



The Law of the International Community: Subjects and Sources of International Law

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2 – Subjects: States

Subjects of the international legal order

- States – **basic** subjects
- International inter-governmental organizations – **functional** subjects

How do we know that these are the subjects of the international legal order?

Is there an international rule which sets the pre-requisites to be a subject?

International legal personality in domestic law systems

Personality is a central concept in **domestic legal systems**, where the characteristics of legal subjects are determined by **specific rules** within the system and it is possible to have a **distinction between (general) legal capacity and the legal capacity to act** (example: limited capacity to act for minors and interdicted legal persons).

See ICJ, *Reparation for Injuries* Opinion (1949):

– question: has the UN, as an organization, the capacity to bring an international claim against a State where an agent of the UN suffered injuries in circumstances involving the responsibility of that State? (background to the request for the advisory opinion was the killing of the UN's chief negotiator for Palestine, Count Bernadotte, reparations were being sought against Israel, not at that time a member of the UN)

The answer was that “The Organization is an international person”, the Court explained that this meant that: “It is a subject of international law and **capable** of possessing international rights and duties” and that “it has the **capacity** to maintain its rights by bringing international claims”.

Does here the ICJ refer to a specific international law rule to say that the UN is a subject of international law?

In order to assess subjectivity, in international law *ex facto oritur jus*

As Ian Brownlie points out in his *Principles of International Law*, the **definition** of a subject of international law as “an entity capable of possessing international rights and duties and having capacity to maintain its rights by bringing international claims” is **circular**. International law recognizes the capacity to act at the international level of an entity if that entity is **concretely** already capable of acting at the international level.

As Jan Klabbers concludes, in his *Introduction to International Institutional Law*, “**Personality in international law**, like ‘subjectivity’, is but a **descriptive notion**: useful to describe a state of affairs, but **normatively empty**, as neither rights nor obligations flow automatically from a grant of personality. Maybe we should then liberate ourselves from the constraints of talking about subjectivity and personality and focus instead on **capacity**.”

But who measures concrete capacity? “Subjects as prisoners of doctrine?” (Andrew Clapham, 2010, *The quest for the implementation of international law*).

Not doctrine, but **effectivity**. The principle of effectivity is central in international law.

The international legal order does not consider legal personality apart from the capacity to act. From the capacity to act legal personality – subjectivity – can be inferred.

Necessary characteristics of States as subjects of international law

As for international organizations, there is no international rule about the creation of States. It is possible, though, to infer from the body of customary international rules granting basic rights and duties to States that **these rules presuppose certain general characteristics** in the entities to which they address themselves.

Two necessary elements:

- a central structure capable of exercising effective control over a human community living in a given territory;

prerequisite: **effectivity** (governments in exile lack effectivity)

- the bodies endowed with supreme authority must be quite distinct from and independent of any other State (endowed with an original – not derivative – legal order);

prerequisite: **independence** (federated states and puppet governments lack independence)

Both prerequisites cannot be expected to be absolute

Other necessary prerequisites? The significance of recognition

These are not very specific criteria. It is difficult to ascertain in practice whether a State fulfils the requisite conditions. A major factor proves of great help: the **attitude of existing States to recognize** or not to recognize the new entities (or also of international organizations to admit them to membership or not).

The act of **recognition, though, has no legal effect on the international personality** of the entity: it does not confer rights, nor does it impose obligations on it, just like the lack of recognition does not necessarily imply lack of subjectivity. **It is a political act, meaning that the State is willing to initiate international interaction with the new entity.**

Subjectivity  general legal status

Recognition  unilateral political act of each State (fragmentation)

Other necessary prerequisites?

- Respect of the fundamental values of the present world community **is not** a prerequisite for State subjectivity

In fact, only subjects are responsible for violations of such fundamental values, expressed by international law rules

The State-organization is the subject of international law

- Effectivity and independence are characteristics of the organizational structure of the State, exerting governmental powers, which is the international subject (not of the community of individual subjects governed by the State-organization)
- Each and every component (central or local) of the organizational structure of the State participates of its international legal personality their action, internationally, is attributed to the State

See ICJ, *La Grand Case* (2001):

in international law, the **acts and omissions of internal organs are imputed to the State** of which they form part, because it is the State as a subject of international law that is the addressee of the obligations. Thus, the Court held the United States responsible for the non compliance of the State of Arizona with the order indicating provisional measures.

Between effectivity and recognition: the case of Taiwan and «the two Chinas»

Taiwan has all the hallmarks of a State, but China does not recognize it and claims that it is part of its territory and subject to its sovereignty.

This in several cases prevents Taiwan from entertaining intercourse also with other States and from participating as a member to the works of some international organizations (see the recent development of procedural solutions to increase its direct participation to ICAO works)

Palestine at the UN and at UNESCO: two different solutions

- Non-member observer State at the UN since November 2012 (before, observer «entity»)
- Full member State at UNESCO since October 2011

Different level of effectivity in the two parts of the territory (West Bank and the Gaza Strip)

Lacking independence: the case of the Turkish Republic of Northern Cyprus

- Proclaimed on 15 November 1983 and recognized by Turkey only
- The UN SC, the Commonwealth Heads of Government and the Committee of Ministers of the Council of Europe considered the declaration of independence «legally invalid»
- The European Court of Human Rights (1995 and 1996, *Loizidou* judgments) said that its acts fall within the jurisdiction of – and are attributable to – Turkey as an (unlawful) occupier (**puppet government**)