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The Quest for International Legal Status: On Finn Seyersted and the Challenges of Theorizing International Organizations Law

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Abstract

After so many decades since the emergence of international organizations, the question of their international legal status – the terms on which they participate in the international legal system – remains the subject of debate. Among all the scholars that have contributed to this debate, Finn Seyersted stands out for having offered a forward-looking, sophisticated and uncompromising account of what international organizations are under general international law and of what international rights, obligations and capacities they consequently possess. Yet Seyersted is perceived as a left-field scholar with a bee in his bonnet. His work is often name-checked but rarely engaged with properly. This article highlights Seyersted's invaluable contribution to the theory of international organizations, which has the merit, among others, of having sensed the direction in which international practice was going. It also ponders how Seyersted's relative lack of success in becoming a more influential scholar can be viewed as a cautionary tale, for there are empirical, conceptual and normative challenges in the quest for international legal status that his work was not able to meet.

1 Introduction

That international organizations are universally described as subjects of international law provides strong evidence that, contrary to the once dominant view,[1] participation in the international legal system is not limited to states. This has been the mainstream position at least since the International Court of Justice (ICJ) ruled that the United Nations (UN) enjoys '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

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[1] On which, see Lauterpacht, 'The Subjects of the Law of Nations', in E. Lauterpacht (ed.), *International Law: Collected Papers* (1975), at 489–493.

operate upon an international plane'.[2] Yet the terms on which international organizations participate in the international legal system *qua* subjects of international law – their international legal status – remain a bit of a mystery. To this date, commentators continue to debate the legal basis and effects of their 'international personality'. Two main questions arise in this context. First, is the existence of an international organization as an autonomous entity operating on the international plane opposable to non-member states? Second, what rights, obligations and capacities accrue to international organizations under general international law?

The name of the Norwegian jurist Finn Seyersted is ubiquitous in discussions of these questions. Throughout the 1960s, Seyersted published a series of lengthy pieces covering various issues of international organizations law.[3] The centrepiece of the series is *Objective International Personality of Intergovernmental Organisations: Do Their Capacities Really Depend upon Their Constitutions?*, which appeared in three formats: as a self-published monograph in 1963; as an article in the *Nordisk Tidsskrift for International Ret* (*Nordic Journal of International Law*) in 1964;[4] and, with some tweaks, as a couple of complementing articles in the *Indian Journal of International Law* in 1964.[5] In this piece, Seyersted articulated a robust conception of the international legal status of international organizations. He viewed international organizations as self-governing entities established under general international law, endowed with objective personality and the same inherent legal capacities that states enjoy on the international plane.

Seyersted's argument caused a splash, with several contemporaneous authors engaging with it in one way or another. Despite not being a book released by a commercial publisher, *Objective International Personality* was reviewed by Joseph Kunz in the *American Journal of International Law*.[6] Even to this day, Seyersted is name-checked in myriad textbooks, monographs and academic articles[7] and not only in Europe and

2 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, at 179.

3 Most notably, Seyersted, 'United Nations Forces: Some Legal Problems', 37 *British Yearbook of International Law* (*BYIL*) (1961) 351; Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations', 14 *International and Comparative Law Quarterly* (*ICLQ*) 31; Seyersted, 'Applicable Law in the Relations between Intergovernmental Organizations and Private Parties', 122 *Recueil des cours de la Académie de droit international de la Haye* (*RdC*) (1967) 427.

4 The self-published monograph and the version published as Seyersted, 'Objective International Personality of Intergovernmental Organisations: Do Their Capacities Really Depend upon Their Constitutions?', 34 *Nordisk Tidsskrift for International Ret* (1964) 1 are identical and even have the same page numbering.

5 Seyersted, 'International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?', 4 *Indian Journal of International Law* (1964) 1 (including a section lifted from Seyersted's *BYIL* article); Seyersted, 'Is the International Personality of Intergovernmental Organizations Valid vis-à-vis Non-Members?', 4 *Indian Journal of International Law* (1964) 233.

6 Kunz, 'Objective International Personality of Intergovernmental Organisations. Do Their Capacities Really Depend upon Their Constitutions? By Finn AJ Seyersted. Copenhagen: 1963. pp. 112', 58 *American Journal of International Law* (*AJIL*) (1964) 1042.

7 Textbooks include D.P. O'Connell, *International Law* (2nd edn, 1970), at 94; Akande, 'International Organizations', in M. Evans (ed.), *International Law* (5th edn, 2018) 231; J. Crawford, *Brownlie's Principles of Public International Law* (9th edn, 2019), at 159; G. Hernandez, *International Law* (2019), at 138; M. Shaw, *International Law* (9th edn, 2021), at 1143, Q.D. Nguyen *et al.*, *Droit international public* (9th edn, 2022), at 803; J. Combacau and S. Sur, *Droit International Public* (13th edn, 2019), at 760. Examples of monographs and articles citing Seyersted can be found in notes 43 and 45 below and in other pieces discussed throughout this article.

North America – the present writer vividly recalls, as a law undergraduate in Brazil in the early 2000s, coming across a discussion of Seyersted's argument in a volume published in Portuguese by Antônio Augusto Cançado Trindade, who was later to become a judge at the ICJ.[8] Commentators have even assigned to Seyersted his own school of thought, the so-called 'objective theory' of the legal personality of international organizations, turning him into an inescapable footnote.

Seyersted was in some ways a visionary. Hindsight shows that some of his basic intuitions as to the directions that international practice was taking were spot on.[9] Yet relatively few contemporary commentators acknowledge an intellectual debt to him. As Jan Klabbers points out, while 'immensely respected', Seyersted 'never gained much of a following'.[10] People working in the field of international organizations are likely to recognize his name, but his contribution is often remembered in the form of reductive soundbites such as 'objective theory' and 'inherent powers'. That is regrettable for, even after so many years, Seyersted remains one of the most imaginative and intellectually bold theorists to try to solve the riddle of the status of international organizations.

This article revisits and reflects on Seyersted's legacy and the importance of his intellectual project by doing two things. First, it locates Seyersted in a long-standing doctrinal debate, showing how subsequent developments in practice and scholarship have vindicated core tenets of his position, even if his work seems to have had limited influence on those developments. Second, it reflects on shortcomings in Seyersted's method that may partly explain his limited influence. Those shortcomings exemplify three challenges to which those individuals who join the quest for the status of international organizations must rise. The first is empirical: how does one prove international legal status? The second is conceptual and concerns the distinction between the rights, obligations and capacities that an international organization enjoys as a subject of international law, on the one hand, and the competences that it may exercise under its constituent instrument, on the other. The third is normative and relates to the need to acknowledge and address the implications of the conception of international legal status proposed. The article concludes by suggesting that Seyersted's project remains as relevant in the second decade of the 21st century as it was in the 1960s and that his contributions, for all their faults, continue to raise the bar for those seeking to theorize international organizations as subjects of international law.

2 Seyersted and the Quest for the Status of International Organizations

A *A Long-standing Debate*

The emergence of intergovernmental institutions in the second half of the 19th century challenged international lawyers whose received wisdom was that only states

[8] A.A. Cançado Trindade, *Direito das Organizações Internacionais* (5th edn, 2012), at 12–15.

[9] As discussed in section 2 below.

[10] J. Klabbers, *An Introduction to International Organizations Law* (4th edn, 2022), at 64; see also Klabbers, 'On Seyersted and His *Common Law of International Organizations*', 5 *International Organizations Law Review* (*IOLR*) (2008) 381, at 387.

could be subjects of international law. How were entities such as the Universal Postal Union, the International Telegraph Union and the League of Nations to be described from a legal perspective? This question captured the imagination of scholars, especially in continental Europe. Some of them, like Georg Jellinek and Dionisio Anzilotti, conceptualized early intergovernmental institutions as 'organized unions of states' or the 'common organs' of states. Others, such as Hans Kelsen and Josef Kunz, argued that those entities should instead be viewed as separate legal persons under international law.[11]

In the intellectual climate of the post-World War II period, ontological conceptions of statehood and sovereignty fell out of fashion.[12] The proposition that personality is essentially a legal construct gained greater acceptance, paving the way for less rigid conceptions of what kinds of subjects international law can have. If statehood and sovereignty are better understood as a status conferred by law rather than as *a priori* social facts, then there is nothing in the nature of the international legal system that prevents it from addressing entities other than states.[13] The ICJ espoused this view in the *Reparation for Injuries* advisory opinion of 11 April 1949, where it said that '[t]he 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'.[14] Commentators soon started to extend the Court's analysis of the legal personality of the UN to other international organizations.[15]

More controversially, the ICJ stated that the legal personality of the UN was 'objective', in the sense that it was opposable to third states and 'not [merely] personality recognized by [the members] alone'.[16] The Court was signalling that Israel, then a non-member, could not ignore the UN's claim for reparation for the assassination of Folke Bernadotte, its envoy to the Middle East. A few commentators decried the Court's finding as unprincipled and suggested that it be ignored.[17] Others accepted the Court's finding but thought that it applied to the UN alone since the reasoning referred to the 'power, in conformity with international law', of 'fifty States, representing the vast majority of the members of the international community'.[18] The

[11] See the excellent account of the debate in von Bernstorff, '*Autorité oblige*: The Rise and Fall of Hans Kelsen's Legal Concept of International Institutions', 31 *European Journal of International Law* (*EJIL*) (2020) 487, especially at 499–513.

[12] For a detailed analysis of the evolution of thinking on international legal personality, see R. Portmann, *Legal Personality in International Law* (2010), especially chs 5, 8. The ontological conception of statehood is described by Portmann in the following terms: 'The state … exists independently of legal provisions. Statehood was conceived as a social fact from which legal analysis departed; it was not a legal question whether a state existed or not.'

[13] An influential statement of this idea is found in H.L.A. Hart, *The Concept of Law* (1961), at 220–226.

[14] *Reparation for Injuries*, *supra* note 2, at 178.

[15] J. Alvarez, *International Organizations as Law-makers* (2005), at 134.

[16] *Reparation for Injuries*, *supra* note 2, at 185.

[17] See, e.g., Bindschedler, 'Les delimitation des compétences des Nations Unies', 103 *RdC* (1963) 307, at 403–404.

[18] *Reparation for Injuries*, *supra* note 2, at 185.

mainstream view, as maintained by Ignaz Seidl-Hohenveldern, the Austrian jurist who became the most present of Seyersted's interlocutors, was that international organizations were 'merely derived subjects of public international law', 'established by the will of their founder States' and only endowed with the express or implied powers envisaged in their constituent instruments.[19] With the exception of the UN (and perhaps similar entities),[20] third states would have a choice between 'recognizing' the legal personality of international organizations and simply ignoring it. This choice was by application of the principle *pacta tertiis nec noncent nec prosunct* (loosely translated as 'a treaty binds the parties and only the parties'), which was later codified in Article 34 of the 1969 Vienna Convention on the Law of Treaties (1969 VCLT).[21] An international organization, the argument went, is *res inter alios acta* ('a thing done between others') in relation to third states unless the latter decide to accord recognition to it.

Seyersted launched a frontal attack on the mainstream view. He thought it was wrong for two reasons. First, it ran afoul of the facts. '[I]n practice', he pointed out, organizations 'perform "sovereign" and international acts even when these have not been authorized in their constitution'.[22] Among other things, they take part in diplomatic relations, hosting the permanent missions of states and sending officials to represent them in relations with other entities; they make international claims and occasionally agree to international dispute settlement; and they are capable of performing all sorts of unilateral acts.[23] Second, the source of the international legal status of international organizations cannot be the will of the members, for the provisions found in constituent instruments do not produce 'external effects'. In other words, neither the organization, nor its members, nor a third party can argue that an act performed by the organization on the international plane is unlawful or invalid as a matter of public international law because it exceeds the organization's competences.[24] This argument led Seyersted to posit that international organizations are 'in principle, from a legal point of view, general subjects of international law, in basically the same manner as States'.[25] The two categories of subjects share the attribute of self-governance, enjoying exclusive 'organic jurisdiction' over their own internal affairs, in the sense that they are 'not subject to the authority of any other

[19] Seidl-Hohenveldern, 'The Legal Personality of International and Supranational Organizations', 21 *Revue Egyptienne de Droit International* (1965) 35, at 71.

[20] See, e.g., H. Schermers, *International Institutional Law* (1972), at 626. Acceptance of the possibility of objective personality for the United Nations (UN) and other universal organizations among scholars that otherwise ascribed to the so-called 'will theory' comes across as deference to the International Court of Justice's (ICJ) advisory opinion.

[21] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[22] Seyersted, *supra* note 4, at 21. By '"sovereign" or international acts', Seyersted means acts performed on the international plane, such as acts of legation, international claims and participation in international treaty making and dispute settlement.

[23] *Ibid.*, at 21–27.

[24] *Ibid.*, at 32–45.

[25] *Ibid.*, at 28–29.

organized community'.[26] It follows that not only do international organizations have an 'inherent capacity to perform any act of international law which [they are] in a practical position to perform', but they also 'enter automatically into the rights and obligations under general international law to the extent that their nature and acts call for application of such rights and obligations'.[27] As a 'general subject of international law', an international organization also possesses 'objective legal personality' in the sense that it 'must be treated as a subject of international law by any other subject of international law which has relations with it'.[28] Seyersted clarifies that such a status implies no 'duty to enter into diplomatic relations' with the international organization but, merely, whenever such relations are entered into, the duty to treat 'the Organization, rather than its several Member States [as] the bearer of the rights and duties arising out of the acts performed by it or addressed to it'.[29]

Seyersted was not alone in suggesting that international organizations possessed objective legal personality. Just to cite a couple of eminent international lawyers writing in the early 1960s, Paul Reuter and Sir Humphrey Waldock took a similar position in general courses at the Hague Academy of International Law. Reuter noted that '[l]'existence d'une organisation relève de critères objectifs' and that 'toute organisation même non reconnue est tenue de certaines obligations et possède certains droits opposables à des Etats tiers, notamment en application de règles générales de droit international public'.[30] Waldock remarked that, 'if an organisation has lawful objects and has been lawfully created, there does not seem to be any cogent reason for withholding from it objective international personality, even although its external relations may in practice be very limited owing to the limited nature of its objects'.[31] But what made Seyersted's work stand out was that no one had pursued the argument as comprehensively as he did. Instead of offering a short or tentative explanation, he tackled the question of what international organizations are from the viewpoint of public international law head on. Nor did he shy away from comparing states and international organizations, even if that comparison was bound to be polemical. In the review of *Objective International Personality* in the *American Journal of International Law*, Kunz described the contribution of the 'Scandinavian author' as 'far-reaching and challenging'. Kunz saw it as being '[i]n contradiction' to the 'prevailing doctrine' and quipped that Seyersted was developing 'his own opposite doctrine'. While the review is not overtly critical, one can read Kunz's bemusement between the lines when he says, for example, that Seyersted's 'whole theory is based on practice, but he holds that this practice is constant and far-reaching enough to constitute general

[26] *Ibid.*, at 64. For Seyersted, thus, the international organizations that qualify as subjects of international law are those that comprise '[i]nternational organs (i.e. organs established by two or more sovereign communities)' which are not 'subject to the authority of any other organized community except that of the participating communities acting jointly through their representatives on such organs' and 'act in their own name'.

[27] *Ibid.*, at 53.

[28] *Ibid.*, at 98.

[29] *Ibid.*

[30] Reuter, 'Principes de Droit International Public', 101 *RdC* (1961) 427, at 519.

[31] Waldock, 'General Course on Public International Law', 106 *RdC* (1962) 1, at 151.

international law'. Kunz concludes by saying, somewhat wryly, that it would be 'interesting to watch the reaction of prevailing doctrine to this challenge'.[32]

It must have been indeed interesting to watch how, in the years that followed, the 'prevailing doctrine' to which Kunz refers became less prevailing. The two codification projects that the International Law Commission (ILC) pursued in the field of international organizations, addressing the law of treaties in the 1970s and the law of international responsibility in the 2010s, provide a fascinating window on how the debate has shifted. In the context of the project on the law of treaties concluded by international organizations, opinion on the issue of status was divided.[33] Some members of the ILC advocated for a provision that tied the capacity of international organizations to conclude treaties to constituent instruments – the Seidl-Hohenveldern approach, so to say. Others pushed for a provision that clarified that international organizations have the capacity to conclude treaties under general international law in accordance with their internal rules, coming closer to Seyersted's approach. Neither of the approaches could be described as 'prevailing' in the debates at the ILC. Special Rapporteur Paul Reuter expressed a personal preference for the latter but ended up, seemingly for political reasons,[34] steering the commission towards the former. The provision now found in Article 6 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (1986 VCLT) thus prescribes that '[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization'.[35]

But if this was a concession to those who equate international organizations with their founding treaties, it was a concession only in theory. For one, the ILC meant Article 6 to be agnostic as to the status of international organizations, disclaiming that it 'should in no way be regarded as having the purpose or effect of deciding [that] question'.[36] Moreover, the commission refrained from adopting any provisions that would have given effect to, or allowed for the enforcement of, the content of Article 6. Notably, the ILC extended to international organizations the provisions found in Article 27 of the 1969 VCLT – according to which domestic law cannot be invoked to justify the breach of a treaty – and Article 46 of the 1969 VCLT – according to which a violation of internal rules regarding competence to conclude treaties can only be invoked as a ground of treaty invalidity if the violation is manifest and concerns a rule of fundamental importance. In his debate with Seyersted, Seidl-Hohenveldern had argued that 'the limitations of the powers of an international organization, which result from the treaty establishing it[,] are limitations under international law and should therefore be effective also in the sphere of the international relations of the

[32] Kunz, *supra* note 6, at 1043–1044.

[33] For a detailed account, see C. Brölmann, *The Institutional Veil in Public International Law* (2007), at 145–150, 158–160, 203–205.

[34] P. Reuter, 1 *Yearbook of the International Law Commission* (*ILC Yearbook*) (1974), at 164, para. 70.

[35] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT) 1986, 25 ILM 543 (1986).

[36] Draft articles on the law of treaties between States and international organizations or between international organizations, 2(2) *ILC Yearbook* (1982), at 24.

organization'.[37] The 1986 VCLT has rejected this approach. Finally, the 1986 VCLT states, in its preamble, 'that international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes'. This clause has been subsequently construed as confirming that, contrary to what Article 6 suggests, the treaty-making capacity of international organizations derives from general international law. Karl Zemanek, who presided over the 1986 Vienna Conference, concedes that this reading of the preamble, which he endorses, 'comes very close to, if it is not identical with, the theory which Finn Seyersted [had] defended for many years'.[38]

The departure from the 'prevailing doctrine' is even more evident in the ILC's debates on the responsibility of international organizations. Special Rapporteur Giorgio Gaja was of the view that when an organization with sufficient independence from its members is set up, 'one could speak of an "objective international personality"'.[39] He pointed out that '[t]he characterization of an organization as a subject of international law thus appears as a question of fact' and that it was no 'logical necessity' to affirm that 'an organization's personality exists with regard to non-member States only if they have recognized it'.[40] This view is reflected in the commentaries to the 2011 Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (ARIO), which cite *Reparation for Injuries* as '[appearing] to favour the view that when legal personality of an organization exists, it is an "objective" personality'[41] and confirm that it is not 'necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible'.[42] The image of international organizations as legal persons that enjoy an objective existence on the international plane is further fleshed out in Article 62, which establishes a presumption that members are not liable for the acts of the organizations that they join.

Another notable affirmation of the notion of objective personality comes from the International Criminal Court (ICC), which recently had the occasion to comment on its own international legal status. The prosecutor asked Pre-Trial Chamber I for a ruling on the question of whether the ICC may exercise jurisdiction over the

[37] Seidl-Hohenveldern, *supra* note 19, at 41.

[38] Zemanek, 'The United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations: The Unrecorded History of Its "General Agreement"', in K.H.B Böckstiegel *et al.* (eds), *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht: Festschrift für Ignaz Seidl-Hohenveldern* (1988) 665, at 671. Seyersted had suggested, soon after the International Law Commission (ILC) concluded the project, that Article 6 was 'useless and *misleading* and should be *deleted*'. Seyersted, 'Treaty-Making Capacity of Intergovernmental Organizations: Article 6 of the International Law Commission's Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations', 34 *Österreichisches Zeitschrift für Öffentliches Recht und Völkerrecht* (1983) 261, at 261.

[39] G. Gaja, First report on the responsibility of international organizations 2(1) *ILC Yearbook* (2003) 105, at 111, para. 20.

[40] *Ibid.*

[41] ILC, 'Articles on the Responsibility of International Organizations for Internationally Wrongful Acts' (ARIO), 2(2) *ILC Yearbook* (2011) 40, at 50.

[42] *Ibid.*

alleged deportation of members of the Rohingya people from Myanmar, which has neither signed nor ratified the Rome Statute.[43] Addressing Myanmar's stance that 'no treaty can be imposed on a country that has not ratified it', the Pre-Trial Chamber recalled *Reparation for Injuries* and concluded that 'more than 120 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 called the "International Criminal Court", possessing objective international personality, and not merely personality recognized by them alone'.[44] The Chamber then noted, in a manner reminiscent of Special Rapporteur Gaja at the ILC, that 'the existence of the ICC is an objective fact', seeing as 'it is a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not'.[45]

Developments in international practice have not put an end, however, to the doctrinal debate over the status of international organizations. Major works on the law of international organizations contrast the 'will theory' (exemplified by Seidl-Hohenveldern) with the 'objective theory' (epitomized by Seyersted), sometimes refraining from taking a position. The proposition that international organizations enjoy objective personality under general international law does have its fair share of supporters,[46] having found its way into mainstream international law textbooks.[47] Yet leading commentators like Henry Schermers and Niels Blokker and Philippe Sands and Pierre Klein still maintain that such an attribute is only shared by 'universal' international organizations like the UN.[48] Likewise, the legacy of Seidl-Hohenveldern seems to remain strong in his home country of Austria[49] and elsewhere in the continent.[50] Just to cite an example, Christian Tomuschat has maintained that '[t]he theory of objective personality, as developed in [*Reparation for Injuries*], was tailored for the United Nations as the primary organization of the international community

[43] Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

[44] Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, (ICC-RoC46(3)-01/18), Pre-Trial Chamber I, 6 September 2018, para. 48.

[45] *Ibid.* The chamber's reasoning, though, speaks to the conceptual confusion in this field, referring, for example, to the 'purposes and considerations of an *erga omnes* character' and to the references to multilateral treaties and customary rules found in the Rome Statute (para. 75).

[46] See, e.g., C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, 2005); D'Argent, 'La Personnalité Juridique Internationale de l'Organisation Internationale', in E. Lagrange and J.-M. Sorel, *Droit des organisations internationals* (2013), recitals 881–884; Brölmann, *supra* note 33, at 88; Gazzini, 'Personality of International Organizations', in J. Klabbers and A. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (2011) 33, at 36–37.

[47] See, e.g., Crawford, *supra* note 7, at 160; Akande, *supra* note 7, at 234–235; Nguyen *et al.*, *supra* note 7, at 830–831.

[48] H. Schermers and N. Blokker, *International Institutional Law: Unity within Diversity* (6th edn, 2018), at 1029–1031; P. Klein and P. Sands (eds), *Bowett's Law of International Institutions* (6th edn, 2009), at 480.

[49] See, e.g., Schmalenbach and Schreuer, 'Die Internationalen Organisationen', in A. Reinisch (ed.), *Österreichisches Handbuch des Völkerrechts* (6th edn, 2021) 215, at 225.

[50] J. Combacau and S. Sur, *Droit International Public* (13th edn, 2019), at 760.

and cannot automatically be applied to any other organization, contrary to a view propagated by Finn Seyersted decades ago'.[51]

Nor can it be suggested that practice has followed a perfect pattern. An incident of interest that commentators have tended to overlook was the refusal by the Soviet Union to recognize the European Economic Community (EEC) until 1988.[52] Given that the Soviet boycott of EEC institutions was based on political and ideological grounds, it is not clear to what extent it can be interpreted as lending support to the 'will theory'. Commenting on the issue in 1970, Hans Blix thought that it '[c]ould hardly be concluded' from its refusal to conclude treaties with the EEC that the Soviet Union '[did] not consider it a subject of international law'.[53] But the opposite position can also be found in the literature.[54]

Yet it seems undeniable that the practice of the past decades has come closer to Seyersted's vision than to Seidl-Hohenveldern's. As the curious example of the relations between the Soviet Union and the EEC recedes into the past, third states have shown little appetite for challenging the legal existence of international organizations through denial of recognition.[55] Indeed, the rise of the EEC (now the European Union [EU]) and other regional integration organizations has confirmed Seyersted's intuitions that there is little that general international law prevents international organizations from doing.[56] In the early 1960s, Seyersted argued that 'if intergovernmental organizations have not yet been invited to participate [in international conferences]

[51] Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 291 *RdC* (1999) 9, at 128.

[52] As Wolfgang Mueller has noted, '[t]o hamper [European] integration, the Soviet Union relied mainly on two tactics: (1) the denial of official recognition and the circumventing of common European institutions, and (2) the promotion of "all-European" forums (instead of West European or transatlantic organizations) and the intensification of state-to-state contacts and trade agreements with EEC members to highlight the benefits of sovereignty versus integration'. Mueller, 'Recognition in Return for Détente? Brezhnev, the EEC, and the Moscow Treaty with West Germany, 1970–1973', 13 *Journal of Cold War Studies* (2011) 79, at 99–100.

[53] Blix, 'Contemporary Aspects of Recognition', 120 *RdC* (1970) 587, at 621.

[54] S. Pritzkow, *Das völkerrechtliche Verhältnis zwischen der EU und Russland im Energiesektor: Eine Untersuchung unter Berücksichtigung der vorläufigen Anwendung des Energiecharta-Vertrages durch Russland* (2011), at 10–11. In a piece published in 1971, Chris Osawke discusses the evolution of Soviet legal thinking on international organizations and its progressive acceptance of the notion of international legal personality, while noting that 'Soviet doctrine would argue that, whereas states are subjects of international law *erga omnes*, international organizations are only subjects *sui generis*', in the sense that 'whereas the international personality of primary subjects of international law-states is exercisable irrespective of the recognition of such a state by other subjects of this law, the international personality of derived subjects of international law … applies only to members of such organizations and to those non-member states which accorded recognition to such an entity'. Osawke, 'Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations', 65 *AJIL* (1971) 502, at 520.

[55] Amerasinghe, *supra* note 46, at 87; D'Argent, *supra* note 46, recitals 881–882. Tomuschat, *supra* note 51, at 128, argues that '[i]nternational practice still proceeds from the assumption that for a full international relationship to come into being recognition is an indispensable requirement' but offers no support for this proposition.

[56] For a discussion of this point, see Bordin, 'Is the European Union a *Sui Generis* International Organization? The Challenge of Arguing for Special Treatment in Customary International Law', in F.L. Bordin, A. Müller and F. Pascual-Vives (eds), *The European Union and Customary International Law* (2022), 48, at 63–65.

on the same footing as States, this is because the practical need has not yet arisen, not because their constitutions do not "confer" this capacity upon them or because they otherwise lack the inherent legal capacity'.[57] The EU's participation in the creation of the World Trade Organization and in major multilateral treaties such as the 2016 Paris Agreement on Climate Change vindicates that claim.[58] As Catherine Brölmann observes, 'Seyersted's writing ... in 1963 may be considered prophetic, as it seems international doctrine and practice are moving increasingly along the lines of his point of view'.[59]

B *Seyersted's Limited Influence*

Seyersted was an attentive observer of international practice who could sense the direction in which the wind was blowing and thus challenged mainstream thinking about the status of international organizations. The fact that he has become a conspicuous footnote, and that his work has been described as '[ranking] among the iconic texts of the discipline of international institutional law',[60] is a mark of academic success. It is hard, though, to shake the feeling that Seyersted's work was and remains under-appreciated. Instead of engaging with the finer points of his analysis, and using them as a building block for their own work, commentators tend to view him as the representative of a somewhat extreme view – the left-field scholar with a bee in his bonnet.[61] His most distinctive contribution to the field seems to have been kicking the door open by arguing at length that it is necessary to look at international organizations also from the perspective of general international law, for many answers cannot be found in constituent instruments and other internal rules. But the steps in the reasoning that make Seyersted's work so valuable are often left undiscussed.

Nor does Seyersted seem to have left an appreciable mark in the international practice whose development he predicted. He claimed, in his posthumously published *Common Law of International Organizations*, that he had a direct role in the *Certain Expenses* advisory opinion given by the ICJ in 1962 and that the ICJ 'turned' from the doctrine of implied powers 'to the contrary principle of inherent powers' after he sent

[57] Seyersted, *supra* note 4, at 24.

[58] Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

[59] Brölmann, *supra* note 33, at 86–87.

[60] Klabbers, 'On Seyersted', *supra* note 10, at 387.

[61] Citations to Seyersted, while abundant, tend to range from *pro forma* name-checking (as in the general textbooks cited in note 7 above) and perfunctory engagement (as in the general volumes on the law of international organizations by Amerasinghe, *supra* note 46; Schermers and Blokker, *supra* note 48; Klein and Sand, *supra* note 48). Even authors who share some or several of Seyersted's tenets either distinguish themselves from him or keep his work at a distance (compare the works by Amerasinghe, *supra* note 46; Gazzini, *supra* note 46; Brölmann, *supra* note 33; White, *infra* note 84). Two contrasting examples of deep engagement with Seyersted are Seidl-Hohenveldern, *supra* note 19, and Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', 44 *BYIL* (1970) 111, at 119–122 (though focusing on the question of inherent powers as it pertains to the interpretation of constituent instruments).

the judges the proofs of a forthcoming publication.[62] Seyersted's claim to have influenced the Court cannot be easily verified, but even if there may have been an affinity between the Court's expansive interpretation of the powers of the UN and Seyersted's work,[63] the *Certain Expenses* opinion says nothing about the status of the UN as a subject of international law, nor does it link the power to engage in peacekeeping to that status. The only reference to Seyersted's work in the case law of the ICJ that the present writer could find is in a separate opinion that Judge Cançado Trindade appended to an order on joinder in the *Certain Activities Carried Out by Nicaragua in the Border Area* case.[64] The reference is as obscure as it is unflattering: going off on a tangent, Judge Cançado Trindade takes a dig at Seyersted, whose work, he says, had 'promptly attracted criticism' for his 'arguable analogy … with the legal position of States'.[65] Judge Cançado Trindade also disagrees with Seyersted's reading of the case law, suggesting that the ICJ has in fact 'espoused to the doctrine of "implied powers", surely distinct from that of "inherent powers"'.[66]

Even if the work of the ILC confirms some of Seyersted's intuitions, his publications do not seem to have been particularly influential on the commission either. Some of them are cited noncommittally in reports issued in connection with projects relating to international organizations.[67] In his first report, Special Rapporteur Gaja mentions in a footnote that '[t]he view that international organizations have an objective international personality was strongly advocated by Seyersted', but he is quick to clarify that 'the inferences that the author drew from the organizations' personality are not relevant in the present context'.[68] Tellingly, Seyersted's name is nowhere to be seen in the commentaries to the ARIO. A contrasting example where Seyersted's work features is provided by Rosalyn Higgins' preliminary exposé and provisional report as rapporteur for the study of the Institut de Droit International on the responsibility of international organizations *vis-à-vis* third parties. In those documents, she describes Seyersted's theory and expresses her agreement with 'the view that the objective existence of an organization on the international plane is not simply a matter of widely shared participation in the founding treaty (as in the case of the UN), but of

62 F. Seyersted, *Common Law of International Organizations* (2008), at 31. The article, published in the *Österreichisches Zeitschrift für Öffentliches Recht und Völkerrecht*, was the same piece that appeared in *BYIL*, referred to in note 3 above. Seyersted was no doubt a master recycler.

63 D. Bowett, *The Law of International Institutions* (4th edn, 1980), at 338, n. 13.

64 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Joinder of Proceedings, Order of 17 April 2013, ICJ Reports (2013) 166.

65 *Ibid.*, Separate Opinion of Judge Cançado Trindade, para. 4.

66 *Ibid.*, para. 5; see also note 7 above.

67 El-Erian, First report on relations between States and inter-governmental organizations, 2 *ILC Yearbook* (1963) 159, at 181; Reuter, First report on the question of treaties concluded between States and international organizations or between two or more international organizations, 2 *ILC Yearbook* (1972) 171, at 176; El-Erian, Second Report on relations between States and Inter-Governmental Organizations, 2 *ILC Yearbook* (1967) 134, at 146; Díaz-González, Second report on relations between States and international organizations (second part of the topic), 2(1) *ILC Yearbook* (1988) 103, at 109.

68 2(1) *ILC Yearbook* (2003), at 111, n. 51.

an objective reality'.[69] It must be noted, though, that Seyersted was a member of the commission established by the Institut de Droit International to carry out the study; in other writings touching upon the status of international organizations, Higgins does not show a similar interest in the substance of Seyersted's theory.[70] Crucially, neither the notion of international organizations as an 'objective legal reality' favoured by Higgins at the Institut de Droit International nor the notion of international organizations as existing as 'a question of fact' favoured by Gaja at the ILC is based on a detailed conception of the international legal status of self-governing entities. They come across as an invitation to take a pragmatic approach rather than to delve into the kind of systemic premises and implications that a theory such as that put forth by Seyersted requires.

The question arises, then, of why Seyersted's was successful enough to become a recurring footnote but not an intellectual leader in a field that he pioneered. There are myriad factors unrelated to academic merit that may bear upon a scholar's success and influence, including institutional support, structural societal imbalances and professional and personal connections.[71] Seyersted was a civil servant throughout his long career, holding posts in Norway's Ministry of Justice and Ministry for Foreign Affairs and a stint at the International Atomic Energy Agency between 1960 and 1965.[72] He also held a chair in international law at the University of Oslo from 1973. As a white Nordic man living in the post-war era, combining a post at a reputable European university with a successful career in the public sector, Seyersted can hardly be viewed as an outsider. He published articles in leading journals, taught at the Hague Academy of International Law and was even elected to the Institut de Droit International.

It is thus more fruitful to turn to academic-related factors that may help explain Seyersted's mixed record. No doubt, Seyersted faced an uphill battle in putting forth a view of international organizations as international legal subjects comparable to states. Under the influence of the 'prevailing doctrine' to which Kunz alluded, the

[69] Higgins, Preliminary Exposé and Draft Questionnaire, 66(1), *Institute of International Law Yearbook* (1995) 251, at 276, 386. Rosalyn Higgins proposed that the draft resolution to be sent to the Institut de Droit International include a provision to the effect that '[t]he international personality of an international organization is, as a matter of international law, opposable to third parties, and is not dependent upon any recognition by them'. *Ibid.*, at 465. This provision was omitted from the final version of the draft resolution, however, possibly because of the opposition of a minority of the members of the commission carrying out the study (compare the responses of Ibrahim Shihata and Jean Salmon). Interestingly, both Seyersted and Seidl-Hohenveldern were members of the commission, though they did not seek to revive their old debate in their responses to the rapporteur's questionnaire. Seyersted submitted a very short response, while Seidl-Hohenveldern abstained from engaging with Higgins' views on objective legal personality.

[70] See, e.g., R. Higgins, *Problems and Process: International Law and How to Use It* (1994), at 47–48 (speaking of the 'objective legal reality of international organizations' without making reference to Seyersted's work). Seyersted's work is cited in some footnotes of R. Higgins *et al.*, *Oppenheim's International Law: United Nations* (2017).

[71] For a fascinating study highlighting the role of professional and personal connections, see Soares Pereira and Ridi, 'Mapping the "Invisible College of International Lawyers" through Obituaries', 34 *Leiden Journal of International Law* (*LJIL*) (2021) 67.

[72] A short biography is available in Seyersted, *supra* note 62, at xxi.

international lawyers of his time struggled to accept that the emergence of international organizations could have had such a transformational impact on the fabric of the international legal system. That Seyersted was ahead of his time may have been a reason for why he acquired the reputation of a maverick scholar. His legacy may have likewise been hindered by the fact that most of his publications date back to the 1960s, which indicates that he was not as active in promoting and refining his ideas in the decades that followed.

But it might be too simplistic to blame the ambivalence with which Seyersted's work has been received solely on the state of play that he encountered in the 1960s, without considering aspects intrinsic to its academic merit. Indeed, Seyersted's work, for all its solidity, exemplifies three pitfalls of theorizing about international organizations. The first is his tendency to make categorical claims that the evidence did not quite support. The second is his penchant for extrapolating constitutional competences from international legal status. The third is his failure to make a normative case for his theory and, imbued as he was with an unshaking faith in international organizations, his relative indifference to concerns to which his conception of international status gave rise. These challenges are discussed in the section that follows.

3 Three Challenges of Theorizing the Status of International Organizations

A *The Empirical Challenge: Proving International Legal Status*

Seyersted's account of the status of international organizations is anchored in a detailed analysis of international practice. He provides several examples in support of his contentions and is so confident that the facts are on his side as to use the rhetorical device of challenging those disagreeing with him to show their evidence to the contrary. For instance, in decrying the 'general view that only certain intergovernmental organizations have international personality in certain respects', he observes that 'legal writers rarely, if ever, make concrete suggestions as to which capacities are lacking'.[73] But Seyersted did not content himself with suggesting that his theory provided the best explanation of existing practice. Rather, he went all out to claim that existing practice 'certainly [was] consistent and extensive enough to constitute customary international law'.[74] In the posthumous volume that brings the different strands of his work together, he posits the existence of a 'common law' of international organization that is '*not* primarily laid down in constitutions or other conventions but which has developed in *practice* as customary law and which covers the aspects not laid down in the constitution and other conventions'.[75]

[73] Seyersted, *supra* note 4, at 19.
[74] *Ibid.*, at 61.
[75] Seyersted, *supra* note 62, at 4.

But Seyersted never engages with the two-element approach to the identification of customary international law,[76] nor does he take steps to demonstrate that the practice he identifies is indeed sufficiently general and qualified by *opinio juris*. He just submits that it is. This exposes his otherwise rigorous analysis to an obvious methodological challenge. The Soviet jurist Grigory Tunkin took advantage of this angle in a pointed critique of the 'Norwegian jurist'. Tunkin recalled that '[t]he existence of a certain State practice is not a sufficient proof of the existence of a customary rule of international law corresponding to this practice', and he argued that there is 'no evidence at all that the practice of international organisations to develop their activities beyond provisions of their respective statutes has been accepted by States as a rule of general international law'. 'The same is still more true', he said, 'of the alleged rule of general international law to the effect that international organisations may perform any acts within their purposes'.[77]

Tunkin's criticism focuses on the narrower point of whether international organizations can do more than what is provided for in their constituent instruments. But the broader lesson to take from it is that, even if there was sufficient normative practice to substantiate this point, it would not follow that Seyersted's comprehensive explanation for the practice – his conception of international organizations as subjects of international law on par with states – would itself be part of customary international law. The practice surrounding the creation and use of international organizations by states for various purposes raises the foundational question of how these organizations fit within the existing international legal system. As Paul Reuter remarked in a report submitted to the ILC, 'the very fact that organizations can be "subjects of international law" implies a radical – and, to some extent, a structural – change in the international community', a change resulting from 'a general rule of public international law which would be permissive in character and would make this particular effect of constituent instruments possible'.[78] The issue that lies at the heart of debates over the status of international organizations thus concerns the extent of the right that states have to act collectively on the international plane through a corporate entity with separate legal personality – in other words, the content of international law's 'rule of incorporation' for international organizations.[79] Do other states have to accept such an arrangement? If so, the picture that emerges is one in which states have the right to create entities that, as Seyersted says, third parties must treat as 'the bearer of the rights and duties arising out of the acts performed by it or addressed to it'.[80] But if a group of states does not have the right to create new subjects of international law, the

[76] For a recent restatement of the orthodox position on the identification of customary international law, see ILC, 'Conclusions on the Identification of Customary International Law', Doc. A/73/10 (2018).

[77] Tunkin, 'The Legal Nature of the United Nations', 119 *RdC* (1966) 1, at 22.

[78] Reuter, Third report on treaties concluded between States and International Organizations or between two or more International Organizations, 1(1) *ILC Yearbook* (1974) 135, at 150.

[79] The phrase 'rule of incorporation' is typically employed in (domestic) company law to refer to the legal regime governing the creation of corporate entities. While one should resist facile analogies between international and domestic law, the phrase provides a convenient gateway for asking questions about what the rules governing the creation of international organizations by states are.

[80] Seyersted, *supra* note 4, at 98.

existence of which is opposable *erga omnes*, then other states may choose on a case-by-case basis whether to deal with the organization as a legal person or whether to treat the acts of the organization as acts jointly performed by the members.

In the end, the choice between those two (or any other conceivable) approaches is one for states to make – either formally or, as is more common in the decentralized system of international law, through the normative practices in which they partake. Seyersted's analysis shows that, even in the 1960s, states seemed more inclined than not to treat international organizations as fully fledged subjects of international law with objective personality and access to a range of international capacities, rights and obligations. Subsequent practice makes this inclination look clearer, but this does not detract from the fact that it will remain difficult to show that an entire theory of the status of international organizations is part of customary international law for as long as states remain ambivalent about the issue. While states take great pains to affirm their own status as sovereign equals,[81] they do not seem equally willing to take an explicit normative position on issues of status that might elevate – or be perceived as elevating – international organizations. Just to cite a recent example from the debate around the ILC's study on the identification of customary international law, the USA has maintained that there is no basis for the proposition that the practice of international organizations can contribute to the formation of customary international law.[82] Seyersted's homeland, Norway, spoke on behalf of the Nordic countries to defend the opposite position,[83] seemingly lending support to his vision of international organizations as subjects of international law whose capacities are not qualitatively different from those of states. It is because of this type of disagreement that, even after so many decades, it can be difficult to assert that the debate between the 'will theory' and the 'objective theory' has been settled as a matter of *lex lata*.[84] The question, then,

[81] See, e.g., Declaration on Principles of International Law Concerning Friendly Relations, UNGA Res. 2625 (XXV) (1970).

[82] Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading, at 3 legal.un.org/ilc/sessions/70/pdfs/english/icil_usa.pdf.

[83] Sixth Committee, Summary record of the 25th meeting, 28 November 2014, Doc. A/C.6/69/SR.25, para. 130.

[84] As Nigel White has remarked, 'the continued debate among international lawyers on the issues of personality reflects the fact that even a fundamental (and quite basic) legal concept in the law of organisations is not settled, but it is being shaped and re-shaped by different, often competing, ideological and theoretical perspectives'. N. White, *The Law of International Organisations* (3rd edn, 2017), at 115. It is interesting to observe, in this connection, that from the three states that directly or incidentally raised the question of international legal status in the context of the drafting of the ARIO, *supra* note 41, one offered a wholehearted defence of the ILC's position on objective responsibility (Mexico, Comments and observations received from Governments, 2(1) *ILC Yearbook* (2011) 103, at 112), another referred to the question of whether objective personality 'would apply to an organization that is not of a universal character' as one on which the ILC commentary should offer further clarification (Austria, Comments and observations received from Governments, 2(1) *ILC Yearbook* (2011) 103, at 107) and the third expressed the view that, because 'the international organization is founded on a treaty which itself is of relative effect ("*res inter alios acta*"), its existence as an autonomous entity cannot theoretically be asserted *vis-à-vis* third states to that treaty' (Democratic Republic of the Congo, Comments and observations received from Governments and international organizations, 2(1) *ILC Yearbook* (2005) 27, at 42).

is which of the two theories provides the better explanation of existing practice and precedent.

It would be unfair to suggest that this point was entirely lost on Seyersted. In a short piece published in 1982 in the *Nordic Journal of International Law*, responding to an article in which Reinhold Reuterswärd defended the position that international organizations were not subjects of international law, Seyersted wisely remarks that the 'choice of theoretical construction must depend upon which construction gives the correct practical results in the simplest and most natural way'.[85] But for all the nuanced passages one finds in his articles, Seyersted's eagerness to describe his arguments as custom illustrates the risk of overplaying one's hand by extrapolating too much from the evidence. Whenever Seyersted leaves the realm of theorizing to embark on the more dubious path of making categorical descriptive claims about the law, he makes what might otherwise have been a convincing reading of international practice look less credible.

B *The Conceptual Challenge: Distinguishing between International Legal Status and Constitutional Competences*

If Seyersted has a catchphrase, it would be 'inherent powers'. By this, he means that international organizations, like states, have 'the inherent capacity to enter into the rights and obligations under general international law to the extent that their nature and acts call for application of such rights and obligations'.[86] This is a legitimate extrapolation from the view that international organizations are legal subjects operating with objective personality on the international plane. Whatever states can do alone, they can do together. If they are entitled to constitute a corporate entity with separate personality to maintain relations with third parties, it follows that a whole range of international rights, obligations and capacities become in principle accessible to that corporate entity. There is, as Seyersted suggests, 'a good basis for analogy when the substantive conditions are the same'.[87]

The 'inherent powers' doctrine is proposed as an alternative to the 'implied powers doctrine', of which Seyersted is the harshest of critics. The implied powers doctrine is encapsulated in the notion that 'the rights and duties of an entity such as the [UN] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'.[88] Seyersted describes it as a 'fiction' and accuses those relying on it of intellectual dishonesty. In his words, 'in order to avoid a conflict with practice and to escape the consequences of their point of departure without admitting its falseness, the formula of "implied powers" has had to be applied whenever the need was felt – in such a wide, fictitious and undefined manner that it

[85] Seyersted, 'The Legal Nature of International Organizations', 51 *Nordisk Tidsskrift International Ret* (1982) 203, at 204.

[86] Seyersted, *supra* note 4, at 53.

[87] *Ibid.*

[88] *Reparation for Injuries*, *supra* note 2, at 180.

offers no guidance, merely an escape from the false point of departure'.[89] While the scope of Seyersted's critique of the 'implied powers' doctrine is not always clear, it seems to comprise two elements – one persuasive and the other less so. Persuasively, he argues that the 'implied powers' doctrine cannot explain the international legal status of international organizations because, if international organizations are indeed legal persons under a rule of general international law, their rights, obligations and capacities on the international plane cannot possibly originate from their internal law, in the same way as the international rights, obligations and capacities of states cannot derive from domestic law. The Dutch jurist Arnold Tammes offered a clear and succinct explanation of this point at the ILC when he noted that '[i]n all legal systems, capacity [is] conferred by an outside source' for '[a] legal entity could never invest itself with general capacity; it could only limit that capacity'.[90]

Not as persuasively, however, Seyersted dismisses 'implied powers' as a doctrine for the interpretation of the constituent instruments of international organizations. He takes pride in the ICJ's decision in *Certain Expenses* to the effect that 'when the [UN] takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization'.[91] For him, this *dictum* signals a departure from 'implied powers' and a confirmation of his own 'inherent powers' doctrine. Seyersted's critique of 'implied powers' as a doctrine for interpretation is not without merit. Implied powers may not provide an adequate doctrinal justification for instances in which international organizations have dramatically expanded their powers.[92] What is problematic in Seyersted's critique, nonetheless, is the supposition that such a doctrinal justification can be found in the characterization of international organizations as subjects of international law. For Seyersted is not only suggesting that international organizations may in principle perform the same international acts as states as a matter of public international law. He is also suggesting that international organizations may avail themselves of such 'inherent capacities' whenever that is not expressly prohibited by their constitutions.[93] He comes across as dismissive of – and even hostile to – the notion that constitutional validation is a precondition for measures taken in the exercise of an organization's exclusive power to regulate its own internal affairs and for action taken on the international plane. In fairness, he does concede that '[t]he provisions of the constitution may be significant inasmuch as they may authorize the Organization to make decisions binding upon the Member States or to exercise jurisdiction over their territory, nationals or organs'.[94] But he maintains that such provisions are not 'usually relevant to the question of the competence of the

89 Seyersted, *supra* note 4, at 30.
90 A. Tammes, 1 *ILC Yearbook* (1974), at 136, para. 52.
91 *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151, at 168.
92 See, e.g., Clark, 'The Teleological Turn in the Law of International Organizations', 70 *ICLQ* (2021) 533, at 554–564. For a historical account of 'international organization expansion' that looks far beyond the 'technologies' of hermeneutics, see G.F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).
93 Seyersted, *supra* note 4, at 44.
94 *Ibid.*, at 29.

Organization to perform any types of international acts', so long as those acts broadly fall under one of the organization's purposes.[95]

It seems at this point that Seyersted struggles with a distinction that has long eluded scholars in the field: the distinction between the law that applies to the international organizations on the international plane and the law that applies to them on the institutional plane (the so-called 'rules of the organization').[96] The *Reparation for Injuries* opinion provides a neat illustration of how this distinction has been elided. The request made by the UN General Assembly to the ICJ gave rise to two related, yet analytically separate, questions. The first was whether the UN had the right/capacity under general international law to bring a claim against Israel, then a non-member of the organization, which hinged upon the international legal status of the UN. Was it an international legal person in relation to Israel? If so, what rights, obligations and capacities did it have? The second question was whether, assuming an affirmative answer to the first, the UN had the competence under its constitution – the UN Charter – to bring that claim, and this hinged upon the purposes and functions that member states have entrusted to the UN, which may limit the exercise of whatever rights and capacities the UN enjoys under general international law. In its opinion, the Court goes on to say that the UN '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'; that '[w]hereas a State possesses the totality of international and duties recognized by international law, the rights and duties of an entity such as the [UN] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'[97]; and that 'the Members have endowed the [UN] with capacity to bring international claims when necessitated by the discharge of its functions'.[98] While one can infer from this reasoning that the UN had both the international capacity and the constitutional competence to bring a claim against Israel, the Court clearly bundled up the two questions.

Unlike the Court, Seyersted sees the importance of distinguishing between the rules of public international law that apply to an international organization and the organization's internal law.[99] This is indeed one of his distinctive contributions to the field. He argues that 'the entire internal law is a distinct legal system for each organization, like national law, which is a distinct system for each State' and decries the 'confusion of the internal law with public international law'.[100] Yet he downplays the role of internal law in limiting the action of international organizations. When he says,

[95] *Ibid.*, at 40.

[96] 'Rules of the organization' are defined in Article 2(b) of the ARIO, *supra* note 41, as comprising 'the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'. A similar definition is found in Article 2(1)(j) of VCLT 1986, *supra* note 35.

[97] *Reparation for Injuries*, *supra* note 2, at 179–180.

[98] *Ibid.*, at 180.

[99] Seyersted, *supra* note 62, at 454, n. 2.

[100] Seyersted, *supra* note 4, at 25. For a persuasive contribution pursuing the same point, see Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', 8 *IOLR* (2012) 397.

for example, that '[i]f the constitution does not define the subjects with which the Organization can deal, as is the case of the Nordic Council, then it can deal with any subject',[101] he seems to be suggesting that the Nordic Council and similar organizations can freely borrow from their international rights, obligations and capacities in search of goals to pursue. But why should general international law be given priority over constitutional arrangements adopted to give to an international organization a specific mission?

Seyersted's mistake is perhaps reading too much into the fact that constituent instruments do not produce 'external effects', which leads him to suggest that 'the great difference which exists between States and intergovernmental organizations is one of fact rather than of law', for '[t]he different extent to which they perform international acts and exercise international rights and duties depends upon their factual opportunities and not upon any basic difference in their legal capacities'.[102] But why should the international lawyer view questions involving the application of constituent instruments, which derive their validity from international law, as merely factual questions? Here, Seyersted pushes the analogy between domestic law and the internal law of international organizations too far. While the distinction between the international plane and the institutional plane is consequential,[103] it does not mean that the internal law of international organizations can be treated as fact in the same way as domestic law is conveniently – if somewhat uncritically – treated as fact.[104] Lack of constitutional competence for performing an act may not affect the validity of that act *vis-à-vis* third parties, but it still gives rise to questions concerning the legal position of the organization and its members under special rules of international law.

Thus, while Seyersted made a fundamental contribution to the debate by showing that it is a mistake to presume that the international legal status of international organizations can be explained by internal law alone, he failed to do justice to the role that internal law plays in determining the extent to which international organizations can tap into their international rights and capacities. General international law and the special international legal regimes established under constituent instruments pose parallel sets of legal questions that must be carefully considered in their own ambit. That is not to say that the 'inherent capacities' of international organizations under general international law cannot be part of an argument about the extent of the powers of any given organization under their internal law. In certain cases, the presumption might well be that an organization that is established to pursue certain goals is constitutionally empowered to perform whichever international acts may be necessary to achieve those goals.[105] However, the starting point for that kind of

[101] *Ibid.*, at 81–82.
[102] *Ibid.*, at 90.
[103] On the relations between general international law and institutional law, see Bordin, 'General International Law in the Relations between International Organizations and Their Members', 32 *LJIL* (2019) 653.
[104] For a nuanced analysis, see Crawford, *supra* note 7, at 48–52.
[105] See, e.g., Treaty on the Functioning of the European Union (TFEU), OJ 2016 C 202/47, Art. 216(1), where the European Union's competence to conclude treaties is articulated in very broad terms.

argument is not general international law itself but, rather, the organization's constituent instrument. If constituent instruments produce no 'external effects', why should one presume, without more, that general international law produces 'internal effects' that allow organizations to exercise competences contrary to the wishes of their members?[106]

C *The Normative Challenge: Assessing the Implications of Objective Legal Personality and 'Inherent Powers'*

That Seyersted oversells his customary international law claims and appears to argue that international organizations can freely access any rights and capacities that accrue to them as subjects of international law makes his contributions appear less cogent than they could have been. One might wonder what drove Seyersted to espouse such an assertive view of the status and powers of international organizations. This may have partly boiled down to style and intellectual temperament, but it also betrays a particular normative standpoint that Seyersted never quite articulated. Torfiin Arnsten, who prepared the unfinished manuscript of *Common Law of International Organizations* for publication, notes that Seyersted's writing 'has consistently been guided and inspired by the idea that international organizations are inherently a good thing in that they contribute to a system of global governance that other mechanisms of coordination among sovereign States could not bring about with the same degree of efficiency and legitimacy'.[107] Commenting on the *Common Law of International Organizations*, Klabbers likewise notes that 'the book oozes a sense of optimism about international organizations', making a show of '1950s progressivism in *optima forma*: international organizations simply can do no wrong'.[108]

In this opinion, Seyersted was no different from some of his peers writing in the post-war period, such as Wilfred Jenks and Henry Schermers, whose work is also imbued with a sense that collective action through international organizations serves the common good.[109] The notion that international law rights and

[106] It is possible that the reading of Seyersted that several scholars – the present writer included – make is inaccurate and that he did not mean his 'inherent powers' doctrine to have much to do with matters of constitutional interpretation. He notes, for example, that '[t]here is one important difference between intergovernmental organizations and States inasmuch as the constitutions of the former define and thereby limit the purposes of the Organization', giving to members 'a right, if they wish to use it, to insist that the Organization does not assume functions connected with other purposes'. Seyersted, *supra* note 4, at 36. He likewise notes that 'even the constitutional limitations of the purposes of the Organization may not constitute limitations upon its international capacity and personality, but merely restrictions of an internal nature', a 'separate question, which goes beyond' the question 'of whether the international capacities of an Organization must be positively deduced from the provisions of the constitution ... or whether they are simply inherent in the Organization as such'. *Ibid.*, at 86. But there is an exhausting ambivalence (or miscommunication) in the way he argues the point and a failure to apprehend that a full answer to the question of whether an international organization may perform an 'international' or 'sovereign' act must deal both with the international law and constitutional law perspectives.

[107] See his foreword to *Common Law of International Organizations*. Seyersted, *supra* note 62, at xiii.

[108] Klabbers, 'On Seyersted', *supra* note 10, at 388.

[109] Compare Sinclair, 'C. Wilfred Jenks and the Futures of International Organizations Law', 31 *EJIL* (2020) 525, at 536; Klabbers, 'Schermer's Dilemma', 31 *EJIL* (2020) 565, at 574–579.

capacities may fill gaps in the skeletal constituent instruments that members adopt, and which often reflect agreements to disagree, is a means of empowering international organizations. If international organizations are 'the good guys', then perhaps they should have access to the same rights and capacities that states have on the international plane and even be allowed to make use of those rights and capacities in the absence of express prohibitions in their constitutions. Klabbers has suggested that Seyersted was an exception to the 'functionalist wave' that prevailed in scholarship in the 1960s and 1970s.[110] But if functionalism 'stands for the broad proposition that the functioning of those creatures should not be impeded' and that 'the law should help organizations to prosper',[111] then Seyersted can also be thought of as an author that shares functionalist values by inviting us to regard international organizations as multipotential international legal subjects that must operate as freely as possible.[112]

But Seyersted never expounds or justifies his normative standpoint. Nor does he fully consider counter-arguments or entertain the idea that international organization action can lead to undesirable results. A first normative blind spot of Seyersted's account is that, even if viewing international organizations as subjects of international law with objective personality makes them more capable of pursuing the common good, it may sometimes come to the detriment of third parties affected by their action.[113] That is particularly evident in cases in which an organization breaches rights owed to non-member states or other entities under general international law. When that happens, is it not a problem that an unwitting third party would be required by international law to deal with the organization instead of with its members? If, for example, NATO conducts an unlawful military campaign against a third state, is it necessarily a principled solution to force that state to invoke the responsibility of the organization rather than the responsibility of its member states?[114] In his debate with Seyersted, one of the most compelling points that Seidl-Hohenveldern made related to the 'inconveniences to recognize a general right of all international organizations to … objective personality'. In Seidl-Hohenveldern's words:

> [i]f any organization can require any non-member State to accept the fact, that the organization can have rights and duties different from its members, the non-member State may suffer a

[110] Klabbers, *supra* note 109, at 568, n. 14.

[111] *Ibid.*, at 566.

[112] The difference between him and his functionalist colleagues was that, while they tended to look for justifications for international organization action from within, focusing on constituent instruments and other internal rules, Seyersted tended to look for such justifications from without, drawing from the international legal system itself.

[113] For critical reassessments of the premise that international organizations are the 'salvation of mankind' or 'harbingers of interational happiness', see Klabbers, 'The Transformation of International Organizations Law', 26 *EJIL* (2015) 9, at 50–64; Benvenisti, 'Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?', 29 *EJIL* (2018) 9, at 16–26.

[114] The argument that the member states of NATO were not responsible for Operation Allied Force in 1999 was made, for example, by France before the ICJ: see *Legality of Use of Force* (*Serbia and Montenegro v. France*), Preliminary Objections of the French Republic, 5 July 2000, paras 23–24.

> disadvantage. It is already difficult enough for a State to bring a claim against another State on account of an international delinquency committed by the latter. This however, is child's play compared to bringing an analogous claim against an international organization. The latter has no citizens and hardly any property abroad, hence, is less vulnerable to reprisals.... Thus, if several States had the intention to commit an international delinquency, would they not be well-advised to establish an international organization, to endow it with the possibility to act in the field concerned and then let it do their dirty work for them? If the injured State would complain to any of the member-States, these would refer him to the organization. ... In that case the injured State without its prior approval would have to exchange relatively good debtors (the member States or member State really responsible for the injury) against a worse one (the organization).[115]

In response, Seyersted offered a persuasive explanation of why member states cannot easily get rid of their own treaty obligations by establishing an international organization. If constituent instruments have no 'external effects', the transfer of competences to an international organization neither terminates the members' individual treaty obligations nor offers an excuse for non-compliance.[116] That may be true, but Seyersted does not deal with Seidl-Hohenveldern's concern that states can make use of international organizations to breach customary obligations owed to third parties while limiting their individual liability.[117] The potential shortcoming of conceiving international organizations as international persons with objective legal personality becomes even clearer if a presumption against member state liability is adopted, as the ILC did in Article 62 of the ARIO.[118] In that case, general international law may indeed have the effect of requiring the injured third party to exchange 'relatively good debtors' for 'a worse one'.[119]

A second normative blind spot of Seyersted's theory is its failure to appreciate the rule-of-law implications of the 'inherent powers' doctrine in regard to the interpretation of constituent instruments. In polities that put a premium on individual freedom, the assumption is not that public authorities enjoy freedom of action but, rather, that they must show that they are competent to act.[120] International law remains a system committed to the sovereign equality of states and to the relative freedom of action that

[115] Seidl-Hohenveldern, *supra* note 19, at 54–55.

[116] Seyersted, *supra* note 4, at 62–75.

[117] Missing in the debate is a discussion of the hazards that international organizations create for individuals, both in member states and non-member states – an omission that was perhaps understandable in the 1960s but is not acceptable presently.

[118] According to Article 62(1) of the ARIO, *supra* note 41, '[a] State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility'.

[119] In chapter 10 of his *Common Law of International Organizations*, which takes into consideration the work of the ILC on responsibility of international organizations, Seyersted doubles down on his original position. Seyersted, *supra* note 62.

[120] For an insightful discussion of the 'liberal' argument for the rule of law, see J. Gardner, *Law as a Leap of Faith* (2012), at 211–218.

states enjoy by virtue of that status.[121] Over time, international law has also become deeply committed to the protection of human rights and individual freedoms from dubious exercises of public authority. It follows that ensuring that international organizations exercise their competences in justifiable ways is a value that international law ought to promote.[122] This does not entail, however, that constituent instruments must be strictly construed. There may be several reasons militating in favour of interpreting constitutions in a purposive way that allows a public entity to discharge its mandate effectively. In its *Nuclear Weapons (WHO)* opinion, the ICJ emphasized 'the necessities of international life' that 'may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities'.[123]

But how the proper balance between legality and effectiveness is to be achieved when one interprets a particular constituent instrument depends on the circumstances and may change over time. International case law itself has recognized that constituent instruments 'can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional' and that 'the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties'.[124] That is the nuance that Seyersted misses when he seems to argue that international organizations, as subjects of international law, not only have 'inherent capacities' under general international law but also 'inherent powers' regardless of the rules that bind them on the institutional plane. The progressive realization that international organizations can also cause harm makes this nuance all the more important.

4 Rediscovering Seyersted in the 21st Century

Decades after Seyersted published his most important work, the quest for the international legal status of international organizations goes on. In the absence of a clear steer from states, or of an authoritative position adopted in codification instruments,

[121] As the ICJ noted in *Certain Expenses*, *supra* note 91, at 168, '[s]ave as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action'. In a similar vein, the Court stated in its *Nuclear Weapons (WHO Request)* opinion that '[i]nternational organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'. *Legality of the Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 66, para. 25.

[122] For a robust discussion of 'grounds of accountability' that bear upon the interpretation of constituent instruments, see Benvenisti, 'The Law of Global Governance', 368 *RdC* (2014) 51, at 110–151. Guglielmo Verdirame explores the insightful notion that one should be able to imply not only powers, but also obligations, from constituent instruments. G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011), at 75–82.

[123] *Nuclear Weapons (WHO Request)*, *supra* note 121, para. 25.

[124] *Ibid.*, para. 19.

judicial precedent or even academic commentary, this status cannot be described in the form of categorical legal propositions. Rather, the question remains one to be theorized about – that is, one that calls for an explanation of relevant principle and practice that is anchored in more persuasive reasons than other rival explanations.

That Seyersted's work continues to impress after all those years lies in the verve with which he embarked on that quest. He did not shy away from asking questions about what the mounting practice that he saw unfolding meant – about how the emergence of international organizations might be transforming the international legal system. In doing so, he took a broad-minded approach to the concept of subjects of international law, based on a convincing analysis of what ensues when states put in place certain institutional arrangements. Seyersted's suggestion that states and international organizations can be compared for certain purposes, which so rattled the conventional wisdom of the time, remains nothing short of inspiring. If one of his intellectual vices was to have let himself be carried away by his enthusiasm for international organizations, one of his intellectual virtues was not to have let instinctive reactions to the obvious political and institutional differences between states and international organizations get in the way of the legal analysis. Instead of presuming that states and international organizations are so different that they must always be placed under separate legal regimes, he understood well that some differences are relevant while others are not.

Even so, as a pioneer operating under the political assumptions that prevailed among the institutional lawyers of his time, Seyersted was not successful in meeting all the demands that his theoretical project asked of him. Not only was he overambitious in his attempt to describe the law, his commitment to emancipating international organizations also led him to move indiscriminately between questions of international capacities and questions of constitutional competences. The normative core of Seyersted's theory has not aged gracefully, as the debate has long moved from how to ensure that international organizations are legally viable to how to ensure that they do not exercise their powers unchecked. For all the challenges that they may still face in fulfilling their mandates, it seems undeniable that international organizations have come of age as a legal form that is widely used (and sometimes abused) in international relations.

But the shift in interest and emphasis does not mean that Seyersted's project and the questions that he asks belong in the past. Rather, what the shift does is to provide us with new reasons to tackle those questions. The issues of international legal status and accountability are linked, for there can be no accountability without some clarity about what rules apply to the conduct of international organizations. Many of those rules will originate from constituent instruments and other forms of institutional law, but some need to be searched for on the international plane, especially when international organizations maintain relations with third parties (non-member states, other international organizations and individuals). And the question then arises of what rules of general international law govern those relations. One can hardly answer this question without taking a position on international legal status. If, as Seyersted has argued, international organizations are subjects of international law

with objective legal personality – if there is a duty under international law to treat 'the Organization, rather than its several Member States [as] the bearer of the rights and duties arising out of the acts performed by it or addressed to it'[125] – it may be possible to extend the default rules of customary international law to international organizations by analogy.[126] In contrast, if our starting point is rather that international organizations are *res inter alios acta*, then the question becomes whether (and how) constituent instruments and acts of recognition invite the applicability of general international law.

Therefore, theorizing about international legal status is not a project of mere intellectual interest. It also serves a crucial practical function: in real cases in which the law that applies to an international organization needs to be identified, the conception of status that one espouses may affect the outcome and how that outcome is reached. There has been a tendency to assert the applicable law unreflectively, without taking a position on status – as shown in the case law of the ICJ and the work of the ILC on the law of treaties – or to stop at pragmatic topoi such as 'international organizations are facts/objective legal realities' – as we see in the work of the Institut de Droit International and the work of the ILC on international responsibility. Yet the problem with skirting a more robust attempt at theorization is that the foundational questions do not simply go away. Agnosticism as to the question of status and the deployment of pragmatic topoi expose the analysis to fundamental challenges. How can characterizing international organizations as 'objective legal realities' lead us to the international law that applies to them?

By transcending agnostic and superficial accounts of international legal status, Seyersted continues to raise the bar for theorizing about the status of international organizations. We can even learn from the blind spots and limitations of his approach as we revisit his project with an eye to the preoccupations of the times in which we live. As we keep on poring over the legal souls of international organizations, we can better equip ourselves to face the questions of what ought to be done with them – of how best to enable them to fulfil their functions and of how best to hold them accountable.

[125] Seyersted, *supra* note 4, at 98.
[126] See F.L. Bordin, *The Analogy between States and International Organizations* (2019).