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## International Legal Personality

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# International Legal Personality

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The concept of international legal personality is parasitic upon the concept of real human personality, which is to say, upon the actual existence of sentient human beings.

“Personality” (in its strictest sense) signifies the separate existence of individual human characters and, indeed, self-consciousness in the possession of mental and moral qualities. The attribution of “legal” personality is a metaphor by which non-human; non-conscious entities (usually collectives) are described in the discourse of law to have mental and moral consciousness. “International legal personality” applies to those entities, which international law regards as an independent personality. States are the paradigmatic example of this. Modern international law developed primarily by viewing states as individuals, and elaborating the natural law which ought to apply between them.<sup>1</sup>

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<sup>1</sup> See e.g., Emmerich de Vattel, *Le Droit des Gens ou Principes de la Loi*

The metaphor of legal personality has always been, and remains, the foundation the international legal system. Hugo Grotius wrote of a great society of states, maintained for the mutual advantage of all.<sup>2</sup> Christian Wolff described nations as *personae morales*,<sup>3</sup> associated in a great *civitas maxima*, just as individual persons unite into their own particular politics.<sup>4</sup> Vattel understood nations or states to be moral persons, with their own will and understanding, as well as rights and obligations.<sup>5</sup> “Because nations are made up of men who are by nature free and independent... their nations or sovereign states must in turn be regarded as free persons living together in a state of nature.”<sup>6</sup> The moral authority of the state derives from the

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*Naturelle, Appliqués à la conduite et aux affaires des Nations et des Souverains.* London. 1758.

<sup>2</sup> Hugo Grotius, *De Jure Belli ac Pacis Libri Tres, in quibus ius Naturae et Gentium item Juris Publicis praecipua explicantur* Revised edition. Amsterdam. Blaeuius. 1646. Prolegomena: “Sed sicut cuiusque civitatis respiciunt, ita inter civitates aut omnes aut plerasque ex consensus jura quaedam nasci potuerunt, et nata apparet, quae utilitatem respicerent non coetuum singulorum, sed magnae illius universitatis.”

<sup>3</sup> Christian Wolff, *Jus Gentium methodo scientifica pertractatum*. Frankfurt and Leipzig. 1764. Praefatio.

<sup>4</sup> *Ibid.* “Cum gentes in civitatem ipsa natura coegerit, quemadmodum eidem convenienter in civitates particulares coierunt singuli.”

<sup>5</sup> Vattel, *Le Droit des Gens*, préliminaires §2.

<sup>6</sup> *Ibid.*, préliminaires §4 : “Les Nations étant composées d’hommes naturellement libres et independans ... les Nations, ou les Etats souverains, doivent être considérés comme autant de personnes libres, qui vivent entr’elles dans l’état de nature.”

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natural rights and freedom of the citizens it represents<sup>7</sup>. This justification of the power of states in international law, by derivation from the people that they represent, provides the primary basis for all treaty law (including the United Nation Charter, which presumes to speak on behalf of “We the peoples of the United Nations”).<sup>8</sup>

The strength of this rhetorical device depends upon perceiving that both law and states exist to serve the person, which is to say, real persons. The collective “people” evokes flesh and blood individuals possessed of hopes, fears, desires, needs, and a set of rights and duties protected by the legal system under which they live.<sup>9</sup> Legal persons, in any given legal system, necessarily include all the real persons subject to that system. Often, however, some classes of “fictive persons” (associations or groups of real persons) are given collective rights and duties by the governing legal regime.<sup>10</sup> Sometimes animate creatures or inanimate objects also enjoy a sort of anthropomorphic personality, as when rocks or dogs are put on trial for murder or given legal protection against cruelty and thoughtless

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<sup>7</sup> *Ibid.*, préliminaires § 5: “la Nation entière, dont la Volonté commune n’est que le résultat des volontés réunies des Citoyens.”

<sup>8</sup> *Charter of the United Nations* (1945), Preface.

<sup>9</sup> See M.N.S. Sellers, “The Nature and Purpose of Law,” *University of Baltimore Law Review* (2004).

<sup>10</sup> See e.g., M. Geldart, *Legal Personality*. Oxford. Clarendon Press. 1924.

exploitation.<sup>11</sup> International law confers legal personality on states, giving them rights and duties in much the same way that real persons enjoy rights against injuries and assaults, and duties not to commit them.<sup>12</sup>

The existence of states (as juristic or moral entities) should not be allowed to obscure the purposes of international law, which is for the common good and regulation of real persons<sup>13</sup>. States and other corporations act, if they act at all, through and upon real persons. German theorists sometimes speak disconcertingly, of the “collective will” (*Gesamtwille*) of a corporate body or the state.<sup>14</sup> No one can deny, however, the culpability of statesmen who violate international law, or the rights of those that they oppress in violating international protections.<sup>15</sup>

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<sup>11</sup> See e.g., N. Sellers, “Criminal Prosecution of Animals” in XXXV *The Shingle* 179 (1972).

<sup>12</sup> See e.g., Emmerich de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle, Appliqués à la conduite et aux affaires des Nations et des Souverains*. London. 1758. Preface, pp. v-xv, for the analogy between nations and persons. Vattel cites Christian Wolff for the idea that nations are “personnes morales” (p.xiv).

<sup>13</sup> Hugo Grotius, *De Jure Belli ac Pacis Libris Tres: in quibus ius Naturae et Gentium, item Juris Publici praecipua explicantur*. (Revised Edition.) Amsterdam. Blacvius. 1646. Prolegomena, p.4: “Haec vero, quam rudi modi iam expressimus, societatis custodia, humano intellectui conveniens, fons est ejus juris, quod proprie tali nomine appellantur.”

<sup>14</sup> Savigny is the primary author of this unfortunate tendency.

<sup>15</sup> Even Jean Bodin, the evangelist of state power, conceded the right of the people to throw off their oppressors. Bodin *Les six livres de la république*. Paris. 1583.

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Some legal systems limit the capacity in which certain persons, such as minors, may act. This does not diminish their personality, but only their ability to act independently from those who care for their interests.

The term “international law” was coined to emphasize the personality of states and the power of governments, to express the collective will of their subjects.<sup>16</sup> Henry Wheaton articulated this virtually universal nineteenth-century consensus when he described international law as “consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations.”<sup>17</sup> This passage describes *ius inter gentes* (law between nations), rather than *ius gentium* in the older sense,<sup>18</sup> and much of international law has come to reflect this statist way of looking at things. Human rights law, necessarily, retained a more direct concern for the real human persons.<sup>19</sup> The Charter of the United Nations still accepts

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<sup>16</sup> Jeremy Bentham, *Morals and Legislation*. London. 1823. II.256. See Percy E. Corbett. *The Growth of World Law*. Princeton. Princeton University Press. 1971. p.34, 177-178.

<sup>17</sup> Henry Wheaton, *Elements of International Law*, ed. R.H. Dana. Boston. Little Brown. 1866. I.14 [23] (p.20).

<sup>18</sup> Cf. Richard Zouche, *Juris et Judicii Feclialis, sive Juris inter Gentes*. London. 1650.

<sup>19</sup> See e.g., August Wilhelm Heffter, *Das europäische Völkerrecht der Gegenwart*. Berlin. 1844. See Wheaton I.10 [16] p.14. “This law is applied, not merely to regulate the mutual relations of states, but also of individuals, so far as concerns their respective rights and duties.”

states as its primary constituency,<sup>20</sup> while also recognizing the importance of international human rights and fundamental freedoms,<sup>21</sup> which members must promote and respect.<sup>22</sup>

The role of international legal personality (in conferring legitimacy upon the power of states in international affairs) has obscured the significance of personality, the purposes of international law, and the legitimacy of international institutions. It does this by focusing on the circumstances in which non-human entities can achieve juristic personality, rather than justifying the value of real human personality in international law. The most famous case on international law legal personality, *Reparation for Injuries*, concerns the right of non-state international organizations to raise claims for injuries before the International Court of Justice.<sup>23</sup> The International Court of Justice exists primarily to adjudicate disputes between states,<sup>24</sup> so it is not surprising that jurisprudence on personality tends to focus on the extent to which other legal persons resemble states in their ability to bring international claims. But this should not

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<sup>20</sup> *Charter of the United Nations*. (1945). Article 4.

<sup>21</sup> *Ibid.* Article I (2).

<sup>22</sup> *Ibid.* Articles 55 and 56.

<sup>23</sup> *Reparation for Injuries case, ICJ Reports* (1949), 179.

<sup>24</sup> *Statute of the International Court of Justice*, Article 34 (1): "Only states may be parties in cases before the Court."

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obscure the central element of legal personality, which concerns the rights and duties of real persons.

International legal personality differs from the artificial legal personality of other legal systems, not in the nature or in the identity of persons, but in the mechanisms through which their rights and duties can be vindicated. Thus, those who deny individual persons or particular organizations standing to vindicate their rights in international tribunals often phrase their objections in terms of legal personality; when the real issue is if the legal system did, or should, give a direct cause of action to a particular person before a particular court. As in old common law, a woman had legal rights and duties, but the power to vindicate them rested entirely in her husband; so, also, do persons and corporations have rights or duties under international law, which only their national government can vindicate in international tribunals.<sup>25</sup> This does not diminish individual legal personality, but rather the power to take legal action, in certain circumstances.

The confusion between personality and standing may lead to injustice, when the absence of standing is taken as the absence of enforceable

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<sup>25</sup> See e.g., *The Mavrommatis Palestine Concessions* Permanent Court of International Justice, 1924.

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rights. Personality concerns the possession of rights and duties. Standing concerns the vindication of rights and duties. One should not understand that the absence of standing implies the absence of rights or personality. As the *Mavrommatis* case clarifies, lacking the power to act in certain international tribunals does not negate underlying rights, which others may or may not raise in defense of one's interests. Standing is a question of systemic utility and representation. Personality is a question of identity and morality.

The international legal system is warranted (or not) by the justice and acuity with which it (1) recognizes, and (2) protects international rights and duties. The first consideration concerns legal personality; the second concerns standing. There is no question that individual human beings, as well as many sorts of artificial persons, have rights and duties under international law. If they have rights and duties, they have legal personality, because legal personality signifies nothing more than interests that the community recognizes as deserving of social protection, or abilities that the community supposes to require restraint. International prohibitions against war crimes, for example, recognize the personality of *both* the victims *and* the perpetrators.

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Some would say that to have personality is to have the personal power to vindicate one's rights,<sup>26</sup> but this confuses the possession of a right and the protection of a right. The protector, or administrator, of a right is a separate concept from the subject of the right. Much of modern international law rests on the possibility of making this distinction. States in modern international law claim to act on behalf of (and in vindication of the rights of) their citizens. If the citizens do not have rights (and, therefore, personality), the state loses the primary justification for its existence.

The move to deny individual persons their legal personality is a move to deny them their rights. Governments wishing to avoid their international obligations, challenge individual legal personality; but this are a self-defeating tactic, because the state's claim to legitimacy, under international law, rests on the separate and collective personalities of the persons subject to its rule. More sophisticated states admit individual personality, but deny their subjects the separate capacity to vindicate their rights themselves, as parents speak for their children, or guardians act for the mentally impaired.

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<sup>26</sup> E.g. Ian Brownlie, *Principles of Public International Law*, 6<sup>th</sup> Edition, Oxford, 2003. pp. 648-50.

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This sort of paternal relationship may be appropriate in certain circumstances, but it runs the risk of mistaking the real needs of its subjects. Just as covertures in the common law contributed to the subordination of women, so unfettered power to speak on behalf of the collective may lead governments into injustice. Those with the power to make decisions on behalf of others tend to favor themselves, which is why there is a trend toward the emancipation of subject classes, giving them a right to speak for themselves. Persons without the legal capacity to protect their own rights have found their rights overlooked more often than those who could assert their rights directly (and in person) in the courts.

People prefer to have the capacity to vindicate their own rights, through access to courts, rather than leaving the protection of their rights in the hands of others. State-centered courts, such as the International Court of Justice, or state-based institutions, such as the United Nations, necessarily privilege the interests of governments over those of their people, because the people have no direct access to the legal proceedings undertaken on their behalf. The most vigorous enforcement of individual rights under international law historically takes place in national courts, which are more accustomed to considering the status of individuals. Individuals not only have rights and duties (and, therefore,

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legal personality under international law), they also have rights in some courts, including national courts, like the United States. Individuals who can vindicate their own rights in court are more likely to enjoy their rights in practice than those who cannot.

This brief review of the nature of personality clarifies the relationship between real persons and artificial persons in international law. The artificial personality of organized groups of individuals, such as corporations or states, exists to expand individual rights by allowing individuals to act collectively. States and other collectives can defend and enhance the rights of their members, which is why they deserve the protection of the law. This should not be taken to diminish the concurrent personality of real human individuals. To do so mistakes the purpose and justification of law, which is to enrich the lives of its subjects.

States and international lawyers should wish all individuals to enjoy their rights in practice, because the legitimacy of government depends upon this result. International law, as a Benthamite *ius inter gentes*, rests on the metaphor that: the state subjects of international law resemble the individual citizens they rule and claim to represent. States derive their just powers from the needs of their subjects. This has leads

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many states to recognize that individual citizens have legal rights and duties, which is to say, legal personality. States also assert their own fictive collective legal personality on the basis of the persons they serve. To deny the legal personality of individuals threatens the legal personality of the state. Scholars and judges, who carelessly do so, undermine the foundations of public international law.