2.1 The capacity to conclude treaties

The ability to make treaties and enter into binding international agreements is the first right often attributed to subjects of international law. It is not disputed that States possess the ability to create law in light of their legal personality.¹⁷⁰ The situation is not as straightforward for international organizations.

The Vienna Convention of the Law of Treaties between States and International Organizations or between International Organizations (hereafter VCLTIO) states in its article 84 that it is open to accession “by any international organization which has the capacity to conclude treaties”. The article thus presumes that the competence to create law can be possessed by international organizations. Although the treaty is not in force, it “acts as a legal and practical guide”.¹⁷¹

The UN’s treaty-making power was affirmed in the *Reparations* case.¹⁷² In regards to other international organizations, some are of the impression that an entity’s status as a legal person “does not necessarily imply power to make treaties”, but can be used to “infer general treaty-making capacity”.¹⁷³ Others are of the opinion that:

“...there is a strong presumption in the absence of contrary indication that such powers are enjoyed by international organizations *qua* international persons, because they are necessary for the discharge of their functions and the fulfilment of their purposes”.¹⁷⁴

The starting point in regards to an organization’s capacity to make treaties is their constituent instrument.¹⁷⁵ In lack of an explicit capacity to make treaties, such a right can be established through an interpretation of the constituent instrument or their implied powers.¹⁷⁶ The deci-

¹⁷⁰ VCLT art. 6

¹⁷¹ Crawford (2012) p 179

¹⁷² ICJ *Reparations for Injuries* p 179

¹⁷³ Crawford (2012) p 180

¹⁷⁴ Amerasinghe (2005) p 102

¹⁷⁵ VCLTIO article 6

¹⁷⁶ Crawford (2012) p 180, Sands & Klein (2001) p 480

sive factor will be whether the right is necessary for the organization's ability to effectively perform its functions.¹⁷⁷ As stated in the Preamble of VCLTIO:

“...international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes”.

The primary view today is that IGOs can enter into international agreements and treaties when the text of the potential Convention allows for it.¹⁷⁸

3.3.2.2 Competence to bring an international claim

The competence to bring an international claim is a frequently mentioned consequence which flows from the possession of international legal personality.¹⁷⁹ The ICJ *Reparation* case defines ‘international claim’ as:

“... the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation and request for a submission to an arbitral tribunal or to the Court...”¹⁸⁰

The Court held unanimously that the UN had the capacity to bring an international claim against both member and non-member States, due to their possession of legal personality and the ability to effectively perform their functions.¹⁸¹ They clearly emphasized that this competence presupposes that both the claimant and the claimed entity are “subjects of international law”.¹⁸² In regards to other international organizations, scholars claim that those IGOs possessing international legal personality have an inherent right to bring international claim

¹⁷⁷ Sands & Klein (2001) p 480

¹⁷⁸ Schermers and Blokker (2011) p 1000, 1123, Sands & Klein (2001) p 480

¹⁷⁹ Crawford (2012) p 180, Evans (2006) p 283

¹⁸⁰ ICJ *Reparations for Injuries* p 177

¹⁸¹ Ibid p 180, Crawford (2012) p 180

¹⁸² ICJ *Reparations for Injuries* p 178

against their members.¹⁸³ As long as their legal personality is objective, the competence to bring international claim is valid in regards to non-member States to the same extent as the member States.

3.3.2.3 Privileges and immunities from national jurisdiction

In order to exercise their functions effectively and independently, organizations can be granted certain privileges and immunities. Privileges and immunities of organizations can derive from either their constitutive instrument, multilateral agreements or headquarter agreements.¹⁸⁴ Contrary to the capacity to espouse claims which depends on the existence of legal personality, the existence of immunities “is not conditioned on the separate legal personality of the entity concerned”.¹⁸⁵ States can within their own jurisdiction grant immunities to any organization regardless of their international legal status.¹⁸⁶ Privileges and immunities are thus often a result of the organization’s nature rather than an inherent power applicable to all legal persons.¹⁸⁷

3.3.2.4 Responsibility under international law

A consequence of legal personality separate from its member States is the possibility for the organization as such to be held responsible for its actions. According to ICJ:

“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 agreements to which they are parties*”.¹⁸⁸

¹⁸³ Schermers and Blokker (2011) p 1191, Evans (2006) p 283

¹⁸⁴ Ibid p 172

¹⁸⁵ Ibid p 180

¹⁸⁶ Gazzini (2009) p 6

¹⁸⁷ Evans (2006) p 283

¹⁸⁸ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p 89-90 (author’s emphasis)

IGOs are subordinate to international law, meaning that the entities are “partly made up of international rules” which they are bound to follow.¹⁸⁹ The notion is that IGOs will be bound by international legal obligations in the same matter as their founding member-States, and to the extent their functions make it possible.¹⁹⁰ ILC’s Draft Articles of 2011 article 3 states that “every internationally wrongful act by an organization entails the international responsibility”. Furthermore, the Draft Articles acknowledge IGOs’ responsibility for breaches of international obligations.¹⁹¹ As the Draft Articles are not adopted, they can only be used as guidelines.

Despite the pending adoption of a treaty concerning the responsibility of international organizations, it is generally recognized in the international community that a logical consequence of legal personality is responsibility and liability for their obligations and actions.¹⁹² With this follows the possibility for an IGO with legal personality to have international claims brought against it.¹⁹³

3.4 Preliminary conclusion

3.4.1 The criteria

Based on the previous paragraphs, it is appropriate to conclude that it is not entirely clear what criteria that need to be fulfilled in order to possess international legal personality. Overall, taking into account the various arguments from the prominent legal scholars, international legal personality does not depend on precise and clear-cut criteria. The attribution of legal personality to organizations is rather based on a discretionary overall analysis, where “the primary test is functional”.¹⁹⁴ There are, however, certain requirements that should be used as guidelines for the evaluation. The organization should possess and exercise certain international rights and duties independent from its members, either expressly through its

¹⁸⁹ Schermers and Blokker (2011) p 997

¹⁹⁰ Ibid p 997, Clapham (2006) p 68

¹⁹¹ ILC Draft Articles Chapter III

¹⁹² Schermers and Blokker (2011) p 1008, Evans (2006) p 283

¹⁹³ ICJ *Immunity from Legal Process* p 89

¹⁹⁴ Crawford (2012) p 170, Sands & Klein (2001) p 473

constitutive instruments or implicitly intended through practice. The international rights and duties and the degree of independence are related to the intention of the founders, as the objective circumstances around the establishment of the organization will reflect the intention behind the establishment.¹⁹⁵ Alongside with the functions of the organization, recognition by the international community should to some extent be present. The attribution of legal personality to organizations seems to be granted to those entities the international community is in need of, making recognition an important factor.

Based on the ICJ *Reparations* case and subsequent judicial decisions and judicial teaching, the following four aspects will be used as requirements or legal guidelines in the thesis' further process:

1. Independence from States and other legal persons.
2. Existence and capability to exercise international legal powers.
3. The intention of the founders by delegated or implied legal personality.
4. Explicit or implicit recognition by other subjects of international law.

3.4.2 The consequences

In regards to the validity of international legal personality, the starting point should be qualified personality. An international organization with international legal personality will thus in principle only be able to enforce its rights and duties upon its members.¹⁹⁶ However, it is evident that international organizations potentially can attain objective legal personality, as with the UN. Objective legal personality can either be explicitly mentioned in their constituent instrument, or flow from the organization's functional position.

As to the consequences of international legal personality, the question of inherent powers is depended on two factors: the possession of legal personality and whether certain rights and obligations are necessary in order for the organization to effectively perform their functions.

¹⁹⁵ Amerasinghe (2005) p 83

¹⁹⁶ ICJ *Reparations from Injuries* p 178

As with the concept of legal personality, any possible inherent powers is a relative question, depending on the organization in concern.

4 The doctrine of legal personality applied to ICRC

4.1 Applicable approaches

4.1.1 The organization's structure

It is evident that the ICRC is an organization with a humanitarian purpose. It is however, unclear what type of organization the entity is, an IGO or an NGO. The distinction is in principle important, as it is generally recognized that the former, but not the latter can possess international legal personality.

Initially, the ICRC was a humanitarian organization established by five Swiss citizens. The absence of involvement by States made it an NGO. In 1915, the ICRC gained national legal personality under the Swiss Confederation as it “became a formal association under Swiss civil law”.¹⁹⁷ Since then, its legal status has evolved and changed. The signing of an agreement between Switzerland and the ICRC in 1993 conferred to the ICRC privileges and immunities normally granted to international governmental organization. It has been argued that ICRC from that point is to be regarded as an IGO, not an NGO.¹⁹⁸ There are prominent arguments for the organization being both an NGO and an IGO.

In support of regarding ICRC as an NGO is their membership and funding. The organization has individuals as their members, and is independent of State affiliation.¹⁹⁹ Furthermore, the organization's funding is voluntary, contrary to IGO's where funding usually is mandatory.²⁰⁰ When it comes to regarding ICRC as an IGO, its role and mandate in the international community and the organization's organs make it “appear more akin to an intergovernmental or-

¹⁹⁷ Nobel (1993) p 80

¹⁹⁸ Ibid p 81

¹⁹⁹ Fleck (2008) p 713

²⁰⁰ Lavoyer and Maresca (1999) p 509

ganization”.²⁰¹ ICRC is equipped with several organs functioning as plenary, executive and administrative organs, a feature known for IGOs.²⁰²

The perception internally in the organization is that the ICRC is neither an IGO nor an NGO. The Movement Statutes article 5 no. 1 states that the ICRC is “an independent humanitarian organization having a status of its own”. Rather than placing ICRC in one of the groups, the organization can be seen as an entity with a hybrid nature.²⁰³ It has “a distinctive duality” in the sense that the organization should not be categorized as either an NGO or an IGO.²⁰⁴ The organization is often referred to as having a legal status *sui generis*, meaning it is unique in its characteristic and not easily categorized.²⁰⁵ The unique nature of ICRC does not imply that the legal status as a subject of international law is excluded given that the international community has accepted that the possession of legal personality is not limited to the normal entities; States and IGOs. The international community has opened up for the possibility for *sui generis* entities to possess international legal personality, entities such as the Holy See and the Sovereign Order of Malta.²⁰⁶

4.1.2 The theories

Purely based on the subjective theory, it could be argued that ICRC is in the possession of international legal personality as the actions and statements by the organization indicate an implied intention to have international legal personality. Despite the lack of an expressed attribution of international legal personality in its statutes, the organization has acted and exercised its powers at the international plane as though it is a subject of international law. However, the intention of the founders of ICRC cannot be decisive in regards to their legal status. As ICRC is established by individual, the notion that States can grant international legal personality to the organizations they create, is poorly suited in this context as States are not members of ICRC. Allowing for individuals to freely establish an organization and granting

²⁰¹ Ibid p 508

²⁰² ICRC Statutes Articles 8-14, Klabbbers (2013) p 86

²⁰³ Rona (2004) p 1

²⁰⁴ Koenig (1991) p 47

²⁰⁵ Lavoyer and Maresca (1999) p 508

²⁰⁶ Crawford (2012) p 124, Bisaz (2012) p 37, Rossi (2010) p 36

the entity with international legal personality, would lead to an uncontrollable and unsolicited expansion of the notion of international legal personality.

Regardless of the intention of its founders, the objective theory could possibly lead to the conclusion that ICRC possesses international legal personality, where the objective criteria is met. Based on the two prominent theories on legal personality in section 3.2.1, the decisive criteria for the attribution of legal personality to the ICRC seems to be an overall judgement where both the intention and objective criterions need to be fulfilled.

4.1.3 Conclusion

ICRC is a *sui generis* entity. It is neither an IGO nor an NGO. Based on its unique role, one could assume that the legal basis for ICRC's possession of legal personality is of a completely different character than for other organizations. However, ICRC's similarities to IGOs imply that the traditional doctrine of legal personality developed by legal practice and teaching should be applied to clarify the legal status of ICRC, to the extent that it is possible.

The following sections will account for the various elements that are often cited as a basis for the ICRC's status as a subject of international law. Under each item, it will be clarified what criteria that are met based on the frequently employed directional lines for legal personality, cited in section 3.4.1.

4.2 The legal basis for ICRC's status as a legal person

4.2.1 International mandate

As already portrayed under section 2.2, the ICRC is entrusted with a wide international mandate, enabling it to participate in the international community. The mandate is often referred to as the legal basis for ICRC's possession of international legal personality.²⁰⁷ What is often failed to mention, is why the international mandate granted to ICRC leads to the conclusion

²⁰⁷ ICTY *Prosecutor v Simic et al* section 46, Lavoyer and Maresca (1999) p 508, Gazzini (2009) p 7

that ICRC possesses international legal personality. There is no explicit mention of legal personality in either of the legal instruments, and as a result the answer lies in an application of the traditional doctrine of legal personality. In relation to the applicable conditions for international organization's possession of legal personality highlighted in section 3.4.1, there is basis for pointing out certain clear-cut evidence to suggest that the mandate may have created the basis for the ICRC's legal basis.

4.2.1.1 International rights and duties

Consequently, the international mandate grants ICRC international rights and duties. The Geneva Conventions and its Additional Protocols have entrusted ICRC with a variety of functions that enable the organization to possess and exercise rights and duties relating to the protection of victims in armed conflict and the guarding of IHL. The rights and duties prescribed in the mandate give ICRC a unique function within IHL. It is first and foremost the functions of ICRC that are used to justify the attribution of legal personality to the organization.²⁰⁸ Based on an analogy from ICJ *Reparation* case it can be argued that ICRC cannot fulfil its functions and purpose under international law unless it is in the possession of legal personality. Amongst other, the International Criminal Tribunal of Rwanda (hereafter ICTR) has concluded that "...the functions attributed to it by the Geneva Conventions have resulted in the acquisition by the ICRC of an international status."²⁰⁹ On the other hand, Gazzini claims the international mandate neither presupposes nor confers international legal personality. In support of his claim he argues that if a High Contracting Party to the Geneva Conventions and Protocols denies ICRC access to prisoners of war, "it commits a violation of the right of the other party to the conflict...not of the ICRC".²¹⁰ The statement implies that the ICRC cannot enforce the rights granted to them under IHL, because it does not hold rights and obligations in international law. The statement is important in the debate, but should not be decisive. It is evident that ICRC possesses international rights, such as the right of initiative under common article 3 to the Geneva Conventions and the right to visit POWs. Gazzini's argument might be

²⁰⁸ Gazzini (2009) p 7

²⁰⁹ ICTR *Prosecutor v Tharcisse Muvunyi* section 15

²¹⁰ Gazzini (2009) p 11

in relation to ICRC's international competence, an issue that should not be confused with the organization's possession of international rights and duties.

4.2.1.2 Implicit recognition

The mandate conferred upon ICRC in both the Geneva Conventions and the Movement's Statutes is a result of a cooperation of virtually every nation. In this sense, the international mandate granted to ICRC is based on the international community's consensus. The International Criminal Tribunal for the former Yugoslavia (hereafter ICTY) stated in *Simic et al* that:

“... by accepting to be bound by the Geneva Conventions, the States party to them have agreed to the special role and mandate of the ICRC”.²¹¹

The international powers entrusted to ICRC pursuant to the Conventions, indicates an implicit recognition of ICRC's international legal personality.²¹²

An implied recognition of ICRC as a subject of international law is also to be found in the International Criminal Court's (hereafter ICC) Rules of Procedure and Evidence. Rule 73 acknowledges ICRC's international legal personality, based on the international mandate conferred upon it.²¹³ ICC has thus reaffirmed and recognized that the mandate gives legal grounds for attributing legal personality to ICRC. As ICC is founded by States, the acknowledgement strengthens the impression of State recognition regarding ICRC's international legal personality.

4.2.2 Judicial decisions

²¹¹ ICTY *Prosecutor v Simic et al* section 48

²¹² Portmann (2010) p 113

²¹³ Rossi (2010) p 39

4.2.2.1 ICTY Trial Chamber *Prosecutor v Simic et al*

Prior to the trial against individuals allegedly causing serious violations of IHL during the Yugoslav wars from 1991, the Prosecution submitted a motion as to whether a former employee of the ICRC could be called as a witness to give evidence of facts proving the guilt of “certain of the accused”.²¹⁴ It was undisputed that the witness itself contacted the Prosecution and wanted to testify during the trial. The disputed issue concerned the ICRC’s right to confidentiality, being their right to “not disclose to third parties information that comes to the knowledge of its personnel in the performance of their functions”.²¹⁵

To settle the dispute, the Court found it necessary to initially clarify the legal status of the ICRC. It should be noted that both parties agreed that the ICRC had international legal personality.²¹⁶ The Court declared:

“It is widely acknowledged that the ICRC, an independent humanitarian organization, enjoys a special status in international law, based on the mandate conferred upon it by the international community. The Trial Chamber notes that the functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols”.²¹⁷

In a footnote to this statement, the Chamber specified its view stating the following:

“It is generally acknowledged that the ICRC, although a private organization under Swiss law, has an international legal personality”.²¹⁸

The possession of legal personality implied that ICRC was capable of possessing international rights, in this case the right to confidentiality. The ICTY explicitly acknowledged ICRC’s status as a subject of international law, without further discussion or analysis. The Court did

²¹⁴ ICTY *Prosecutor v Simic et al* section 1

²¹⁵ Ibid section 55

²¹⁶ Ibid section 35

²¹⁷ Ibid section 46

²¹⁸ Ibid footnote 9

not clarify the legal status of ICRC, but merely recognized it. However, the decision does amplify that the organization's legal status is based on the mandate granted to ICRC. The decision is furthermore an example of an international claim being brought on ICRC. Based on the opinion by the Court in the ICJ *Reparations* case, such an act presupposes that both parties are subjects of international law.²¹⁹

It is evident that the decision entails an explicit acknowledgement of ICRC's international legal personality. However, it is not immediately clear what significance the statements have. ICTY is an ad hoc tribunal for the purpose of prosecuting those who committed war crimes during the Yugoslav wars from 1991.²²⁰ Clapham argues that the ICTY is not an "authoritative decision-making body".²²¹ As a consequence the statements "can only represent an *ad hoc* declaration of the situation rather than a constitutive act creating personality".²²² Despite it being an ad hoc tribunal, the explicit recognition by legally knowledgeable representatives of international law in a legally binding document cannot be regarded as anything other than a statement of great importance and persuasive strength. Although not authoritative, the statements are without a doubt a vital part of the overall analysis. According to ICJ Article 38, "judicial decisions" are regarded as a legal source. Statements *ratio decidendi* in judicial decisions will thus be of general relevance in regards to the law in question.

4.2.2.2 Decisions by the ICTR

Subsequent case law has significance as to whether ICTY's decision is convincing. Unlike most national legal systems, international law has formally "no system of 'precedent'".²²³ However, practice has shown that:

²¹⁹ ICJ *Reparations for Injuries* p 178

²²⁰ S/RES/827 (1993)

²²¹ Clapham (2006) p 71

²²² I.c.

²²³ Duffy (2005) p 7

“...decisions of the ICJ and other international courts and tribunals are important as they are often treated as providing authoritative interpretations of the law in question, and followed as authority in later cases”.²²⁴

Several decisions from the ICTR support the statements by ICTY regarding ICRC’s legal status and the organization’s capability to possess international powers.

In the motion for inadmissibility of a former volunteer of ICRC in the case against *Nyiramasuhuko* ICRC did not oppose to the testimony, meaning the Court did not need to take a stand on the legal issue. However, the decision does confirm that both the Prosecution and the Defence agreed that employees of ICRC had a right to confidentiality, and the dispute concerned whether volunteers had the same right.²²⁵ In *Prosecutor v Tharcisse Muvunyi* ICTR confirmed that international law has granted ICRC “the exceptional privilege of non-disclosure of information” relating to ICRC’s activities, and as a result the “acquisition by the ICRC of an international status”.²²⁶

The fact that subsequent practice from international courts follows ICTY’s decision provides a greater basis for claiming that the decision in practice has the effect of a precedent.

4.2.3 Headquarters agreements

The ICRC has concluded headquarter agreements with more than 80 States around the world, thus conducting diplomatic relations with States.²²⁷ The agreements are created with the aim of setting a legal framework for “the independent action of ICRC delegates and the ICRC itself” in each individual country.²²⁸

²²⁴ I.c.

²²⁵ ICTR *Prosecutor v. Nyiramasuhuko* section 1 and 2

²²⁶ ICTR *Prosecutor v Tharcisse Muvunyi* section 15 and 16

²²⁷ ICRC website <<http://www.icrc.org/eng/where-we-work/index.jsp>>, ICRC Annual Report 2008 p 40

²²⁸ Rossi (2010) p 40

The very first headquarter agreement was signed between ICRC and the Government of the Cameroon in 1973 and lay the foundation for the agreements to come.²²⁹ Perhaps the most commonly known headquarter agreement is the one concluded with Switzerland, where ICRC's relationship with Switzerland was specified in an agreement concluded on 19 March 1993. As the agreements are negotiated with each individual country, there is no standard headquarter agreement. However, most of them contain similar provisions regarding the recognition of ICRC's international legal personality. The ICRC has, based on previous agreements, developed a Standard Proposed ICRC Headquarter Agreement, which is used as guidelines for the individual agreement.²³⁰

What is exceptional about these agreements is that States usually only conclude similar agreements with IGOs. As ICRC is a hybrid organization, a prerequisite for States upon the concluding of the headquarter agreements is the assimilation of ICRC to an IGO.²³¹ By entering into agreements normally signed with IGOs, States chose to treat ICRC as an IGO and thereby allowing the organization to take part in international relations as a legal person.²³² The assimilation of ICRC to an IGO is in itself a strong indicator that ICRC is regarded as a subject of international law, as IGO's are generally recognized as possessing international legal personality.

The headquarter agreements will often include an expressly recognition of ICRC's legal personality.²³³ Article 1 in the agreement with Switzerland recognizes "the international juridical personality and the legal capacity" of the ICRC.²³⁴ As the headquarter agreements often include a provision of ICRC's legal personality, the individual State has expressly recognized ICRC's legal status.

Besides the explicit recognition by States, the agreements furthermore reaffirm the organization's independence. Implicitly, the immunities and privileges often granted through the

²²⁹ Beigbeder (1991) p 324

²³⁰ Rona (2002) Annex 2

²³¹ Rossi (2010) p 40

²³² Rona (2002) p 209

²³³ Rossi (2010) p 40

²³⁴ Agreement between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993 Article 1

agreements will contribute to the maintenance of ICRC's independence.²³⁵ Besides the implicit conferment of ICRC's independence, an explicit mention of the organization's character is not unusual. Article 2 in the agreement with Switzerland explicitly guarantees "the ICRC independence".

4.2.4 Recognition by the United Nations and other international organizations

4.2.4.1 Observer status at the United Nations

The UN General Assembly invited the ICRC to be honoured with a permanent observer status in October 1990.²³⁶ The General Assembly's 138 Member States passed the resolution unanimously.²³⁷ The invitation to act as an observer was an "exceptional gesture" and signaled the "international community's willingness to accept the ICRC's function within the UN".²³⁸

Prior to the new observer status, the ICRC, alongside with several NGOs, "had consultative status with the Economic and Social Council" pursuant to the UN Charter article 71.²³⁹ The consultative status did not entitle the holder "to attend the meetings and conferences of the main UN bodies", a matter that required special invitation "to attend individual meetings".²⁴⁰ With the change from consultative to observer status in 1990, ICRC's new status has its advantages. Unlike before, the new observer status allows for ICRC to attend meetings and conferences arranged by the main UN bodies on a "permanent representation", as well as the right to "speak on its own initiative".²⁴¹ Overall, the status allows the ICRC to "participate in a more active and visible way in the work of the UN", although they are not entitled to vote.²⁴²

²³⁵ Lavoyer and Maresca (1999) p 509

²³⁶ UN GA Resolution 45/6 16 October 1990

²³⁷ International Review of the Red Cross No. 279 (1990)

²³⁸ Lavoyer and Maresca (1999) p 508

²³⁹ Koenig (1991) p 38

²⁴⁰ I.c.

²⁴¹ Ibid p 38-39

²⁴² Lavoyer and Maresca (1999) p 508, Koenig (1991) p 46

There are presumably three reasons behind the UN's decision to invite the ICRC to take part in its proceedings as an observer. Firstly, the General Assembly emphasized "the mandate conferred" to ICRC under the Geneva Conventions.²⁴³ Secondly, the invitation had a connection with the organization's "special role... in international humanitarian relations".²⁴⁴ Lastly, the granting was a part of the overall wish to enhance the co-operation between the UN and ICRC.

The question of interest in this thesis is whether an invitation for observer status at the UN signalizes that the entity is regarded as having international legal personality. In order to answer this question, we must first look at which other entities have been granted observer status at the UN.

Besides States and certain national liberation movements, observer status is usually granted to IGOs, such as the European Union and the African Union.²⁴⁵ Besides IGOs, a total of five so-called "other entities" have been granted observer status at the UN, amongst them the ICRC, the International Olympic Committee and the International Federation of Red Cross and Red Crescent Societies.²⁴⁶ According to the information available at the UN website, no NGO have been invited to participate as observer in the UN. The entities having observer status thus tend to be the ones possessing international legal personality, or at least the ones usually accepted as having the opportunity to be regarded as a subject of international law.

International legal personality is in all probability not a prerequisite for observer status at the UN. However, the status has so far not been granted to any organization whose international legal personality is entirely out of the question. For instance, the Organization for Security and Co-operation in Europe (OSCE), lacks international legal personality, as it is not a "full-fledged international organization", but is granted observer status at the UN.²⁴⁷ Still, OSCE

²⁴³ UN GA Resolution 45/6 16 October 1990

²⁴⁴ I.c.

²⁴⁵ Koenig (1991) p 43-45, UN Website on Permanent Observers

²⁴⁶ UN website on Permanent Observers

²⁴⁷ OSCE Website on The legal framework (2010)

has attempted to address its legal status, so far without success, indicating that the organization possibly could be acknowledged as a subject of international law.

As for the ICRC, there is no conclusive answer in regards to whether the UN at the time of the granting considered the organization to be a subject of international law. Legal scholars are torn between the significance of the observer status in relation to the question of ICRC's possession of legal personality. Gazzini claims that the observer status is without significance to ICRC's legal status in the international community.²⁴⁸ Koenig on the other side argues that the observer status was granted to ICRC because of its international mandate, its conclusion of several headquarters agreements and consultative status in several international bodies, enabling the organization to possess a "functional international personality".²⁴⁹ Looking at the characteristics of the other observers as well as UN's reasons for granting ICRC observer status, it is appropriate to consider the observer status as a *strengthening* argument for ICRC's possession of international legal personality. The observer status is an implicit recognition by the international community of ICRC's unique legal status due to its mandate and connection with international legal persons. Based on the traditional legal doctrine, the recognition by the UN is an argument in favor of ICRC being a subject of international law.

4.2.4.2 Co-operation agreements

Beside its diplomatic relations with States, ICRC has concluded several co-operation agreements with various international organizations. The co-operation agreements are signed in different regions of the world, and across religion and cultures. The agreements aims to "increase and improve" the cooperation between the organizations, by opening up for participation of representatives as observers at conferences and meetings, as well facilitate for the exchange of information and carry out joint activities.²⁵⁰ ICRC has concluded co-operation agreements which amongst others the Organization of African Unity (1992), Organization of American States (1996) and the League of Arab States (1999).²⁵¹

²⁴⁸ Gazzini (2009) p 7

²⁴⁹ Koenig (1991) p 37

²⁵⁰ Lavoyer and Maresca (1999) p 510

²⁵¹ I.c.

These kinds of agreements are usually concluded between international organizations with international legal personality. The same logic as with States' recognition of ICRC's legal personality in the individual headquarters agreements, is applicable also in regards to the co-operation agreements. By concluding agreements with ICRC, international organizations have treated ICRC as an IGO rather than an NGO.²⁵² Hence, the agreements can be viewed as an implicit recognition by the different IGOs in regards to the legal personality of ICRC.

4.2.5 Conclusion

The previous sections have described the most commonly stated reasons for ICRC's legal status. It remains to reach a possible conclusion regarding the first sub-issue of the thesis, namely whether the ICRC possesses international legal personality.

Keeping in mind the criterions that are applicable in the thesis, several arguments support ICRC's possession of international legal personality. The intention of the founders is for ICRC to be a subject of international law and therefore able to participate in the international legal community. Despite the lack of an expressed intention to have international legal personality, the intention is implied through ICRC's subsequent action and practice. It is furthermore evident that ICRC is an international organization independent from States and other legal persons. The element of independence is both confirmed and enhanced in the headquarters and co-operation agreements. The international mandate, strengthened by the ICTY *Simic et al* case, leaves no doubt as to the existence and the capacity to exercise international rights and duties. In analogy to ICJ's subsumption in the *Reparations* case the ICRC is intended to exercise and enjoy, and is to this day exercising and enjoying functions and rights that can only be explained on the basis of the possession of international legal personality. In light of the Court's decision in this case, the ICRC is not able to carry out its mandate conferred to it by States under IHL if it is void of international legal personality.²⁵³ Furthermore, ICRC has on multiple occasions been recognized as possessing international legal personality, due to both the element of trust and the organization's resemblance to IGOs. A commonly stated

²⁵² Rona (2002) p 209

²⁵³ Rossi (2010) p 40

argument in legal theory is the ICRC possesses international legal personality “because states have tacitly recognized it as an international person”.²⁵⁴ The ratification of the Geneva Conventions and their Additional Protocols, as well as the conclusion of individual agreements with ICRC indicate that “states must have recognized the ICRC as an international person by implication”.²⁵⁵

It is today generally accepted that the ICRC possesses international legal personality, although the status is often qualified as limited, functional or sui generis with reference to its international mandate.²⁵⁶

4.3 The legal consequences of the attribution of legal personality to the ICRC

In the ICTY *Prosecutor v Simic*, the parties did not dispute on the legal personality of ICRC. It was however a fact that:

“...the Prosecution and the ICRC disagree as to the consequences that flow from the ICRC’s status”.²⁵⁷

Despite the recognition as a subject of international law, the consequences thereof have not been clarified. Nor do the organization’s constitutional instruments provide indications as to the consequences of the legal personality. The following sections will provide thoughts on what consequences that could be a natural result of international recognition of ICRC’s legal status.

²⁵⁴ Portmann (2010) p 112

²⁵⁵ Ibid p 113

²⁵⁶ Rossi (2010) p 41, Koenig (1991) p 47

²⁵⁷ ICTY *Prosecutor v Simic et al* section 35

4.3.1 Qualified vs. objective legal personality

The validity of organizations' international legal personality, and the distinction between qualified and objective personality are vital parts of the notion of international legal personality. However, the discussion is not easily applicable to ICRC. Contrary to IGOs, the members of ICRC are individuals, not States. Based on the applicable doctrine of international legal personality, States should therefore in principle not automatically be bound by ICRC's international legal personality without expressly recognition.

A natural reasoning for ICRC could be that the validity of its legal status applies to the High Contracting Parties of the Geneva Conventions, given that the international mandate to a large extent is the legal basis for ICRC's status as a subject of international law. As these conventions are considered universal, one could argue that ICRC's legal personality also applies to non-member States of the Geneva Convention. The Geneva Conventions are binding on every nation, member States as well as non-member States, as international customary law, implicating that also ICRC's international legal personality is valid on all nations. ICRC's mandate is furthermore established through the Movement's Statutes, which is developed at International Conferences with the participation of the High Contracting Parties to the Geneva Conventions. The participation by the High Contracting Parties at the International Conferences strengthens the argument that ICRC has objective legal personality, as virtually all the world's nations are party to the Geneva Conventions.

To date there is no clear answer as to the validity of ICRC's legal status in regards to other subjects of international law. It remains to see if the issue will be resolved.

4.3.2 Rights under international law

4.3.2.1 Competence to create law

Contrary to the generally accepted notion of an inherent treaty-making power granted to IGOs with legal personality, ICRC's competence to create law is a controversial issue.

A prominent argument against ICRC's competence to create law is the organization's lack of accession to international conventions. To illustrate one can mention the Geneva Conventions

of 1949. ICRC tried to conclude the conventions in 1930, but opposition from States resulted in delays, as “states controlled the codification of IHL”.²⁵⁸ Despite ICRC’s direct involvement in the elaboration of humanitarian treaties, the organization is not a signatory to any international convention, contrary to other international organizations such as the UN. On the other side, ICRC has a tremendous active part in the development of IHL and the drafting of the conventional instruments in this specific area of international law. The existence of IHL is to a large extent the result of ICRC’s initiative and preparation.²⁵⁹ The extensive initiative, preparation, participation and encouraging by ICRC in the treaty-making process in IHL, suggest that ICRC “has contributed directly and substantively to the lawmaking process”.²⁶⁰ However, the direct involvement by ICRC in the treaty-making process does not automatically mean that the organization has treaty-making capacity. An element of ICRC’s participation that most strongly suggests that ICRC has treaty-making power is ICRC’s study on customary IHL. Certain legal scholars have argued that ICRC’s activities, hereunder the study, “amount to State practice” and could be binding as customary international law.²⁶¹ Others are of the opinion that assessments from the ICRC “are not legally binding upon States or Tribunals”, thereby precluding the possibility for ICRC’s studies to have law-making force.²⁶²

Furthermore, ICRC has concluded headquarter and co-operation agreements without a specific legal basis for this capacity. According to Crawford, such a persistent practice can in principle create “a general treaty-making capacity”.²⁶³ According to VLCTIO Article 2 no. 1 a) these agreements are considered to be a “treaty” within the Convention’s wording, as they are concluded between States and ICRC as an “international organization” or “between international organizations”.

A possible conclusion is that the ICRC has the competence to conclude treaties as long as it falls within its field of competence. As long as the treaties in concern revolve around ICRC’s

²⁵⁸ Forsythe (2005) p 261

²⁵⁹ Woodward (2010) p 156

²⁶⁰ Ibid p 154

²⁶¹ Ibid p 156

²⁶² Gazzini (2009) p 13

²⁶³ Crawford (2012) p 180

mandate in IHL, the organization will due to its legal personality have a limited treaty-making capacity.

4.3.2.2 Competence to bring an international claim

In accordance with its international mandate, the ICRC has adopted guidelines concerning the organization's action in the event of violations of IHL.²⁶⁴ According to the guidelines' section 1. General rule, ICRC has the right to take "all appropriate steps" to put an end to violations on its own initiative. Although not explicitly mentioned, a natural understanding of the wording indicates that ICRC in pursuance of the guidelines' section 1. General rule has the competence to bring an international claim against other subjects of law where it would be considered a natural reaction to the violation.

Apart from ICRC's guidelines for action in the event of violations of IHL, the organization's own practice suggests that ICRC possesses the capability to bring international claims. Particularly one episode illustrates ICRC's competence to bring international claims. During a UN intervention in Zaire in 1961, an ICRC delegate together with two Red Cross volunteers were killed in a Red Cross ambulance in Katanga, allegedly by UN troops in violation of IHL.²⁶⁵ Following the incident, ICRC decided to submit a claim against the UN for compensation for UN's violation of IHL. A commission of inquiry was established, and without admitting responsibility, the UN paid compensation to the ICRC.²⁶⁶

It seems natural that ICRC as a matter of principle is entitled to bring international claims. ICRC delegates are deployed in many operations, where certain circumstances could give a cause to raise a claim. The litigation avenues are feasible open, but are in practice significantly restrictive, as it would be counterproductive to ICRC's role and mandate. As ICRC operates under the fundamental principles of neutrality and impartiality, it is questionable whether ICRC will make use of this ability, although it in principle has the capacity to bring international claims.

²⁶⁴ International Review of the Red Cross, No. 858 (2005)

²⁶⁵ Beigbeder (1991) p 321

²⁶⁶ Gazzini (2009) p 7

4.3.2.3 Privileges and immunity

As stated under section 3.3.2.3, the granting of privileges and immunities to organizations is not a result of their possession of international legal personality. It is rather a consequence of States' sovereignty to provide rights to and enter into agreements with entities of their own free will. ICRC is granted privileges and immunities by several States, not as a consequence of their status as subjects of international law, but due to States' own choice.

4.3.2.4 The right to confidentiality

It is today an undisputed feature of the ICRC to enjoy “an absolute privilege to withhold information”.²⁶⁷ There are seemingly three legal sources which recognize the organization's right to confidentiality: ICTY Trial Chamber *Prosecutor v Simic et al*, ICC Rules of Procedure and Evidence rule 73 and headquarter agreements.²⁶⁸

In the 1999 decision by the ICTY Trial Chamber, ICRC argued that the principle of confidentiality “is a key element on which it needs to rely in order to be able to carry out its mandate”.²⁶⁹ The Chamber found this argument to be supported by State practice. In its conclusion, the Chamber found after an overall analysis that a privilege of non-disclosure for the ICRC was “necessary for the effective discharge by the ICRC of its mandate”.²⁷⁰ With respect to the parties to the Geneva Convention and the Protocols, the Chamber concluded that “the ICRC has a right to insist on such non-disclosure” as a matter of customary international law due to its possession of legal personality.²⁷¹

Rule 73 of the ICC Rules of Procedure and Evidence codified ICRC's right to confidentiality in 2000. Pursuant to Rule 73 sections 4-6, the Court cannot impose upon those who work or

²⁶⁷ Ibid p 4

²⁶⁸ Rona (2002) p 210

²⁶⁹ ICTY *Prosecutor v Simic et al* section 55

²⁷⁰ Ibid section 73

²⁷¹ Ibid section 73, Rona (2002) p 211

have worked for the ICRC to witness or submit information gathered during their employment. Apart from ICRC, no other organization, neither IGOs nor NGOs, is granted this privilege, which in turn confirms the uniqueness of ICRC.²⁷²

Trough headquarter agreements, States can explicitly give their consent to ICRC's right to confidentiality. The degree of ICRC's right to non-disclosure varies as no headquarter agreement is the same. However, the standard provisions for headquarter agreement proposed by the organization contain the right to confidentiality, indicating that the right usually will be included in the agreements.²⁷³ Both the agreement with Switzerland and Australia acknowledges ICRC's right to confidentiality.²⁷⁴

4.3.3 Obligations under international law

4.3.3.1 Responsibility under international law

As stated in section 3.3.2.4, it is generally recognized that IGOs can be held responsible for violations of international law, as a consequence of their international legal personality and founding by States. Unlike IGOs, ICRC is not founded by States, and in that matter not necessarily bound by international law. The question is whether the notion can be used analogously to the ICRC.

The fact that ICRC is an entity capable of participating in international law implies that a possibility to be held responsible is the "price to pay".²⁷⁵ Given that ICRC is often being assimilated with IGOs, it is likely that the same reasoning should apply regarding ICRC's responsibility for its international wrongful acts. The reasoning implies that the ILC Draft Articles is applicable as ICRC is granted international legal personality. It would furthermore be inconsistent with the organization's purpose and function if the ICRC could not be held accountable for their illegal actions. It would weaken the organization's confidence and reputation if

²⁷² Rona (2002) p 210

²⁷³ Rona (2002) Annex 2 article 5 and 10

²⁷⁴ Agreement with Switzerland article 11, Agreement with Australia article 10

²⁷⁵ Klabbers (2013) p 124

violations of international law by the ICRC do not have legal consequences. The legal status of ICRC thus entails that it is not beyond the realms of possibility that ICRC could be liable for wrongful acts or failed duty of care by its delegates.

4.4 The significance of the attribution

It remains to consider whether the attribution of international legal personality has any significance. The relevant question is whether the status has value beyond what is already resulting from international conventions and agreements. Two aspects will be emphasized in order to portray the independent significance of ICRC's recognition as a subject of international law.

4.4.1 The privilege of non-disclosure

The attribution of international legal personality has independent significance for ICRC's right to confidentiality. Where such a right is not recognized in an individual headquarter agreement, it will still exist by virtue of the organization's legal status. Take for example Norway, which has not entered into a headquarter agreement with the ICRC. If Norway were to demand to receive sensitive information from the ICRC, the organization would not have the right to not disclose the information unless it is regarded as a subject of international law. The attribution of legal personality enables ICRC's to decline to give evidence due to the right's basis in customary international law, where the right to confidentiality is not granted in a headquarter agreement.

The granting of international legal personality and the privilege of non-disclosure of information is generally "in the very interest of the victims the ICRC seeks to protect and assist".²⁷⁶ Envision the situation at Guantanamo Bay. The information and insight gathered by ICRC delegates through visitation and interviewing will by virtue of ICRC's right to confidentiality entail that the detainees often will remain anonymous and that ICRC will be reluctant to share the information they acquire. Conversations with organizations that do not possess this right could possibly make prisoners more restrained in the information they provide.

²⁷⁶ Lavoyer and Maresca (1999) p 508

ICTR confirmed in *Prosecutor v Tharcisse Muvunyi* that international law has granted ICRC “the exceptional privilege of non-disclosure of information” relating to ICRC’s activities.²⁷⁷ The Court furthermore pointed out that “such privilege is *not* granted to national Red Cross societies”, clearly signaling the significance of ICRC’s right to confidentiality.²⁷⁸ Where information is gathered as a volunteer for a national Red Cross society, the right to confidentiality does not apply, contrary to information gathered by ICRC delegates. The privilege of non-disclosure thus emphasizes the importance of the efforts performed by ICRC delegates. The right to confidentiality enables ICRC delegates to perform their duties without the fear of having to disclose the information they possess.

4.4.2 The possibility of expanded competence

The attribution of international legal personality has furthermore individual significance as the status implies a possibility for ICRC to be granted additional international rights and duties, which would not be possible without the status. The status implies that ICRC has the possibility to be party to international Conventions, such as the ILC Responsibility of International Organizations if the draft articles are subject to a treaty opening for entering. The legal status furthermore entails that the ICRC in principle can be held accountable for their international actions, as well as take legal proceedings against other subjects of international law. These rights and duties stem from ICRC’s international legal personality, as opposed to international agreements.

²⁷⁷ ICTR *Prosecutor v Tharcisse Muvunyi* section 16

²⁷⁸ I.c.

5 Concluding remarks

Throughout the thesis, it has been elucidated that the international community today generally recognize IGOs as subjects of international law, contrary to NGOs. The problematic issue in the thesis has been that ICRC, although an international organization, does not fit either category. It is rather described as a hybrid organization, a unique or *sui generis* entity. Despite the lack of categorization of the ICRC, the thesis has found it appropriate to apply the traditional doctrine of international legal personality, due to ICRC's similarities with IGOs. Based on an analysis of the criteria for international legal personality applied to ICRC, the thesis has concluded that several arguments support the notion of ICRC being a subject of international law. The possession of international rights and duties has its legal basis in the international mandate and the ICTY *Simic* case. Furthermore, ICRC acts independent from States or other subjects of international law, a feature which is verified in both the Geneva Conventions and the individual headquarter agreements.

However, the international recognition suffers from a clear weakness, as it legally speaking is weakly justified. Despite clear statements about ICRC's possession of international legal personality, there is a lack of legislation and extremely limited juridical practice. The recognition is rather justified in implied intentions, individual agreements with the organization and the overall opinion of legal scholars throughout history. ICRC's alleged international legal personality is to this day still not codified in the Geneva Conventions, its Additional Protocols, the organization's Statutes or the Movement's Statutes. Despite this weakness, the ICRC does satisfy the criteria based on the traditional doctrine, implicating that it is in fact a subject of international law.

A problematic impact of the recognition of ICRC as a subject of international law is whether the recognition entails that ICRC is a model for the international participation of other non-State actors, such as Amnesty International or Save the Children. ICTY stated in the *Simic* case that the recognition of ICRC's international legal status "does not 'open the floodgates' in respect of other organizations".²⁷⁹ The statement was confirmed by ICTR in the case con-

²⁷⁹ ICTY *Prosecutor v Simic et al* footnote 56

cerning *Prosecutor v Tharcisse Muvunyi*.²⁸⁰ Legal scholars are of the same opinion, when they argue that ICRC's unique legal position "can hardly serve as a model for other Non-State Actors."²⁸¹

The thesis thus concludes that the ICRC has a functional international legal personality and the consequences thereof largely correspond to the consequences of the legal status for IGOs in general. Furthermore, ICRC's international legal personality has independent significance beyond what already results from international conventions and agreements.

²⁸⁰ ICTR *Prosecutor v Tharcisse Muvunyi* section 16

²⁸¹ Nobel (1993) p 82

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