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While international personality of international organizations nowadays benefit from an increasing acknowledgement in the scholarship,² opinions regarding their nature, and thus nature of their personality, remain divided. Organs of the international community,³ international bureaucracies,⁴ or servitors of their members:⁵ approaches to this relatively new class of subjects of international law differ greatly from scholar to scholar. This divergence in conceptions is not without consequences in practice: all actors of international law, be it states diplomats, advisors, officials of international organizations, or judges, are in last analysis individuals whose behaviour is affected by their more or less conscious opinions regarding the field. In this perspective, the International Court of Justice is no exception; and since its case law ultimately reflects a balance between opinions of its individual members, which implies that solutions implemented vary with its composition, there is no surprise in its seemingly self-contradicting approach to international organizations. This gives rise to ambiguities with regard to a certain number of issues pertaining to attribution of behaviours of organizations and their agents, binding force of their norms, source of their legal personality, and so forth.

At the source of these ambiguities are different ideas, more or less clearly formulated, on what international organizations are. While these ideas may be as diverse as their authors are, they

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2 Just in recent years: Fry, 'Rights, Functions, and International Legal Personality of International Organizations' (2018) 36 *Boston University International Law Journal* 221; Worster, 'Relative International Legal Personality of Non-State Actors' (2016) 42 *Brooklyn Journal of International Law* 207; Czaplinski, 'Recognition and International Legal Personality of Non-State Actors' (2016) 2016 *Pecs Journal of International and European Law* 7; Kjeldgaard-Pedersen, 'The Influence of the Concept of International Legal Personality in the Drafting of the Statute of the Permanent Court of International Justice' (2014) 16 *Journal of the History of International Law* 9; d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 *International Organizations Law Review* 91.

3 Ruffert and Walter, *Institutionalised International Law* (2015; C.H. Beck/Hart/Nomos).

4 See, by Barnett and Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53-4 *International Organization* 699-732, and more recently *Rules for the World: International Organizations in Global Politics* (2004; Cornell University Press).

5 Reuterswärd, 'The Legal Nature of International Organizations' (1980) 49 *Nordisk Tidsskrift for International Ret*, 14-30.

nevertheless can be classified according to several paradigms of the international organization that, although having rose in popularity at different times, actually coexist in both scholarship and positive international law. There is nothing surprising there: the same goes for the state conceptions of which, although tending to align with some standards spreading of which is ensured by globalization, are actually varied. Paradigms for the international organization, numbering three, are the three most extreme boundaries of the scope of theoretical views on nature of international organizations. While these paradigms show variations on a number of technical features,⁶ the main stumbling block from which all these variations result consist in defining whether hierarchy exist between an international organization and its member states and if it be the case how this hierarchy is framed.

Of these three paradigms, the first is rather conservative and the most protective of sovereignty of states, which naturally leads it to deny any autonomy of concept of international organization. Instead, it attempts to reduce it to a mere category of treaty, for which reason it has been styled, and will be styled in this study, as ‘contractual’ paradigm.⁷ While this contractual approach aims at ignoring the corporate character of international organizations, it does it inasmuch as organizations considered are made of intergovernmental bodies exclusively, allowing to describe these as states acting simultaneously in the same way; apparition of non intergovernmental bodies lead supporter of this paradigm to identify a hierarchical relationship between the member states and the organ where the member states stand at the top and the organ as the subordinate. The second paradigm finds its inspiration in federalist views developed starting in the 18th century and that pervaded a part of the scholarship in the field of international law from the beginning of the 20th century until the seventies. In this conception, international organizations and their member states would be in a hierarchical relationship with the organization in the superior position and the member states in the subordinate one. Yet, although this conception of international organizations, rather idealistic, is based on federalist views, it is also quite clear that international organizations are no federations, for which reason I will style this paradigm as ‘pseudo-federalist’ in the following. The third paradigms is the one that, in a more realistic understanding of the contemporary international society, takes international organizations for ‘ordinary’ subjects of international law to the extent these exercise some influence or power, which

6 A rather exhaustive inventory may be found in D’Aspremont, ‘The Law of International Organizations and the Art of Reconciliation’ (2014) 11-2 *International Organizations Law Review* 428-453.

7 See observations in Hurd, *International Organizations* (2011; Cambridge University Press) at 25ff. See also dicta in *Bacchelli v. Comune di Bologna*, 20 February 1978, Court of Cassation, Italy, in Lauterpracht et al. (eds) (1988) 77 *International Law reports*, at 623, that distinguishes what the court called the ‘contractual and the institutionalist theories’ of international personality of international organizations. See also D’Aspremont, *op. cit.* note 6, that reproduces this dichotomy by using concepts of ‘contractualism’ and ‘constitutionalism’.

I will style 'objective' in the following. In this perspective, there is no hierarchical relation between an organization and its member states, except cases of express agreement. Hence, it seems plain that, while the concern of the 20th century was to establish the legal personality of international organizations under international law, the concern of the 21st century is to clarify nature of this personality, and that views expressed in this regard tend to align with either of the three paradigms evoked above.

These three paradigms, or some of the technical features to which they give rise, are contended by scholars of various obediences who each rely on certain, positive, international law to assert their views that nevertheless remain strongly divided. The problem, in my opinion, is that most of endeavours on the topic of international personality of international organizations stop at the *Reparation* case,⁸ and that there is anything one wants to find in this case; in particular, the three paradigms seem equally reflected therein.⁹ This ambiguous character prevents the *Reparation* case from constituting the definitive settlement of both question of personality of international organizations and nature of this personality, *i.e.* the abstract paradigm that provides this personality with a rationale.

In the following, I will attempt to discern how these three paradigms are reflected in the case law of the PCIJ and the ICJ. In so doing, I will limit my investigations to the question of attribution of conduct of states delegates in organs or organizations. While this may be only one of the numerous features reflecting the three paradigms in the case-law of the World Court, this aspect is in itself quite significant since it connects to the crux of the matter: are states delegates in intergovernmental organs actual sovereign states, merely members of the organ, or both at the same time? In this regard, the stance of the Court seems to have been influenced by the three paradigms in different proportions in the course of its activity (2). Both its inconstant stance and its possible rationale result in the generation of a dual framework that may contribute to fragmenting international law (3). Yet, this supposes that the three paradigms and their respective characteristics be first briefly discussed (1).

1. Three Paradigms for the International Organization

There are, conceptually speaking, three main paradigms at the origin of theories on international

⁸ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949, I.C.J Reports 1949, p. 174.

⁹ See observations in Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 *Virginia Journal of International Law* 275, at 369.

organizations as well as technical features implemented in the course of their operation. This does not mean that all authors dealing with international organizations support openly one of these paradigms. Instead, these three paradigms: 1) have been asserted as such by certain authors, 2) concentrate all possible technical features for which they provide both a rationale and a consistent, devoid of contradictions, explanation, and 3) correspond to approaches to international organizations where it matters for concerned actors, outside the legal field, in political terms that may be reflected in the conduct of states.

The three paradigms identified here (contractual, quasi-federal, and objective) correspond to different political approaches. Rittberger *et al.* identify three contemporaries theories of international organizations (neo-realism, neo-institutionalism, and social constructivism) that each partake in the three great branches of international relations (the realist, institutionalist, and constructivist schools).¹⁰ While Rittberger *et al.* are concerned with political features, the three theories they identify may be connected to the three legal paradigms expounded here.

Table 1. Three Paradigm and their Characteristics

	Contractual			Pseudo-federal	Objective
Nature	Treaty	Gathering of States Organs	Common Organ	Federation/Confederation	'Ordinary' subject of International Law
Existence	Not exists	Almost not exists	Almost exists	Exists	Exists
Hierarchy	-		Organization subordinate to States	States subordinate to Organization	None
Elementary	Treaty		Effects of a treaty		Subject
Character	Realist			Liberal	Constructivist

1.1 The Contractual Paradigm

First is a contractual approach to international organizations. In this conception, international organizations are essentially treaties, be it a specific category of treaties¹¹ or the effects of a specific

¹⁰ See Rittberger, Zangl, and Kruck, *International Organization* (2012; Palgrave Macmillan) 15-34.

¹¹ See Rapisardi-Mirabelli, 'Théorie Générale des Unions Internationales' (1925-II) 7 *CCHAIL*, at 366; Kaufmann, 'Les Unions Internationales de Nature Economique' (1924-II) 3 *CCHAIL*, at 187; Anzilotti, *Cours de droit international*, (Paris: Syrey, 1929, translation by Gidel), at 283; Kirgis, *International Organizations in Their Legal Setting* (St Paul

category of treaties. Under the influence of the concept of *Vereinbarung* developed by Triepel and Jellinek,¹² a first understanding of international organizations was that of unions of states, characterized by a sort of general interest of the states taking part thereto. In this strict origin of the contractual paradigm, international organizations do not exist as such. Establishment of the likely first sort of organs to appear, standing conferences, gave rise to a development of this vision by incorporating in it the view that intergovernmental organs thus created were actually organs of the participating states acting simultaneously in the same way.¹³ That is also the conception that the PCIJ seemingly professed in the *Lausanne Treaty* case, on which occasion the PCIJ, the predecessor of the ICJ, happened to describe the Council of the League of Nations as “composed of representatives of Members, that is to Say, of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage.”¹⁴ Although the Court evokes in a first time the ‘representatives’, or ‘delegates’, of the member states, it is in the sense of the member states making up the Council by themselves, the Court adding:

“In a body constituted in this way, whose mission is to deal with any matter "within the sphere of action of the League or affecting the peace of the world", observance of the rule of unanimity is naturally and even necessarily indicated. Only if the decisions of the Council have the support of the unanimous consent of the Powers composing it, will they possess the degree of authority which they must have: the very prestige of the League might be imperilled if it were admitted, in the absence of an express provision to that effect, that decisions on important questions could be taken by a majority. Moreover, it is hardly conceivable that resolutions on questions affecting the peace of the world could be adopted against the will of those amongst the Members of the Council who, although in a minority, would, by reason of their political position, have to bear the larger share of the responsibilities and consequences ensuing therefrom”.¹⁵

In this perspective, organizations concerned almost do not exist. Subsequent establishment of non intergovernmental organs led to a rather peculiar vision, the so-called common organ theory.

Minn: West Publishing, 1977), at 3; and the classification in A. McNair, *The Law of Treaties* (1961), at 253-271. See also Barile, 'La Structure de l' Ordre Juridique International' (1978-III) 161 *CCHAIL*, in particular at 33f; Truyol y Serra, 'Théorie du Droit International Public' (1981-IV) 173 *CCHAIL*, at 369ff; Carrillo-Salcedo, 'Droit International et Souveraineté des Etats' (1996) 257 *CCHAIL*, at 125; Verhoeven, 'Considérations sur ce qui est commun : Cours général de droit international public' (2002) 334 *CCHAIL*, at 59.

12 Triepel, *Droit International et Droit Interne*, (1920, translation R. Brunet; new edition 2010; Pantheon-Assas), at 49-73, esp. 67; see also observations in Rapisardi-Mirabelli, *supra* note 11, at 345-359; and comments in Lev, 'The Transformation of international Law in the 19th Century', in Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2011; Elgar) at 137f.

13 For a detailed classificatin thereof, see Quadri, *Cours général de droit international public*, (1964) 113 *CCHAIL* 237–483; also Morelli, *Cours général de droit international public*, (1956–I) 89 *CCHAIL* 437–556.

14 *Article 3, Paragraph 2, of the Treaty of Lausanne*, advisory opinion of 21 November 1925, serie B, no. 12, PCIJ, *Collection of Advisory Opinions* p.5, at 29. I underline.

15 *Ibid.* I underline.

Originating in the mind of Italian scholars,¹⁶ the *organe communi* is a body that belongs at the time to each of the participating states, that they share in common.¹⁷ At this point of the contractual paradigm, international organizations almost exist, but nevertheless remain somehow absorbed by their member states. Under this paradigm, international organizations are understood as being subordinate to their member states, of which they are the organs.

Under this paradigm, powers of international organizations, the organ of either each or all participating states are transferred by delegation. There is, of course, no separate international personality to be found, except if expressly provided for by a treaty in the case of the common organ theory. In this case, the organization may not be assimilated to its members (although behaviours of the former are still attributed to the latter because of their hierarchical relationship).

Although federalists started focusing on international organizations after the inception of the League of Nations, which despite its weak structure was the institution that resembled the most a world government both at this time and in history, it is only after its reformation as the ICJ that the World Court started to show signs of being influenced by this approach.

1.2 The Pseudo-federal Paradigm

A second paradigm conserves this focus on hierarchical features, but with reversal: it is now states that are the subordinate of international organizations wherein they are members, of which they become the organs. This paradigm arise from idealism that marked the scholarship between the two world wars. First expressed in relation to the League of Nations,¹⁸ then the United Nations,¹⁹ the view

16 In addition to pre cited works of Quadri and Morelli, see Anzilotti, 'Gli Organi Communi nelle Societa di Stati' (1914) *Rivista di Diritto Internazionale* 156.

17 Santulli, 'Retour à la Théorie de l'Organe Commun, Réflexions sur la Nature Juridique des Organisations Internationales à partir du cas de l'ALBA et de la CELAC, comparées notamment à l'Union Européenne et à l'O.N.U' (2012) 3 *Revue Générale de Droit International Public*, 565–578; and Reuterswärd, *op.cit.*

18 For few instances: Siotto-Pintor, *Les sujets du droit international autres que les Etats*, (1932) 41 *CCHAIL* 245–308, at 294–295; Newfang, *The United States of the World* (1930; G.P. Putnam's Sons);

19 Here are some examples: Ross, *Constitution of the United Nations, Analysis of Structure and Function* (1950; Rinehart and Company); Friedrich, 'Federalism, Regionalism, and Association' (1974) 2 *European Journal of Political Research*, 385–394; Hay, 'International and Supranational Organizations: Some Problems of Conceptualization' (1965) *International Trade and Investment*, 733–770; Vandenbosch and Hogan, *The United Nations: Background, Organization, Functions, Activities* (1952; McGraw-Hill Book Company Inc.); Reuter, 'Organisations Internationales et Evolution du Droit', in *L'Evolution du Droit Public, Etudes Offertes à Achille Mestre*, (1956; Sirey), at 448 and 'Confédération et Fédération: "Vetera et Nova"', in *La Communauté Internationale, Mélanges Offerts à Charles Rousseau* (1974; Pédone), at 218.

that some specific organizations be federal states or confederations seems to have enjoyed some popularity until the seventies. Useless to mention, this paradigm, strongly inspired by federal views, was contended in connection with a small number of international organizations, essentially the League of Nations, the United Nations, and the European Communities (and not the Union, since the CJEU clarified the issue before its inception).²⁰ The Charter of the United Nations, in particular its preamble (“We the peoples of the United Nations”), and its Article 24 conferring to the Security Council capacity to act on behalf of the members seem to have played a role here. This pseudo-federal paradigm thus appears motivated by either the universal character or the capacity to adopt binding norms.

It is naturally the organization combining both features, the UN, that remains the contemporary contender for world federalism, especially thanks to a combination with an element of the conventional paradigm, the *vereinbarung*, in the form of the concept of an international community²¹ having an international personality of its own of which international organizations would be the organs²² and the Charter of the United Nations the constitution.²³ Traces of this paradigm, never fully endorsed by the Court, can nevertheless be found in several of its rulings.

In the case of *Reservations to the Convention on Genocide*, the Court found that the convention, while “intended by the General Assembly and by the contracting parties to be definitely universal in scope”, far from being a contractual embodiment of the interests of each states party, was instead “manifestly adopted for a purely humanitarian and civilizing purpose” in which “States do not have any interests of their own” but “a common interest, namely, the accomplishment of those high purposes

20 With regard to the European Communities, see Heraud, ‘La Communauté Européenne de Défense dans ses Relations avec l’Alliance Atlantique et la “Fédéralisation Fonctionnelle” du Continent’ (1952) 58 *Revue du Droit Public et de la Science Politique en France et à l’Etranger*, 980–1007; and also Lagrange, ‘L’ordre juridique de la C.E.C.A. vu au travers de la jurisprudence de sa Cour de Justice’ (1958) 74-5 *Revue du Droit Public* 862, and his *Joined opinion* as Advocate General delivered on 12 June 1956 in *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, case 8-55., CJUE, *English special edition 1954-1956*, at 277ff.

21 See Gaja, *The Protection of General Interests in the International Community*, *General Course on Public International Law (2011)* (2012) 364 *CCHAIL* 13–185; Macdonald, Ronald, ‘The International Community as a Legal Community’, in Macdonald and Johnston, *Towards World Constitutionalism* (2005; Nijhoff), 853-909; and earlier Mosler, *The International Society as a Legal Community* (1974) 140 *CCHAIL* 1–320.

22 See Ruffert and Walter, *op.cit.*, at 28–29 and following developments; also Virally, *L’Organisation Mondiale* (1972; Armand Colin); and Jenks, ‘Some Constitutional Problems of International Organizations’ (1945) 22 *British Yearbook of International Law*, 11–72.

23 See Fassbender, ‘The Meaning of International Constitutional Law’, in Macdonald and Johnston, *Towards World Constitutionalism* (2005; Nijhoff), at 846-851, *The United Nations Charter as the Constitution of the International Community* (2009; Nijhoff), and ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law*, 529–619; and also Dupuy, *L’Unité de l’Ordre Juridique International: Cours Général de Droit International Public* (2000) (2002) 297 *CCHAIL* 9-490.

which are the *raison d'être* of the convention".²⁴ Later on, in its advisory opinion concerning Namibia, the Court, while asserting the *erga omnes* character of resolution 276 (1970) of the Security Council declaring the presence of South Africa in Namibia illegal, emphasized that: "all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted".²⁵ In these two instances, the Court referred to common interests that were of higher standing than the sum of individuals interests of each of the states involved and that were universal in character. It seems quite plain that the common interests the Court evoked in its dicta ought not be comprehended as a community of interests *inter alia*, but instead operates a shift by evoking a sort of common interests in the sense of municipal concept of public/general interest.

Although actual contention that international organizations be federations or confederations²⁶ may have been progressively abandoned, idea that organizations be aggregates of states clothed in a corporate veil, which would make them hybrid, or having an open texture,²⁷ remains. At the same time, combination of the pseudo-federal paradigm with the concept of international community led the pseudo-federal paradigm to drift away from the bulk of international organizations and be limited in its scope to the United Nations. This let some room for a new paradigm to slowly appear.

1.3 The Objective Paradigm

A third paradigm popularity of which has been increasing in the last decade is that of international organizations conceived as 'ordinary', full-fledged, subjects of international law operating in independence.²⁸ Since in this case international personality of organizations is considered to not depend on external conditions but to be attributed by the sole reason of their establishment, it may be

24 *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, *I.C.J Reports* 1951, p. 15, at 23 (12).

25 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports* 1971, p. 16, para. 127.

26 See for instance Reuter, 'Confédération et Fédération: "Vetera et Nova"', in *La Communauté Internationale, Mélanges Offerts à Charles Rousseau* (1974; Pédone), 199–218.

27 Brölmann, *The Institutional Veil in Public International Law* (2007; Hart Publishing), at 253.

28 Dunoff, 'Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations', (2013) 43 *Netherlands Yearbook of International Law* 2012, 99–127, at 121; see also Barnett and Finnemore, *op.cit.*; and observations in Brölmann, *op. cit.*, at 30.

called ‘objective’.²⁹ The characteristic of this paradigm is to depart from hierarchy: the relation between organizations and states is here understood as a ‘normal’ relation between subjects of international law. This supposes that such a relation is essentially bilateral and consensual in nature (without precluding collective aspects from arising between member states).³⁰

The advisory opinion in the *WHO* case 1980 implemented this paradigm to a certain extent.³¹ In this ruling, the court had to examine the relations between the WHO and Egypt from two angles: that of Egypt being a member of the WHO, and that of this country hosting a regional office of the organization. The Court happened to describe both relations in the following terms:

“By the mutual understandings reached between Egypt and the Organization [...] a contractual legal régime was created [93 (24)] between Egypt and the Organization which remains the basis of their legal relations today. The very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization. Egypt offered to become host to the Regional Office in Alexandria and the Organization accepted that offer [...] As a result the legal relationship between Egypt and the Organization became, and now is, that of a host State and an international organization, the very essence of which is a body of mutual obligations of co-operation and good faith. [...] the element of mutuality in the legal régime thus created between Egypt and the WHO is underlined by the fact that this was effected through common action based on mutual consent. This special legal régime of mutual rights and obligations has been in force between Egypt and WHO for over thirty years.”³²

In so doing, the Court described the relation between an organization and its member states as contractual in nature entailing mutual obligation of cooperation and good faith. Such a relation is grounded in membership itself, and it thus not dependent on any additional commitment or adoption of a specific instrument, for instance a treaty; “the very fact of Egypt’s membership” is sufficient. It consists in “mutual obligations of cooperation and good faith”, and it seems that in this context the element of mutuality, on which the Court insisted, albeit in a different context, quite heavily, matters. It furthermore that the “mutuality” constitutes, here, the mark of a (quasi-)contractual regime based on the consent of the parties. Finally, these obligations rest upon both the member and the organization, which features a sort of parallelism that is consistent with the seemingly contractual nature of membership in the dicta of the Court in the *WHO Case*. Hence, in this paradigm, relation between a

29 See developments in Seyersted, *Common Law of International Organizations*(2008; Nihoff), at 43ff, and in particular at 44.

30 See Schifano, *How the Legal Personality of International Organizations affects the Unity of International Law: On Mutual relations Amongst their Respective Legal Orders* (2016; Hitotsubashi University, doctoral dissertation), at 245-272.

31 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, I.C.J Reports 1980, p. 73.

32 *Ibid.*, at 92 (23), para. 43. I uderline.

state and an organization is not one that proceed from hierarchy, but (necessarily relative) equality between two subjects of international law.

Table 2. Three Paradigm and Technical Features to Which they give rise

	Contractual			Pseudo-federal	Objective
Nature	Treaty	Gathering of States Organs	Common Organ	Federation/Confederation	'Ordinary' subject of international law
Personality	-	-	Conferred by treaty	Conferred by treaty	Inherent
Member States	Assimilated	Assimilated	Separate	Assimilated	Separate
Powers	-	-	Delegation/Agency	Attributed (transfer?)	Inherent
Interests	Vereinbarung	-	Member States (?)	Member States	Organization
Norms	-	-		Not binding	Mutual obligations of cooperation and good faith

2. Attribution of Conduct of States Delegates

Whether members of intergovernmental organs of international organizations ought to be regarded as sovereign states, merely members of the organ, or both is probably the issue on which the case law of the world court is the most fluctuant. The matter is also obscured by the fluctuant position of states, since, for questions of attribution of conduct and liability, these are prone to modify their stance depending on considerations of opportunity. This issue and solutions successively adopted in its regard manifest the three paradigms evoked earlier. While adopting an approach based on the contractual paradigm leads to consider states delegates in intergovernmental organs of international organizations as sovereign states, since in this case there is no organization, following the third paradigm that takes organizations for subjects of international law in separation from their member states results in considering the same delegates as members of the organs they compose exclusively. Alternatively, adopting a pseudo federal approach will lead to, at the same time, take states delegates for organ members while identifying these with the member states, which indeed proceeds from a replication of the institutional specifics of the federation and the confederation that both have at least one organ dedicated to the representation of the federated or confederated states.

Consequently, the majority of the members of the Court beholding one of these paradigms will result in the ruling issued displaying conclusions in law that conform with this paradigm, and either affirm or deny effect of the corporate veil over attribution of conduct of states delegates. The Court privileging one of these possible approaches likely depends on the nature of the legal question it has to answer; it is indeed plain that the Court attributes conducts of states delegates differently depending on the purpose for which it must do so.

2.1 Attribution to States

There are three matters for which the ICJ happened to ‘pierce the veil’ and attribute conduct of organs of an international organization to its member states: 1) questions relating to establishing obligations of states, 2) questions relating to breach of their obligations by states and, 3) questions relating to establishing existence of a dispute between states. For these three, an evolution in the stance of the Court, which reflects a gradation in the importance given to conduct of states delegates in organs of organizations, can be observed. While the Court classically gave to such elements a supplementary role, these acquired over time enough weight to become means on their own standing for characterizing states obligations, their breach, and ensuing disputes.

The Court allowed that conduct of states delegates in the organs of an international organizations produce some effects for the states from which they originate out of concern for establishing obligations of this state. The Court first did so by considering these conducts as elements of facts susceptible to partake in evidence of the conduct of the state concerned.³³ In this perspective, the ICJ happened to consider that votes in intergovernmental organs, in particular the General Assembly of the UN, could reflect an *opinio juris* susceptible to ground the emergence of a rule of customary law when unanimous.³⁴

These two features come with their limitations, and seem to be accounted more as facts to be integrated to a cluster of evidence than as legal acts inherently capable of generating rights and obligations for a member state. Thus, when the Court proceeds to examining states behaviors in international *fora* for such purposes, it does so in support to elements existing separately. Yet the Court

33 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, I.C.J Reports 1986, p. 14, at 41 (31), para. 64.

34 *Ibid.*, at 99 (89), para.188, and at 106 (96), para. 202; and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J Reports 1996, p. 226, at at 254 (32)–255 (33), para. 70.

also happened to consider that behaviors of states delegates in international organizations could in itself characterize an agreement. In particular, concordant votes of states delegates in intergovernmental organs may realize agreement among these states.³⁵

The Court may also ignore the corporate veil with a view to establishing a breach of states obligations, which seems to be characterized by a similar evolution. In spite of dicta of the PCIJ in the *Lausanne Treaty case* the Court seemed at first reluctant to allow behaviors of states delegates in organs to produce effects for states concerned.³⁶ Instead, considered individual behavior of states delegates in “international settings” in a restrictive way, with a view to complement already existing elements.³⁷ From this standpoint, the Court taking into account such behaviors can be said to be supplementary. In the *Nicaragua Case*, the Court considered behavior of delegates of the United States, somehow as a matter of facts, in order to establish their breaching their obligations under international law. In so doing, the Court adjoined its examination the condition that conducts in question “acknowledge facts or conduct unfavorable to the States represented”, in which case “[t]hey may then be construed as a form of admission”.³⁸

Yet, later the Court did consider behavior of a state delegate in an organ of an organization as susceptible to breach in itself obligations of the state concerned. In the *Interim Accord Case*, the Court concluded that Greece breached its obligations under its agreement with Macedonia (now North Macedonia) on the sole basis of the vote cast by its delegate to NATO.³⁹ Here also, the acknowledgment of the place of behaviors of states delegates in characterizing a state breaching its obligations underwent an evolution from supplementary to primary.

Finally, the Court may consider conducts of states delegates sent to an organization in order to establish a dispute between the states they represent into its organs. In this field, attitude of the Court regarding conflicting relations between member states appears more nuanced. It seems that positions of states delegates in organs of an organization being able to characterize a dispute between states they

35 See *Whaling In The Antarctic (Australia v Japan, New Zealand Intervening)*, Judgment of 31 March 2014, I.C.J Reports 2014, p. 226, at 257 (35), para. 83; and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment of 1 October 2018, at 53, para. 171.

36 *Op. cit.*, note 14.

37 *Military and Paramilitary Activities... (op. cit.)*, at 44 (34), para. 72; and *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, 5 October 2016, (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment of 5 October 2016, I.C.J. Reports 2016, p. 833, at 849 (20)-850 (21) para. 39, and at 852 (23)-854 (25), paras. 48-50

38 *Military and Paramilitary Activities... (op. cit.)*, para. 64.

39 See *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644, at 660 (20), para. 42, and the contortions to which it gave rise on the part of the Court in its dicta.

represent abides by strict conditions, and therefore remains a supplementary means. First, reference to positions of states delegates needs be invoked for the sake of establishing the jurisdiction of the Court,⁴⁰ and not to deny it.⁴¹ Second, the issue must have arose independently in the bilateral relations of the states involved in the alleged dispute and not be limited to the proceedings of the organ wherein conducts considered happened.⁴²

In addition, there are questions for which the Court systematically refuses to attribute behaviours of organs or their members to member states. These concern mainly matters of internal management and legal relations between an organization and one or more of its member states; the later aspect, in particular, crystallizes the situation of international organizations that sometimes face, and even confront, their member states.⁴³

2.2 Attribution to the Organization, Exclusively

The Court thus happens to give full effect to the corporate personality of international organizations by refusing to attribute conduct of states delegates in the organs of an organization to the member states. In this perspective, the PCIJ refused to let a convention entered into by an organization produce effects for its member states on this sole ground.⁴⁴ In the *Oder River* case, the Barcelona Convention of 20 April 1921, which had been ratified by six out of the seven the members of the Oder River Commission and approved by the League of Nations, complemented provisions of the Versailles Treaty that defined, and thus extended, the jurisdiction of the Commission. This extension involved sections of waterways that belong to the Oder system located in Polish territory; yet, Poland had not ratified the Barcelona Convention. Considering the claims of six other member states based on the Barcelona Convention, the Court refused to admit that approval of this Convention by the League of

40 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, 5 October 2016, (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 833

41 *Interpretation of Peace Treaties*, Advisory Opinion of 30 march 1950, I.C.J. Reports 1950, p. 65, at 71; *Reservations...*(*op. cit.*), at 19 (8)-20 (9); *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J Reports 1975, p. 12, at 25 (17), para. 34; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J Reports 2004, p. 136, at 163 (31)-164 (32), paras. 63-64; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, I.C.J., Advisory Opinion of 25 February 2019, at 21, para. 81, and at 23, paras. 89-90.

42 *Western Sahara...*(*op. cit.*),*ibid.*

43 See dicta of the Court in the *Reparation* case (*Reparation...*(*op. cit.*), at 179 (9)) assessing this "character of the Organization, which occupies a position in certain respects in detachment from its Members".

44 *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, Judgment no. 16 of 10 September 1929, Collection of Advisory Opinions, Series A no. 23, Publications of the Permanent Court of International Justice, 1929, Leyden, A.W. Sijthoff Publishing Company, at 21.

Nations, to which Poland was a member, “should replace [ratification] rather than supplement it”,⁴⁵ concluding that “it cannot be admitted that the ratification of the Barcelona Convention is superfluous, and that the said Convention should produce the effects referred to in that article independently of ratification.”⁴⁶ The PCIJ thus refused to attribute a decision of an international organization, the approval of the Barcelona Convention by the League, to the states the delegates of which composed the organ giving the approval. In the same view, a state having delegates in the organ that approved a draft convention subsequently opened to ratification by the member states of the organization bears no consequences for this state with regard to rights and obligations arising from the convention, even though it was subsequently ratified by some other states and entered into force.⁴⁷ Yet, confronting these cases to more recent occurrences evoked above, and considering that this issue of attributing approval of a convention by an organization was last examined in 1951, the stance they reflect may be outdated.

Otherwise, under framework of advisory proceedings, the Court tends to reject arguments based on the question submitted to it being object of a dispute between two states. This old stance⁴⁸ has been reasserted this year⁴⁹ and several times in the interval.⁵⁰

Staff matters necessarily led the Court to consider the corporate personality of international organizations. In the *Reparation* case, the Court found that “[i]n claiming reparation based on the injury suffered by its agent, the Organization does not represent, but is asserting its own right”.⁵¹ Although the Court was occupied here with distinguishing rights of the organization and those of its agents, which is a classic issue in the case of agency or delegations, it also highlights the distinction between rights of the organization and those of its member states. Likewise, in the *Effect of Awards* case, the ICJ specified that in the relations with staff members, the “juridical person” on whose behalf the Secretary-General is acting is the organization, in this case the UN, as well as the one that is bound in case of a judgement of the (then) UNAT.⁵²

Another context that naturally led the Court to give full effect to the corporate personality of international organizations is that of distributing rights and obligations between those and their member states. Such distribution may arise from actual disputes or issues on allocating powers. The former may

45 *Ibid.*, at 21.

46 *Ibid.*

47 *Reservations... (op. cit.)*, at 28 (17).

48 *Peace Treaties... (op. cit.)*, *op. cit.* note 41.

49 *Chagos Archipelagos... (op. cit.)*, *op. cit.* note 41.

50 *Western Sahara... (op. cit.)*, *op. cit.* Note 37; *Wall... (op. cit.)*, *op. cit.* note 41.

51 *Reparation... (op. cit.)*, at 184.

52 *Effect of awards of compensation made by the U.N Administrative Tribunal*, Advisory Opinion of 13 July 1954, I.C.J. Reports 1954, p. 47, at 53.

find an example in the question submitted to the Court in the *Reparation* case: “In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?”⁵³ Plainly the Court understood the question as that of a distinct personality of the United Nations, which it did not fail to identify,⁵⁴ thus answering the question unanimously for damage caused to the United Nations, and by eleven votes to four for damages caused to the victim and persons entitled through him. It is remarkable that result of votes was identical on these two points whereas the state responsibility of which is involved is a member of the United Nations or not.

Issues of allocating respective powers of an organization and its member states also gives rise to a need to take the corporate personality of the former for attribution purposes into account. Such was the case when the PCIJ had to specify powers of the European Commission of the Danube on the maritime sector of the Danube from Galatz to Braila, which thus implied specifying powers of Romania over the same territory.⁵⁵ Another instance of issue concerning allocating respective powers of an organization and a state arose in the *WHO* case.⁵⁶ While this case revolved around a dispute between the majority of the states participating in the WHO Regional Office for the Eastern Mediterranean over location of seat of said office amid a background of political tensions, the Court reframed the question submitted to it as one of distribution of powers, consisting in ascertaining whether the WHO’s power to exercise its right to select the location of its seat was or was not regulated by reason of obligations vis-a-vis Egypt wherein its seat was until then located.⁵⁷

It thus seems that the stance of the Court on the question of attribution of conducts of states delegates is quite unclear. This concerns first this very question of attribution (attribute to the state, or not?), which itself seems to proceed from a lack of certainty on the quality of states delegates (members

53 *Reparation...* (*op. cit.*), at 175.

54 *Ibid.*, at 178.

55 *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion No.14 of 8 December 1927, Collection of Advisory Opinions, Series B, Publications of the Permanent Court of International Justice, 1927, Leyden, A.W. Sijthoff Publishing Company, at 7.

56 *Interpretation of the Agreement of 25 March 1951...* (*op. cit.*).

57 *Ibid.*, at 89. This aspect is further stressed in the subsequent dictum: "The Court notes that in the World Health Assembly and in some of the written and oral statements before the Court there seems to have been a disposition to regard international organizations as possessing some form of absolute power to determine and, if need be, change the location of the sites of their headquarters and regional offices. But States for their part possess a sovereign power of decision with respect to their acceptance of the headquarters or a regional office of an organization within their territories ; and an organization's power of decision is no more absolute in this respect than is that of a State."

of the organ, or actual sovereign states?). This uncertainty is also reflected in the rationale for attributing: while the Court takes votes of states delegates into account as potentially reflecting an *opinio juris*, it also allows for these same votes to realize agreement among states the delegates of which voted in a concordant fashion; but while agreement is binding over the parties by reason of their sole consent, *opinio juris* does not suffice in itself to establish a binding rule.⁵⁸ In addition to the necessary evolution that affected the case-law of the World Court over the course of a century, it may be observed that its stance on the issue of attribution of conduct of states delegates, chaotic at first sight, actually depends on its concern in each case, and in particular depending on the procedural context, contentious or advisory, under which each case arises. This duality of solutions implemented by the Court, and their correlation to two distinct procedural contexts, gives rise to two distinct legal frameworks in the jurisprudence of the ICJ.

3. Dual Framework

Erratic character of the stance of the ICJ and its predecessor, the PCIJ, on issue of attribution of conduct of states delegates in organs of international organizations seems not to follow any precise pattern. Yet, factoring procedural context under which these seemingly divergent rulings occur allows to identify two distinct frameworks for this issue arising, which in turn may lead the Court to alter its positioning on this issue.

Let's first consider overall variations on this issue over time. The table below presents raw data from the case law of the PCIJ and the ICJ, classified in two columns depending on their assimilating member states to organizations in which they participate, or on the contrary giving full effects to the corporate veil and distinguishing between the two. Each year when rulings happened to be issued are allocated a score, +1 if favouring the assimilation between organizations and their member states, -1 if favouring their formal distinction, and null if ambiguous.

This data is then arranged in a chart (see Figures 1 below). From Figure 1 it is quite clear that stance of the World Court on the question of attribution of conduct of states delegates in organs of international organizations is fluctuant, which means that implementation of the paradigms from which the different solutions implemented by the Court on this issue arise is, likewise, fluctuant. Number of

⁵⁸ *Military and Paramilitary Activities...*(*op. cit.*), at 97 (87)-98 (88), para. 184.

cases where the Court decided to attribute the behaviour of a state delegate to the state from which it originates are 30 percent more numerous (12) than cases where the Court refused to do so (8). To this might be added few cases that are ambiguous on this issue (4). Yet, a closer examination of context in which this implementation happens may provide some leads. In particular, procedural context (contentious or advisory) seems to affect the attitude of the Court: while it seems more inclined to attribute behaviours of states delegates to member states, thus identifying the two, in the context of

Table 3: Attribution of conduct of states delegates in organs

Year	Attribution to		Score
	Member states	Organization	
1925	B 12 Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne		-1
1927	B 14 Jurisdiction of the European Commission of the Danube (p.57-58)	B 14 Jurisdiction of the European Commission of the Danube (p. 30)	0
1929		A 23 Territorial Jurisdiction of the International Commission of the River Oder (p. 21)	1
1948	Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (pp. 62-63)		-1
1949		Reparation for Injuries Suffered in the Service of the United Nations (p. 179 and 184)	1
1950	International Status of South-West Africa (pp. 134-136)	Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950 (p. 71)	-1/1
1951	Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (p.22)	Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (p. 28; pp. 19-20)	0
1954		Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (p. 53)	1
1971	Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (para. 101)		-1
1973	Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal (para. 25)		-1
1975	Western Sahara (paras. 29-30)	Western Sahara (paras. 34- 36)	0
1980		Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt	1
1982	Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal (para. 42)		-1
1986	Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (paras. 64, 72 and 188)		-1
1996	Legality of the Threat or Use of Nuclear Weapons (para. 70) Legality of the Use by a State of Nuclear Weapons in Armed Conflict (para. 27)		-1
2004	Legality of Use of Force (Serbia and Montenegro v. Portugal) (para.66)	Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (para. 63-64)	-1/1
2010	Accordance with international law of the unilateral declaration of independence in respect of Kosovo (paras. and 94)	Accordance with international law of the unilateral declaration of independence in respect of Kosovo (paras. 33)	0

2011	Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (para. 181) Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece) (para. 42)	-1
2014	Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) (para. 83)	-1
2016	Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) (paras. 39, 48-50, 56)	-1
2018	Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile) (para. 171)	1
2019	Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (paras. 81 and 88-90)	1

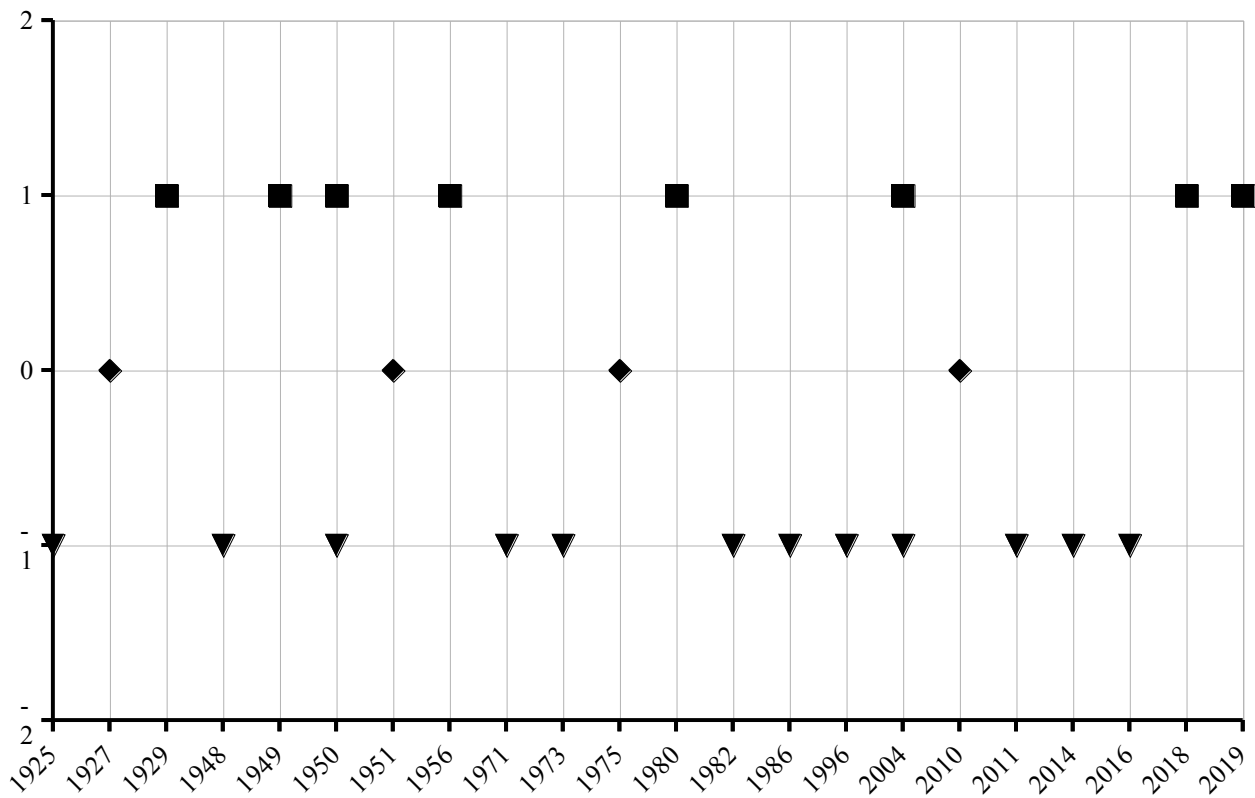


Figure 1: Fluctuation of the position of the Court with regard to the relation between organizations and their member states. A positive value (1) is attributed to distinguishing the organization from the states, while a negative value (-1) is attributed to assimilating the former to the latter. Ambiguous cases, or years where contradicting positions were issued in different decisions, are given a null value (0).

contentious cases, the Court instead tends to refuse to do so more easily in the context of advisory proceedings (see, respectively, Figures 2 and 3 hereinafter).

This apparent divergence in the treatment of the question arises from nature of issues concerning international organizations that diverge depending of the framework – judicial or advisory – under which they are raised. Questions submitted to the Court by international organizations and their organs somehow suppose that the Court consider the organization in question independently from its member states; otherwise such questions would likely make non sense. Settling disputes between two states instead requires the Court to examine the behaviour of the states involved, often ambiguous, through a wide variety of elements of both legal and factual nature; happenings in intergovernmental organs of organizations partake in the latter category.⁵⁹

This difference in framework seemingly explains why the same issue may receive diverging solutions depending on the procedural context under which it arises. For example, issue of attribution of conduct of states delegates in intergovernmental resulting in a bilateral dispute may be sought in a contentious context and ignored in an advisory context. Unsurprisingly, the stances adopted by the Court on this issue in both contexts result in allowing the jurisdiction of the Court to be established. This difference in purposes seemingly results in differences in attributing behaviours; this nevertheless also reflects different conceptions of the nature of relation between an organization and its member states that correspond to the three paradigms evoked above.

These views are confirmed by an examination of, on the one hand, advisory opinions and, on the other hand, judgments involving issue of attribution of conduct of states delegates issued by the PCIJ and the ICJ.

3.1 Advisory Opinions

Issue of attribution of conduct appeared first in context of advisory proceedings. While the constant expansion of powers and material scope of activities of international organizations will result in their being increasingly relevant to inter-states disputes, it is apparently only in 1986 that a contentious case first involved a need to actually settle on attributing the conduct of delegates of a state.⁶⁰ Instead,

⁵⁹ *Obligations concerning Negotiations...* (*op. cit.*), at 855 (26), para. 56.

⁶⁰ See *Military and Paramilitary Activities...* (*op. cit.*).

advisory context required examining such issue as early as in 1925. At this time, the Permanent Court was resolutely in favour of the contractual paradigm that led it to attributing conduct of states delegates in intergovernmental organs of the League to states.

Yet, two years later, the Permanent Court seemingly started to account for the corporate personality of the European Commission for the Danube, which is not surprising since this case ultimately revolved around an opposition, in term of distribution of powers, between the Commission and Romania.⁶¹ In particular, the Court marked its acknowledging a functional distinction between a state delegate to the Conference, the main intergovernmental organ of the Commission, and this same delegate acting as the President of this organ.⁶² Yet, so doing did not prevent the Court from examining repartition of votes in the Conference in order to characterize their intentions.⁶³ The Court upholding attitudes reflecting two distinct paradigms in the same case somehow shows that, although taking into account the corporate personality of the Commission was necessary for the settlement of the issue of attributing respective powers of the Commission and Romania, so doing departed from the usual approach in 1927 that is reflected in other parts of the advisory opinion, thus making this case an ambiguous one.

Since then, the stance of the Court, ICJ or PCIJ, over issue of attribution of conduct of states delegates has been oscillating between exclusive attribution to the member states the delegate of which had its conduct considered and exclusive attribution to the organization the organ of which has the delegate concerned as a member. If the former stance is upheld, the Court conforms to the contractual paradigm, taking states delegates for actual sovereign states, while in the latter case it implements the objective paradigm by considering states delegates to be exclusively members of one of the organs of an organization. In between are certain ambiguous cases that are not exclusive in attribution conduct of states delegates to either states or the organization. These may reflect influence of the pseudo-confederal paradigm, since it is a characteristic of this paradigm to consider members of intergovernmental organs as being at the same time states and organ members, or simply a lack of decisiveness on the part of the Court with regard to this question of attribution.

The last two decades yet show the Court leaning towards exclusive attribution of conduct of states delegates composing intergovernmental organs to the organization wherein the organ belongs. In the *Wall case*, in 2004, the Court refused to dismiss the request for an advisory opinion based on the question submitted connecting with a dispute between two states, stressing that “it was the General

61 *Jurisdiction of the European Commission...*(*op. cit.*).

62 *Ibid.*, at 30.

63 *Ibid.*, at 57-58.

Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.”⁶⁴ This position that “motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court’s exercise of its discretion whether or not to respond” was recalled six years later, in an advisory opinion concerning the declaration of independence of Kosovo.⁶⁵

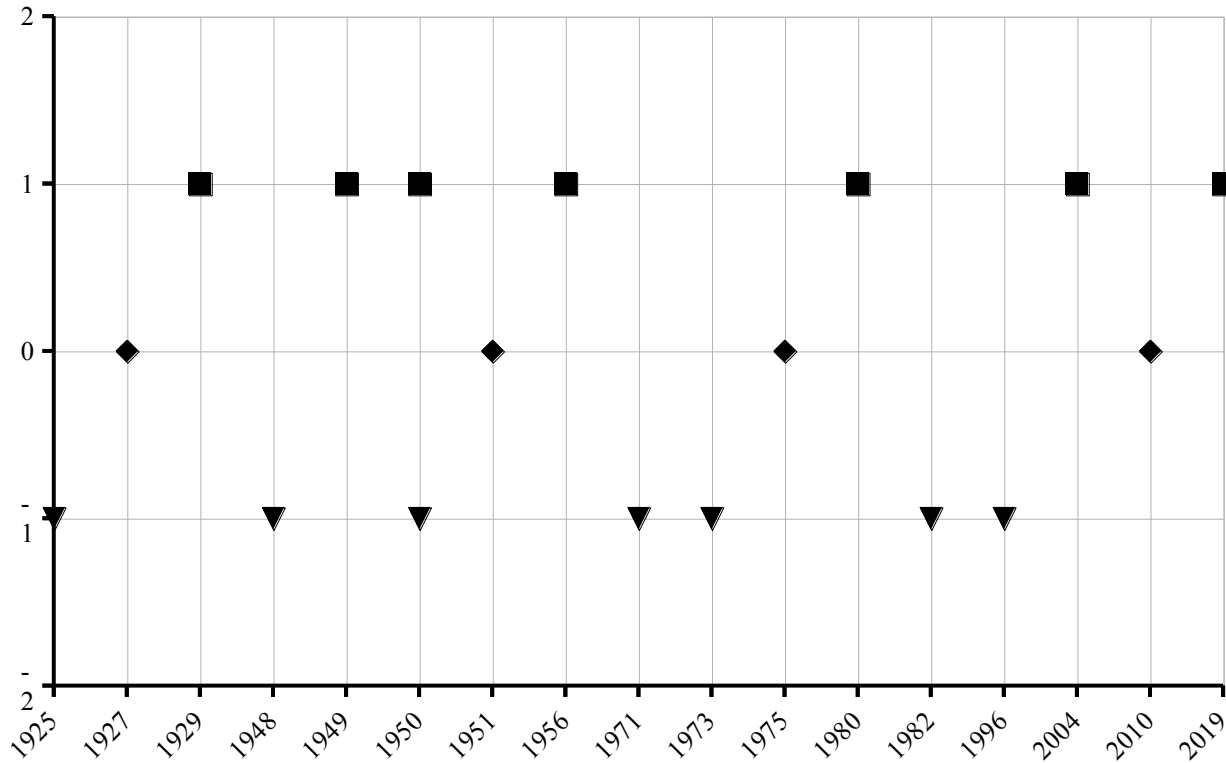


Figure 2: Fluctuation of the position of the Court with regard to the relation between organizations and their member states, taking into account only advisory opinions. A positive value (1) is attributed to distinguishing the organization from the states, while a negative value (-1) is attributed to assimilating the former to the latter. Ambiguous cases, or years where contradicting positions were issued in different decisions, are given a null value (0).

64 *Wall... (op. cit.)*, at 163 (31)-164 (32), para. 63-64.

65 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, I.C.J Reports 2010, p. 403, at 417 (18), para. 33.

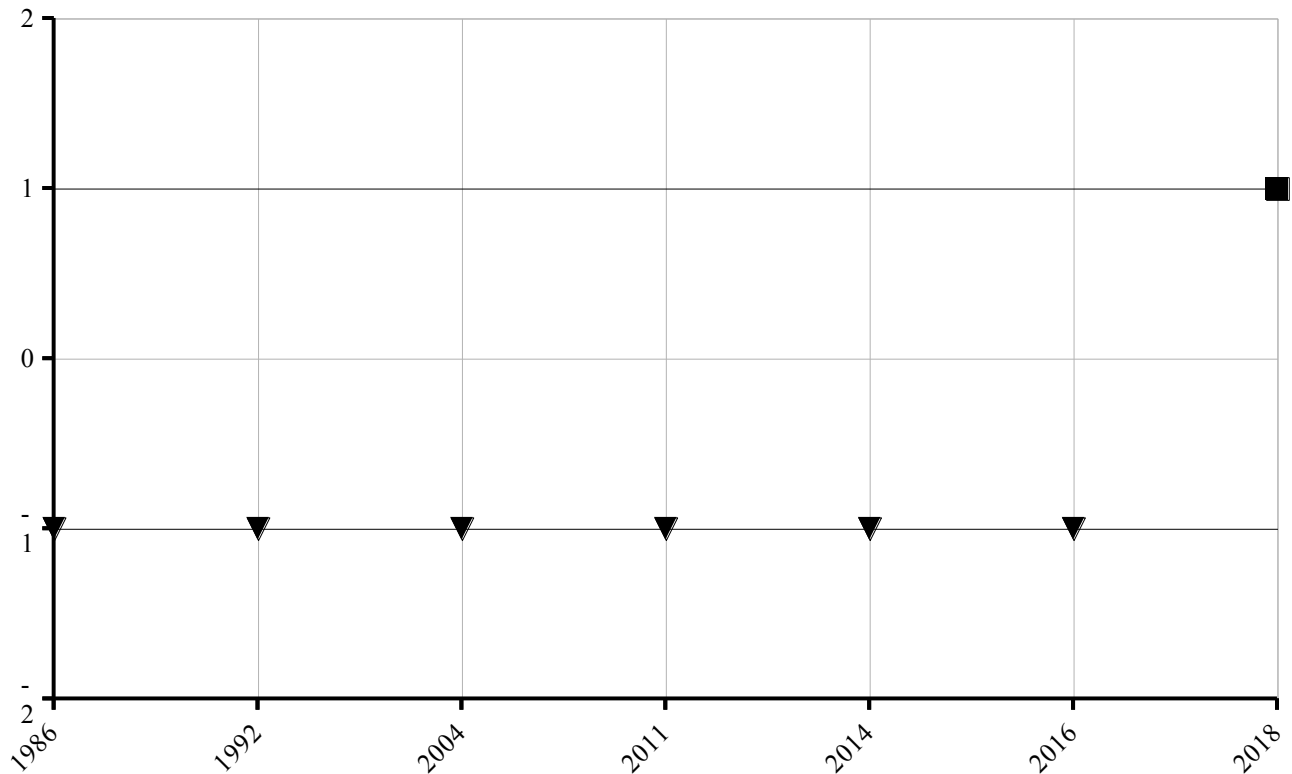


Figure 3: Fluctuation of the position of the Court with regard to the relation between organizations and their member states, taking into account only judgments. A positive value (1) is attributed to distinguishing the organization from the states, while a negative value (-1) is attributed to assimilating the former to the latter. Ambiguous cases, or years where contradicting positions were issued in different decisions, are given a null value (0).

In the same opinion, the Court stressed that binding force of resolutions of the Security Council of the UN over the member States was “irrespective of whether they played any part in their formulation”,⁶⁶ which, in addition to be a feature that arises from the UN Charter, emphasizes the corporate character of the organization: decisions of an organ are not tantamount to an agreement among states the representatives of which voted in favour of a decision, but have their binding force specified by a distinct body of rules, both procedural and substantial. What makes the advisory opinion on Kosovo ambiguous is the Court including subsequent practice of “states affected by those [...] resolutions” among means for interpreting resolutions of the Security Council, which is hardly understandable if said resolutions, including their substantial content, are to be binding independently from the role of states.⁶⁷

In February of this year, the Court again upheld the stance that “its opinion ‘is given not to States,

⁶⁶ *Ibid.*, at 442 (43), para. 94.

⁶⁷ *Ibid.*

but to the organ which is entitled to request it”⁶⁸. It also reiterated its long standing position to reject objection to its advisory jurisdiction grounded on existence of a bilateral dispute involving the same question as the one submitted to the Court, here characterised by the circumstance that “divergent views have been expressed by” two states interested in the question.⁶⁹

It thus seems that the advisory procedural context favours the Court implementing features of the corporate veil and refuse to equate organs of international organizations and states delegates therein to the member states themselves, which makes it partake in implementing either the quasi-federal or the objective paradigms. Contentious proceedings, on the other hand, seemingly entail the opposite reaction.

3.2 *Judgments*

In contrast with what can be said of the treatment of the issue of attribution by the Court in an advisory procedural context, rulings issued in a contentious context seem reluctant to allowing the corporate veil to produce all its effects. This transparency⁷⁰ that seems to characterize corporate identity of international organizations in the context of contentious cases is a feature induced by either the contractual or the quasi-federal paradigms. Additionally, this trend seems to have been heightening over time: while in its judgement in the Nicaragua 1986 Case,⁷¹ the Court indeed asserted its piercing the veil of intergovernmental organs with some restrictions,⁷² which makes it a case that belongs to the ‘ambiguous’ category, these restrictions were not subsequently reiterated by the Court. Instead, subsequent cases law seemed to entertain the view that behaviour of delegates of states in intergovernmental organs be attributed to member states.

The Court did so first by equating the results of votes on some resolutions in organs of the UN with “a position endorsed by the vast majority of the Members of the United Nations” while considering issue of the (former) Federal Republic of Yugoslavia (Serbia and Montenegro) automatically continuing the membership of the former Socialist Federal Republic of Yugoslavia in the

68 *Legal Consequences of the Separation...*(*op. cit.*), at 21, para. 81.

69 *Ibid.*, at 23, paras. 89-90.

70 On this notion: Weil, *Le Droit International en Quête de son Identité. Cours Général de Droit International Public*, (1992-VI) 237 *CCHAIL* 9–370, at 104; and Brölmann, *op. cit.*, at 29-33.

71 *Military and Paramilitary Activities...*(*op. cit.*), at 14, para. 64.

72 See *supra* pp. 11-12.

United Nations in a series of eight cases judged on 15 December 2004.⁷³ In particular, the Court took into account the voting figures in order to make this statement.⁷⁴ While in these eight cases the enacted position of two organs of the UN, the Security Council and the General Assembly,⁷⁵ has been attributed collectively to a certain “majority” of member states without further precisions, the Court later extended the mechanism to individual states. In two cases settled in 2011 the Court pierced the corporate veil of an organization for the sake of ascertaining the behaviour of a state.

In the judgment in the *Interim Accord case*,⁷⁶ the Court had to know of a penultimate occurrence in the dispute between Greece and the then Republic of Macedonia (now North Macedonia) over the name of the latter. In particular, the Court had to decide whether Greece violated its commitment “not to object to the application by or the membership of [North Macedonia] in international, multilateral and regional organizations and institutions of which the [Greece] is a member” under Article 11 of its Interim Accord with North Macedonia concluded in September 1995. In so doing, the Court had to consider the decision adopted by the NATO, an organization wherein Greece has membership, at the Bucharest Summit held on April 2008 to not extend an invitation to North Macedonia to begin talks on accession to NATO and the possible failure of Greece to comply with its obligations arising from Article 11 of the Interim Accord at this time. In spite of Greece attempts to make use of the corporate veil of the organization and the collective character of its decision on accession of North Macedonia,⁷⁷ the Court rejected this argument and decided that, through the conduct of its delegate in NATO, objection to accession of Macedonia was attributable to Greece that thus failed to comply with its obligations under Article 11 of the Interim Accord. In so doing, the

73 *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 279 at 306 (31), para. 67; *Legality of Use of Force (Serbia and Montenegro v. Canada)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 429, at 455 (30), para. 66; *Legality of Use of Force (Serbia and Montenegro v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 575, at 601 (30), para. 66; *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 720, at 746 (30), para. 65; *Legality of Use of Force (Serbia and Montenegro v. Italy)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 865, at 892 (31), para. 66; *Legality of Use of Force (Serbia and Montenegro v. Netherlands)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 1011, at 1037 (30), para. 66; *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 1160, at 1186 (30), para. 66; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 1307, at 1333 (30), para. 65.

74 *Legality of Use of Force (Serbia and Montenegro v. Belgium)...*(*op. cit.*), at 303 (28)-304 (29), paras. 59-60. Other judgments issued the same day contain similar dicta.

75 While taking a decision of the General Assembly as, let apart attribution, reflecting the views of a "vast majority" of member states of the UN might be acceptable, it seems to me that saying the same of a resolution of the Security Council may be far more debatable since the totality of the members of this organ does not even amount to ten per cent of the total number of member states.

76 *Interim Accord...* (*op. cit.*).

77 *Ibid.*, at 660 (20), para. 42 and at 670 (30), para. 80.

Court, albeit having been incited to do so by the issue at stake and the framing of Greece obligations in the Interim Accord, nevertheless gave in attributing conduct of states delegates to member states.⁷⁸

The same year, the Court had to know of a dispute opposing Georgia to Russia on alleged attempts of ‘ethnic cleansing’. On this occasion, the existence of a dispute, as well as attempts at negotiation by the parties, was contested,. Yet the Court rejected the objection on the grounds of behaviours of the parties ascertained on the basis of several declarations including those made by their delegates at a meeting of the Security Council.⁷⁹ By these two cases, the Court confirmed its long standing position that conduct of states delegates in international organizations can reveal their positions on a specific issue.

The position of the Court seems quite stable in this regard. In the *Whaling* case, the Court considered that an organization “resolutions [being] adopted without the support of all States parties to the Convention and, in particular, without the concurrence of” the respondent state prevented these resolutions from being “regarded as subsequent agreement [...] nor as subsequent practice establishing an agreement of the parties” concerning interpretation of provisions of a treaty.⁸⁰ Yet, this statement implies that, in the event the respondent state concur, agreement may be inferred. In 2016, and in spite of using a seemingly prudent language, the Court nevertheless frankly admitted that votes cast in intergovernmental organs could characterize existence of a dispute between two member states by stating that “[t]he wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a legal dispute in some circumstances, particularly where statements were made by way of explanation of vote”,⁸¹ although it assorted this statement with some limitations.⁸² In all these cases, the Court set aside the corporate veil ensuing from legal existence of an organization in order to discern a conduct, happening within its organs, that it attributed to its member states. In its judgment of 2016, the Court specified that while taking into account ‘exchanges made in multilateral settings’,⁸³ which include international organizations, these were considered as a matter of ‘facts’.⁸⁴

78 *Ibid.*, at 670 (30), para. 81-83.

79 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), 1 April 2011, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70, at 139 (73), para. 181.

80 *Whaling...* (*op. cit.*), at 257 (35), para. 83. In the same vein, see the advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory opinion of 8 July 1996, I.C.J. Reports 1996, p. 66, at 81 (19), para. 27.

81 *Obligations concerning Negotiations...* (*op. cit.*), at 855 (26), para. 56.

82 *Ibid.*, at 852 (23) para. 45.

83 *Ibid.*, at 849 (20), para. 36.

84 *Ibid.*

And yet, two years later, the Court rejected an argument consisting in seeking an agreement between the parties to a dispute in a resolution adopted by consensus in an organization in which the two participate. Examining obligation of Chile to negotiate an access to the Pacific Ocean with Bolivia alleged by the latter, the Court was presented with resolutions adopted by the General Assembly of the OAS. Observing that these resolutions did not purport an obligation to negotiate supported by Chile, the Court stated that “resolutions of the General Assembly of the OAS are not *per se* binding and cannot be the source of an international obligation. Chile’s participation in the consensus for adopting some resolutions therefore does not imply that Chile has accepted to be bound under international law by the content of these resolutions.”⁸⁵ In spite of the Court dicta mentioning it, it is not quite sure that concerned resolutions having been adopted by consensus played a role here, similar circumstances in the *Interim Accord* case did not prevent it from doing the contrary in 2011.

This last case may differ from the others in that it relates to establishing an agreement between the parties to the dispute while previous cases related to establishing their differences. While the latter context does not generate obligations for the state the behaviour of which is under scrutiny, the former does, and this difference in legal consequences may justify the different solutions adopted by the Court. But it may also be that approach of the Court under framework of judicial proceedings is entering in a period of uncertainty akin to that which affected its attitude under framework of advisory proceedings until end of the 1990’s, thus denoting an inflection towards a better distinction between respective conducts of organizations and their members.

3. Conclusion

The *a priori* erratic jurisprudence of the ICJ and its predecessor, the PCIJ, with regard to issue of attribution of conduct of states delegates in organs of international organizations reflects its being divided among different paradigms of the international organization. Changing composition of the Court and circumstances of each affair leads it to scatter features arising from these three paradigms in its case law in a disordered fashion. Yet, further examination reveals that balance between these paradigms and their reflection in actual rulings is strongly dependent on the procedural context under which rulings are issued. This results in the Court implementing a dual framework with regard to this question of attribution of conduct.

⁸⁵ *Obligation to Negotiate...*(*op. cit.*), at 53, para. 171.