

# The issue of legal personality within the modern international legal system

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Within the contemporary international legal system, there are two main areas of uncertainty in determining the range of legal persons or subjects. Firstly, although States remain the main type of legal person, it is unclear whether an entity qualifies as a State for the purposes of international law. Secondly, during the 20<sup>th</sup> century other entities have received legal personality, giving rise to greater uncertainty as to what degree of personality such non-State entities possess. This essay will investigate the issue of statehood in the modern international legal system, followed by an examination of how and to what degree non-State entities possess legal personality.

International legal personality gives an entity legal rights and duties which can be enforced before an international or municipal tribunal.<sup>1</sup> The classical era of international law<sup>2</sup> was dominated by the positivist view that States were the exclusive legitimate legal persons on the international plane.<sup>3</sup> This system is said to date back to the Treaty of Westphalia in 1648 and the shift to a system of sovereign states regulating their relations with each other.<sup>4</sup>

States, as the principal legal person of international law, have original personality as an

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<sup>1</sup> O'Brien, J (2001) *International Law* (Cavendish Publishing Limited), p.138.

<sup>2</sup> Normally the classical period is considered by writers to be the period prior to 1914; O'Brien, J (2001) *International Law* (Cavendish Publishing Limited), p. 137.

<sup>3</sup> O'Brien, J (2001) *International Law* (Cavendish Publishing Limited), p. 137.

<sup>4</sup> The Treaty of Westphalia of 1648 brought the Thirty Years' War to an end. It is broadly accepted that the Treaty defined the principles of state sovereignty, exclusive territoriality, legal equality, non-intervention, standing diplomacy and international law. Thus, establishing the early modern system of states; Teschke, B, 'Theorizing the Westphalian System of States: International Relations from Absolutism to Capitalism' (2002) *European Journal of International Relations*, Vol. 8, p. 6; Bordoni, C, A Crisis of the State? The End of the Post-Westphalian Model (12/02/13), *Social Europe Journal*, accessed on 26/11/13 through: <http://www.social-europe.eu/2013/02/a-crisis-of-the-state-the-end-of-post-westphalian-model/>

inherent attribute of statehood. This means that they have absolute competence and total rights and duties recognised by international law. However, what is considered to be a state is not as clear.

The essential criteria of statehood, and the general starting point, are laid out in Article 1 of the Montevideo Convention.<sup>5</sup> It provides that: *‘the state as a person of international law should possess the following qualifications: (a) a permanent population<sup>6</sup>; (b) a defined territory<sup>7</sup>; (c) government<sup>8</sup>; and (d) a capacity to enter into relations with other states.’*<sup>9</sup> The fourth point requires that the ‘state’ must have legal independence, implying the need for territorial sovereignty.<sup>10</sup> However, other criteria based on pragmatic and political considerations are also taken into account. Thus the Montevideo criteria are not sufficient on their own to establish statehood, making the issue of statehood far more complex.

One of the most important ways in which principle can give way to pragmatism is through recognition. This means that a State recognises the other entity as entitled to exercise all

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<sup>5</sup> Montevideo Convention on Rights and Duties of States 1933.

<sup>6</sup> The territory must contain a population regarded as that territory’s inhabitants.

<sup>7</sup> A defined territory means that the entity must have a physical existence in a geographical area. This does not mean that a precise border is needed without any opposing disputes. Thus, Israel and Palestine are considered to be states even though Israel refuses to limit their claim on the territory of Palestine.

<sup>8</sup> It must be shown that the territory has an effective government. This means a government who is independent from any other authority, controls the affairs of the state and ensures social and legal order. However, if a state ceases to have an effective government this does not automatically remove that state of its statehood. For example, Syria remains a State even though there is no effective government over the entire population and territory due to civil war; Dixon, M (2010) “Textbook on International Law” (7<sup>th</sup> ed.)(Oxford University Press), p. 120.

<sup>9</sup> Whether a state exercises their legal capacity to enter into relations with other states is not relevant to whether they qualify as a state. An entity will be regarded as a state even though it is under direct or indirect control of another state; Dixon, M (2010) “Textbook on International Law” (7<sup>th</sup> ed.)(Oxford University Press), p. 120.

<sup>10</sup> Thus, Hong Kong will not be considered a State under international law, even though it has a territory, population and government, because it is under the lawful sovereign authority of China.

the capacities of statehood. There are two theories in relation to the consequence of recognition. One is the declarative theory which sees recognition as affirmation of statehood when the legal criteria have already been fulfilled.<sup>11</sup> This view was codified in Article 3 of the Montevideo Convention which states that: *'The political existence of the state is independent of recognition by the other states.'* Thus, an entity may have a political existence without being recognised as a sovereign authority. The constitutive theory on the other hand, defines a state as a subject of international law only if it is recognised as a sovereign state.<sup>12</sup> In reality, there is reason to believe that this theory is the strongest theory as it is next to impossible for a state to survive without recognition.<sup>13</sup> This is owing to the fact that non-recognition of a potential "State" prevents the entity from exercising a capacity to enter into legal relations with other states since they decline to do so. One way in which this can occur is if the entity has attained legal independence unlawfully. For instance, The Turkish Federated State of Northern Cyprus has been denied statehood by the Security Council<sup>14</sup> due to its independence flowing from the illegal invasion of Northern Cyprus by Turkish troops in 1974.<sup>15</sup> Even though the entity has a permanent population, defined territory and an effective government, the illegal attainment of factual independence prevents a legal capacity from arising. Thus it becomes clear that the Montevideo criteria are not sufficient on its own to establish statehood. However, the

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<sup>11</sup> Recognition is not what creates the State; Wallace, R, Martin-Ortega, O (2013) "International Law" (7<sup>th</sup> ed.) (Sweet & Maxwell ), p.76.

<sup>12</sup> Klabbbers, J (2013) *International Law* (Cambridge University Press), p. 73.

<sup>13</sup> An example of this is Biafra, who proclaimed independence from Nigeria in 1967. However, it was not collectively recognized by other States and became a part of Nigeria again in 1970; Klabbbers, J (2013) *International Law* (Cambridge University Press), p. 73.

<sup>14</sup> SC Res 541 (1983); SC Res 550 (1984).

<sup>15</sup> The occupation and acquisition of territory through the use of force is contrary to Article 2 (4) of the UN Charter which states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

significance of non-recognition is disputed, making the issue as to whether a state exists or not, highly contentious.

Since the inception of the United Nations (UN) and the end of the Second World War, the scope of international legal personality has expanded to 'non-State entities.' Since the *Reparations for Injuries* case<sup>16</sup>, it has been well established that non-state entities may possess international legal personality, separate from that of its members. The International Court of Justice (ICJ) found that the UN had a derived legal personality implied by the UN Charter and the organisation's given functions, and not merely because it was recognised by Member States alone. Legal personality must have been intended; otherwise the UN would not be able to carry out its purposes as intended by its founding members. This point was confirmed in the *Advisory Opinion concerning the Legality of the Use of Nuclear Weapons*<sup>17</sup> where the ICJ stressed that the legal competence of non-State entities was governed by the 'principle of speciality', meaning that the States can award them with powers limited to their function.<sup>18</sup> Hence, whilst states have original personality allowing them a general competence and equal capacity under international law, non-state entities only have personality to the degree necessary for the achievement of their roles within the international legal system. Thus, the approach taken in relation to legal personality of non-State entities is functional rather than territorial.

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<sup>16</sup>*Reparations for Injuries Suffered in the Service of the United Nations* I.C.J. Rep. 1949. The case concerned whether the UN could bring a claim for reparations for injuries suffered by its agents while in service. In order to reach a decision it had to be established whether the UN had legal personality within the international legal system.

<sup>17</sup>*Advisory Opinion concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* I.C.J. Rep. 1996.

<sup>18</sup>Hence, the ICJ found that The World Health Organisation, as an international organisation under the United Nations, and specialized in the area of international public 'health', would not be awarded the competences of other parts of the United Nations system.

Whether an Intergovernmental Organisation (IGOs) has international legal personality, and to what degree, seems to be relatively clear. These organisations are set up with the task of realising a common goal. In order to exercise their function they are awarded certain autonomy by the Member States, often expressly provided for in the relevant Treaty.<sup>19</sup> For instance, in Article 47 of the Treaty on European Union it is stated that: '*The (European) Union shall have legal personality.*' What degree of legal personality that they possess, however, is dependent upon the states which are affected.

In relation to other types of non-State entities, matters are not as clear. These non-state actors extend their activities trans-nationally but have their legal origin and basis within national legal systems. The Red Cross in particular, has a hybrid nature. The organisation is formed under Swiss law but has the capacity to enter into relations with states and has been given specific competences through the 1949 Geneva Conventions.<sup>20</sup> However, most non-State entities do not have their competences expressly laid out in a treaty or constituent document. The Holy See is such an entity, without defined aims and objectives,<sup>21</sup> and its functions are exclusively religious. It has derived legal personality akin to that of statehood<sup>22</sup>

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<sup>19</sup> In rare cases personality may only be implied (such as in the case of *Reparations for Injuries Suffered in the Service of the United Nations* I.C.J. Rep. 1949) or expressly denied (i.e. Art.4 of the Statute of the International Hydrographic Organisation); Wallace, R, Martin-Ortega, O (2013) "International Law" (7<sup>th</sup> ed.) (Sweet & Maxwell ), p. 89.

<sup>20</sup> Under Article 9 and 10 of the Geneva Convention Relative to the Treatment of Prisoners of War the Red Cross has been given certain tasks in relation to the protection of prisoners of war; Klabbers, J (2013) *International Law* (Cambridge University Press), p. 88.

<sup>21</sup> Maluwa, T, 'the Holy See and the Concept of International Legal Personality: Some Reflections', (1986) *The Comparative and International Law Journal of Southern Africa*, Vol. 26, p. 23.

<sup>22</sup> The Holy See enjoys sovereign privileges and immunities, the ability of recognizing new states and governments, participation in international conferences, membership in international organisations and a treaty-making capacity; Maluwa p. 23-24.

because of States' willingness to enter into international relations with it.<sup>23</sup> Thus, it has a legal capacity due to State recognition of it as having competences on the international legal arena, even though it is under the territorial sovereign authority of the Vatican City State. Hence, whether a non-State entity has legal personality, and to what degree, is highly ambiguous. This is because of the dependence on recognition by States and the fact that they may possess this capacity regardless of being under the lawful sovereign authority of a State.

The functional approach and 'principle of speciality' further confuses the issue of legal personality of non-state entities, as each has a different degree of legal competence. Though it would create greater certainty, it does not seem to be a workable option that non-State entities should be subject to a general legal regime.<sup>24</sup> This argument is based on their invariable nature specific to their purpose. Therefore a generalisation cannot be made and requires each to be examined separately. This shows a need for an alternative approach to international legal personality that reflects the modern changes in the international community.<sup>25</sup> One argument is that international law needs to depart from the Westphalian model and rather ask which political actors shape the legal processes and how they do so in order to establish whether they are subjects of international law.<sup>26</sup> At present however, the approach to legal personality is clearly not satisfactorily transparent.

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<sup>23</sup> Wallace, R, Martin-Ortega, O (2013) "International Law" (7<sup>th</sup> ed.) (Sweet & Maxwell), p 99.

<sup>24</sup> Hlavkova, M: *Meeting summary: Legal responsibility of International organisations in International Law* (10/1-/11, Law Discussion Group at Chatham), p. 5.

<sup>25</sup> C Harding and C L Lim: *Renegotiation Westphalia* (1999, Martinus Nijhoff Publishers) p. 10.

<sup>26</sup> *Ibid.*

To conclude, there has been a clear move away from the Westphalian system of States and the classical era as States are no longer the exclusive subjects of international law.

Nonetheless, they remain the main type of legal persons due to their absolute competence as an inherent attribute of statehood and power of recognition of other subjects of international law. Whether an entity qualifies as a state is ambiguous due to the lack of definite formal criteria that is not confused by political and pragmatic considerations. This matter is further disordered by the uncertainty of the significance of these considerations.

The issue of international legal personality has been further complicated through the extension of legal personality to non-State entities. Their legal capacity is subject to a functional limitation, dependent upon the recognition by states making it difficult to establish whether, and to what degree, they have legal personality unless it is expressly provided for in a treaty or constituent document.

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