LEGAL CHARACTER OF INTERNATIONAL ORGANIZATIONS

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I Introduction

One of the phenomena characterizing today's world is the development of various types of international organizations. Many scholars of international law have shown strong interest in this phenomenon and have analyzed it from different angles.

There are a number of reasons why the general social phenomenon of the development of international organizations has drawn the special attention of international law scholars, and has become an object of legal analysis.

First of all, there lies the fact that international organizations are created by treaties which form an important source of law in international law.[1] As the study of international law includes in its important part the study and analysis of various types of treaties, it is natural that international organizations established by treaties become a point of interest for international law scholars.

Secondly lies the fact that international organizations are not naturally formed units like most States but are bodies created by explicit agreement among States.[2] A legal analysis is not necessary for the study of gradually evolving and naturally created units such as States which have some degree of political, economic, social or cultural solidarity as a uniting bond. On the other hand, for entities such as international organizations which have been formed artificially and deliberately, based upon a legal document known as a treaty, in relatively recent past, legal analysis cannot be passed upon in understanding its organizational structure and activities.

Thirdly lies the heterogeneous or multi-cultural character of the comprising elements of international organizations. The member States of international organizations often possess heterogeneous cultural, linguistic or religious backgrounds and therefore when trying to act in concert for the realization of a common goal the legal documents stating their agreement play an essential role, and the analysis of such materials takes on great importance. This holds not only for the action of member States but also for the action of the staff of the secretariats of international organizations, known as "international staff" or "international civil servants." It is indispensable that some form of regulation by law is given for the maintenance of a concerted action of such international civil servants for whose recruitment "/d/ue regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible" (UN Charter: Article 101, paragraph 3).

Fourthly lies the most fundamental reason as to why international law scholars have shown interest in the study of international organizations, particularly their legal analysis. That is the recognition by the international law scholars that, while on the one hand the emergence and development of international organizations have rested on international law as mentioned above, on the other hand it is bringing about an important fundamental change to the system of traditional international law.[3]

There are two aspects to the impact wrought to the system of traditional international law by the emergence and development of international organizations. One is the aspect that the necessity for adjustment has arisen due to the disturbance of the system of traditional international law following the emergence of new actors (not possessing such qualities of States as sovereignty, territory and population) in international society traditionally composed of States only. From this point of view, such questions as the international legal capacity (or personality), treaty-making power, privileges and immunities and international responsibility of international organizations have been tackled by theorists of international law.

The other aspect is the fact that the emergence and development of

international organizations have forced various forms of changes to the concept of State sovereignty, which is the most basic concept in the traditional international legal order. Such questions as the binding force of the resolutions of international organizations upon their member States, the relationship of the voting system to the principle of sovereign equality of States, the problems of activities of international organizations and the encroachment of State sovereignty (such as interference in domestic affairs), and more recently the question of supra-nationality of international organizations, have been studied from this point of view.

A common and fundamental question when trying to individually take up the legal questions concerning international organizations as mentioned above is that of the legal relationship of these organizations to their member States; or, to put it in different words, the question of "what type of legal entities international organizations are." This paper attempts to give an answer to this fundamental question by examining different theories which have been advanced.

Two points of clarification must be made before proceeding further. Firstly, this paper deals only with intergovernmental (or public) international organizations, as the foregoing description clearly implies. Non-governmental organizations (NGOs), international (multinational) companies, mixed private and public international enterprises, all of which are at times included in the broad category of international organizations, are excluded. Also excluded are intergovernmental international organizations not directly established by treaties, such as the United Nations Industrial Development Organization (UNIDO), the United Nations Development Program (UNDP) and the United Nations Conference on Trade and Development (UNCTAD), all of which were established by the resolutions of the General Assembly of the United Nations (the UN). These organizations are excluded because, although they are bodies enjoying relative autonomy vis-à-vis the UN, they are, strictly speaking, subsidiary organs of the UN and not independent international organizations.[4]

Secondly, although the aim of this paper is to make clear the legal character of present-day international organizations, it is impossible to

give a detailed account of all such organizations, which are said to be over two hundred. Therefore, relatively well-known, representative international organizations will be referred to and explained as examples.

II. Confederation Theory

Opinions vary within scholars as to what type of legal entities international organizations are, in particular, on how to grasp the legal character of international organizations in relation to their member States.

The first and earliest theory may be called the "confederation theory." This theory tries to conceive of international organizations as but one form of composite States – the confederation of States.

The example of this theory is found in Oppenheim's *International Law*, Vol. I, edited by H. Lauterpacht (8th edition). In this book, regional international organizations such as the Organization for European Economic Cooperation (OEEC: later re-organized as the Organization for Economic Cooperation and Development – OECD), the Organization of American States (OAS) and the Council of Europe are given as modern variations of confederation.[5]

Corbett, after a careful study of power, structure and functions of the League of Nations, the predecessor of the UN and one of the earliest international organizations, concludes that the League is a confederation. He writes:

> "... the League of Nations, being indisputably a permanent contractual union of independent States having for its principal object the preservation of peace and protection against aggression, and possessing a permanent organization for the realization of these ends, is a confederation. ...
>
> The Covenant does in fact present certain striking resemblances to the various treaties of confederation. It contains the guarantee of independence and security which is common to them all, provides similar machinery for the settlement of disputes, sets up a Diet, stipulates contributions to expenditure, aims at the restriction of armaments attempted in the American Articles of 1778, prohibits the conclusion of treaties inconsistent with its terms."[6]

The line of thought trying to understand international organizations as confederations is considered to be a theoretical succession from the

times of the administrative unions and customs unions created in the late nineteenth century. These associations of States were seen as a type of union of States or confederation, and international organizations which have developed from them were also thought of as a developed form of confederations.[7] That when the League of Nations, which was more institutionally advanced than administrative unions, was established there were some who saw it as a "superstate"[8] suggests that it was commonly seen in the process of strengthening of associations from a loose grouping of States to a confederation and finally to a federation – or a federal State. Peter Hay eloquently puts forward his argument along this line as follows:

> "Thus, it requires emphasis that, however useful, these distinctions (between 'administrative international organization' and 'governmental international organization' – note by the present writer) are only descriptive; the analytic problem for all forms of institutional cooperation of states is the same: what position does the association or organization occupy in international law vis-à-vis its members and as a function of this, vis-à-vis non-members, the international community? For this reason, political associations and all international organizations may be considered together. By like token, classifications based on differentiations between entities created under international law (the typical international organization or confederation) and those which are an extension of national constitutional law (the federation) may be disregarded: their object is not establishment of the existence of international legal personality: instead, these classifications measure and evaluate the degree of interaction between the organization and its members in order to reach a conclusion about the legal nature of the organization from the municipal law point of view."[9]

The confederation theory, although it has some merits in trying to see international organizations within the framework of the traditional system of international law, is subject to the following criticism based on the observation of the recent phenomenon of multiplication of international organizations and their organizational development:

(a) The majority of international organizations today, except the only example of the European Communities (EC), are not considered to be in the process of developing finally to become, nor

have the possibility to become, a federal State;

(b) Most international organizations today do not give, even in a limited sense, orders or directives to member States, which touch upon the sovereignty of the States, nor do they have the possibility to give such orders or directives in the near future; and

(c) International organizations, like the UN, are not at all seen, even in the limited sense, and even in terms of possibility in the future, as sovereign entities externally or internally.

For these reasons, international organizations are not considered anything similar to States, even by the people working there. Accordingly, the confederation theory, which approximates international organizations to (sovereign) federal States, is not a popular view today.

III Corporation Theory

The second theory concerning the legal character of international organizations regards them as corporations (or bodies corporate), rather than something similar to States (union or confederation of States, super-States, world government, etc.). This theory is most powerfully advanced by Dayton Voorhees in 1926, in connection with the legal nature of the League of Nations.[10] He rejects to describe the League as a "super-state," and proposes to describe it as a "corporation."

Voorhees asserts, first of all, that the League is not "super" because "[i]t can issue no commands; it can make no rules or regulations binding on any member without that member's express consent."[11]

Secondly, Voorhees maintains that the League is not a "State" because it "lacks most of the important characteristics of a state," which, he considers, are people, territory, government and sovereignty.[12]

Finally, he concludes that the League is a "corporation" because "it has all of the essential characteristics of a corporation." The essential characteristics of a corporation, as he enumerates, are: (a) that "it is an artificial being created by law"; (b) that it "exists 'as a body politic' under its own special name"; (c) that "it has the capacity of perpetual succession"; and (d) that it "has the capacity of acting within the scope of its charter as a natural person."[13]

Voorhees reached the above conclusion by analyzing the provisions of the League's Covenant and its practice. Particularly interesting is his comparison of the relationship between the League and its member States to that between a corporation and its stockholders. For instance, he sees that in the League the member States, apart from participating in the discussions of the annual General Assembly meetings, do not directly touch upon daily business which is being carried out by the Secretariat under the supervision of the Council. This, according to Voorhees, corresponds to the situation of a corporation where stockholders, apart from participating in the general meeting of stockholders, do not touch upon daily business which is being carried out by the president and his staff under the supervision of the executive board.

However, Voorhees also finds some difference between the League and a domestic corporation in that the League is an international association of sovereign States created by an international treaty and endowed with aims which have public character, whereas a domestic corporation is an association of people created by a contract under domestic law for private purposes such as profit-making and provision of benefit to its members. Thus, it is appropriate, he concludes, to distinguish the League from a domestic corporation by calling the former an "international public corporation." [14]

The corporation theory is advocated even today by scholars such as Clive Parry.[15] Yuichi Takano also appears to support this theory when he writes that:

> "International organizations are not political or governmental bodies but are functional bodies . . . . They resemble corporations within a municipal society . . . ."[16] (translation from Japanese by the present writer)

The main assumptions of the corporation theory may be summarized in the following three points:

(a) Like corporations, international organizations are entities independent and separate from their composing members;

(b) International organizations do not stand superior to their member States with dominant power and authority; and

(c) International organizations are, unlike States, not sovereign entities both internally and externally.

Takano's words cited below express these points very clearly:

"International organizations are not simple gatherings of States as international conferences are; they possess a permanent and independent existence and functions in the international society. Their existence and functions cannot be deduced into those of the member States. . . . International organizations are, on the one hand, not political or governmental entities as States are. International organizations are functional entities established on the basis of, and with the consent of, sovereign States; they do not exist or function as State-like bodies possessing sovereign elements, nullifying the sovereignty of their member States encroaching upon or absorbing its existence or function."[17] (translation from Japanese by the present writer)

The corporation theory appears to describe accurately the current legal relationship between international organizations and the member States. However, it is not free from criticisms as follows:

(a) Analogy cannot be so easily drawn from the concept of a corporation developed under municipal law to apply it to a quite different situation of the international society; and

(b) Some international organizations today, like the EC or the UN, are actually empowered to apply, in a certain situation, enforcement measures to their member States. The International Civil Aviation Organization (ICAO) and the World Health Organization (WHO) have the power to set international standards to be observed by their member States in order to achieve their respective purposes.[18] These phenomena are not totally explainable by the corporation theory.

IV Functional Theory

The theory which gave theoretical foundation to the establishment and development of various international organizations after the Second World War, centered around the UN and its specialized agencies, was the "functional theory," or to use the more common terminology, the "functional approach to international organizations." The theoretical and practical impact the functional theory has given, consciously or not,

to the process of the drafting of the UN Charter and the establishment and development of the UN's specialized agencies and other international organizations, is immeasurably large.

At the same time it is irrefutable that the post-war study of international organizations has also been influenced, consciously or not, by the functional theory. Thus, Wolfgang Friedmann writes that "/t/here is, of course, no doubt that it is the functional approach which has triumphed in post-war international organisation, resulting in a complex pattern of organisations with different objectives, constitutions and powers."[19]

The functional theory was most persuasively put forward by David Mitrany[20] in 1943 when the Second World War was still in the midst of raging. His theory may be summarized as follows: "The political reality does not permit the creation of the world government in the immediate future. Thus, we must approach it gradually from the area (function) where cooperation among States is possible, and from among the countries which share political, economic, geographical and historical solidarity. Generally speaking, in the area farther from politics it is easier to achieve institutional cooperation. Such cooperation is also easier to achieve if one approaches it regionally."[21]

The functional theory differs from the confederation theory in that the former does not see international organizations as political and comprehensive sovereign entities like States while the latter regards international organizations as State-like entities although in a limited sense. The functional theory also differs from the corporation theory in that the former considers that the creation of an international organization implies transfer, or concentration, of part of sovereignty of member States to the organization while the latter maintains that member States retain sovereignty even though they join in international organization.

If we try to describe the functional theory in a few words, it is the "federalism by installments"[22] or it is a way to approach "peace by piecemeal"[23] or "peace by pieces."[24]

Although the functional theory differs from the confederation theory as pointed out above, both have the common perception of international organizations in the sense that the establishment of an international orga-

nization results in the partial limitation or transfer of the sovereignty of its member States. The difference between the two theories lies in the degree and nature of partiality of the limitation or transfer of sovereignty. Therefore, both theories come to the same conclusion that the development and strengthening of international organizations would in the end result in a unified federal government, whether regionally or globally. However, a closer look at them would teach us that they are decisively different on the following three points:

(a) First of all, while the confederation theory takes the stand on factual conception, the functional theory aims at the future realization of its goal – a global government;

(b) Secondly, when we talk about confederations, we refer to the historical examples of unions of States involving such political matters as the right to conduct diplomatic relations, right of war, right to impose tariffs, etc., but when functionalists talk about integration of States through international organizations, they emphasize institutional cooperation in technical and social fields which they claim to be separated from politics or games of power; and

(c) Thirdly, as the confederation theory anticipates that each international organization may develop to become a unified, federal State, the future of the international society would still be pluralistic, whereas the functional theory aims at the realization of one unified global government as a final goal, not a society of multiple federal States developed from international organizations.

As was mentioned earlier, the practical and theoretical impact the functional theory has given to the post-war world is immense. However, this is not to say that the functional theory as the most popular theory concerning the legal character of international organizations has been without criticism. The study of Ernst Haas attempting to prove the limitation of the validity of the functional approach through a detailed analysis of the organization and activities of the International Labour Organization (ILO) is well known. He concludes:

"With respect to organizational impact on the international environment, our study of the ILO cannot 'prove' anything about the transformation of the system. . . . Although the international environment undoubtedly underwent very dramatic changes since 1919 – moving *simultaneously* toward and away from integration (depending on which set of functions is examined) – not even the most committed Functionalist would attribute these changes overwhelmingly to the work of the ILO."[25]

James Patrick Sewell made a similar study by taking up the example of the International Bank for Reconstruction and Development (the World Bank), which Mitrany refers to as a good example of an international organization proving his theory. Sewell seems to throw some doubt at the validity of the functional theory, although he admits certain merits in it, too.[26]

In more general terms, Stephen S. Goodspeed criticizes the functional theory as follows:

"The inherent weakness in the functionalist approach is the assumption that it is possible to prevent the intrusion of political influences into the realm of technical and welfare activities. There is no clear dividing line. . . . Until political tensions subside and until fundamental political agreement is reached, there is little possibility that greater economic and social cooperation will take place."[27]

Evan Luard shares the same criticism with Goodspeed.[28] He further points out three shortcomings of the functional theory. First is that despite the development of various technical and specialized international organizations, the reality of the post-war presents a big hurdle of politics to the realization of the world integration. Second is that due to the creation of various international organizations an unanticipated question of coordination of their activities has arisen for which we have found no effective answer. Third is that the functional theory cannot give an answer to the question of internal armed clashes which have become a common type of conflicts after the Second World War.[29]

The criticisms of the functional theory cited above are of course valid. However, it has to be pointed out that they are mostly directed towards the fact that the world and international organizations are not in fact moving in the direction anticipated by the functional theory. In other words, the criticisms are not directed towards the shortcomings of the

functional theory in its theoretical perception of the nature of international organizations but towards the lack of relevance between the reality of the post-war world and the expected image of the world foreseen by the functional theory.

The present writer has always felt, through the studies of such international organizations as the World Bank, that there exists a certain limitation in the perception of international organizations by the functionalists. For example, the functional theory assumes that, when an international organization is given a strong decision-making power and an executive authority, that organization can be considered to have acquired control over part of sovereignty of member States. The World Bank and other international financial institutions of a similar type, such as the International Development Association (IDA), the International Finance Corporation (IFC), the Inter-American Development Bank (IDB) and the Asian Development Bank (ADB), do in fact possess a strong decision-making power and an executive authority,[30] but they do not seem to integrate member States by controlling part of sovereignty of member States. In reality, the activities of these financial organizations have no direct connection with sovereignty because the principal function of such organizations is the provision of funds, goods and services, nothing to do with sovereignty of their member States.

Conceptually, therefore, the World Bank and other similar financial organizations are not the type of international organizations the functional theory tries to characterize. In fact, they are much similar to the type of international organizations the corporation theory tries to conceive of.

V Conclusion

In the foregoing, we have analyzed three different ways to look at the legal character of international organizations. Each seems to have some merits as well as shortcomings. What then might be the most appropriate theory on this question?

Our conclusion is that the present international organizations are so complex and diverse that a simple theory to apply to all international

organizations is impossible. We may even say that any single theory to try to describe the legal nature of all international organizations is liable for inaccuracy because we can easily find examples to which such a theory cannot be applied.

What is wrong today is to try to treat all international organizations as basically the same entities on the ground that they are created by international treaties among States. The fact is that, depending upon the contents of the agreement among States, which relates to numerous elements surrounding the creation of each international organization, the legal character can be different, and in fact it is different.

Some organizations, such as the EC, can perhaps be best explained in the manner proposed by the confederation theory.[91] Organizations, such as the World Bank, can be most adequately described as corporations. The relations between the UN and its specialized agencies (excluding the World Bank and three other financial organizations) can be appropriately explained in the context of the functional theory. What should be done, therefore, is not to try to prove one clear-cut theory to explain the legal character of all the existing international organizations, but to try to analyze each international organization to find out to what extent one specific theory is applicable and the others are not.

Finally, in connection with our conclusion, we have to mention two important points. One is that we should not assume that any organization can be explained by one theory. It is rather likely that an organization may have a mixed character which can only be explained by different theories. For instance, the International Monetary Fund (IMF) could be described in the manner of the functional theory in its regulatory aspect [92] of foreign exchange control: but it can also be explained as a corporation when we look at its capitalistic foundation and its operational activity of assisting member States which have fallen into exchange deficit by providing international currency.

The second point of importance is that the same organization can change, over the years, through either the explicit or implicit consent of its member States, the legal character of its structure and functions. This has happened clearly in the case of the IMF or the EC. Actually, it is not

too much to say that any international organization is undergoing some degree of such changes because international organizations are living and trying to adjust their structure and functions to the changing needs of member States and the world as a whole.

Notes

(1) Michael Akehurst, *A Modern Introduction to International Law*, Third Edition, London, George Allen and Unwin Ltd. (1977), pp. 30-32.
(2) Ingrid Detter, *Law Making by International Organizations*, Stockholm, P. A. Norstedt & Söners Förlag (1965), p. 328.
(3) Joseph Kunz, "Editorial Comment – The Systematic Problem of the Science of International Law," *American Journal of International Law*, Vol. 53 (1959), pp. 382-383.
(4) Henry G. Schermers, *International Institutional Law*, Vol. I, Leiden, A. W. Sijthoff (1972), pp. 8-9.
(5) L. Oppenheim, ed. by H. Lauterpacht, *International Law*, Vol. I, Eighth Edition, London, Longmans, Green and Co. Ltd. (1955), pp. 182-185.
(6) P. E. Corbett, "What is the League of Nations?" *The British Year Book of International Law*, No. 5 (1924), p. 147.
(7) *Ibid.*, p. 148.
(8) Dayton Voorhees, "The League of Nations: A Corporation, Not a Superstate," *The American Political Science Review*, Vol. 20 (1926), p. 847.
(9) Peter Hay, "International and Supranational Organizations: Some Problems of Conceptualization," *International Trade, Investment, and Organization*, ed. by Lafave and Hay, University of Illinois Press (1967), p. 358.
(10) Voorhees, *op. cit.*
(11) *Ibid.*, p. 847.
(12) *Ibid.*, p. 848.
(13) *Ibid.*, pp. 849-850.
(14) *Ibid.*, p. 852.
(15) Clive Parry, "The International Public Corporation," *The Public Corporation*, ed. by W. Friedmann (1954), p. 495.
(16) Yuichi Takano, *Kokusai Soshiki-ho* (Law of International Organizations), New Edition, Tokyo, Yuhikaku (1975), pp. 3-4.

(17) *Ibid.*, pp. 1-3.
(18) Charles Henry Alexandrowicz, *The Law-Making Functions of the Specialized Agencies of the United Nations*, Angus and Robertson (1973), pp. 45-69.
(19) Wolfgang Friedmann, *The Changing Structure of International Law*, London, Stevens & Sons (1964), p. 277.
(20) David Mitrany, *A Working Peace System*, London, Royal Institute of International Affairs (1943).
(21) David Mitrany, "The Functional Approach to World Organization," *International Affairs*, Vol. 24, No. 3 (1948), p. 358.
(22) Ernst B. Haas, *Beyond the Nation-State – Functionalism and Organization*, Stanford University Press (1964), p. 13.
(23) James Patrick Sewell, *Functionalism and World Politics – A Study Based on United Nations Programs Financing Economic Development*, Princeton University Press (1966), p. 3.
(24) Lyman C. White, "Peace by Pieces," *Free World*, Vol. 11 (1946), pp. 66-68.
(25) Haas, *op. cit.*, pp. 430-431.
(26) Sewell, *op. cit.*, pp. 293-297.
(27) Stephen S. Goodspeed, *The Nature and Function of International Organization*, Second Edition, New York, Oxford University Press (1967), p. 526.
(28) Evan Luard, *International Agencies – The Emerging Framework of Interdependence*, The MacMillan Press Ltd. (1977), pp. 324-325.
(29) Luard, *op. cit.*, pp. 325-327.
(30) Yozo Yokota, "Kokusai Kinyu-kikan-no Soshiki-ho-jo-no Tokushoku – Kokusai Kosha-ron-no Kokoromi (1)" (Organizational Characteristics of International Financial Institutions – An Attempt of a Systematic Study of International Public Corporation [Part I]), *Kokusai-ho Gaiko-zasshi* (The Journal of International Law and Diplomacy), Vol. 70, No. 1 (1971), pp. 55-57.
(31) Paul Reuter, *Institutions internationales*, 8e édition, Presses Universitaires de France (1975), pp. 242-243.
(32) Charles Henry Alexandrowicz, *World Economic Agencies – Law and Practice*, London, Stevens & Sons (1962), p. 174.

国際機構の法的性質

〈要　約〉

横田洋三

国際機構に関する研究は，従来，主として，国際法学者によって手がけられてきた。その理由は，第1に，国際機構が，国際条約という，国際法学者の研究対象となっている法律文書を基礎につくられた組織体であるということである。第2に，国際機構の出現と発達によって，国家主権，国際法の主体，外交関係法，条約法など，国際法の主要部分に大幅な修正をほどこす必要が出てきたことも，その理由の一つである。

ところで，こうして国際法学者による国際機構研究が進行するにつれて，国際機構はいかなる性質の法律団体か，という問題が提起されるようになった。

この点に関しては，現在，学者の間に見解の一致は見られない。ある学者は，国際機構を「国家連合」としてとらえ，別の学者は，それを「法人」としてとらえる。さらに別の学者は，国際機構を，国家主権の一部移譲による「機能的統合体」としてとらえる。これらの学説の妥当性は，理論的には証明されない。なぜなら，理論上は，加盟国の合意さえ得られれば，国際機構は，国家連合にも，法人にも，機能的統合体にもなりうるからである。それゆえ，国際機構の法的性質を解明するには，帰納的方法により，一つ一つの国際機構に具体的にあたり，それらがどのタイプに属する，あるいは近い，組織体であるかを，検証する必要がある。

現存の国際機構の主なものを概観してみると，あるものは国家連合に近く（たとえば，欧州共同体），あるものは法人に近く（たとえば，世界銀行），あるものは機能的統合体に近い（たとえば，国連）。今日存在するすべての国際機構の法的性質を説明する単一の理論は，存在しないというのが，結論である。