General Introduction

The creation of international organizations and their dynamic development have played a pivotal role in the evolution of international law. In her latest work, Laurence Boisson de Chazournes emphasises that in modern international relations '[c]ooperation through international organizations has become a fundamental pillar of the international legal order'.[1] International organizations stemmed from the practical necessity for states to co-operate in various and often rather technical areas. Their dynamic development has resulted not only in the institutionalisation of international co-operation, but also in their becoming, alongside states, key actors in modern international relations.

Traditional definitions of international law have assumed to be exclusive the legal personality of states, which, as sovereign entities, were also the sole creators of international law. The treaty-making capacity of states was a natural and essential element of their international legal personality. Gradually, however, the era of states' exclusive capacity to create and implement international law began to draw to a close. Clearly this did not happen the moment the first international organizations were established. The development of international organizations involved not only a growth in their number but also an increase in their powers, including law-making powers, *vis-à-vis* internal and also later in external relations. The organizations, initially intended to replace *ad hoc* diplomatic conferences in order to promote international co-operation, eventually became active non-state actors in developing international relations and international law.

The treaty-making capacity of international organizations constitutes one of the more important, albeit complex, issues in international law. These issues cannot be researched and discussed selectively, as they comprise such important elements of international law as international legal personality; the sources of law, including in particular international agreements; and law-making mechanisms, including in particular mechanisms for entering into international commitments and their application in practice. The main challenge of researching and presenting such fundamental aspects of international law is that they are not clearly defined by the rules of international law, and the practice in this respect is not uniform. The difficulty of this task is further increased by the diversity of opinion in the field, as demonstrated by, for example, the discussion within the International Law Commission (ILC) during work on

1 L. Boisson de Chazournes, *Interactions between Regional and Universal Organizations. A Legal Perspective*, Brill Nijhoff, Leiden, 2017, p. 1.

the codification of the law of treaties and the codification of the responsibility of international organizations. The academic discussion on this topic must also be based on both the law of treaties and international institutional law, a fact that requires research and subsequent conclusions to draw from both areas of international law.

Treaty-making capacity is a particularly important attribute of the international legal personality of subjects of international law, namely states and international organizations. Moreover, the legal status of international organizations as non-state subjects of international law determines their treaty-making capacity. The purpose of this work is therefore to determine the nature, sources and specificity of the treaty-making capacity of international organizations as international legal persons, and to address several basic research questions focusing on three fundamental issues.

Of foremost importance is the need to define the essence of the international legal personality of international organizations as entities created and operating under international law. This will help establish the nature of the treaty-making capacity of international organizations as deriving from general international law, as well as the nature of their treaty-making powers. Secondly, these findings will then help determine the sources of the treaty-making powers of international organizations and identify the categories of these powers that enable international organizations to enter into international agreements. Special attention will be paid to the category of the implied treaty-making powers of international organizations as well as the bases for and limits of implying such powers. These issues have become the focus of an extensive academic discussion based particularly on the case law of the International Court of Justice (ICJ).[2] Thirdly, all the findings will be evaluated in the context of the practice of international organizations. The study will identify the treaty-making powers exercised by individual international organizations – for example the European Union (EU) – and the problems that this entails. The dynamic development of international co-operation drives not only the development of international organizations but also of their treaty-making powers. It results in searching for new forms of co-operation that, in the opinion of some, are less formal but more effective. The powers of some such entities, and in particular their law-making powers, resemble the powers of international organizations. This study will therefore address the question of the legal status of these entities in light of contemporary international law.

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2 The first and most commonly quoted case is the *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: ICJ Reports 1949*, p. 174.

In order to accomplish the objective of this study and respond to the basic research questions, the appropriate structure of this work is by necessity based on the assumption that detailed research issues will be presented in the context of the more general problems of international organizations and other forms of international co-operation. The literature on international organizations as forms of international co-operation is indeed vast, which may suggest that it is too broad a subject for a work of this kind. The purpose of the work, however, is to present the essence and nature of the treaty-making capacity of international organizations as international legal persons, and so the study will begin by highlighting the nature of international organizations as unique entities with their own legal personality. This legal personality, separate from states – which are themselves the founders and members of international organizations – is their most recognisable characteristic.

The special nature of international organizations and their legal personality are derived from the will of member states (functional personality). Consequently, in practice the international legal personality of a given international organization is exercised to a varying degree in accordance with its constitutional instrument. This is also true of the organization's treaty-making powers, which are particularly important attributes of this personality. The situation would change were we to consider it from the perspective of the concept of the objective personality of international organizations, where the endowment of international legal personality follows naturally from the fact that an organization exists; hence the foundation of international personality is not the result of the will of the founders but is to be identified in general international law. This problem will be discussed in the context of Henry G. Schermers and Niels M. Blokker's definition of an international organization as a form of co-operation founded on an international agreement, having at least one organ with a will of its own and established under international law.[3] It seems that in the absence of a universally accepted definition of an international organization, and given that the ILC adopted various different definitions depending on the particular codification requirements, the definition proposed in this study is best suited to presenting the dynamic nature of international institutional law in connection with the more static nature of the law of treaties. Since international co-operation may take many institutional forms, this definition will also enable a discussion of the differences between international organizations and other forms of co-operation. Some

3 H. G. Schermers, N. M. Blokker, *International Institutional Law* (5th edition), Martinus Nijhoff Publishers, Leiden, 2011, p. 36–37, para. 33. For the purpose of this study, the definition presented by H. G. Schermers and N. M. Blokker will be discussed together with comments.

of the more flexible forms of co-operation have no treaty-making powers or separate international legal personality. These 'soft law organizations', as non-treaty-based institutions and without their own international legal personality, are therefore not international organizations.[4] On the other hand, other more flexible forms of co-operation, i.e. some treaty bodies, and particularly environmental autonomous institutional arrangements, do have law-making powers in external relations. Their legal status therefore requires further detailed analysis in this study.

Proper analysis of the research issues concerned in this study requires not only a clarification of certain terminological issues regarding one's definition of an international organization but also the consistent use of relevant key terms, such as capacity, powers and competences. The approach applied throughout this work is that of Jan Klabbers, who highlights the differences between the capacity to do something and the power and competence to engage in this activity.[5] While capacity as an abstract notion derives from general international law, competences and powers, as noted by Catherine Brölmann, follow from the 'institutional make-up of the organization'.[6] An analysis of this issue will thus open chapter II. Since the construction of the notion of international personality of international organizations should include both the concept of objective personality and the concept of functional personality, the following sections of this chapter present both these sources of the powers of international organizations. The discussion focuses more precisely on inherent powers and in particular on the premises of Finn Seyersted's concept of such powers of international organizations.[7] On the other hand, the discussion also focuses on the attributed powers of international organizations as those powers that are most closely connected with the principle of the sovereignty of states. While the attributed powers that are expressly granted in the constitutional instrument of a given international organization raise few doubts, implied powers, which are a category of attributed powers but require a complex implication process often resting on uncertain foundations, attract far more criticism. Implication of powers nevertheless allows the interpretation of attributed powers to be more dynamic, which is especially important given the constantly developing activ-

4 J. Klabbers, 'Institutional Ambivalence by Design: Soft Organization in International Law', *70 NJIL*, 2001, p. 415.

5 J. Klabbers, *An Introduction to International Organizations Law* (3rd edition), Cambridge University Press, Cambridge, 2015, p. 268.

6 *Ibidem*; see also: C. Brölmann, *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties,* Hart Publishing, Oxford, 2007, p. 93.

7 F. Seyersted, *Common Law of International Organizations*, Martinus Nijhoff Publishers, Leiden, 2008, p. 43 *et seq*.

ity of international organizations in areas that fall outside of the scope of their statutes. Given the special character of this category of powers of international organizations, the focus of analysis is, for example, the nature of and the basis for the implication of powers, as well as the possible and necessary limits of this process, with particular attention being given to the conditions of necessity and essentiality that have been so thoroughly discussed in the doctrine and case law. This will therefore form the foundation of a detailed discussion of the treaty-making powers of international organizations in chapter III, for which the point of departure will be the assumption that treaty-making capacity is the most important attribute of the international personality of both states and international organizations.

Ius contrahendi determines the international personality of international organizations, which always implies the capacity to conclude treaties. As such, the treaty-making capacity of international organizations is an abstract notion denoting a general capability to conclude treaties and is derived from general international law. Pursuant to the Preamble to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, however, 'international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes'.[8] This capacity, although derived from general international law, is governed by the rules of a given organization. One might therefore say that the treaty-making powers of an international organization derive from sources definable as the rules of the organization, which themselves form the 'institutional make-up' of every international organization. They constitute the actual exercise of the treaty-making capacity of international organizations and determine the individual nature of the treaty-making powers of each of them. Article 6 of the 1986 Vienna Convention, which stipulates that '[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization', allows a broad interpretation of the specific treaty-making powers of international organizations. This interpretation can be based not only on their constituent instruments but also on the decisions and resolutions adopted in accordance with these instruments, or even on the established practice of international organizations, which, in the context of customary law, may be thought of as well-recognised. This broad interpretation leads to the conclusion that international organizations mostly use their attributed treaty-making powers, that is, the powers expressly granted in their constituent instruments, and their implied treaty-making powers

8 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations signed at Vienna on 21 March 1986*, see: UN Doc. A/CONF.129/15; 25 ILM 543.

or even inherent powers. Given that the greatest controversies in the doctrine centre on the concept of the implied treaty-making powers of international organizations, particular attention is paid to their essence and the dynamic way in which they are implied.

In reality, international organizations exercise their treaty-making powers in many ways and to varying degrees. The constituent instruments differ greatly from organization to organization, not only with respect to their legal personality but especially regarding the nature and scope of their powers in external relations, particularly their treaty-making powers. While the United Nations Charter is a constituent instrument that deals with these issues quite superficially, the constituent instruments that currently underpin the functioning of the EU contain far more specific provisions. The EU is a special case because the concept of implied treaty-making powers was applied particularly extensively in EU practice. The next chapter will therefore analyse the treaty-making powers of the EU, both in light of the treaties and rich case law of the Court of Justice of the European Union (CJEU). The legal status and external powers of the EU has been the subject of considerable research and academic discussion. Among the many reasons was the particular fact that the existing treaties neglected to expressly specify the legal personality of the EU, which not only provoked discussion but also raised serious doubts as to the Union's ability independently to exercise treaty-making powers in its relations with third states and other international organizations. The Treaty of Lisbon (Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)) changed this by expressly vesting the EU with its own legal personality and confirmed that the limits of its competences were determined by the principle of conferral. The Union consequently became recognised as an international organization with its own legal personality, which is not to say that it has legal capacity equivalent to that of Member States. As an international organization the EU has no general law-making capacity; in other words, its capacity to act in external relations and to conclude treaties is governed by the principle of conferral.

The treaty-making powers of the EU are not uniform. Under the banner of the EU's external competences they may be considered either exclusive competences or competences shared between the Union and its Member States. Both these categories of the Union's external competences are provided for in the treaties. The exercise of the Union's treaty-making powers in practice, however, poses serious problems, as demonstrated, for example, by the mixed agreements concluded jointly by the Union and its Member States with third states or other international organizations. The focus of an extensive analysis will be the clause in Article 216 of the TFEU that reflects well

the principle of conferral and leaves considerable scope for interpretation of the expressly granted, and the implied, treaty-making powers. The Treaty of Lisbon, which reflects the evolution of the doctrine of implied powers, not only forms the basis for implying the Union's treaty-making powers, it also determines their nature as either the exclusive or shared powers to enter into international commitments. The analysis of the case law of the CJEU in chapter IV will lead to the conclusion that the decisions of the Court gradually modified the basis for implying the treaty-making powers of the EU in the sense that, initially, they stressed the need for relevant EU internal legislation[9] but went on to point to the principle of parallelism[10], and eventually quoted the attainment of the organization's objectives set out in the treaties, in accordance with the principle of *effet utile*.[11] The Court expressed its final stance on the matter by acknowledging two traditional bases for implying the Union's treaty-making powers: firstly, the existence of relevant EU legislation and, secondly, the existence of an EU objective, for the fulfilment of which the Union's expressly granted internal powers need to be complemented by external treaty-making powers. The provisions of Article 216(1) and Article 3(2) of the TFEU represent the final enactment of the extensive case law in the area of the implied treaty-making powers of the European Union. These provisions are extensively analysed along with the 'flexibility clause' found in Article 352 of the TFEU.

An academic discussion on the treaty-making powers of international organizations needs to take into account one more element. The appearance and development of international organizations on the international scene required the formulation of new theoretical constructs to explain the international legal status of these new entities. Today, there are a great many constructs in international institutional law that address this question. However, practice shows that in some areas traditional international organizations are replaced by other forms of co-operation that enable more flexible co-operation than that possible within the framework of an international organization. One area where more flexible co-operation takes place is international environmental law. In order to implement the provisions of most multilateral environmental agreements (MEAs), states create dedicated treaty bodies in place of traditional international organizations. Therefore, just as there was

9 22/70 Commission v Council (*ERTA* case) [1971], ECR-263.

10 Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977], ECR-741.

11 Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228(6) of the EC Treaty [1994], ECR I-5267.

a need in the past for discussion of the legal status of international organizations as new entities equipped by states with their own legal personality and specific powers, so today it is necessary to discuss the legal status of these treaty bodies and especially environmental treaty bodies. Some of these bodies, the so-called autonomous institutional arrangements (AIAs), possess legal personality and law-making powers, including in particular treaty-making powers, as a result of the will of states. Still, their legal status in international law is unclear and is therefore a legitimate subject for discussion. For this reason, the present study will also include a section devoted to this issue, presented in chapter V with the example of AIAs that have operated as treaty bodies for nearly all MEAs concluded since the mid-1970s. Modern MEAs establish more flexible institutions and mechanisms for their implementation in practice. Although environmental treaty bodies are not established as traditional international organizations, in reality they exercise to a considerable degree the decision-making powers of such organizations, both in internal and external relations. Modern environmental treaty bodies are, like international organizations, created by the will of states on the basis of international agreements and, again like international organizations, form autonomous entities with their own legal personality. The similarities between environmental treaty bodies and international organizations go even further. Within certain limits treaty bodies possess their own treaty-making powers, which may be either expressly granted or implied in relations with states, international organizations and other treaty bodies. The discussion of the legal status of such bodies must be based on the rules of the law of treaties and international institutional law. Such a discussion is necessary insofar as academic research should answer the needs of international practice. Moreover, as far as the Polish literature on international law is concerned, these issues have been absent from academic discussion.

An appropriate methodology is key to examining the research issues in a way that achieves the aims and answers the questions of any study. The most common approach in legal methodology is the legal dogmatic method, without which proper analysis of the sources of international law would not be possible. This research method must, however, take into account the specific nature of international law and especially its sources. In order to analyse the sources of international law, we must first establish their content, which is a much more complicated task than is the case with national law. The task is challenging not only in respect to the rules found in international agreements but most of all in respect to the rules of customary law and the general principles of international law. For the latter it is necessary to reconstruct their content based on other legal norms, as well as the practice of states and

other subjects with international personality of their own. When referring to the legal dogmatic method, the case law of international courts, as the source for a doctrine of implied powers, and in particular the implied treaty-making powers of international organizations, clearly has to be taken into account. In order to achieve the aim of this study, therefore, it will be necessary to draw heavily on the comparative research method. Since the analysis will focus on those provisions of the constituent instruments of various international organizations that concern their powers, and especially treaty-making powers, the search for parallels and the formulation of conclusions must be based on a comparative analysis. The comparative analysis will also be essential for examining the position of the ILC, especially as regards the codification of the law of treaties. The historical method, on the other hand, will be used on a significantly smaller scale, as the analysis of the historical development of the institutions under discussion is of little importance in accomplishing the objectives of this study.

Presenting wide-ranging research issues, which concern the fundamental aspects of international law and are crucial from the perspective of international practice, requires the analysis of a large body of literature. Indeed, international organizations to a greater or lesser extent are of interest to all researchers of international law. Neither is it possible to study the different processes regulated by international law without regard to the role of international organizations in modern international relations. All major academic publications available will therefore be used in this work, including monographs, studies and articles. As the literature on the legal personality of international organizations and their powers is vast, the presentation of the findings will necessarily have to be kept to a minimum and balanced with other elements of the discussion. The literature on the treaty-making capacity of international organizations, and particularly on the exercise of their treaty-making powers, on the other hand will be presented in much greater detail.

The analysis of the treaty-making capacity of international organizations will focus on the constituent instruments of international organizations, and particularly those of the United Nations (UN) and the EU. The substantial codification work of the ILC in areas concerning the law of treaties and the codification of the responsibility of international organizations will also be used. As some concepts of the treaty-making powers of international organizations, particularly the concept of implied treaty-making powers, have been shaped by case law, the focus of a detailed analysis and examination will be on the case law of the ICJ and of the CJEU.

Finally, since this work was part of a *cotutelle* programme between the Faculty of Law and Administration of Adam Mickiewicz University in

Poznań and the Faculty of Law of the University of Geneva, the study also includes Polish international law doctrine, in particular addressing the subject of the law international organizations. Regrettably, Polish legal literature has no up-to-date publication on the treaty-making capacity of international organizations. There are several recent interesting monographs on the law of international organizations, focused in particular on the problem of their international responsibility.[12] It is therefore hoped that this study will stimulate a discussion among Polish scholars on the *ius contrahendi* of international organizations.

12 See, e.g.: Ł. Augustyniak, *Odpowiedzialność organizacji międzynarodowych za działania ich funkcjonariuszy*, PTE Poznań 2015; A. Czaplińska, *Odpowiedzialność organizacji międzynarodowych jako element uniwersalnego systemu odpowiedzialności międzynarodowoprawnej,* Uniwersytet Łódzki, Łódź, 2014; and B. Krzan, *Odpowiedzialność państwa członkowskiego z tytułu działalności organizacji międzynarodowych*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2013.