In the absence of consistent state practice, state succession in respect of treaties has long been a rather uncertain field of international law. For example, while the 1978 Vienna Convention on Succession of States in Respect of Treaties provided, in accordance with the advice given by the International Law Commission, that a new state is bound by the international agreements binding on the predecessor state,[61] the 1987 Restatement (Third) of the Foreign Relations Law of the United States took the opposite view. Meanwhile scholars involved in the drafting of these instruments readily acknowledge that these standards were very open to criticism.[62] One of the foremost authorities on the subject even observed that 'state succession is a subject altogether unsuited to the process of codification'.[63]

State practice during the 1990s strongly supports the view that obligations arising from a human rights treaty are not affected by the succession of states.[64] This applies to all obligations undertaken by the predecessor state, including any reservations, declarations and derogations made by it. The continuity of these obligations occurs *ipso jure*. The successor state is under no obligation to issue confirmations to anyone.[65] Consent from other states is not required. Individuals residing within a given territory therefore remain entitled to the rights granted to them under a human rights treaty. They cannot be deprived of the protection of these rights by virtue of the fact that another state has assumed responsibility for the territory in which they find themselves. It follows that human rights treaties have a similar 'localised' character as treaties establishing boundaries and other territorial regimes.[66]

61 Article 34(1) of the Vienna Convention on Succession of States in Respect of Treaties, adopted 22 August 1978, not yet in force.

62 See, eg I Sinclair, 'Some Reflections on the Vienna Convention on Succession of States in Respect of Treaties', in *Essays in Honour of Erik Castren*, 1979, 149, 153.

63 DP O'Connell, 'Reflections on the State Succession Convention' (1979) 39 *ZAoRV* at p 725.

64 For a more cautious conclusion see MN Shaw, 'State Succession Revisited' (1994) 5 *Finnish Yearbook of International Law* 34, 38 ('one is on the verge of widespread international acceptance of the principle that international human rights treaties continue to apply within the territory of a predecessor state irrespective of a succession'). Disagreeing, Bosw, 'State Succession with Regard to Treaties' (1995) 111 *Mededelingen van de Nederlandse voor International Recht* 18.

65 As a matter of fact, while a notification of continuing adherence to a human rights treaty may not be strictly required, in practice such a step may be gratefully accepted by the depository and the other state parties because it resolves any ambiguities that exist.

66 Menno T Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 *EJIL* 469 at pp 469, 482.

CHAPTER 5

THE SUBJECTS OF INTERNATIONAL LAW

5.1 Introduction

> International personality means capacity to be a bearer of rights and duties under international law. Any entity which possesses international personality is an international person or a subject of international law, as distinct from a mere object of international law.[1]

> A subject of international law is considered to be an entity capable of possessing international rights and duties and endowed with the capacity to take certain types of action on the international plane. The terms international legal person or legal personality are commonly used when referring to such entities.[2]

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and 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.[3]

> A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.[4]

The principal question we are concerned with here is – to whom does international law apply? In order to be a subject of international law an entity must have international personality – it must be capable of possessing international rights and duties and as a consequence must have the capacity to maintain such rights by bringing international claims. A subject of international law owes responsibilities to the international community and enjoys rights, the benefits of which must be claimed, and which, if denied, may be enforced to the extent recognised by the international legal system, via legal procedures, ie the entity will have procedural capacity.

> Since the law of nations is based on the common consent of individual states, and not of individual human beings, states solely and exclusively are the subjects of international law.[5]

Reparation for Injuries Suffered in the Service of the United Nations Case[6]

On 17 September 1948, Count Bernadotte, a Swedish national, was killed, allegedly by a private gang of terrorists, in west Jerusalem, at the time

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1 Schwarzenberger and Brown, *Manual of International Law*, 6th edn, 1976, London: Stevens at p 42.

2 Henkin *et al*, *International Law: Cases and Materials*, 1993, St Paul's, Minn: West Publishing at p 228.

3 ICJ in *Reparation* case [1949] *ICJ Rep* p 174 at p 178.

4 Brownlie, *Principles of Public International Law*, 1990, Oxford: Oxford University Press at p 58.

5 Oppenheim, *International Law*, 1912, London: Longman.

6 Advisory Opinion [1949] *ICJ Rep* at p 174.

controlled by Israel. Count Bernadotte was the Chief United Nations Truce Negotiator in the area. In the course of deciding what action to take in respect of his death, the United Nations General Assembly sought the advice of the ICJ. Israel was admitted to the United Nations on 11 May 1949, shortly after the Court gave its opinion.

Opinion of the Court

The first question asked of the Court is as follows:

In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a state, has the United Nations, as an Organisation, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him? ...

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the Community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective action of states has already given rise to instances of action upon the international plane by certain entities which are not states. This development culminated in the establishment in June 1945 of an international organisation whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

The Charter has not been content to make the Organisation created by it merely a centre 'for harmonising the actions of nations in the attainment of their common ends' (Article 1, para 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organisation by requiring them to give it every assistance in any action undertaken by it (Article 2, para 5), and to accept and carry out the decisions of the Security Council; by authorising the General Assembly to make recommendations to the Members; by giving the Organisation legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organisation and its Members. Practice – in particular the conclusions of conventions to which the Organisation is a party – has confirmed the character of the Organisation, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organisation is a political body, charged with political tasks of an important character, and covering a wide field namely the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its Members it employs political means. The 'Convention on the Privileges and Immunities of the United Nations' of 1946 creates rights and duties between each of the signatories and the Organisations (see in particular section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international

personality and the capacity to operate upon an international plane. It is at present the supreme type of international organisation, and it could not carry out the intentions of its founders if it was devoid of international personality. it must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

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

The next question is whether the sum of the international rights of the Organisation comprises the right to bring the kind of international claim described in the Request for this Opinion. That is a claim against a state to obtain reparation in respect of the damage caused by the injury of an agent of the Organisation in the course of the performance of his duties. Whereas a state possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organisation are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of 58 or more Foreign Offices, and the Court concludes that the Members have endowed the Organisation with the capacity to bring international claims when necessitated by the discharge of its functions ...

... It cannot be doubted that the Organisation has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its intentional obligations towards it. The damage specified in Question I(a) means exclusively damage caused to the interests of the Organisation itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian. It is clear that the Organisation has the capacity to bring a claim for this damage. As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organisation, the Member cannot contend that this obligation is governed by municipal law, and the Organisation is justified in giving its claim the character of an international claim.

When the Organisation has sustained damage resulting from a breach by a Member of its international obligations, it is impossible to see how it can obtain reparation unless it possesses capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organisation, save the defendant state, must combine to bring a claim against the defendant for the damage suffered by the Organisation.

In dealing with the question of law which arises out of Question I(b) ... the only legal question which remains to be considered is whether, in the course of bringing an international claim of this kind, the Organisation can recover 'the reparation due in respect of damage caused ... to the victim ...'

The traditional rule that diplomatic protection is exercised by the national state does not involve the giving of a negative answer to Question I(b).

In the first place, this rule applies to claims brought by a state. But here we have the different and new case of a claim that would be brought by an Organisation.

In the second place, even in inter-state relations, there are important exceptions to this rule, for there are cases in which protection may be exercised by a state on behalf of persons not having its nationality.

In the third place, the rule rests on two bases. The first is that the defendant state has broken an obligation towards the national state in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach. This is precisely what happens when the Organisation, in bringing a claim for damage suffered by its agent, does so by invoking the breach of an obligation towards itself. Thus, the rule of the nationality of claims affords no reason against recognising that the Organisation has the right to bring a claim for the damage referred to in Question I(b). On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organisation, when the Organisation invokes, as the ground of its claim, a breach of an obligation towards itself.

Nor does the analogy of the traditional rule of diplomatic protection of nationals abroad justify in itself an affirmative reply. It is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organisation on the one hand, and the Secretary General and the staff on the other, to the bond of nationality existing between a state and its nationals.

The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realising that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law ...

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

Having regard to its purposes and functions already referred to, the Organisation may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed. For the same reason, the injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national state would not be justified in bringing a claim for reparation on the ground that diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organisation must provide them with adequate protection ...

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organisation, and that he may count on

it. To ensure the independence of the agent, and, consequently, the independent action of the Organisation itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organisation (save of course for the direct and immediate protection due from the state in whose territory he may be). In particular, he should not have to rely on the protection of his own state. If he had to rely on that state, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that – whether the agent belongs to a powerful or to a weak state; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent – he should know that in the performance of his duties he is under the protection of the Organisation. This assurance is even more necessary when the agent is stateless ...

The obligations entered into by states to enable the agents of the Organisation to perform their duties are undertaken not in the interest of the agents, but in that of the Organisation. When it claims redress for a breach of these obligations, the Organisation is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'; as was stated by the Permanent Court in its Judgment No 8 of 26 July 1927 (Ser A, No 9, p 21). In claiming reparation based on the injury suffered by its agent, the Organisation does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organisation.

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

The questions remains whether the Organisation has 'the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him when the defendant state is not a member of the Organisation.

In considering this aspect of Question I(a) and (b), it is necessary to keep in mind the reasons which have led the Court to give an affirmative answer to it when the defendant state is a Member of the Organisation. It has now been established that the Organisation has capacity to bring claims on the international plane, and that it possessed a right of functional protection in respect of its agents. Here again the Court is authorised to assume that the damage suffered involves the responsibility of a state, and it is not called upon to express an opinion upon the various ways in which that responsibility might be engaged. Accordingly the question is whether the Organisation has capacity to bring a claim against the defendant state to recover reparation in respect of that damage or whether, on the contrary, the defendant state, not being a member, is justified in raising the objection that the Organisations lacks the capacity to bring an international claim. On this point, the Court's opinion is that 50 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 recognised by them alone, together with the capacity to bring international claims ...[7]

(The Court answered Question I(a), unanimously, and I(b), by 11 votes to four, in the affirmative.)

Question II is as follows:

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

The affirmative reply given by the Court on point I(b) obliges it now to examine Question II. When the victim has a nationality, cases can clearly occur in which the injury suffered by him may engage the interest of both his national state and of the Organisation. In such an event, competition between the state's right of diplomatic protection and the Organisation's right of functional protection might arise, and this is the only case with which the Court is invited to deal.

In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the state or the Organisation to refrain from bringing an international claim.

... The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organisation and its Members it draws attention to their duty to render 'every assistance' provided by Article 2, para 5, of the Charter.

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

The risk of competition between the Organisation and the national state can be reduced or eliminated either by a general convention or by agreements entered into in each particular case. There is no doubt that in due course a practice will be developed, and it is worthy of note that already certain states whose nationals have been injured in the performance of missions undertaken for the Organisation have shown a reasonable and co-operative disposition to find a practical solution.

The question of reconciling action by the Organisation with the rights of a national state may arise in another way; that is to say, when the agent bears the nationality of the defendant state.

The ordinary practice whereby a state does not exercise protection on behalf of one of its nationals against a state which regards him as its own national does not constitute a precedent which is relevant here. The action of the Organisation is in fact based not upon the nationality of the victim but upon his status as agent of the Organisation. Therefore it does not matter whether or not the state to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant state by the agent constitutes any obstacle to a claim brought by

7 It may be argued that this is incorrect: how can third parties be affected by treaty obligations?

> the Organisation for a breach of obligations towards it occurring in relation to the performance of his mission by that agent.

(The Court answered Question II by 10 votes to five.)

5.2 The subjects of international law

5.2.1 Independent states

> States are the principal subjects of international law. Of the term 'state' no exact definition is possible, but so far as modern conditions go, the essential characteristics of a state are well settled.[8]
>
> The normal criteria which the government apply for recognition as a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a government who are able of themselves to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant.[9]

The traditional definition of a state for the purposes of international law is the one to be found in the Montevideo Convention on the Rights and Duties of States 1933:

MONTEVIDEO CONVENTION ON THE RIGHTS AND DUTIES OF STATES 1933[10]

Article 1

The state as a person of international law should possess the following qualifications:

(a) a permanent population;

(b) a defined territory;

(c) government; and

(d) capacity to enter into relations with other states.

Article 2

The federal state shall constitute a sole person in the eyes of international law.

Article 3

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

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8 Starke, *Introduction to International Law*, 11th edn, 1994, London: Butterworths at p 95.

9 Minister of state, British Foreign and Commonwealth Office (1986) 57 *BYIL* 507.

10 Done at Montevideo, Uruguay on 26 December 1933. Entered into force on 26 December 1934. Parties: Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States, Venezuela.

Article 4

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

Article 5

The fundamental rights of states are not susceptible of being affected in any manner whatsoever.

Article 6

The recognition of a state merely signifies that the state which recognises it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.

Article 7

The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognising the new state.

Article 8

No state has the right to intervene in the internal or external affairs of another.

Article 9

The jurisdiction of states within the limits of national territory applies to all the inhabitants.

Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.

Article 10

The primary interest of states is the conservation of peace. Differences of any nature which arise between them should be settled by recognised pacific means.

Article 11

The contracting states definitely establish as the rule of their conduct the precise obligation not to recognise territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measures. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

Article 12

The present Convention shall not affect obligations previously entered into by the High Contracting Parties by virtue of international agreements.

Article 13

The present Convention shall be ratified by the High Contracting Parties in conformity with their respective constitutional procedures. The Minister of Foreign Affairs of the Republic of Uruguay shall transmit authentic certificated copies to the governments for the aforementioned purpose of ratification. The instrument of ratification shall be deposited in the archives of the Pan American Union in Washington, which shall notify the signatory governments of said deposit. Such notification shall be considered as an exchange of ratifications.

Article 14

The present Convention will enter into force between the High Contracting Parties in the order in which they deposit their respective ratifications.

Article 15

The present Convention shall remain in force indefinitely but may be denounced by means of one year's notice given to the Pan American Union, which shall transmit it to the other signatory governments. After the expiration of this period the Convention shall cease in its effects as regards the party which denounces but shall remain in effect for the remaining High Contracting Parties.

Article 16

The present Convention shall be open for the adherence and accession of the states which are not signatories. The corresponding instruments shall be deposited in the archives of the Pan American Union which shall communicate them to the other High Contracting Parties.

An alternative view of statehood is offered by Schwarzenberger and Brown who argue that an entity must satisfy a minimum of three conditions before it can be considered an independent state. Those conditions are:

(1) the entity must possess a stable government which does not recognise any outside superior authority;

(2) the government must rule supreme within a territory which has more or less settled frontiers;

(3) the government must exercise control over a certain number of people.

James Crawford[11] identifies five 'exclusive and general legal characteristics of states':

1 In principle, states have plenary competence to perform acts, make treaties, and so on, in the international sphere: this is one meaning of the term 'sovereign' as applied to states.

2 In principle states are exclusively competent with respect to their internal affairs, a principle reflected by Article 2(7) of the United Nations Charter. This does not of course mean that they are omnicompetent, in international law, with respect to those affairs: it does mean that their jurisdiction is *prima facie* plenary and not subject to the control of other states.

3 In principle states are not subject to compulsory international process, jurisdiction, or settlement, unless they consent, either in specific cases or generally, to such exercise.

4 States are regarded in international law as 'equal', a principle also recognised by the Charter (Article 2(1)). This is in part a restatement of the foregoing principles, but it may have certain other corollaries. It does not mean, for example, that all states are entitled to an equal vote in international organisations; merely that, in any international organisation not based on equality, the consent of all the Members to the derogation from equality is required.

5 Finally, any derogations from these principles must be clearly established: in case of doubt an international court or tribunal will decide in favour of the freedom of action of states, whether with respect to external or internal affairs, or as not having consented to a specific exercise of international jurisdiction, or to a particular derogation from equality. This presumption – which is of course rebuttable in any case – is important in practice, as well as

11 James Crawford, *The Creation of States in International Law*, 1979, Oxford: Clarendon Press at p 32.