

WEEK 2: STATUS AND POWERS OF INTERNATIONAL ORGANISATIONS

RECAP:

- Functionalism explains that **IOs as agents of States who have assigned it specific functions to fulfil** (often to achieve shared/communal interests)
- Based on historical analysis, Sinclair raises questions on whether IOs are imperial as they shape statehood and decolonised States based on a Western liberal world view.

NOTE: Functionalism helps explain why States give IOs certain status and powers (i.e. to fulfil their functions); however, functionalism is unable to fully explain the current powers of IOs

WHAT IS MEANT BY LEGAL PERSONALITY?

Legal personality = **capability of independently bearing rights and obligations under IL**

Legal personality is relevant in practice:

1. Allows actors to enter into treaties
2. Suggests that actors can have rights (e.g., privileges and immunities)
3. Means that actors can be liable for breaching international obligations

NOTE Legal personality is not the same as subjecthood

- **Actor being a subject (States and IOs)-** IL applies to those entities (passive way of having the law apply to you)
- **Lacking legal personality-** broader than subjecthood- being engaged and active in the legal system (can create international obligations and exert certain rights, hold others accountable for breaches of IL etc.)
- Individuals are subjects of IL but lack legal personality.

CAN IOs HAVE LEGAL PERSONALITY?

- Historically, only States can have legal personality under IL
- But there is a shift away from this state-centric view and IOs can obtain legal personality:
 1. Under domestic law
 2. Under international law

NOTE: That IOs can obtain legal personality does not mean that they are legally the same or have equal rights and obligations. Nor does it mean that IOs have the same rights as States. For example, IOs cannot be party in a contentious case at the ICJ and not all IOs can enter into treaties.

CONSIDER: Should an IO have legal personality- generally yes.

- To enable IOs to fulfil those functions, they need legal personality

- IOs can obtain legal personality under domestic law
- IOs can obtain legal personality under IL

IO LEGAL PERSONALITY UNDER DOMESTIC LAW

- Domestic law of each state determines who possesses legal personality
- Each state can determine whether to recognise the legal personality of each IO
- States are free to give IOs personality under domestic law irrespective of its status under IL
- Legal personality covers the capacity to enter into contracts, acquire property, institute legal proceedings and perform other legal acts necessary for the fulfilment of IOs functions
- IO can function within the legal system within the one State which recognises their legal personality
- Cannot sign treaties; act within the international legal system
- Personality under domestic law only refers to what the IO does within that state under domestic law
- Modern law of IOs: member States have an obligation to give IO legal personality under domestic law
- UN Charter requires members to recognise UN as a legal person **(Article 104 UN Charter)**

TWO ISSUES IN PRACTICE

1. **UNCERTAIN WHETHER CERTAIN IOs HAVE LEGAL PERSONALITY IN NON-MEMBER STATES**
2. **SOME NGOs POSSESS LEGAL RIGHTS THAT RESEMBLE THE LEGAL PERSONALITY STATUS**

UNCERTAIN WHETHER CERTAIN IOs HAVE LEGAL PERSONALITY IN NON-MEMBER STATES

- Uncertain whether IO should have legal personality in non-member states
- EU has legal personality in all EU member states (can function as a legal person in all those jurisdictions)
- When EU goes abroad, they are not necessarily recognised as a legal person outside of Europe
- In principle, (constituent) treaties do not create obligations for third States
- Arab Monetary Fund case: legal personality is recognised as required by comity

SOME NGOs POSSESS LEGAL RIGHTS THAT RESEMBLE THE LEGAL PERSONALITY STATUS

- For example, IFRC (Red Cross) is not created by States but has agreements with several States regarding its legal personality
- This includes basic legal acts (e.g., contracts, etc.) as well as immunities and privileges

IO LEGAL PERSONALITY UNDER INTERNATIONAL LAW

- **IO can act in the international legal system; have disputes with states; have certain international rights**

Whether IOs can possess legal personality is not controversial, but how they can obtain legal personality is contested

Three doctrinal approaches:

1. **Will theory**
2. **Objective personality theory**
3. **Presumptive personality approach**

WILL THEORY

- IOs have legal personality if States wanted to bestow this upon their creation
- Therefore, legal personality must be the 'will' of States
- **Will should be deduced from the intention of States (usually expressed in constituent treaty)**

Limits of the will theory:

- Most constituent treaties do not explicitly create legal personality (e.g., UN Charter)- **Exception - treaty on the EU explicitly states that EU has legal personality**
- Risk of creating a 'paper' reality – how States act in practice is more important/relevant
- Uncertainty around recognition of legal personality by non-member States

POSITIVISM: IL is only created by the consent of States

CONNECTION BETWEEN WILL THEORY AND POSITIVISM

- If IL is created by the consent of states (positivism), so shall legal personality be established by the consent of the states (will theory)

LIMITATIONS OF WILL THEORY:

- Constituent treaties do not expressly provide for the authority of IOs
- Risk of creating an empty concept/merely a paper reality- if you establish legal authority as an intention, consider whether states will actually recognise legal personality and engage with IOs

NOTE: If IOs are confined to the States' will, they are confined to that. If we accept that some IOs have limited legal personality, this undermines progress- stops cooperation etc.

OBJECTIVE PERSONALITY THEORY

- Legal personality exists simply because it is an IO; for an IO to have a role, it needs to have legal personality
- Legal personality of IOs is an objective fact, irrespective of States' 'will'
- Legal personality flows from 'organizationhood', analogous to legal personality of States
- Critical factor: What is an IO? What is organisationhood? IO should have a 'distinct will' and not be a mouthpiece for states but should express its own views
- If an IO does have a distinct will, it should also have legal personality

NOTE:

- Organisationhood is an unclear/ambiguous concept
- Implies that legal personality may become jus cogens (mandatory law)
- Circular logic- How can an IO have distinct will without legal personality?

STATES OBJECT TO THIS THEORY- It ignores positivism to a degree- outlines that consent is not required to define legal personality

PRESUMPTIVE PERSONALITY APPROACH

- **Legal personality of IOs should be presumed unless and until the opposite is shown**
- The intention of States is not leading
- The activities of the IO may be indicative of its legal personality

LIMITATIONS

- Pragmatic compromise rather than a doctrinal theory
- Uncertain how the presumption can be rebutted (what is the opposite of legal personality?)

LEGAL PERSONALITY AT THE ICJ – ACCEPTED THEORY OF LEGAL PERSONALITY IN PRACTICE

Advisory opinion- non-binding legal opinion of the Court; most cases the cases are brought by the UN General Assembly to ask clarification on a legal question

NOTE: Advisory opinion is non-binding and cannot be a precedent

Reparations for Injuries Advisory Opinion	
FACTS	- In 1948, Count Folke Bernadotte—who negotiated release of more than 30,000 people from German concentration camps towards the end of WWII—was assassinated in Israel - Bernadotte was UN Ambassador sent to mediate in the Israeli-Palestine conflict - UN wanted to seek reparations from those responsible for his assassination, but it was unclear if UN General Assembly had the authority to do so
ISSUE	- UNGA referred question to ICJ: 'has the United Nations, as an Organization, the capacity to bring an international claim (...) in respect of the damage caused (...) (b) to the victim or to persons entitled through him?'

	- UNGA essentially asks whether the UN has legal personality to make a claim for reparations
HELD	- UN Charter is silent on UN legal personality - UN Charter does not explicitly confer legal personality upon UN - ICJ: States are not the only subjects of international law (i.e., legal personality is not reserved to States alone) - ICJ: UN is designed to be a general IO and must have legal personality to fulfil its functions - ICJ: The UN's legal personality is, however, not equal to that of States ICJ ADOPTED THE WILL THEORY / PRESUMPTIVE APPROACH (Not entirely clear) - ICJ does not object objective personality theory IMPLICATIONS OF THIS OPINION? - Establishes the legal personality of the UN; UN is now recognised to have legal personality - UN created a tribunal to deal with internal disputes (following this case and the confirmation of the UN's legal personality) 'In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.' (p. 9)

POWERS OF IOs

EXAMPLES

- Rulemaking and standard setting
- Enforcement and oversight
- Dispute settlement
- Information gathering and dissemination
- Executing policies and programs in practice

POWERS OF IOs CHANGE OVER TIME: EXAMPLES

