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INTERPOL as a subject of international law

Summary

One of the main characteristics of contemporary international law is the proliferation of the addressees of its norms - the subjects of international law (international legal persons). Nevertheless, certain holders of rights and duties under international law, such as INTERPOL, are still awaiting recognition of their de facto status of subjects of international law. The cause of this is the fact that the concept of international legal personality is still an instrument of international legal doctrine for the recognition or non-recognition of the status of a subject of international law to certain entities. Accordingly, the paper first considers the concept of international legal personality. On that basis, the paper analyses the factual position of INTERPOL in the international legal order and consequently provides an affirmative answer to the question of its subjectivity in international law.

Keywords: *INTERPOL, subject of international law, concept of international legal personality.*

1. INTRODUCTION

Until the mid-20th century, membership in the "exclusive club" of subjects of international law was reserved only for states. This was a consequence of the affirmation of the absolute sovereignty of the states that began with the Peace of Westphalia of 1648[1] and culminated in positivist doctrine during the 19th century.[2] According to positivist doctrine, international law

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[1] The Peace of Westphalia of 1648, which also represents the birthday of modern international law, laid the foundations of a new international legal order, based on a community of equal and sovereign states (Nijman, 2004:10).

[2] The sublimation of positivist doctrine represents Hegel's doctrine of "will of the state", according to which the state possesses its own will and absolute sovereignty, while international law is only a product of the will of sovereign states. Hegel (2005: 132, 196) thus points out: "The state is the realized ethical idea or ethical spirit. It is the will which manifests itself, makes itself clear and visible, substantiates itself. It is the will which thinks

was exclusively a product of the will of sovereign states, while the concept of international legal personality was brought into direct connection with sovereignty, i.e. states that were the only ones considered sovereign. In such state-centric international legal order, states were considered the only subjects of international law,[3] and international legal personality was an instrument for excluding entities other than states from the international legal order (Nijman, 2004: 116-121).

Despite the dominance of positivism and state-centric international legal order, during the 18th and 19th century, entities other than states managed to acquire the status of subjects of international law. Those entities included protectorates, insurgents and belligerents, the European Commission of the Danube and public administrative unions. Moreover, during the first half of the 20th century, the League of Nations, internationalized territories (Free City of Danzig, Saarland), mandated territories and later trust territories and non-self-governing territories joined the circle of subjects of international law. A common feature of all the aforementioned entities was the possession of a relatively limited scope of international legal personality, in contrast to the states that possessed the largest scope of legal personality in the international legal order. The reasons for recognizing the limited international legal personality of the mentioned entities can be primarily sought in the fact of their territorial determination following the example of states.[4] Given that territorial determinism, along with population and sovereign power, was a constitutive element of the state - the only "true" subject of international law, some authors accepted the possibility that entities that at least partially resembled the state could acquire a certain scope of international legal personality (Vukas, 1991:487).

Unlike previous cases, other candidates for the acquisition of international legal personality, such as individuals, international non-governmental organizations (NGOs) and trans-governmental organizations (TGOs), continued to live in an indefinite position, only as *de facto* subjects of international relations, waiting for recognition of their own international legal personality.[5] The turning point was the advisory opinion of the International Court of

and knows itself, and carries out what it knows, and in so far as it knows.", while his chapter on international law begins with: "International law arises out of the relation of independent states. Whatever is absolute in this relation receives the form of a command, because its reality depends upon a distinct sovereign will."

[3] Liszt (1898:21) thus begins his chapter on international legal personality: "Nur die Staaten (nicht die Fürsten noch die Völker) sind Subjekte des Völkerrechts: Trager von völkerrechtlichen Rechten und Pflichten.", while Brierly (1960:1) defines the international law with the words: "The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another". Many authors also refer to the judgment of the Permanent Court of International Justice from 1927 in the *Case of S.S. Lotus*, in which the Court took a position on states as the only subjects of international law: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." S.S. Lotus (France v. Turkey), Judgment No. 9, 1927 P.C.I.J. Series A, No. 10, p. 18.

[4] Mosler (2000: 716) notes that never, even during the peak of the absolute sovereignty of states, did the number of states correspond to the total number of subjects of international law.

[5] The Holy See, the Order of Malta, and the Catholic Church are just some of the international non-governmental organizations that have existed in the international legal order, without having the recognized status of a subject of international law (Lapaš, 1999: 5-6).

Justice from 1949 on Reparation for Injuries Suffered in the Service of the United Nations (Bernadotte Case), in which the Court confirmed the international legal personality of one international organization - the United Nations, but also opened the door to the recognition of the international legal personality of other entities. The Court then pointed out: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life ..." (I.C.J. Reports 1949: 178).

The previous citation from the Court's advisory opinion has not lost its relevance even after more than seventy years. Therefore, it still represents a starting point in most theoretical considerations that aim to explain the concept of international legal personality in general or to explain the personality of certain entities in the international legal order. The link made between international law and the international community only confirms a process that has been going on for hundreds of years. In this process, the international community, i.e. its members – subjects of international law, create international law, which then creates its own subjects - members of the international community. The driving force of this circular process is primarily the common need and interest of the members of the international community for the regulation of mutual relations by the rules of international law. In this way, the strong interconnectedness and existential interdependence of the international community and international law comes to the fore, reaffirming once again that law can only exist in society, and society cannot exist without law - *ubi societas, ibi ius*.[6] Within the time frame of this relationship it can be noticed that, depending on the needs of the international community, rights and duties were granted to certain entities by the international legal order. In this way, these entities have become subjects of international law which are different in their nature and in the extent of their rights. Part of that diversity, determined by the needs of the international community at a given time, has become one trans-governmental organization - INTERPOL.[7]

It was founded in 1923 under the name of the International Criminal Police Commission (ICPC) and over the years has evolved into the International Criminal Police Organization - INTERPOL, whose goal is to ensure and promote international criminal-police cooperation and to establish and develop institutions that will contribute to the prevention and suppression of

[6] Thus Brierly (1960: 42) points out: "Law can only exist in a society, and there can be no society without a system of law to regulate the relations of its members with one another. If then we speak of the 'law of nations', we are assuming that a 'society' of nations exists…". Shaw (2014: 1) has a similar attitude: "Every society, whether it is large or small, powerful or weak, has created for itself a framework of principles within which to develop." See also Klabbers (2009: 1).

[7] The temporal dimension of international legal personality is noticed by many authors. Feldman (1985: 357) thus points out: "It should be repeated that historic-comparative analysis has proved that international legal relations at each stage of historical development had their specific countenance and particular international personality." Similarly, Degan (2011: 205): "The circle and type of subjects of international law are subject to change over time."
Trans-governmental organizations are those organizations whose membership is composed exclusively of organs of the central government. The "trans-governmental" character of these organizations stems from the fact that these entities perform certain typically state functions – executive, legislative and judicial, and that when entering into legal relations with public legal persons of national law of other states, or with public legal persons of international law, are not under direct control of the central organs of foreign affairs of their governments. See also Keohane, Nye (1971: XV).

ordinary crimes which are not of a political, military, religious or racial character (Articles 1, 2 and 3 of the INTERPOL Constitution). In order to achieve its goals, INTERPOL performs four core functions: securing global police communication services; operational data services and databases for police; operational police support services; and police training and development.

However, to understand the nature of this unique organization it is necessary to first look at its origins. The idea of institutionalizing international police cooperation arose at the first International Criminal Police Congress, held in Monaco in 1914 (Deflem, 2000: 752). Although the World War I thwarted plans to establish an international police organization, at the initiative of Johannes Schober, President of the Vienna Police, the next International Police Congress was held in Vienna in 1923. At the congress, representatives of the police authorities from 20 countries founded ICPC with headquarters in Vienna. It is indicative that the Vienna Congress was not a classic international conference attended by plenipotentiaries of the states. On the contrary, it involved police officers who were not under the direct control of their governments. Moreover, ICPC was not established by a treaty or any other internationally legally binding instrument for states. It is more than obvious that the concept of political neutrality on which today's INTERPOL is based, as well as its trans-governmental character, trace their roots to the founding of the ICPC.

Like the ICPC, its successor, INTERPOL was also not established by a treaty. Unlike intergovernmental organizations, whose constitutive act is, as a rule, a treaty concluded by states, the Constitution of the INTERPOL was adopted by its General Assembly. A look at Article 4, Paragraph 1 of the INTERPOL Constitution reveals that its membership consists of "official police bodies" whose functions fall within the scope of INTERPOL's activities. The fact that the membership of INTERPOL is formally composed of public legal persons of national law, i.e. of the organs of the central government – official police bodies, determines the trans-governmental character of INTERPOL. INTERPOL's membership composed of official police bodies and the fact that it was not established by a treaty were a sufficient argument for some writers to classify INTERPOL as an international non-governmental organization (Schermers, 1995: 1321) and to deny it the status of a subject of international law.[8] For other writers, INTERPOL is a *de facto* intergovernmental organization, although its status remains unclear (Gless, 2012: 257).

Despite that, there is no doubt that INTERPOL today is a leading organization in the field of international criminal-police cooperation,[9] and the fact that its membership brings together official police bodies from as many as 195 countries only further confirms this. Moreover,

[8] "Interpol is not an international organization. It is therefore not a subject of international law and has no jurisdiction of its own." Gallas (1995: 1444)

[9] On the other hand, in the field of European criminal-police cooperation, the leading organization is EUROPOL, an agency of the European Union whose objective is to support and strengthen action by the competent authorities of the member states of the European union and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more member states. Apart from its nature - EUROPOL is an agency of the European Union while INTERPOL is a trans-governmental organization, EUROPOL differs from INTERPOL in that it is primarily focused on cooperation at the regional level (the competent authorities of the member states of the European Union), while INTERPOL is focused on cooperation at the international level, which includes the competent authorities of practically all countries of the world, as well as other actors such as the United Nations. Finally, EUROPOL deals exclusively with serious crimes, while INTERPOL deals with all types of crime.

given that we live in an age of globalization when the world is more connected than ever, but also more interdependent, and therefore more vulnerable, institutionalized international cooperation, including that in the field of criminal-police cooperation, is becoming more necessary.

The growing role and importance of INTERPOL in international relations thus drew the attention of international law doctrine to it and at the same time raised the question of its subjectivity in international law. Therefore, the subject of this paper will be the position of INTERPOL in the international legal order. Consideration of the mentioned issue will begin with defining the concept of international legal personality. Understanding the concept of international legal personality and its constitutive elements is a precondition for achieving the main purpose of this paper – analyzing certain rights and duties of INTERPOL under international law and thus providing an answer to the question of its subjectivity in international law. Successful proving of the possession of rights and duties under international law by INTERPOL will represent a confirmation of INTERPOL's *de facto* status as a subject of international law, while at the same time it will remain for international legal doctrine to recognize that status through the concept of international legal personality. Finally, given the scarcity of norms governing the position of INTERPOL in the international legal order, the task of this paper, but also the doctrine in general, is to point out the need for further incorporation of INTERPOL into the international legal order and to propose adequate solutions for that incorporation.

2. THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY

In every legal order, including international law, there are certain entities that the legal order makes holders of rights and duties (Shaw, 2014: 142). By becoming holders of rights and duties under international law, the entities acquire the status of subjects of international law, i.e. they become international legal persons. Without the possession of international legal personality, i.e. without the possession of rights and obligations in international law, the entities cannot act according to the rules of international law or be subject to the international legal order, in short, they cannot exist as subjects in international law.[10]

Precisely for this reason, the concept of international legal personality (international legal subjectivity) has been attracting the attention of international legal doctrine for centuries without losing its relevance. [11] Many authors in history have built their own conceptions and

[10] The exceptional importance of international legal personality in international law is emphasized by numerous authors. Thus Klabbers (2005: 2) emphasizes the traditional view in international legal doctrine that: "Without legal personality, so the implication goes, those entities do not exist in law, and accordingly cannot perform the sort of legal acts that would be recognized by that legal system, nor even be held responsible under international law. ", while Nijman (2004: 9) points out: "For although in both theory and practice the consensus is that ILP (International Legal Personality) is one of the fundamentals of international law…"

[11] Vukas (1991: 483) raises the following question regarding the status of various actors in international relations - states, trust territories, intergovernmental organizations, various groups of individuals: "There is a permanent query: which of these entities are subjects of international law, that is, who possesses legal personality under international law?", while the International Court of Justice in its 1949 advisory opinion on *Reparation for injuries suffered in the service of the United Nations* in relation to the question of the international legal personality of the United Nations notes: "Does the Organization possess international personality? This is no doubt a doctrinal expression to controversy. " (I.C.J. Reports 1949: 178). See also Nijman (2004: 4).

definitions of international legal personality, but to this day none of them has been accepted at the level of positive international law. The reason for this lies in the fact that, unlike states and their developed vertical legal systems, international law as a relatively young branch of law is only a partially constructed, horizontal legal system whose rules are still in the process of emerging.[12]

Despite the fact that nowadays is completely dominant the view according to which, in addition to states, there are other subjects of international law, the very concept of international legal personality remains controversial and insufficiently clarified at the level of international legal doctrine. The views of the authors generally differ on issues related to the circle of subjects of international law, the way of acquiring international legal personality and its constitutive elements, i.e. the consequences in the international legal order. The dynamics of international relations, which influenced the emergence of numerous subjects of international law different in the extent and nature of their rights and thus hindered the efforts of international legal doctrine to define international legal subjectivity, certainly contributed to this. Thus, the international legal personality has become a relative concept that varies from subject to subject of international law.[13] Nevertheless, by reviewing and analyzing the existing definitions of international legal personality in international legal doctrine, it is possible to single out its essential, constitutive elements around which there is general agreement and use them to determine the concept of international legal personality more clearly.

Numerous authors, having their own visions of international law and its subjects, have defined the concept of international legal personality. Blix (1970: 611) thus proposes one of the simplest definitions in the theory of international law by defining the subject of international law each entity to which the norm of international law is addressed. Other authors associate the international law personality with the possession of rights and duties under international law. Thus, Cassese (2001: 46) considers the holders of international rights, powers and duties to be the subject or legal person of international law. Bekker (1994: 55), on the other hand, associates the concrete execution with legal personality, or at least the potential ability to exercise certain rights, and the fulfillment of certain obligations. Dixon (2000: 104) thinks similarly, defining the subject of international law as a body or entity capable of possessing and performing rights and duties under international law.

The aforementioned definitions, like most others, are based on the advisory opinion of the International Court of Justice of 1949 in the Bernadotte case, in which the Court designated an international person as a subject of international law which has the capability to possess international rights and duties and to maintain its international rights by bringing international claims (I.C.J. Reports 1949: 179). For Brownlie (2008: 57), the Court's point of view is a conventional definition of a subject of international law, according to which an entity recognized by international law as capable of possessing rights and duties and of bringing international claims, and having these capacities, is a legal person.

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[12] "The major consequence of the horizontal structure of the international community is that organizational rules are at a very embryonic stage." Cassese (2001: 6).

[13] In this regard, Dixon (2000: 105) points out: "The most important point about international personality is, indeed, that it is not an absolute concept.", while Shaw (2014: 143) argues: "Personality is a relative phenomenon varying with the circumstances."

Building on the classical definition of international legal personality, certain authors, in addition to legal capacity - the capacity of possessing rights and duties under international law (*capacitas iuridica*), place special emphasis on capacity of an entity to produce legal consequences on its own (*capacitas agendi*). Degan (2011: 205) thus defines as a subject of international law anyone who has legal capacity and *capacitas agendi* in the international legal order, while Andrassy (2010: 65), in addition to having legal capacity, emphasizes the possession of business and delictual capacity, integral parts of *capacitas agendi*, thus defining as a subject of international law, i.e. an international person as anyone who is a holder of rights and duties under international law (legal capacity), who acts directly according to the rules of that law (business capacity) and is directly subject to the international legal order (delictual capacity). Similarly, other authors among the constitutive elements of international legal personality include the legal capacity - possessing of rights, duties and powers established by international law, and *capacitas agendi* - the capacity to act on the international plane directly or indirectly through other states.[14] Feldman (1985: 359), on the other hand, in addition to possessing its own rights and duties in relations with other legal entities, among the main features of international legal personality includes participation in international legal relations with the existence of the autonomous will of the participants in these relations. The importance of participating in international relations is also noticed by Fitzmaurice (1953: 2), so for him the ability to enter into relations with other international persons is a necessary feature of international legal personality. Dailler and Pellet (2002: 596) emphasize the ability to act autonomously in international relations (*capacité d'action autonome dans les relations internationales*) as an indicator of international legal personality. Similarly, Greig (1976: 92) defines international person as an entity that has the power of independent action on the international plane, while Dixon (2000: 106) defines international legal personality as the ability to act in the international legal system.

The definition given by Alvarez is also interesting. He starts from a negative definition of international legal personality, determining that an entity that is not a subject of international law or an international legal person is not capable of being a party to treaties. It does not have the ability to bring international claims against other international persons, does not possess other international rights and duties and does not exist with relative autonomy in the legal sphere (Alvarez, 2006: 129).

International legal responsibility, as well as the delictual capacity of the subject of international law, are constitutive elements for many authors in defining international legal personality. Thus, for Mugerwa (1968: 249), to be a subject of international law, that is, to be an international legal person in the international legal order, includes three essential elements: the possession of a duty, including responsibility for any conduct other than that prescribed by the legal system; the capacity to bring claims and the capacity to enter into contractual or legal relations with other legal persons recognized by a particular legal system (in our case - the international legal system). Parsing the international legal personality on two constitutive elements - legal capacity and *capacitas agendi*, as an integral part of *capacitas agendi*, Degan (2011: 205) states, among other things, international responsibility

[14] "An international person is one who possesses personality in international law, meaning who is a subject of international law so as itself to enjoy rights, duties or powers established in international law, and generally, the capacity to act on the international plane either directly, or indirectly through another state." (Jennings, Watts, 1992: 119-120).

- direct and independent responsibility for internationally wrongful acts, i.e. for violation of obligations under international law, internationally committed acts, i.e. violation of obligations under international law. Andrassy (2010: 65) also includes international responsibility among the constitutive elements of international legal personality, while d'Aspremont (2007: 93) considers international responsibility as a natural consequence of international legal personality. Reuter (1958: 85), however, as a subject of international law determines the entity which among other things owns the rights and duties which are directly defined and enforceable by international law. The position expressed by Special Rapporteur Gaja in his First report on the responsibility of international organizations to the Commission International Law Commission is also interesting. According to Gaja, responsibility under international law can arise only for a subject of international law, i.e. norms of international law cannot impose "primary" or "secondary" obligations on an entity in case of violation of a "primary" norm if that entity does not have legal personality under international law.[15]

Certain authors include the capacity to conclude treaties (*ius contrahendi*) among the constitutive elements of international legal personality, while others emphasize the capacity to participate in the construction of norms of international law. An example of first thinking is Kirgis (1993: 14) who considers capacity to conclude treaties to be an important aspect of an international personality, much like Brownlie (2008: 57) and Mugerwa (1968: 249). In this context, it is interesting to point out the position taken by Austria when sending its comments on the Draft Articles on the Law of Treaties to the International Law Commission. On that occasion, it was pointed out that the capacity to conclude treaties is one of the essential criteria of the status of a subject of international law, therefore an entity (in this case an international organization) that does not have the capacity to conclude treaties cannot be a subject of international law.[16] An example of second thinking is Mosler (2000: 711), according to whom the notion of a subject implies a member of the international legal order which has active role in international relations and which participates in the law-creating process. Reuter (1985: 85) also requires the capacity to participate, to a certain extent, in the construction of rules of international law, in order to recognize an entity as a subject of international law, while Degan (2011: 205) points out general participation in creating and amending norms of general and particular international law as one of the aspects of *capacitas agendi*, i.e. legal personality. Like Degan, Portmann (2010: 8) emphasizes "competence" for the creation of international law as one of the peculiarities of international legal personality.

Ibler (1987: 302) defines a subject of international law as one that is directly subject to the rules of international law (an international person) and is capable of being the holder of rights and duties under international law and a party to proceedings before the International Court of Justice. From the above given definition, it can be seen that among the constitutive elements of international legal personality, the capacity to *bring a claim* before international judicial bodies (*ius standi in iudicio*) is also included. Other authors have a similar understanding of international legal personality (Brownlie, 2008: 77; Mugerwa, 1968: 249) as well as International Court of Justice which in its advisory opinion of 1949 in the *Bernadotte case*, confirmed the international legal personality of the United Nations and, as

[15] See: First report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur (A/CN.4/532), 26 March 2003, p. 8.

[16] See: Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session (A/6309/Rev.1). Yearbook of the International Law Commission, vol. II, 1966, p. 281.

one of its aspects, the capacity to *bring* an *international claim*. On that occasion, the Court pointed out: "It can now be assumed that the Organization has the capacity to bring a claim on the international plane, to negotiate, to conclude a special agreement and to prosecute a claim before an international tribunal.." (I.C.J. Reports: 181).

Finally, based on the review of international legal doctrine, i.e. the views and definitions of certain authors related to the concept of international legal personality, we can single out its essential, constitutive elements around which there is general agreement and use them to define the concept of international legal personality more clearly.

Legal capacity (*capacitas iuridica*) – the capacity of possessing rights and duties under international law is the main constitutive element of international legal personality, i.e. its possession is a *condicio sine qua non* for an entity to be considered as a subject of international law, or an international legal person (Vukas, 1991: 491).

While some authors see the possession of legal capacity as a precondition for acquiring international legal personality (Lapaš, 1999: 78), others see legal capacity as a consequence of acquired international legal personality (Alvarez, 2006: 129). It is interesting to mention the position advocated by Shaw (2014: 142), according to whom legal capacity represents a link between the status of a legal person and certain rights and duties. Despite these doctrinal disagreements, legal capacity remains the main constituent element of international legal personality for most writers. Mosler (2000: 711) thus considers the possession of legal capacity to be a common feature of all subjects of international law. For most authors legal capacity implies the possession of rights and obligations under international law. Thus, for Degan (2011: 205), legal capacity is manifested in the fact that a subject of international law can be a holder of rights and obligations, i.e. that it is an "international person".[17] Not all entities in the international legal order have the same extent of legal capacity. International legal order is the one which, depending on the needs of the international community, determines the extent of rights and duties of its subjects. It is precisely for this reason that the extent of legal capacity of a subject of international law depends on its function in the international community.

The capacity of an entity to produce legal consequences on its own (*capacitas agendi*) is another constitutive element of international legal personality. *Capacitas agendi* occurs as the consequence of a previously acquired legal capacity. Despite disagreements among authors regarding certain aspects of *capacitas agendi* in international law, there is a general consensus that the *capacitas agendi encompasses* the capacity to conclude treaties (*ius contrahendi*), the right of legation (*ius legationis)*, the right to *bring* an *international claim (ius standi in iudicio)*, the right to convene and participate in international conferences, the right to create international law. *Capacitas agendi* also encompasses delictual capacity – the capacity to breach an international obligation, i.e. to commit an internationally wrongful act. However, not all entities in international legal order have the same extent of *capacitas agendi*. Similarly to the extent of legal capacity, the extent of *capacitas agendi* of a subject of international law is also determined by its function in the international community and by the needs of that community.

[17] Mosler (2000: 712) points out: "Legal capacity is a status in law which is, in a legal system, the reference point (*point d'atache, Anknüpfungspunkt*) of conferring rights, obligations and competences."

3. INTERPOL AND INTERNATIONAL LEGAL PERSONALITY

Given that the issue of the international legal personality of INTERPOL is still on the margins of doctrinal debates, we will have to look the answer to this question primarily in the international legal order itself, as well as in international practice. An additional aggravating circumstance is the fact that positive international law does not contain any norm that would determine the circle of subjects of international law, the manner of acquiring international legal personality, as well as its consequences in the international legal order.

A look at the acquisition of the legal personality of INTERPOL in the internal legal orders of states reveals that it is generally regulated by national legislation in each of the states (e.g. by the legislation of the United States of America),[18] or by headquarters agreement (e.g. the Agreement with France regarding INTERPOL's headquarters in France).[19] At the same time, the international legal personality of INTERPOL is the result of actual excercise, i.e. possession of rights and duties under international law. Despite that, in practice we can find a treaty between Belgium and INTEPROL from 2012 (entry into force 2020) which explicitly assigns international legal personality to INTERPOL.[20] However, the conclusion of that treaty required the prior possession of one of the aspects of international legal personality - the right to conclude a treaty. Therefore, in this paper we will analyze the factual position of INTERPOL in the international legal order, i.e. certain aspects of its legal capacity and *capacitas agendi* that it has achieved under international law, and thus answer the question of INTERPOL's subjectivity in international law.

The capacity to conclude treaties is one of the most important elements of the international legal personality of international organisms, although it may be correct to say that the capacity to conclude treaties is one of the causes of acquiring the international legal personality of international organisms.[21] The mentioned right is undoubtedly the most important instrument by which international organisms, as well as other subjects of international law, enter into mutual legal relations. It can be noticed that the concluding of treaties is one of the main ways of establishing international relations, so its appearance is linked to the very beginnings of

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[18] See: Executive Order 12425 of June 16, 1983, International Criminal Police Organizations, *Federal Register*, vol. 48, 1983.

[19] Article 2 of the Agreement between INTERPOL and France on INTERPOL's headquarters in France provides: "The Government of the French Republic recognizes the Organization's legal personality and, in particular, its capacity to:

a) enter into contracts;

b) acquire and dispose of movable and immovable property connected with its activities;

c) be party to judicial proceedings." See: Agreement between the Government of the French Republic and the International Criminal Police Organization concerning the headquarters of INTERPOL and its privileges and immunities in French territory. United Nations Treaty Series, vol. 2387.

[20] Article 2 of the Agreement between Belgium and INTERPOL provides: "The Organization shall have international legal personality and capacity." See: Headquarters Agreement with exchange of letters between the Kingdom of Belgium and the International Criminal Police Organization INTERPOL (ICPO-INTEPROL). United Nations Treaty Series, I-56310.

[21] Lapaš (2008: 29) points out that the consequence (although, in fact, the cause) of acquiring the international legal personality of international organizations is the realization of international legal capacity, but also *capacitas agendi* - primarily business capacity (the capacity to conclude treaties, active and passive right of legation), as well as delictual capacity.

international relations. As the first treaty, we can determine the one from 3100 BC concluded between the rulers of two Sumerian city-states, Lagash and Uma, for the purpose of settling the question of their borders and resolving border disputes between the said city-states (Nussbaum, 1954: 1-3). Given that the capacity to conclude treaties (*la capacité de conclure des traités*) proved to be crucial in establishing, maintaining and developing international relations, some authors include the capacity to conclude treaties as a constitutive element in their definitions of international legal personality. Although it is generally accepted today that only subjects of international law possess the capacity to conclude treaties, it can be noticed that not all subjects of international law possess it.[22]

INTERPOL is one of the international organisms that has achieved the capacity to conclude treaties, as proved by the treaties concluded with states, including headquarters agreements. INTERPOL has thus concluded several treaties with the countries in which it has its headquarters: Argentina, Belgium, El Salvador, France, Cameroon, Kenya, Ivory Coast, Thailand and Zimbabwe (Rutsel Silvestre, 2010: 133). Moreover, INTERPOL is also a party to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[23] It is interesting to note that only states and international organizations can become parties to the said Convention. In addition to the states, INTERPOL has concluded numerous cooperation agreements with international organizations.[24]

The right of legation is another element of international legal personality achieved by INTERPOL. The right of legation actually includes two types of legation - the active right of legation and the passive right of legation. The right of legation can therefore be defined as the right of a subject of international law to open its diplomatic missions and accredit the head of that mission, i.e. send its diplomatic representatives (diplomatic agents) to other subjects of international law - active right of legation, as well as the right of the subject of international law to receive diplomatic missions and the head of that mission, i.e. receipt of diplomatic representatives of other subjects of international law - passive right of legation (Berković, 1997: 20). Apart from the states that have the largest extent of rights and duties under international law, which includes the right of active and passive legation, other subjects of international law, although not all, exercise this right.

INTERPOL is one of those entities that has achieved the active right of legation. The proof of that is the agreement between INTERPOL and France regarding INTERPOL's headquarters in France, which guarantees INTERPOL and its officials privileges and immunities that are largely equal to the diplomatic privileges and immunities enjoyed by diplomatic missions of states and their diplomatic representatives under the Vienna Convention on Diplomatic Relations of 1961.[25] Moreover, Article 16 (1) of the mentioned agreement

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[22] A typical example of restrictions on the capacity to conclude treaties can be found in states under the protectorate, but also in certain internationalized territories, such as the Free City of Danzig (Andrassy, Bakotić, Seršić, Vukas, 2010: 133-138; 168-175).

[23] For the text of the Convention see: Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Narodne novine - Međunarodni ugovori, n. 1, 1994,

[24] For a list of cooperation agreements concluded between INTERPOL and international organizations see: http://www.interpol.int/About-INTERPOL/Legal-materials/Cooperation-agreements (accessed 20 September 2021).

[25] See: Vienna Convention on Diplomatic Relations of 1961. United Nations Treaty Series, vol. 500.

between INTERPOL and France expressly provides that the Secretary-General of INTERPOL in France shall have the status provided for the head of a diplomatic mission, while paragraph 2 of the same Article provides that INTERPOL Directors shall be granted, for the duration of their functions, the privileges and immunities accorded to diplomatic agents. INTERPOL has concluded similar agreements with other states in which it has its regional headquarters - Argentina, Ivory Coast, El Salvador, Cameroon, Kenya, Thailand and Zimbabwe (Rutsel Silvestre, 2010: 133). Also, INTERPOL has concluded the same agreements with the states in which it has its liasion offices (e.g. Netherlands).[26] The Executive Order 12425 of the American President Reagan from 1983, which guarantees INTERPOL the privileges, exemptions and immunities conffered by the International Organizations Immunities Act, can also serve as a proof of the active right of INTERPOL's mission.[27]

The right to convene and participate in international conferences, another element of international legal personality, has long been reserved exclusively for states. In today's international practice, the right to convene international conferences has largely passed into the hands of international organisms, primarily intergovernmental organizations (e.g. United Nations), while on the other hand the right to fully participate in international conferences remains primarily in the hands of states. If we look at INTERPOL, we will notice that it also managed to achieve certain elements of the right to participate in international conferences. Thus, for example, the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) in its Annex III contains a list of international organizations and other entities that participated in the work of the conference as observers.[28] INTERPOL, among others, is on the mentioned list. Also, the list of participants in the Diplomatic Conference for the adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (1995) includes, *inter alia*, INTERPOL.[29]

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[26] See: Exchange of notes constituting an agreement between the Kingdom of the Netherlands and the International Criminal Police Organization (INTERPOL) concerning privileges and immunities for the INTERPOL liaison office at Europol in The Hague. United Nations Treaty Series, vol. 2713.

[27] "By virtue of the authority vested in me as President by the Constitution and statutes of the United States, including Section 1 of the International Organizations Immunities Act (59 Stat. 669, 22 U.S.C. 288), it is hereby ordered that the International Criminal Police Organization (INTERPOL), in which the United States participates pursuant to 22 U.S.C. 263a, is hereby designated as a public international organization entitled to enjoy the privileges, exemptions and immunities conferred by the International Organizations Immunities Act; except those provided by Section 2(c), the portions of Section 2(d) and Section 3 relating to customs duties and federal internal-revenue importation taxes, Section 4, Section 5, and Section 6 of that Act. This designation is not intended to abridge in any respect the privileges, exemptions or immunities which such organization may have acquired or may acquire by international agreement or by Congressional action." Executive Order 12425 of June 16, 1983, International Criminal Police Organizations, *Federal Register*, vol. 48, 1983.

[28] For the text of the Annex see: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume I, Final documents (UN Doc. A/CONF.183/10), pp. 65-79.

[29] For a list of participants see: Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Rome, 7 to 24 June 1995, Acts and Proceedings, Presidenza del Consiglio dei Ministri, Dipartimento per l'informazione e l'editoria, Rome, 1996, pp. 48-65

The capacity to *bring a claim* before international judicial bodies is another right that international organisms have achieved in the international legal order.[30] Namely, having become holders of rights and duties under international law, international organisms have found themselves in a situation where they have to protect their acquired subjective rights. Given that these are rights acquired at the international level, their effective protection is only possible at the international level. Therefore, international organisms were forced to seek protection of their rights before international judicial bodies (judicial or arbitral).

Despite the fact that the statutes of some international judicial bodies do not provide capacity to *bring a claim* for international organisms (e.g. the Statute of the International Court of Justice), they, including INTERPOL, have achieved capacity to *bring a claim* before several other international judicial bodies. The Statute of the oldest administrative court - International Labour Organization Administrative Tribunal (ILOAT) thus allows international organisms that meet the requirements of the Statute to submit to the jurisdiction of the ILOAT.[31] Consequently, INTERPOL submitted to the jurisdiction of the ILOAT. [32]

In addition, there are frequent cases where international organisms subject their disputes through treaties to *ad hoc* international arbitral tribunals or permanent international arbitral tribunals. Thus, for example, Article 24 (1) of the Agreement between INTERPOL and France regarding INTERPOL's headquarters in France provides for submission of disputes to the Permanent Court of Arbitration in the Hague.[33]

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[30] In the international legal literature, in addition to the term *ius standi in iudicio*, the term *locus standi* is also used for "the capacity to bring a claim" (Boczek, 2005: 74; Brownlie, 2008: 685).

[31]Article II (5) of the ILOAT Statute states: "The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body."
Annex to the ILOAT Statute states: "To be entitled to recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization in accordance with paragraph 5 of article II of its Statute, an international organization must either be intergovernmental in character, or fulfil the following conditions:

a) it shall be clearly international in character, having regard to its membership, structure and scope of activity;

b) it shall not be required to apply any national law in its relations with its officials, and shall enjoy immunity from legal process as evidenced by a headquarters agreement concluded with the host country; and

c**)** it shall be endowed with functions of a permanent nature at the international level and offer, in the opinion of the Governing Body, sufficient guarantees as to its institutional capacity to carry out such functions as well as guarantees of compliance with the Tribunal's judgments." For the text of the Statute with the Annex see: https://www.ilo.org/tribunal/about-us/WCMS_249194/lang--en/index.htm (accessed 20 September 2021)

[32] For a list of international organisms that have recognized ILOAT's jurisdiction see: https://www.ilo.org/tribunal/membership/lang--en/index.htm htm (accessed 20 September 2021)

[33]Article 24 (1) of the Agreement between INTERPOL and France states: "Unless the Parties in the dispute decide otherwise, any dispute between the Organization and a private party shall be settled in accordance with the Optional Rules for Arbitration between International Organizations and Private Parties of the Permanent Court of Arbitration by a tribunal composed either of one or of three members appointed by the Secretary General of the Permanent Court of Arbitration. Either party may however request the Secretary General of the Permanent Court of Arbitration to establish such a tribunal immediately to examine a request for provisional measures to ensure that its rights are protected."

Participation in the creation of international law for many authors, participation in creation of international law is one of the most important elements of international legal personality (Degan, 2011: 205; Mosler, 2010: 711; Portman, 2010: 8). However, as with most subjective rights in the international legal order, this right has long been reserved exclusively for states. It was the appearance of international organisms on the international stage, among other things, that resulted in the intensification of the creation of international law. Namely, the creation of international law in many international organisms is one of their main functions. Therefore, the mentioned capacity of international organisms is one of the most developed elements of their *capacitas agendi* in the international law. A look at international practice reveals that international organisms participate in many ways in the creation of international law.[34] However, their participation in the creation of international law was achieved primarily through two main ways of creating international legal norms - treaties and international customs.

INTERPOL has thus achieved its participation in the creation of international law directly by concluding treaties (e.g. headquarters agreements) and indirectly through states, i.e. by participating in international conferences aimed at the adoption of conventions (e.g. Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects). Furthermore, INTERPOL has contributed to the emergence of the rules of customary international law through both elements necessary for their emergence - general practice and *opinio iuris*. Moreover, given that soft law rules can become part of customary international law, it can be noticed that certain resolutions of the INTERPOL General Assembly, such as the 2003 Rules on the Processing of Information for International Police Cooperation,[35] or the 2011 Rules on the Processing of Data,[36] contain soft law (Schöndorf-Haubold, 2008: 1733).

Finally, in addition to business capacity, INTERPOL has achieved another constitutive element of legal capacity - delictual capacity. In international law delictual capacity implies the capability of a subject of international law to violate an international legal obligation, i.e. to commit an internationally wrongful act (*fait internationalement illicite*) and thus lead to its own international legal responsibility (liability).[37] Namely, the consequence (actually the cause) of the international legal personality of international organisms is the possession of rights and obligations under international law. Possession of the mentioned obligations under international law has as a necessary consequence the international legal responsibility of international organizations, considering that every legal norm in international law, including the one that imposes a certain obligation, can theoretically be violated.[38]

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[34] Brownlie (2008: 691-693) points out seven ways in which international organizations participate in the creation of international law: a) forums for state practice; b) prescriptive resolutions; c) channels for expert opinion; d) decisions of organs with judicial functions; e) the practice of political organs; f) external practice of organizations and g) internal law-making.

[35] See: Rezolucija AG-2003-RES-04.

[36] See: Rezolucija AG-2011-RES-07.

[37] In the international legal literature, the terms "responsibility" and "liability" are used interchangeably (Ryngaert, Buchanan, 2011: 133-134). Some writers such as Schermers and Blocker (2003: 1005), while acknowledging that there is no general agreement regarding the use of the terms "responsibility" and "liability", use the term "responsibility" for acts involving a violation of international law, while using the term "liability" in a broader sense, including acts that are not unlawful but still cause harm.

[38] Shaw (2014: 950) points out, "Responsibility is a necessary consequence of international personality and the resulting possession of international rights and duties."; similar to Bowett (2009: 518): "Liability is thus generally presented as the logical corollary of the powers and rights conferred upon international organizations."

4. CONCLUSION

Right at the beginning of the search for the answer to the question of the international legal personality of INTERPOL, we encountered the eternal question: who is the subject of international law, i.e. who is the international legal person? Every attempt to answer the mentioned question, including ours which is just a drop in the ocean of similar attempts, only confirms that the concept of international legal personality penetrates into the very heart of international law where subjects of international law represent the starting point, but also the final destination of that same law. In that circular process that has been going on for centuries, members of the international community, guided by common needs and interests, have created from certain entities subjects of international law different in their nature and extent of their rights. The international legal doctrine can only state this dynamism of international relations and try to determine the concept of international legal personality, based on certain entities endowed by international law with rights and duties. Consequently, from the existing definitions of international legal personality, we have singled out those essential elements of that personality around which there is a general agreement in international legal doctrine. Understanding the concept of international legal personality is precondition for detection of the subjectivity of certain entities in the international legal order - in our case INTERPOL.

There is no doubt that INTERPOL has become the holder of certain rights and duties under international law - e.g. it has achieved the capacity to conclude treaties, the active right of legation, certain elements of the right to participate in international conferences, the capacity to *bring a claim* before international judicial bodies, participation in the creation of international law (directly and indirectly) and finally delictual capacity. Having achieved both constituent elements of the international legal personality - the capacity of possessing rights and duties under international law (*capacitas iuridica*) and the capacity of an entity to produce legal consequences on its own (*capacitas agendi*) - INTERPOL has become an international person, i.e. it has acquired the status of a subject of international law. The international legal personality of INTERPOL is thus exclusively a matter of fact, while for international legal doctrine only remains to validate that fact. At the same time, the concept of international legal personality plays a traditional role as an instrument for the "legalization" of the already existing INTERPOL's factual status as a subject of international law. On the other hand, the extent of INTERPOL's rights and duties under international law still depends exclusively on the dynamics of international relations in which INTERPOL itself participates, i.e. the needs and interests of the international community for the legal regulation of those relations.

However, it is obvious that INTERPOL is today only partially incorporated into the international legal order. The task of the international legal doctrine is to, taking into account the current and future needs of the international community, propose the best solutions that will fully regulate the position of INTERPOL, as well as other similar entities, in the international legal order. It is to be hoped that the international community will take into account at least a part of those solutions and incorporate them into the international legal order. Only in that way international law will achieve the goal for which it was created - the regulation of relations between members of the international community.

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Sažetak

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INTEPROL kao subjekt međunarodnog prava

Jedna od glavnih karakteristika suvremenoga međunarodnog prava jest proliferacija adresata njegovih normi - subjekata međunarodnog prava (međunarodnopravnih osoba). Usprkos tome, pojedini nosioci prava i dužnosti po međunarodnom pravu, poput INTERPOL-a, i dalje čekaju na priznanje svojeg faktičkog statusa subjekta međunarodnog prava. Uzrok je tome činjenica da je koncept međunarodne pravne osobnosti još uvijek instrument međunarodnopravne doktrine za priznavanje ili nepriznavanje statusa subjekta međunarodnog prava određenim entitetima. U skladu s tim, rad prvo razmatra koncept međunarodnopravne osobnosti. Na temelju toga u radu se analizira faktički položaj INTERPOL-a u međunarodnopravnom poretku i posljedično daje potvrdan odgovor na pitanje njegova subjektiviteta u međunarodnome pravu.

Ključne riječi: INTERPOL, subjekt međunarodnog prava, koncept međunarodnopravne osobnosti.