

# Recognition and International Legal Personality of Non-State Actors<sup>1</sup>

Władysław Czapliński

*Professor of International and European Law, Institute of Law Studies, Polish Academy of Sciences, Warsaw, Poland*

*There is no doubt that states and international organizations are regarded as subjects of international law. The position of other entities acting in international relations is unclear. The international legal personality of groupings [including armed ones] struggling for the right to self-determination is the most controversial, as there are no universally accepted criteria of the personality under international law. The author discusses the role of recognition in granting international legal personality, as well as the function of non-recognition of unlawful acts as an element of the law on international responsibility.*

*Keywords: International Subjects, statehood, international organizations non-state actors, recognition, international responsibility for unlawful acts*

## 1. Introduction

Although from today's perspective one must admit that legal personality belongs to the key theoretical problems of international law, such an approach has been elaborated relatively late in the development of the law of nations.<sup>2</sup> This is hardly surprising, as before the 1920s states were considered to be the only subjects of international law. The establishing of the League of Nations and International Labor Organization modified to some extent the approach of the international community to the problem, and the creation of the United Nations forced the ICJ to formulate some important requirements relating to the recognition of legal personality of international organizations.

There is a growing interest among international lawyers for a legal personality of non-state actors. This is a new phenomenon, in particular if one leaves aside international organizations. Surprisingly, publications concerning the issue are relatively limited. The aim of the present paper is an attempt to define, to what extent the legal personality of the non-state actors can be derived directly from international law, and/or whether it depends on recognition by the international community.

Our starting point is that the international personality is in principle indivisible, and its scope should be the same with respect to all primary (states) and derivative or secondary (all other subjects including non-state actors, sometimes called non-state participants in international relations) actors. There is no

---

<sup>1</sup> The research was supported by the National Science Centre in Cracow, in the framework of the research project 2014/13/B/HS5/01490.

<sup>2</sup> On theoretical aspects of legal personality under international law see recently two monographs: J. E. Nijman, *The Concept of International Legal Personality. An Inquiry into the History and Theory of International Law*, The Hague 2004; and R. Portmann, *Legal Personality in International Law*, Cambridge 2010. On Non-State Actors cf. selection of articles edited by A. Bianchi, *Non-State Actors and International Law*, Ashgate, Farnham 2009; and First Report of the Committee on Non-State Actors in International Law, Report of the 74<sup>th</sup> Conference 2010, p.630, and subsequent work of the Committee.

doubt that every state possesses legal personality; doubt can exist, however, as to a qualification of a particular subject as a state (an example of Palestine is especially striking from the point of view of international theory and practice). The legal personality of other subjects and its consequences give rise to doubts and disputes. Moreover, it is not possible to treat all the non-state actors as a homogenous category; on the contrary, we have to approach each kind of subject individually. This is an important complication as far as general conclusions on legal personality and recognition are concerned.

There are four elements connected with international legal personality: a treaty-making power (often referred to as *jus tractatum*), a right to send and receive diplomatic envoys (*jus legationis*), a right to present claims based on international responsibility, and a right to use armed force.<sup>3</sup> Consequently, according to our main thesis, every international subject must possess these features. We have to make a distinction between the international legal personality and competence to act in international relations. Those powers should be provided in a statute (founding treaty) of the international organization concerned, or – with respect to other non-state actors – in any instrument defining or confirming their international legal status. An option to undertake an effective international action opposable to other subjects and shaping the international position of the entity concerned is an indispensable element of the international legal personality.

A mere fact of possessing rights and obligations based on international law is not sufficient to claim international personality. Such rights and duties must be based upon an international agreement concluded between the states or other subjects of international law, and they are binding exclusively if accepted by them. Let's take the example of the (nearly universally accepted<sup>4</sup>) Washington Convention of 3 March 1973 on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>5</sup> Does the conclusion of or accession to the convention grant international legal personality to all endangered animals, to Amur tigers as a whole, or to particular tigers? What is the influence of reservations to the Convention upon the legal situation of specific animals? In fact under current international law states only can be parties to the CITES, and wild animals and plants do not themselves accede, etc. In fact, the same reasoning applies to individuals (human beings). We discuss a possible legal personality of transnational corporations, legal persons of public law and private law of specific states, foreign investors (protected under BITs or multilateral instruments), finally of individuals as such (in connection with human rights treaties or with the international criminal responsibility). We can ask the same question with respect to endangered plants and animals.

Can we assume that all subjects of international law possess *ipso iure* the characteristics mentioned above, but they do not have specific powers to exercise them? What are similarities and differences between the nature of subjects of international law, the scope of their personality, and the effectiveness of their action under international law?

The creation of intergovernmental organizations raises a question about a distinction between the legal personality of states and other subjects of international law. We are unable to quote here a full list of the latter. We find some, the personality of which is traditionally accepted – like national liberation movements, belligerents, or guerillas. The latter two categories usually relate to the parties to a civil

---

<sup>3</sup> Even though the power to wage war is limited under the UN Charter, the practice shows that states under various circumstances refer to the use of force, although they try to justify it. As to international organizations, the power to use armed force can be considered with respect to the UN and regional organizations within the meaning of the Charter. It is hardly imaginable that some states establish an international organization with a single goal to use armed force at its own account, and the member states would not bear any responsibility (what is a logical consequence of separate legal personality of the organization and its members).

<sup>4</sup> In September 2013 some 178 states were parties to the Convention.

<sup>5</sup> <http://www.cites.org/eng/disc/text.php> (20 March 2016).

war, attempting at secession. In that sense all those subjects claim the exercise of their right to self-determination. Such a formula is controversial. Let's remind ourselves that the use of armed force by Russia against Georgia in August 2008 was justified by the necessity of support to Southern Ossetia and its people, internationally recognized and allegedly lawfully struggling for independence.

## 2. Legal Personality of International Organizations

International intergovernmental organizations represent the most numerous and characteristic group of non-state actors. We deliberately exclude here non-governmental organizations. The dominant view is that they are not subjects of international law, although they can play an important role in international relations. The creation of the first international organizations in the first half of the 19<sup>th</sup> century did not constitute a revolution in international law. International river commissions were international organs rather than international organizations. By the way, the category of international organs deserves more attention from international legal writing. Up to now, no definition of such organs was formulated; we do not know what its features are— in particular we do not know what the differences are between international organs and organizations: one of them is that international organs do not have members (?!); nor do we have a clear classification of international organs. This category encompasses many various entities, starting with river commissions (from their very beginning they were exceptionally progressive – they could regulate the conduct of individuals in connection with the navigation on international rivers or other forms of their exploitation, albeit in a limited scope), through control bodies established in accordance with human rights treaties, to international courts and tribunals.

Two theories have been formulated during the recent decades to define the legal personality of international organizations. The objective one was proposed by F. Seyersted; among the proponents of the subjective one we can mention H. Schermes/N. Blokker, A. Reinisch, D. Bowett and C. F. Amerasinghe. According to the objective concept, the international organization can be granted the legal personality notwithstanding its statute, if some objective criteria required by (general) international law are met. The partisans of the dominant, subjective theory maintain that the legal personality can be either based on express provisions of the founding (constitutional) treaty, or implied from powers, rights and obligations imposed upon the organization by the member states. In fact, both theories suggest that international legal personality and particular powers to act are somehow connected with the will of the member states.

The World Court in two advisory opinions concerning the international legal position of non-state actors emphasized that international subjects can possess different scopes of powers. The first opinion related to the territorial scope of the European Commission of the Danube and was adopted on 12 August 1927.<sup>6</sup> Two commissions were established on the basis of Articles XVI-XVIII of the Treaty of Paris of 1856. The scope of powers of the final European Commission for the Danube was defined by the so-called Public Act of 2 November 1865 regulating the navigation on the Danube. The states-parties put the Commission under the protection of international law (Article 1). The Additional Public Act of 28 May 1881 conferred upon the Commission numerous powers of double nature: regulatory and technical. The commission was supposed to become a sort of a “river state”.<sup>7</sup> The dispute referred to the Court

---

<sup>6</sup> PCIJ Publ. 1927, Series B, No. 14, p.5;

[http://www.worldcourts.com/pcij/eng/decisions/1927.12.08\\_danube.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.12.08_danube.htm) (20 March 2016).

<sup>7</sup> See P. M. Dupuy, *Droit international public*, Paris 2010, at 198. Strictly speaking, neither the protocol itself, nor the 1927 advisory opinion do not use this notion. In 1930, one G.A. Blackburn stressed that the powers of the Commission justify the treating of it in future like the state, including the membership in the League of Nations. Cf. "International Control of the River

concerned whether the territorial changes before the riparian states after the conclusion of the said Public Act led to any modification of the competence of the Commission with respect to the lower part of the Danube between Galatz and Braila. The advisory opinion stated that the powers of the Commission were confirmed by the international treaties concluded after its establishing, in particular by the Public Act. If the parties agreed as to their substantive scope, there was no need to decide on their nature or legal basis. The Court emphasized that the Commission was not the state, as it did not dispose of territorial powers. Its activity was independent of the territorial sovereignty vested upon the riparian states. However, it was an international institution (*institution internationale*)<sup>8</sup>, exercising powers of functional character. They encompassed *inter alia* the power to intervene if the states-parties acted contrary to their engagements concerning the exploitation of the Danube. These activities of the Commissions should not exceed its powers granted by the states under the treaties. The opinion should be considered as the recognition of competence of the international agency, and the rejecting of any form of its international legal personality – so that it could not have any power deriving directly from international law.

The second opinion was passed on 11 April 1949 and concerned the reparation for injuries suffered in the service of the UN.<sup>9</sup> Contrary to the 1927 opinion, the Court was invited to rule on the powers of the UN not defined in the Charter. The Court used the opportunity to formulate a general theory of the legal personality of international organizations. The 1949 opinion must be interpreted with caution and restrictively, as an exceptional solution, as the international community was at that time fully dominated by the states. The opinion was applicable to the United Nations as the universal organization with nearly general participation, so that the will of the member states was decisive for an opposability of the legal personality of the UN towards all states. The Charter did not provide *expressis verbis* the competence to present international claims nor to send diplomatic envoys (special missions, using contemporary language). The Court stated however that if the member states conferred upon the organization certain powers, they had to grant the UN certain scope of legal personality. In fact Art.104 of the Charter provides for a legal personality, limiting it to domestic legal orders of the member states. A proposal to grant international legal personality was rejected at the San Francisco conference, as the delegates decided that the personality would derive from the Charter as a whole.<sup>10</sup>

The court stressed that not all the subjects acting in international relations have the same scope of legal personality. The states are sovereign and therefore they have the full scope of legal personality. The powers of the international organizations are limited and strictly connected with the functions conferred by the member states. There was no doubt that the power to send diplomatic agents was indispensable to perform the functions of the UN, and that those agents had to be protected under international law. This protection corresponds with the diplomatic protection by the states, but because of the nature of the UN it's purely functional. The Court based the protection on the context of all the provisions of the Charter, what corresponded with the proposals from San Francisco. So it rejected any powers of the organizations based directly upon international law, but referred to the conception known later as the doctrine of implied powers.

Summing up, both advisory opinions went in the same direction. The opinion of 1949 to a certain narrow extent completes the previous opinion of 1927. Both opinions found a source of the competence of the

---

Danube", *Current History*, XXXXII (September 1930). This opinion was criticized by J.Kunz in 1945. He stated that the river commissions constituted an object of international law regulation, and were not subjects of law. See "Experience and Techniques in International Administration", *Iowa Law Review*, XXXI (November 1945), p. 50.

<sup>8</sup> Advisory Opinion, at 64. The Court referred also to a notion of a *international body* (at 43).

<sup>9</sup> ICJ Rep. 1949, s.174; [http://www.worldcourts.com/icj/eng/decisions/1949.04.11\\_reparation\\_for\\_injuries.htm](http://www.worldcourts.com/icj/eng/decisions/1949.04.11_reparation_for_injuries.htm) (20 March 2016).

<sup>10</sup> Por. C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge 2007, at.78.

international organizations in the will of the member states. They also confirmed the principle of conferred powers as the basis of action of the organizations on the international plane. This principle is currently universally accepted. It expresses the subjective legal personality, depending upon the decision of the founding fathers of the organization. There is a dispute concerning the nature of implied powers, which are not provided by the statute, but necessary to achieve the goals of the organization. The *Reparation for injuries* opinion based the implied powers on the general context of the Charter. On the contrary, in the practice of the European Union the decision on the implied powers is vested upon the Council, depending on the proposal of the Commission and subject to consent of the European Parliament. In practice, the possible scope of the implied powers was framed extensively, the only limit being the letter of the founding treaties. We could discuss whether the conception of implied powers does not reflect the objective legal personality of the international organization, as certain powers could possibly be derived from general international law.

Comparing with other subjects of international law, the role of recognition with respect to international organizations and international organs is much less significant. It is of certain importance for the relations between the particular organizations with non-member states, but it does not constitute a condition of its activity in international relations. However, if we accept the objective theory of legal personality, we have to cope with its significant weakness: it does not clarify how the international personality could be imposed on the organization against the will of the member states and of the organization itself. In such a situation the recognition by third parties would play a more important role than now, in particular in the context of the opposability of the activities of the organization, and of the effectiveness of its acts.

What is difficult is not the definition of the international organization or its legal personality, but the qualification of the specific entity as the organization.

The discussion on the objective character of the legal personality took place also in the European Union after the conclusion of the Treaty of Maastricht. Some authors stated<sup>11</sup> that the Union acquired an implied international legal personality, with the consent of the member states which empowered the Union to conclude international agreements in the areas of common foreign and security policy, and the cooperation in justice and home affairs. Moreover, those agreements could be concluded on behalf of the Union, and not of the member states.

### 3. Recognition and Legal Personality

Classical international law included national liberation movements, guerillas and belligerents in civil wars in the category of international legal subjects. Those notions and expressions used in international language have positive connotation, and express a support of the international community for those subjects. On the other hand, we often face certain groupings engaged in armed confrontation with existing states and governments but deprived of an international support and condemned by the international subjects. It is interesting to investigate what factors decide whether the groupings in

---

<sup>11</sup> E.g. J. Klabbers, *Presumptive Personality: the European Union in International Law*, in M. Koskeniemi (ed.), *The International Law Aspects of the European Union*, The Hague-London 1998, p. 231; R.A. Wessel, *The International Legal Status of the European Union*, *European Foreign Affairs Review* 2(1997), p.109 ff; G. Hafner, *The Amsterdam Treaty and the Treaty-Making Power of the European Union*, in G. Hafner et al (ed.) *Liber Amicorum Professor Ignaz Seidl Hohenfeldern*, The Hague et al. 1998, p.257 ff.

question are treated as pioneers of independence and heroic freedom fighters, or rather as armed bands and terrorists.

The said groupings are connected with internal (non-international) armed conflicts, and they conduct armed hostilities in order to proclaim independence, or – from the other perspective – to secede. In that sense all these subjects struggle for their self-determination which can be understood either as the external self-determination (aimed at the establishing of a new state), or as internal self-determination (unconstitutional change of government, modification of a political, economic and social system, etc.).

In order to check the legal situation of non-state actors we start by a defining who is a bearer of the right to self-determination. In the colonial context it was based on a list proposed by the special UN Committee on Decolonization, indicating all dependent territories. In accordance with UNGA Resolutions 1514 and 1541 (XIV), they had – alternatively – an option either to create a newly independent state, or to join already existing newly independent state (former colony), or to establish a new state together with another former colonial territory. A dependent territory could not, however, remain part of the former colonial power. Plebiscites in Gibraltar and Mayotte to maintain a colonial status were exceptional.<sup>12</sup> Already in the time of decolonization the right of self-determination did not concern people in ethnic (tribal) sense, but instead it was granted to a population of a specific territory. That can be seen in particular in Africa. The OAU confirmed the principles of intangibility of frontiers and territorial integrity during its first session in 1964. The same principles were included subsequently by Art. 4(a) of the Constitutional Act of the African Union. In the meantime the said principles were put in question by secessions of Eritrea (1993) and South Sudan (2011). This suggests that from the point of view of the territorial integrity of the state the secession of the part of territory is evaluated in a different way than the modification of frontiers by foreign intervention.

The approach to possible subjects of self-determination was verified and modified in the process of the Conference on Security and Cooperation in Europe. Under pressure by Western European states, the instruments of the CSCE confirmed that the right to self-determination is not limited to colonial people, but it is attributable to all nations (peoples organized in states). It consists of the right to determine freely the political, economic and social system of the state. From such an angle, the boundaries in Europe are not fixed once for all eternity, but they can be modified if the peoples (nations) concerned freely express such a will in a democratic way. This idea paved a way towards a unification of Germany under favorable circumstances, nearly 25 years after the adoption of the Helsinki Act.

More recently the role of *uti possidetis* was emphasized in the process of dissolution of the USSR and Yugoslavia, and – from a perspective particularly close and interesting for us – in the case of regaining independence by Lithuania.<sup>13</sup> In all cases connected with the dismemberment of the federations the international community was eager to recognize new states in the former administrative frontiers within the predecessor states. This confirms that self-determination has a territorial dimension. Also opinions of an arbitration commission, the so-called Badinter Committee, accepted the *uti possidetis* principle. In Opinion No. 3 of 11 January 1992<sup>14</sup> the Committee stated that together with the gaining of

---

<sup>12</sup> In fact, a referendum in Gibraltar in 2002 concerned an establishing of a British-Spanish condominium, and not independence.

<sup>13</sup> The Declaration of Independence of 11 March 1990 refers to the principles of territorial integrity and inviolability of frontiers, as formulated in the Final Act of the CSCE, while the two remaining Baltic states in their declarations of independence invoked the revival of their prewar statehood and boundaries. The reason of invoking *uti possidetis* is clear: Lithuania acquired rights to the (then Polish) city of Wilna on the basis of a treaty between the USSR and Lithuania of 10 October 1939. The conclusion of that treaty was possible thanks to the Hitler-Stalin Pact of August 1939, the validity of which Lithuania constantly challenged. This situation is a perfect example of a political schizophrenia.

<sup>14</sup> EJIL 3(1992), p.182.

independence by the former Yugoslav republics and their international recognition, the administrative boundaries turned into state borders and were therefore protected by international law. The importance of *uti possidetis* was further strengthened by accepting a protection of the territorial integrity of Bosnia and Herzegovina. Opinion No. 2 of 11 January 1992 confirmed that the Serbian and Croatian minorities had the right to autonomy within the state, but were not entitled to join Serbia and Croatia, respectively – as they did not possess the right to self-determination. Again, the territorial dimension of self-determination replaced the ethnic one.

The ICJ emphasized the importance of *uti possidetis* in its judgment in the Territorial dispute (Burkina Faso/Mali) case.<sup>15</sup> It indicated that the principle belonged to general principles of law, and its application went beyond regional relations in the African context. The Court's argument is puzzling, as because of its content and role in international practice *uti possidetis* should be interpreted rather as customary norm. Perhaps it would be too difficult to give evidence of the customary nature of the norm.

Recent UNSC resolutions concerning Western Sahara,<sup>16</sup> one of the last dependent territories, confirm the connection between self-determination and population of specific territory, notwithstanding its ethnic composition.

The issue of subjects of the right to self-determination (ethnic groups, other groups of individuals, population of the territory) is of crucial importance for our topic. The recognition of that right will be decisive for the establishing of their position in international relations, and for granting them rights and obligations. Those rights depend therefore of the will of the third parties, so in fact the said non-state actors do not have international legal personality.

Specific problems occurred in the cases of civil wars in Libya and Syria. The oppositional movements were recognized by the international community as “legitimate representatives of the people”. Formerly the same formula was used in a colonial or similar to colonial context (PLO, ANC in South Africa, and FRELIMO in Mozambique). The recognition (not necessarily amounting to *de iure*) by the resolution of the UN General Assembly or by the majority of states was decisive. The same expression was used in the ICJ's advisory opinion on the accordance with international law of the unilateral declaration of independence of Kosovo (2010) where the Court stated that the act passed by the elected representatives of the people was not attributable to the international administration of Kosovo. The Libyan Transitional Council declared itself a sole representative of the Libyan people (but not as the transitional government) at the end of February 2011, and as such it was recognized by France and a number of other states. The recognition of the new government was possible first after the occupation of Tripoli and defeat of the Gaddafi regime, and took the form of voting on the credentials in the UN General Assembly (16 September 2011). The *Syrian* National Coalition of *Syrian* Revolution and Opposition Forces was established in November 2011, after several months of civil war, as a result of consolidation of a part of oppositional organizations. It was subsequently recognized by Libya, France and a group of other states. On the contrary, the government in exile for Syria, established in Turkey in March 2013, did not get an international recognition.

What is the significance of recognition as legitimate representatives of people? Under classical international law, a legitimism of state authorities was subordinated to legalism and effectiveness. This tradition was challenged in the 1990s, as the right to democracy was invoked as customary rule in Europe

---

<sup>15</sup> ICJ Rep. 1986, p.565 ff.

<sup>16</sup> Resolutions 1495(2003), 1813(2008), 1871(2009), or 2099 (2013).

and America.<sup>17</sup> If it becomes universal, the role of recognition/non-recognition as a measure protecting democracy will increase. Taking into account a military coup d'état in Egypt in summer 2013, there is still a long way to go. Secondly, the recognition as legitimate representative does not amount to the recognition of government, but allows certain level of protection under international law, enables purchase of weapons and other equipment, as well as possibly giving access to financial resources. Finally, from the perspective of third parties, it strengthened possible reparation claims for damages suffered during the civil war. Art. 10 of Articles on international responsibility of states (as annexed to the UNGA resolution 56/83 of 12 December 2001) provides for a responsibility of new governments for damages incurred during the insurrection, although the responsibility can be implemented first after the collapse of the previous regime.

#### 4. Obligation of Non-Recognition of Illegal Situations<sup>18</sup>

If recognition is the source of international legal personality of non-state actors, it should imply the obligation not to recognize those entities, the establishing and activities of which are unlawful. We should deny a priori any effects of such acts. Such an approach is particularly important when armed groups claiming recognition invoke the right to self-determination; as such situations constitute a threat to the territorial integrity of the state concerned.

The principle of non-recognition of unlawful territorial acquisitions was initiated by the so-called Stimson doctrine, proposed by the US government in connection with the Japanese aggression in China in January 1932, and continued with respect to the annexation of the Baltic States by the USSR in 1940. In international practice the problem became acute after a proclamation of independence by Southern Rhodesia (1965) and in the context of the Israeli-Arab war in 1967. Resolution 216(1965) called the member states not to recognize the illegal regime of prime minister I. Smith and its declaration of independence. The same idea was repeated in the following resolutions, including resolution 423(1978) rejecting all effects of activities of the illegal government, and resolution 448(1979) calling for non-recognition of the results of domestic elections. As to the situation in the Middle East, resolution 242 (1967) emphasized the illegality of territorial acquisitions by force and called on the parties to the conflict to respect the territorial integrity of all states in the region. One can invoke also resolution 402 (1976) condemning the recognition of Transkei by Lesotho, resolution 541 (1983) on the Turkish Republic of Northern Cyprus, resolution 662 (1992) on the invasion of Kuwait by Iraq, and resolution 757 (1992) on the war in Bosnia and Herzegovina.

The obligation not to recognize unlawful situations was confirmed in the 1970s, by numerous resolutions of the UNGA and decisions of international courts. The Declaration on Principles of International Law (resolution 2625[XXV] of 24 October 1970) stated in al.10 of Principle 1: *No territorial acquisition*

---

<sup>17</sup> See i.a. Th. Franck, *The Emerging Right to Democratic Governance*, AJIL 86(1992), p.46; J. Crawford, *Democracy and International Law*, BYBIL 64(1993), p.113; R. Müllerson, *Democracy Promotion: Institutions*, International Law and Politics, RCADI 333(2008), s.9; G. H. Fox & B. Roth, *Democracy and International Law*, Review of International Studies 27(2001), p.327; J. Wouters & B. de Mester & C. Ryngaert, *Democracy and International Law*, NethYBIL 34(2003), p.137; selection of papers by R. Burchill, *Democracy in International Law*, Ashgate 2006.

<sup>18</sup> See recently S. Talmon, *The Duty Not to „Recognize as Lawful” a Situation Created by the Illegal Use of Force or other Serious Breaches of a Jus Cogens Obligations: An Obligation without Real Substance*, in M. Thouvenin & Ch. Tomuschat (eds.), *The Fundamental Rules of the International Legal Order*, Leiden-Boston 2006, p.99; M. Dawidowicz, *The Obligation of Non-Recognition*, in J. Crawford & A. Pellet & S. Olleson (eds.), *The Law of State Responsibility*, Oxford 2010, p.677; A. Pert, *The “duty” of non-recognition in contemporary international law: issues and uncertainties*, 2013 ILA-ASIL Asia-Pacific research Forum: Challenges in the Asia Pacific, May 15-16, 2013; Taipei, Taiwan, Republic of China.

*resulting from the threat or use of force shall be recognized as legal.* The same formula can be found in resolution 2734[XXV] of 16 December 1970, or the Declaration on the Strengthening of International Security. Finally the Definition of aggression (resolution 3314[XXIX] of 14 December 1974) reads in Art. 5(3), that *no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.* All those resolutions were adopted by consensus.

As to the jurisprudence of the ICJ, we start with the advisory opinion on Namibia (1971).<sup>19</sup> The Court confirmed the extinction of the mandate of South Africa with respect to Namibia, so that the occupation of the territory became illegal. All the member states of the United Nations should abstain from any acts suggesting, that they recognized (even *de facto*) the legality of that occupation. In *East Timor* case,<sup>20</sup> the Hague judges stated surprisingly that no international organ obligated the states not to recognize the annexation of East Timor by Indonesia and consequently not to negotiate any question relating to it with any state other than Portugal as colonial power. Finally, in the advisory opinion on the wall in the Palestinian territory<sup>21</sup> the Court confirmed the acquisition of territory by force is illegal and cannot be recognized. In the latter cases there was a certain discrepancy between judges as to an interpretation of the principle of non-recognition. Judge Skubiszewski in his separate opinion of 1995 stated that the obligation is automatic, absolute and self-executing; while Judge Higgins in her opinion of 2004 considered that the decision of the UNSC was required.

European courts also referred in their jurisprudence to the illegality of certain situations and the obligation not to recognize their effects (*e.g.* the ECJ in its judgment in *SP Anastasiou (Pissouri)* [1994],<sup>22</sup> concerning the rejection of the certificate of origin issued by the customs authorities of the Turkish Republic of Northern Cyprus, while in *Brita*[2010]<sup>23</sup> it denied it; or the decision of the European Court of Human Rights in Strasbourg in *Ilaşcu* [2004],<sup>24</sup> concerning the responsibility of Russia for the violations of human rights in Transdnistria).

Articles on state responsibility pronounce *expressis verbis* on the non-recognition of unlawful situations in a mysterious way, in the context of responsibility for serious violations of peremptory norms of international law (Art.41). This seems to restrict the significance of the rule, and also to undermine a universal application of another principle: *ex iniuria jus non oritur*.

The obligation of non-recognition of unlawful situations is usually invoked in the context of illegal territorial situations, but it should not be limited to them. The non-recognition concerns also an illegal (unconstitutional) government and other cases. It seems that the customary nature of the principle is sufficiently confirmed by the international practice.

In this context we should address one more question: who decides whether the questionable situation is really unlawful. The ICJ seems to suggest (in the *East Timor* case) that there must be a basis for the decision in the form of the resolution of political organs of the UN. We disagree with this postulate,

<sup>19</sup> *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), ICJ Rep. 1971, p.16

<sup>20</sup> ICJ Rep. 1995, p.90.

<sup>21</sup> *Advisory Opinion on Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, ICJ Rep. 2004, p.136.

<sup>22</sup> Case C-432/92, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, ECJ Rep. 1994, p.I-3087;

[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61992J0432&lg=en](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61992J0432&lg=en) (20 March 2016).

<sup>23</sup> Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg Hafen*,

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0386:EN:HTML> (20 March 2016).

<sup>24</sup> *Ilaşcu and others v Moldova and Russia*, Application 48787/99, judgment of 8 July 2004.

simply because of the political nature of the acts of the General Assembly or the Security Council. Articles on state responsibility go in a similar direction, as they leave to the states a decision as to claiming international responsibility for violations of obligations *erga omnes* (Art. 42(b) and 48(1)(b)). The practice relating to sanctions and countermeasures decisively confirms this solution. Each state<sup>25</sup> itself takes a decision on recognition of other international actors and their rights and obligations.

## 5. The UN Security Council and the Status of Non-State Actors

The question remains open whether the fact that particular non-state actors were directly addressed by the Security Council resolutions can influence their international legal situation and confer legal personality. The UNSC deals with such entities mostly – if not exclusively – while acting in accordance with Chapter VII of the Charter, and tries to enforce the principles of law of armed conflicts and humanitarian law. A common usage is an appeal for cessation of hostilities.

We find numerous examples of resolutions addressed to non-state actors other than international organizations. This is in a way special, as according to Art. 48 (2) of the UN Charter exclusively the states are obligated to obey to the decisions of the Organization.

Examples of resolutions addressed to non-state actors are more and more numerous, starting with resolution 46(1948), addressed to the Arab Higher Committee and Jewish Agency in Palestine. Further instruments include *e.g.* Resolution 1193 (1998) concerning different groups in Afghanistan, including Taliban, Resolution 1270 (1999) addressed to armed groups in Sierra Leone, Resolution 1822 (2008) concerning terrorist activities of Al-Qaeda and Taliban, Resolution 1856 (2008), relating to different armed groups in the Democratic Republic of the Congo (including in particular the Congrès national pour la Défense du peuple (CNDP), Lord's Resistance Army, and Forces Démocratiques de Libération du Rwanda (FDLR)), Resolution 1860 (2009) addressed to Israel and Hamas, calling to ceasefire, and finally Resolution 1701 (2006), concerning the situation in Lebanon, calling for cessation of hostilities, disarmament of Hezbollah, and establishing of demilitarized zone in Southern Lebanon. Moreover, the non-implementation of such resolutions can result in imposing sanctions upon the groups concerned – *e.g.* Resolution 1127 (1997) proclaimed sanctions against UNITA (acting in Angola) for disobeying the peace agreements of Lusaka.<sup>26</sup> We emphasize that the adoption of those resolutions did not amount to the recognition of international legal personality of the addressees, but granted them certain powers to act in international relations (rights and obligations), without taking any firm position towards their status.

## 6. Concluding Remarks

The passage of the ICJ's advisory opinion of 1949 in the *Bernadotte* case emphasizing that the scope of legal personality, international rights and obligations, varies with respect to different categories of subjects remains fully actual. It's time to modify and to systematize the approach to non-state actors.

---

<sup>25</sup> We do not consider here a situation where some particular states are under international obligations to coordinate their policies.

<sup>26</sup> The UNSC addressed certain resolutions directly to individuals, *e.g.* imposing smart sanctions (travel ban, freezing of assets), but also calling to participate in processes of national reconciliation (see resolution 1072[1996] concerning the situation in Burundi, resolution 1258[1999] on the situation in the Democratic Republic of the Congo) or even to stop producing and distributing drugs (resolution 1333[2000] on Afghanistan). It might be interesting to analyze whether the resolutions could have direct effect (become self-executing).

The legal personality of international organizations depends upon the will of the founding states, and it cannot be questioned, at least by the members. The universal organizations like the UN are opposable to all states including non-members (which are not numerous anyway) – in that sense Art. 2(6) of the UN Charter establishes an objective regime (effective *erga omnes*) within the meaning of Art. 35-37 of the Vienna Convention of 1969 on the Law of Treaties. A possible protest against the legal personality of the said organization by third parties is not of importance. International organs based on international treaties can also have international legal personality of a functional nature and limited powers. Two specific subjects, the Holy See and the Order of Malta, are universally recognized on the basis of the general consensus. Their personality derives from the former territorial status. There is also a consensus as to the personality of the International Committee of the Red Cross, although there is no ground to expand this international personality to other NGOs.

It is much more difficult to build up such a consensus as to other non-state actors. The notions of “belligerent” or “guerilla” are fluent and indeterminate, there are no homogenous criteria allowing the identification of particular subjects, and their acceptance depends upon recognition, so it’s highly political. The expression “national liberation movement” is in a way outdated, conditioned by ideology and connected with the process of decolonization by armed force. The legality of their activities in the era of the ban on the use of armed force can be disputable. This category should be more and more replaced by a notion of separatist or secessionist movements. Such expressions are, however, pejorative. We suggest replacing it by “people attempting to exercise their right to self-determination”. The classification of those subjects will also depend on recognition. The subjects expressly or at least implicitly recognized on the forum of universal international organizations will be privileged, even though recognition of this kind does not prejudge their international legal personality (see the case of Palestine after being granted observer status within the UNGA).

The situation of groups of individuals or political fractions is even more complicated. We do not suppose that they are subjects of international law. They only possess certain international legal rights and obligations, *e.g.* in the domain of the law of armed conflicts (as to admissible weapons and methods of warfare) and humanitarian law. The scope of those rights and obligations is dependent upon the recognition by third parties, and consequently on conferral by them. The recognition will be of constitutive importance. The recognized non-state actors do not have per se any attributes of international legal personality, derived directly from general international law, except those connected with customary international human rights law. One has to remember that human rights protection is individual. Certain doubts exist with respect to a possibly collective nature of protection of minorities (individual rights can be exercised jointly by the individuals belonging to the same group) and to self-determination. The latter can be exercised exclusively if recognized by third parties, and thus we start following a vicious circle.