Relative International Legal Personality of Non-State Actors

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Introduction

Functionalist analysis is now the controlling approach for assessing which non-state actors enjoy limited international legal personality in the sense of having capacity for international rights and obligations. While on the one hand, conservative authorities might still insist that the only true subjects of international law are states,1 on the other hand, there is considerable pedigree for engaging non-state actors as international legal persons. The difficult for legal clarity and certainty has been to distinguish those entities that are legal persons from those that are not (a binary approach), which rights, duties and obligations they hold on the international plane, and which entities are objective persons *erga omnes*. Although some schools of thought suggest that once an entity is identified as a legal person, it enjoys that personality as an objective, *erga omnes* nature, actual practice is more equivocal, and a great many non-state actors exist as quasi-persons or hybrid entities that blur the distinctions. These entities are considered international legal persons for some purposes but not others, or only in relation to certain actors, but not others. Thus, within the category of non-actors, we have the challenge of personality fragmentation: identifying which actors are international legal persons vis-à-vis which existing legal persons, and for what purposes they enjoy personality. This article will examine the variable and disaggregated international legal personality of non-state actor quasi-persons, with a view to learn some lessons about how personality for these entities is currently understood.

Based on a survey of various entities and quasi-persons, we find that the overriding consideration is one of function in the international community and legal system. This approach is already well known in the field of international organizations for such questions as the powers of organizations,2 but this paper will argue that is also manifested in the quasi-personality enjoyed by other non-state actors. This paper will exclude only states from this analysis. A non-state entity will have personality in the international legal system to the degree to which it functions on the international legal plane. Notwithstanding Brownlie’s submissions on the matter,3 this consideration is not truly circular. It appears that the existing legal persons assess the actions (or proposed

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actions) of certain entities and consider the need or benefit of engaging with those entities as international legal persons rather than as domestic legal persons or unincorporated entities. From this assessment, international rights and duties are assigned. We are reminded of the International Court of Justice’s assessment of the needs of the international community and the nature of the entity’s functions in according personality in connection with its assessment of the personality of the United Nations.\(^4\) Once that choice of the needs of the international community is made, the entity enjoys limited international legal personality for the designated function and in the designated relationship. Because this assessment is necessarily dependent on the entities’ functions and exists within a specified relationship, international legal personality for non-state actors is therefore relative and subjective.

**International Legal Personality**

It is well accepted in legal doctrine that entities other than states enjoy rights and duties, and international legal personality, to a degree under international law.\(^5\) Certainly these entities are very different from states,\(^6\) but it is important to assess the kind of personality they enjoy to understand their variable legal nature in international law. The difficulty is that, aside from states (or perhaps not even including states), there is no clear law on identifying international legal personality.\(^7\) In general, most authorities agree that an international legal person is an entity with a certain capacity for international rights and obligations.\(^8\) Some authorities take a very vague approach to capacity, looking merely for capacity to enjoy international rights and obligations,\(^9\) whereas others are more demanding, looking for specific capacities, *i.e.* the capacity to conclude international


International practice shows that persons and bodies other than states are often made subjects of international rights and duties, that such developments are not inconsistent with the structure of international law and that in each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from the preconceived notion as to who can be the subjects of international law.

W.E. HALL, A TREATISE ON INTERNATIONAL LAW (8th ed., 1924) (“to a limited extent ... it [international law] may also govern the relations of certain communities of analogous character”); T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 69 (7th ed., 1923) (subjects of international law include “those other political bodies which, though lacking many of the attributes of sovereign states, possess some to such an extent as to make them real, but imperfect, international persons”).


\(^7\) See ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 9 (2010).

\(^8\) See Reparation for Injuries Suffered in the Serv. of the UN, Adv. Op., 1949 I.C.J. Reps. 174, 179 (Apr. 11); Vincent Chetail, The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward, in D. ALLAND, V. CHETAIL, O. DE FROUVILLE & J.E. VISUALES, eds., UNITY AND DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROF. PIERRE-MARIE DUPUY (2015); Hersch Lauterpacht, General Rules of the Law of Peace, in 1 ELIHU LAUTERPACHT (ed.), INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 147 (1970); Myres McDougal & Harold Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, in MYRES MCDougAL, ET AL., STUDIES IN WORLD PUBLIC ORDER 3, 25 (1960). In addition, some authorities require the intent of the entity itself to be an international legal person, see e.g. ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 176 (1999). Also see Case 22/70, Comm’n EC v. Council EU (Eur. Ct. Just.) (holding that where an entity is granted personality, then it must have the normal powers of an international legal person, such as adopting treaties).

agreements, conduct diplomatic relations (active and passive legation) and bring international claims.\(^{10}\) To some degree this debate hinges on the form of participation of the actor on the international plane, both in creating and applying, but also in identifying violations of the law.\(^{11}\) It also “functionalizes” personality away from a status from which rights and duties flow, to a result of actions. Yet these distinctions between actors that fully participate and those that do not is increasingly less relevant as new actors increasingly participate in the law in partial ways,\(^{12}\) and enforcement of the law is already diffuse and often not compulsory.\(^ {13}\) International law has struggled to find a way to integrate these subjective and relative international actors into the international legal system,\(^ {14}\) and the emerging practice is to view the entities functionally, largely following these capacity considerations.

The debate over the law of recognition, while contentious in the case of states, is largely not controversial for non-state actors. States, as “original” (or perhaps “natural” in a sense) legal persons,\(^ {15}\) retain significant discretion to recognize non-state actors or not, and, more fundamentally, serve as gatekeepers to the international legal order. These emerging international law participants do not participate by inherent right, as states do, but due to admission to the international legal order by states. Thus, recognition theory for non-states follows an analogy with the constitutive theory of state recognition. But this is merely an analogy. For example, it is not entirely clear whether the limitations on non-recognition for purported states, such as \textit{jus}

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\(^{11}\) See Jan Klabbers, \textit{The Concept of Legal Personality}, 11 Ius Gentium 35–66 (2005) (discussing the distinction between subject and person).

\(^{12}\) See Reparation for Injuries Suffered in the Serv. of the UN, Adv. Op., 1949 I.C.J. Reps. 174, 178 (Apr. 11) (“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.”)


\(^{15}\) See Legality of the Use by a St. of Nuclear Weapons in Armed Confl., Adv. Op., 1996 I.C.J. Reps. 66, 78, para 25 (July 8):

international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations . . . are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.
Draft Articles on the Responsibility of International Organisations

Articles on State Responsibility with Commentary

Perhaps this lack of clarity is merely the result of a lack of practice where constitutive acts of non-state actors are inherently violations of international law. Generally, where an international organization violates international law, it is held responsible under international law and such action of the organization does not touch the lawfulness of the organization’s creation. We can, however, imagine a situation where an organization or other non-state actor is constituted for the express purpose of violating international law, perhaps even jus cogens norms. From a purely contractual treaty perspective, such an act would oblige all other international legal persons to refuse to recognize the new person, but from an organic or constitutional perspective, we might find that the new person exists notwithstanding ex injuria and its acts that contravene international law attract responsibility.

This paper will now walk through the various non-state actors with claims to a certain degree of international legal personality and identify where and how functional assessments are being made with resulting international rights and obligations.

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20 See Waite & Kennedy v. Germ., Judgment (Eur. Ct. Hum. Rts.) (holding that a state may not pursue unlawful ends by incorporating an international organization); Int’l L. Comm’n, Draft Articles on the Responsibility of International Organizations, UN Doc A/66/10, art. 28, II-2 YB Int’l L. Comm’n (2011) (holding that a state member of an international organization could be held responsible for providing a competence to the organization that would have breached international law if the state had committed it).

International Organizations

Firstly, it is widely understood that international organizations enjoy personality, but organizations are often understood to only enjoy personality in relation to the states that create them. Although the International Court of Justice (ICJ) held in Reparations that the United Nations enjoyed objective personality vis-à-vis a state that was not a member, objective personality is not the dominant view on the personality of international organizations. That does not mean that non-members cannot exercise the choice to recognize the personality of the international organization under special law, act or agreement. It simply means that international law does not require non-members to respect the personality of an international organization of which they are not a member. Thus the organization can operate and is capable of holding rights and obligations under international law only in its relations with the states that create or interact with it. While this relative personality might seem to create awkward potential situations, most states will take a pragmatic view and engage with the organization as an international legal person. Where they do not, the relative links of rights and duties is not so different from other managed fragmented regimes, such as the law on reservations to multilateral treaties.

In addition, there are some cases where the very members of the organization might differ over whether to treat the entity as an international organization with international personality. There are various entities that are set up and function in fact, including mundane tasks such as contracted for office space, yet are not

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In their case, too, international legal personality does not flow from recognition by other subjects of international law or from the simple recognition of that international personality by the member states in the establishing treaty. It is only when the formal establishment of the IGO is followed by its effective possibility to act independently as a distinct subject that international legal personality actually ensues.

Also see Agreement for the establishment of the Joint Vienna Institute, July 27, 29, Aug. 10, 19, 1994, 209 UNTS 391 (as evidence of a treaty purely between international organizations).
acknowledged to be international organizations, perhaps even by its own members. It seems strange that a state might refuse to acknowledge the personality of an organization of which it is a member, but it does happen. Entities such as the Organization for Security and Co-operation in Europe (OSCE), 27 Commonwealth, 28 and even European Union (EU) 29 defy our normal understandings of international organizations in their relations with their member states. 30 It is also unclear whether treaty regimes that create treaty organs such as Conferences of States Parties and treaty secretariats are international organizations or not, with disagreement between parties being possible, 31 meaning that some members might treat the treaty regime as a de facto organization and others might not. Even constituent organs of international organizations have acted independently of their organization on the international plane from time to time, 32 and this practice has been supported by certain members of the organization, challenging our understanding of their

27 See generally Jan Klabbers, Institutional Ambivalence by Design: Soft Organizations in International Law, 70 NORDIC J. INT’L L. 403-421 (2001) (discussing forms of cooperation apparently outside international law, e.g. OSCE).


The Secretariat was established by Commonwealth Heads of Government as a visible symbol of co-operation between them, to promote consultation and exchange of opinions among member governments and, in furtherance of the 1991 Harare Commonwealth Declaration and related instruments of the association, to provide policy advice and assistance in support of the Commonwealth’s fundamental political values, sustainable development and the promotion of international consensus.


Key U.S. Redlines in the Negotiations … There will be no mandate for an international body to enforce an ATT. Parameters … No new international organization should be created to enforce an ATT. Exports will ultimately be a national decision.


4. By virtue of its establishment, the Secretariat assumed certain attributes of an international organisation established by treaty such as independence; the possession of a legal personality; and the enjoyment of privileges and immunities. The Secretariat is an entity created by States Parties to assist them in fulfilling their responsibilities under the Treaty. …

5. Therefore, the Government of the Republic of Trinidad and Tobago envisages the establishment of an independent organisation that has the competence to contract for services with any other organisation such as, inter alia, United Nations Organisations, regional and international governmental organisations, universities, private sector entities and other suppliers. …

50. Consistent with the obligations it has assumed under the 1946 Convention on the Privileges and Immunities of the United Nations, the Government of the Republic of Trinidad and Tobago, in a Headquarters Agreement to be negotiated with the ATT Secretariat, will facilitate the extension of diplomatic-type privileges and immunities to specified senior officials of the Organization. It should be noted that similar privileges and immunities have been extended to other international organisations operating in Trinidad and Tobago.

32 See e.g. Exchange of letters recording an agreement relating to privileges and immunities of members of the International Court of Justice, the Registrar, officials of the Registry, assessors, the agents and counsel of the parties and of witnesses and experts, June 26, 1946, Int’l Ct. Just. – Neths., 1947 UNTS 63; Exchange of notes constituting an agreement between the Kingdom of the Netherlands and the International Court of Justice concerning the status of ICI trainees in the Netherlands, Oct. 14, 2004, Int’l Ct. Just. – Neths., 2368 UNTS ____, UN No. 42687 (May 5, 2006).
organizational capacity. Therefore, it is possible for organizations to be subjective legal persons even in relation to its members.

There is a second way – and more important for this paper – in which certain entities can have relative personality as an international organization, and this perspective even pertains to the states that are members of the international organization. This second way is based on function, i.e. whether the entity acts as if it is an international organization in its relations with one or more of its members.33 Contrasted with the first possibility of subjective choice either by non-members or members, here we are looking at relative personality where the personality is functionally assessed. If the entity fulfills functions as if it were an international organization, then it may legally be classified as such. It is well acknowledged that while personality can be explicitly granted in an international organization’s constitutive instrument,34 it need not be, and personality might be implicit in the functions of the organization.35 After all the UN has international personality and this status is nowhere made explicit in the UN Charter.36 Understanding that personality may be implicit, we then consider whether there is a universal definition of an international organization that we could apply objectively, and find that there is not.37 Notwithstanding these differences in definitions, we see that the essential test for whether an entity is an international organization is whether there is a grant of capacities with meaningful independence.38 In each case, we must determine whether the entity in question is recognized as or treated as having an international personality right or rights. Importantly this exercise is case by case, depending on the specific entity at issue39 and the personality that results is personality limited to the functional


37 This conclusion is also supported by the lack of a universal definition of international organization. See e.g. HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY (4th ed. 2003); C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (2ed. 2005); JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2ed ed. 2009); BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS 15-16 (Philippe Sands & Pierre Klein eds., 2009); Maurice Mendelson, The Definition of “International Organization” in the International Law Commission’s Current Project on the Responsibility of International Organizations, in MAURIZIO RAGAZZI, ED., INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 371, 372 (2005). The International Law Commission avoided the question, see e.g. II-1 YB Int’l L. Comm’n 105-7 (1985); Report of the Int’l L. Comm’n, 55th sess. (2003), UN Doc. A/58/10 at p. 38. The definition of international organization continues to be subject to some debate, but most commentators agree at least that there must be a legal person, created under international law, with some degree of meaningful independent capacity from its members.


right acknowledged. 40 Thus, we take a functional approach and can understand an entity as having international legal personality as is necessary for the exercise of its tasks.

The particular functions we assess, though, are not entirely clear. Functions might include treaty-making power,41 but could also include mundane tasks. After all, an entity that is constituted by (written or unwritten) agreement, but not incorporated under domestic law, yet has the ability to purchase office goods and perform other tasks requiring personality, must have personality under some legal order. Lacking compliance with the domestic legal order, we can only presume that the entity has international legal personality, even though we are only considering, e.g., the bulk purchase of office paper. Furthermore, such a functional person will not have the full bundle of international rights and abilities associated with the international legal personality of states because it is a limited and functional entity only. Thus, for example, the traditional view is that, although international organizations (and other non-state actors) can enter into international agreements, they cannot contribute to the formation of customary international law. 42 Specifically, the acts of international organizations and decisions of international tribunals do not qualify as constitutive state practice.43 However, why we should consider that an organization can create treaty obligations but not contribute to customary obligations, is not fully understood.

**Self-determination Peoples, Indigenous Peoples and National Liberation Movements**

In addition to international organizations, there are a variety of other international actors that can bear limited, relative and functional international personality. There is no reason a priori why there cannot be other international legal persons than states and international organizations.44

Firstly, “peoples” have been recognized as holders of the right of self-determination under international law,45 and the right to receive support in seeking independence from domination, which may even amount to a right

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to sovereignty (or sovereign rights). If our test to be an international legal person is some functional vesting of an international right, then holding the right to self-determination, might qualify. Being an entity with some international rights, we can understand the entity to be an international legal person insofar as it holds those rights.

National Liberation Movements (NLMs) are also accorded certain international rights and duties, and thus a degree of personality, as a kind of agent of the territory they purport to liberate. They have been understood to be capable of issuing binding unilateral statements, especially statements pledging to be bound by the Geneva Conventions, in their de-colonization struggle. For example, while sometimes spoken of as a “Memorandum of Understanding”, the ICJ appeared to consider the Oslo Accords as a binding legal instrument. The PLO is a clear example of an NLM that has attained international legal personality. Although initially a project under significant guidance by Egypt, it quickly shifted to independent operation under Arafat’s Fatah organization. By 1969, under the Cairo Agreement, the PLO had acquired governance and de facto sovereignty over Palestinian refugee camps in Lebanon and five years later was acknowledged to be the sole international representative of the Palestinian people by the Arab League, shortly thereafter becoming a UN observer. In 1989, it declared independence and entered into the Oslo Accords with Israel in 1993. The PLO has exercised rights of consent and the use of armed force. It has issued commitments to

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47 See ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 272 (2010); T. KOIVUROVA, FROM HIGH HOPE TO DISTILLATION: INDIGENOUS PEOPLES’ STRUGGLE TO (RE) GAIN THEIR RIGHT TO SELF-DETERMINATION, 15 INT’L J. MINORITY & GROUP RTS 1, 24 (2008).


49 See e.g. Polisario Front of Western Sahara, Note of Information (Sep. 13, 1989); Palestine Liberation Organization (PLO), Declaration (June 7, 1982); South West Africa People’s Organisation, Declaration to the International Committee of the Red Cross (July 15, 1981); União Nacional para a Independência Total de Angola (UNITA), Declaration (July 25, 1980), 20 INT’L REV. RED CROSS 320 (1980); ICRC, Annual Report 1977 16 (1978); African National Council-Zimbabwe African People’s Union (ANC-ZAPU), Undertaking, ICRC, Annual Report 1975 8 (1976).


51 See Appl. of the Oblig. to Arb. under Sec. 21 of the UN HQ Agmt of 26 June 1947, Adv. Op., 1988 I.C.J. Reps 12 (Apr. 26); MALCOLM SHAW, INTERNATIONAL LAW 247-8 (6th ed. 2008) (“While Palestinian statehood has clearly not been accepted by the international community, the Palestinian Authority can be regarded as possessing some form of limited international personality. Such personality, however, derives from the agreements between Israel and the PLO and exists separately from the personality of the PLO as an NLM, which relies upon the recognition of third parties.”)

Another, different example, might be Namibia. See UNGA Res. 2248 (S-V) (May 19, 1967) (creating the Council for Namibia, a subsidiary organ of the UNGA that served as Administering Authority of the Trust Territory).


53 See UN Doc A/43/827-S/20278 (Nov. 18, 1988); UN Doc A/RES/43/177.
respect human rights law, and in any event, has been held to be bound to human rights law as a state-like entity. Although simply because an entity has the capacity to enter into international agreements does not necessarily mean it can also participate in the creation of customary international law. Here just as with international organizations, we find the field still monopolized by states. The conclusion is therefore that NLMs can exercise partial international rights and create international law through only one of the classic sources.

Where they are not an NLM, indigenous peoples still hold some international rights, albeit more limited. The ICJ, UN High Commissioner for Human Rights, and several states (at least historically) consider that indigenous peoples can be party to international agreements. However, the ICJ has refused to hold that these

57 This conclusion excludes NLMs or other peoples’ groups that also qualify as insurgents or belligerents. In these latter categories, they might have a stronger argument that their practice should be consider as contributing to customary international law, at least in the field of IHL.

States need to do more to honour and strengthen their treaties with indigenous peoples, no matter how long ago they were signed … ‘Even when signed or otherwise agreed more than a century ago, many treaties remain the cornerstone for the protection of … human rights today … The honouring of treaties has in many cases been described as a sacred undertaking requiring good faith by each party for their proper enforcement … I encourage States to take concrete steps to honour and strengthen the treaties they have concluded with indigenous peoples and to cooperate with them in implementing new agreements or other constructive arrangements through transparent, inclusive and participatory negotiations …

60 See W. Sahara, Adv. Op. 1975 I.C.J. Reps. 12, paras. 75–84; Siegfried Wiessner, American Indian Treaties and Modern International Law, 7 St. Thos. L. Rev. 567, 569–71 & nn. 12–13, 574, 583, 592 (1995). In addition, states that supported the UN Declaration on the Rights of Indigenous Peoples have implicitly expressed opinio juris that agreements with indigenous peoples could in some cases be considered “treaties”. See UNGA Res. 61/295, Declaration on the Rights of Indigenous Peoples, art. 37(1) (Sept. 13, 2007) (“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other arrangements concluded with States or their successors and to have States honour and respect such”); The use of the term “treaty” alongside “agreements and other arrangements” strongly suggests the use of the same legal definitions in the VCLT. Also see Worcester v. Geo., 31 U.S. (6 Pet.) 515, paras. 45-48, 84-92 (1832) (finding that “The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial … The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings,
entities were states, forcing the conclusion that these collective non-state actors are a special case of legal person and have at least sufficient personality for certain agreements. In this context it is helpful to recall that article 3 of the Vienna Convention on the Law of Treaties (VCLT) did not exclude treaty making capacity for entities other than states, and by doing so implicitly confirmed it. But we continue to lack a clear definition of an indigenous people as such. Practice is inconsistent in a way; each situation of indigenous people is treated on a case-by-case basis, with differing arrangements and differing outcomes following decolonialization. Some of these groups were initially regarded as having international capacity, but were later conquered and their separate personality was extinguished. Some actually maintained their international
capacity in dormancy during colonialism to reassert it following de-colonialization,\textsuperscript{65} while others attempted to assert their personality following de-colonialization only to lose it definitively then.\textsuperscript{66} Some entities were able to maintain sovereign capacity for a considerable period before becoming absorbed by stronger neighbors.\textsuperscript{67} Some maintained a modified and domesticated version of their capacity with lingering, though limited, capacity,\textsuperscript{68} whereas others maintained only a pretense to international capacity and today have merely a symbolic status usually in the form of a continuing traditional “ruler”.\textsuperscript{69} On the other hand, this practice is consistent in a different way, in that each case was approached functionally. Each situation was assessed as a unique practical case, largely lead by concerns over how the territory was functionally operating at the time, not really a class of cases, and in this process the states reached functional, pragmatic solutions.

One difficulty with personality in these kinds of groups is determining whether that personality is “original” or “derived”. States are understood to be original persons and through their act of creating international organizations, the organizations are understood as derived. But “peoples”, NLMs and indigenous peoples are

\textsuperscript{65} See e.g. Terms of a Maritime Truce for Ten Years between Great Britain and the Chiefs of the Arabian Coast, June 1, 1843, 95 CTS 5; Provisional Agreement between Great Britain and King Mwanga of Uganda (Africa), May 29, 1893, 178 CTS 447; Treaty between Great Britain and Mwanga, King of Uganda (Africa), Aug. 27, 1894, 179 CTS 374.

\textsuperscript{66} See e.g. Extradition Treaty between Great Britain and Hyderabad, May 5, 1867, 133 CTS 378; Agreement between Great Britain and Hyderabad modifying the Extradition Treaty of 8 May 1867, July 21, 1887, 169 CTS 58; Treaty between Great Britain and the Maharaja of Kashmir and Jammu, April 2, 1870, 140 CTS 158; Agreement between Great Britain and Hyderabad for the construction of a railway, May 19, 1870, 140 CTS 173; Conditions for Freedom of Commerce agreed between Russia and Kashgar, April 9 (21), 1872, 144 CTS 357; Memorandum of Agreement between Great Britain and Hyderabad, Aug. 13, 1872, 145 CTS 65; Treaty of Commerce between Great Britain and Kashmir, Feb. 2, 1874, 147 CTS 243; Agreement between Great Britain and the Jammu and Cashmere State for the Construction of Telegraph Lines from Jammu to Srinagar and Srinagar to Gilgit, Mar. 9, 1878, 152 CTS 219; Opium Agreement between Great Britain and Hyderabad, Oct. 29, 1883, 161 CTS 257; Memorandum of Agreement respecting Railways between Great Britain and Hyderabad, Apr. 30, 1885, 165 CTS 34; Agreement between Great Britain and Kashmir-Jammu relative to the Construction of a Railway to Jammu, July 4, 1888, 170 CTS 404; Telegraph Agreement between Great Britain and Kashmir and Jammu, July 3, 1890, 172 CTS 463; Supplementary Agreement between Great Britain and the State Council of Kashmir and Jammu relative to the Funds required for the Construction of the British Section of the Jammu and Kashmir State Railway, Nov. 1, 1890, 173 CTS 33; Imperial Service Troops Agreement between Great Britain and Mysore, June 24, 1899, 187 CTS 364; Imperial Service Troops Agreement between Great Britain and Jammu and Kashmir, Sep. 12, 1899, 188 CTS 56; Imperial Service Troops Agreement between Great Britain and Hyderabad, Dec. 24, 1900, 189 CTS 170; Deed of Cession of Railway Jurisdiction between Great Britain and Hyderabad, May 28, 1901, 189 CTS 395; Memorandum of Agreement between Great Britain and Hyderabad, Nov. 5, 1902, 192 CTS 158; Agreement respecting Extradition to and from Berar between Great Britain and Hyderabad, Nov. 29, 1910, 212 CTS 326.

\textsuperscript{67} See e.g. Treaty between Great Britain and the Maharajah of Sikkim, Mar. 28, 1861, 123 CTS 266; Additional Act to the Universal Postal Convention of 1 June 1878, with Final Protocol and modification of Regulations, Mar. 21, 1885, 165 CTS 110; Agreement between Great Britain and the Sandwich Islands, July 31, 1843, 95 CTS 205; Convention between Hawaii and Portugal for the Provisional Regulation of Relations of Amity and Commerce, May 5, 1882, 160 CTS 209; Convention of Commerce and Navigation between Hawaii and Russia, June 7 (19), 1869, 139 CTS 351; Declaration between Great Britain and the Sandwich Islands (Hawaii), June 29, 1869, 139 CTS 359; Declaration interpretative of the Commercial Convention of 26 May 1846 between France and Hawaii, March 25, 1851, 105 CTS 315; Postal Convention between New South Wales (Great Britain) and Hawaii, Mar. 10, Apr. 30, 1874, 147 CTS 84; Treaty of Amity, Commerce and Navigation between Belgium and Hawaii, Oct. 14, 1862, 126 CTS 329; Treaty of Amity, Commerce and Navigation between France and the Sandwich Islands (Hawaii), Oct. 29, 1857, 117 CTS 435.

\textsuperscript{68} See e.g. Treaty of Alliance between Spain and the Choctaw etc. (North America), July 14, 1784, 49 CTS 107; Treaty of Peace and Alliance between Spain and the Choctaw and Chickasaw (North America), May 10, 1793, 52 CTS 29; Treaty of Alliance between Spain and the Choctaw etc. (North America), July 14, 1784, 49 CTS 107; Treaty of Peace and Alliance between Spain and the Choctaw and Chickasaw (North America), May 10, 1793, 52 CTS 29; Treaty of Alliance and Commerce between Great Britain and the Cherokee North American Indians, Sep. 20 (30), 1730, 33 CTS 277; Treaty of Peace and Alliance between Spain and the Cherokee (North America), Oct. 28, 1793, 52 CTS 175; Treaty of Waitangi, U.K.–Maori, Feb. 6, 1840, 89 Consol. T.S. 473, reprinted at Treaty of Waitangi Act 1975, sch. 1.

\textsuperscript{69} See e.g. Treaty between Great Britain and Ashantee, Sep. 7, 1817, 68 CTS 5; Treaty of Peace between Great Britain and Ashantee (West Africa), Feb. 13, 1874, 147 CTS 271; Treaty of Peace between Great Britain and the Ashantee and Fantee Chiefs (Gold Coast), Apr. 27, 1831, 81 CTS 455; Treaty between Great Britain and the King, Chiefs and Elders of the People of Ife (Africa), May 22, 1888, 170 CTS 387; Treaty between Great Britain and Igbabo (West Africa), Jan. 8, 1885, 165 CTS 51; Agreement between Great Britain and the King of the Abaqua Zooool [sic] (South Africa), Mar. 3, 1836, 86 CTS 29; Conditions of Appointment of Chiefs agreed between Great Britain and the Zulus (South Africa), Sep. 1, 1879, 155 CTS 201; Terms between Great Britain and Cetewayo, King of the Zulus (South Africa), Aug. 1882, 160 CTS 367; Treaty between Great Britain and the King of the Zulus (South Africa), May 6, 1835, 85 CTS 127; Treaty between Great Britain and the Zoolah [sic] Nation (Southern Africa), Oct. 5, 1843, 95 CTS 477-1.
not well classified as original or derived persons. In one sense, they are original, just as states are. Clearly they are not created in fact by states, but are instead constituted through their own original historical process. Yet, they need recognition as such in order to access those international rights. And those rights are arguably created by states. The prevailing view is that an indigenous group or NLM must be recognized as such in order to operate as a legal person.\textsuperscript{70} For this reason, the classic constitutive-declaratory theory argument seems to apply by analogy. However, upon becoming a qualifying group, the people does not accrue the full range of international rights comparable to a state, but rather a limited range of rights connected to the function of being an indigenous group. Thus, again, we find that these kinds of entities can be relative, functional persons.

**Insurgents, Belligerents, and Combatants**

Sometimes overlapping with de-colonization and NLMs, but at other times not linked to those phenomena, are entities with some degree of effective control that are acknowledged to be persons with whom the international community can engage on the international plane. These entities often resemble states, sometimes in a highly organized manner (e.g. they might even adopt internal “legislation”\textsuperscript{71}), and states may engage with them on the international plane, but for reasons such as mandatory \textit{ex injuria} non-recognition they cannot acquire the legal rights that come with full personality or statehood recognition.\textsuperscript{72}

International legal doctrine has recognized that insurgents and belligerents in armed conflict bear rights and duties directly under international law.\textsuperscript{73} The most important duties are those coming from international

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\textsuperscript{70} See Malcolm Shaw, \textit{International Law} 247-8 (6th ed. 2008) (“…personality … as an NLM, … relies upon the recognition of third parties.”)

\textsuperscript{71} See e.g. Liberation Tigers of Tamil Eelam, Tamil Eelam Child Protection Act (Act No 3 of 2006); Communist Party of Nepal–Maoist, Public Legal Code 2060 (2003/2004).


... Still, DFRs are not accorded full ILP. Governments seem to find it necessary to express their disapproval of these regimes by not (fully) including them in international decision-making. Such policies will continue to prevent DFRs from being fully operational international actors, blocking meaningful cooperation with them and making it impossible to expect their full adherence to international norms.

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humanitarian law, but they might also be held to human rights law. Some authorities maintain a distinction
that only states are held to human rights law, whereas both states and armed groups are held to international
humanitarian law. Thus, non-state groups cannot formally “violate” human rights, but instead simply commit
“abuses”. In seeking to place responsibility, some authorities would exempt the non-state group from
collective responsibility, and instead fix responsibility on another state (or state-like) actor that should have
protected the population from the mistreatment. However, the drive to extend the application of human rights
law is functional: to be able to document and identify the mistreatments by non-state actors, rather than limit
themselves only to states. One technique for applying human rights law was to insist that non-state groups
complying with any commitments that they may have made to follow human rights law. An additional
technique is to identify human rights norms that were specifically extended to non-state actors under
conventional law. In some cases, as a substitute for a treaty, the UN Security Council is relied on. The

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Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 51 (1952);
L. Zegveld, Accountability of Armed Opposition Groups in International Law 48 (2002); M Schoiswohl, Status and
(Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of ‘Somaliland’ 68-71
(2004).

75 See e.g. UN Hum Rts. Council, UN Doc. A/HRC/RES/S-22/1 (Sep. 1, 201):

Condemns in the strongest possible terms the systematic violations and abuses of human rights and violations of
international humanitarian law resulting from the terrorist acts committed by the so-called Islamic State in Iraq and the
Levant and associated groups taking place since 10 June 2014 in several provinces of Iraq, which may amount to war
crimes and crimes against humanity, and strongly condemns in particular all violence against persons based on their
religious or ethnic affiliation, as well as violence against women and children

N. Rodley, Can Armed Opposition Groups Violate Human Rights?, in K.E. Mahoney & P. Mahoney, eds, HUMAN RIGHTS IN THE

76 See UN Hum. Rts. Council, Comm’n of Inq. on Gaza, Report of the detailed findings of the independent commission of inquiry
established pursuant to Human Rights Council resolution S-21/1, UN Doc. A/HRC/29/CRP.4, para. 501 (June 24, 2015)

The commission is of the view that inmates were transferred out of the prison and summarily executed with the apparent
knowledge of the local authorities in Gaza, in violation of their obligation to protect the right to life and security of those
in their custody. These extrajudicial executions, many of which were carried out in public, constitute a violation of both
international humanitarian law and international human rights law.

77 See e.g. A. Clapham, Focusing on Armed Non-State Actors, in A. Clapham & P. Gaeta, eds., THE OXFORD HANDBOOK OF
INTERNATIONAL LAW IN ARMED CONFLICT 766-810, 793-9, 802-5 (2014); Amnesty Int’l, Strangling Necks’ Abductions, torture and
summary killings of Palestinians by Hamas forces during the 2014 Gaza/Israel conflict, AI Doc. MDE 21/1643/2015, 35-37 (May 26,
2015).

78 See e.g. UN Hum. Rts. Council, Comm’n of Inquiry on Syria, Report of the independent international commission of inquiry on the

79 See UN Hum. Rts. Council, Comm’n of Inquiry on Syria, Report of the independent international commission of inquiry on the
Syrian Arab Republic, UN Doc A/HRC/19/69, para. 44 (Feb. 22, 2012); J.K. Kleffner, The applicability of international humanitarian
law to organized armed groups, 93 INT’L REV. RED CROSS 443-61 (2011).
difficulty with this approach is that the language of the resolutions does not prescribe human rights for the actors by its own legal act, instead the resolutions usually conclude that the group has violated human rights law, suggesting that the law was somehow already in existence for the actor at the time of the violation. A final technique is to assert that, whether the groups were held to human rights law in the same way as states was not the issue, rather, all actors are held to jus cogens. Since the list of jus cogens norms is not settled, this approach could be used to include a wide spectrum of human rights protections. But the more controversial approach is to assimilate the non-state actor to the state, to designate it as a de facto state-like entity, all the while denying that it is a state, and hold it to compliance with human rights norms just like a state. After all, non-state armed groups are considered to have the capacity to undertake state-like organizational policy sufficient for crimes against humanity convictions. The project of extending the application of human rights law thus has a major effect for personality. This pragmatic solution now gives new appreciation to the way that the international persons such as states and the UN now engage with armed groups directly, perhaps giving those groups limited, functional personality.

However, engaging with these groups in this way means that the groups might be able to argue for a role in shaping the applicable norms. Many agreements with non-state insurgent actors, or agreements with the UN and this practice is specifically encouraged by Common Article 3 of the Geneva Conventions, although the precise legal value of treaty-type agreements with such entities is unclear. In many of these agreements, the parties do not undertake new human rights commitments but “reaffirm” their existing obligations under

82 See e.g. T. Rodenhäuser, International legal obligations of armed opposition groups in Syria, 2 Int’l Rev. L. 1-16 (2015).
84 See e.g. UN Hum. Rts. Council, Comm’n of Inq. on Gaza, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, UN Doc. A/HRC/29/CPR.4, para. 45 (June 24, 2015) (“… it is worth recalling that non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.”); UN Hum. Rts. Council, Ben Emmerson, Spec. Rapp., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/29/51, paras. 30-31 (June 16, 2015) (concluding that ISIL is obliged to respect human rights)
89 See e.g. Memorandum of Understanding regarding UN Mine Action Support to Sudan, Sudan – SPLM – UN (Sep. 19, 2002).
international law\textsuperscript{91} rather than commit to new obligations.\textsuperscript{92} Many of these have been have been applied as treaties.\textsuperscript{93} In at least one case, an armed group was able to successfully accede to a treaty,\textsuperscript{94} even though this possibility should not be formally correct, unless the group could be seen to be a person with capacity for that act.\textsuperscript{95} Also groups have been held to have the capacity to issue binding unilateral statements, especially promises to comply with international humanitarian law.\textsuperscript{96} Some of these promises have been made to the

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\textsuperscript{91} See e.g. Agreement on the Civilian Protection Component of the International Monitoring Team, Phils – Moro Islamic Front (MILF) (Oct. 27, 2009); 12-Point Understanding, Seven Political Parties – Nepal Communist Party (CPN-M) (Nov. 22, 2005); Protocol on the Improvement of the Humanitarian Situation in Darfur, Sudan – Sudan Liberation Movement/Army (SLM/A) – Justice and Equality Movement (JEM) (Nov. 9, 2004); CPN-M, Appeal of the Communist Party of Nepal (Maoist) (Mar. 16, 2004); Peace Agreement, Liberia – Liberians United for Reconciliation and Democracy (LURD) – Movement for Democracy in Liberia (MODEL) – Political Parties (Aug. 18, 2003); Ogaden Nat’l Liberation Front (ONLF), Political Programme (undated); RUF/SL, Lasting Peace in Sierra Leone: The Revolutionary United Front Sierra Leone (RUF/SL) Perspective and Vision (undated).


In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called \textit{jus contrahendum}), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law. The NMRR concluded two Agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In these Agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees.

\textit{Also see UN SC Res 1127 (1997) (regarding UNITA and the Lusaka Protocol).}

\textsuperscript{94} See Instruments of Accession of the Algerian Republic to the Geneva Conventions of August 12, 1949 (registered at Berne, June 20, 1960) \textit{reproduced at M BEDJAOUI, LAW AND THE ALGERIAN REVOLUTION 199 (1961) (instrument was deposited by the Provisional Government of Algeria, prior to attaining effective control or international recognition). Cf. NDFP, Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977 (July 5, 1996) (merely declaring that the NDFP will apply the conventions, but not attempting to adhere to the conventions).}


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International Committee of the Red Cross (ICRC)\textsuperscript{97} and others to the UN.\textsuperscript{98} In some ways more importantly than these specific agreements or unilateral commitments is whether the practice of non-state actors contributes to customary international law. Some scholars and courts have looked to the practice of non-state actors for establishing or proving the rules of customary international law.\textsuperscript{99} For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) has, albeit in a limited manner, referred to practice of non-state actors in assessing customary international law.\textsuperscript{100} Since the ICJ Statute only requires that the practice be accepted as law and does not limited the provision to acceptance by states only, there may be some plausibility to this argument.\textsuperscript{101} Some have even suggested that non-state armed groups are developing their own law of armed conflict parallel to that of states.\textsuperscript{102} However, most authorities, such as the International Law Commission (ILC), maintain that only states may contribute to the formation of customary international law.\textsuperscript{103} So while the ICRC has documented the practice of armed groups, it isolates that practice from the practice of states in discovering customary international law because of this uncertainty in the rules on


\textsuperscript{102} See Sophie Rondeau, Participation of armed groups in the development of the law applicable to armed conflicts, 93 (883) Int’l Rev. Red Cross 649 (2011); Marco Sassoli, Taking armed groups seriously: ways to improve their compliance with international humanitarian law, in \textit{1 INTERNATIONAL HUMANITARIAN LEGAL STUDIES} 50 (2010)

customary international law. In any event, the precise normative effect of insurgent practice is not settled, but it is surely informative of the status of certain international humanitarian law.

As alluded to above, underlying this practice is simply the need, the functional need, to limit the impact on civilian populations by holding combatants to certain minimum legal obligations. For belligerents, we need for them to be coved by international humanitarian law in order to better protect civilians and participants, but we do not want the combatants to enjoy the benefits of statehood or claim ignorance of jus cogens violations. Common Article 3 commands that the application of the article “shall not affect the legal status of the Parties to the conflict”. What we find in this practice is that non-state actors are sometimes treated as if they have international legal personality and sometimes not, depending on whether they are engaging with issues of international humanitarian law, a relativist, functional personality. This is the logical result of the theory of the “equality of belligerents” – that insurgents should be treated equally to the states against whom they are fighting for purposes of the effective and practical application of a uniform code of the law of armed conflict.

Highlighting their relative nature, though, it is more debatable whether the prohibitions on the use of force, specifically in UN Charter art 2(4), apply to them. Some authorities are now arguing that where insurgents have sufficient independent control and have organized themselves into a de facto regime, they may benefit from the prohibition on the use of force. Strictly speaking, the rule only covers “states”, and states can normally exercise their police function to resist civil war. Yet it might be argued that the term “state” is not the same as “UN member”, so any insurgent group that operates a de facto state might qualify. The Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG) found that the South Ossetia and Abkhazia entities, while not states, were “state-like” and thus covered by the prohibition on the use of force.


107 This, however, does not mean that DFRs have no international rights or obligations: ‘international law has (…) developed some rudimentary mechanisms to ensure that the developments on the ground are not entirely left to the (domestic) “laws” of anarchy’. Jonte van Essen, De Facto Regimes in International Law, 28(74) MERKOURIOS – UTRECHT J. INT’L AND EUR. L. 31-49 (2012).


112 See 2 INDEP. INT’L FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT 229, 239-42 (Sep. 2009).

use of force. Similarly, the Office of the Prosecutor of the International Criminal Court has concluded that such state-like entities are capable of coordinated policy sufficient for crimes against humanity. These cases are not isolated, Crawford has applied the prohibition on the use of force to the relations between the PR China and ROC on Taiwan, and the UN Security Council has held that use of force between North and South Korea – not considered independent states at the time – was also covered by the prohibition on the use of force. Again, a functional, pragmatic approach is taken, because what matters is whether the entity controls territory comparable to a state. The international legal personality of these entities, though, is understood as being relative to their nature, role, functions and duties.

Private Organizations: Corporations and Non-Government Organizations

Other organizations are increasingly considered international persons for limited, functional purposes. These entities can be formally private entities, such as corporations or universities, sometimes incorporated by states and sometimes by individuals, and sometimes under domestic law, yet at other times created by treaty. As will be discussed below, there does not appear to be any barrier to granting personality rights to non-traditional bearers of personality where the international community deems it appropriate.

States can create private organizations through either treaty or domestic law. For example, the University for Peace’s creation was based on UN General Assembly Resolutions (and remains intimately linked to, though not a part of the UN) and a subsequent treaty. Afterwards it entered into a headquarters agreement with Costa Rica that acknowledged it was an “international institution” with “the legal status necessary to bearers of personality where the international community deems it appropriate.”

117 See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 470 (2d ed., 2007); UNSC Res. 82 (1950) UN Doc S/1501 (June 25, 1950); UNSC Res. 83 (1950) UN Doc S/1511 (June 27, 1950); UNSC Res. 84 (1950) UN Doc S/1588 (July 7, 1950); Tom Miles, North Korea threatens South with “final destruction”, REUTERS (Feb 19, 2013) available at http://www.reuters.com/article/2013/02/19/us-nkorea-threat-idUSBRE91I0J520130219 (reporting on the threat of North Korea against South Korea of a “final destruction” at the United Nations Conference on Disarmament in 2013 and the reactions of the governments of South Korea, France, Germany, Spain Poland US and Britain that the threat was a breach of article 2(4)).
120 See e.g. Agreement concerning the headquarters of the University for Peace, Mar. 29, 1982, Univ. Peace – Costa R., 1288 UNTS 15, UN No. 21235. Also see 1 UNTS 15, 90 UNTS 327, 885 UNTS 13.
121 See JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW 3 (2005) (defining international legal personality and providing an extensive theoretical overview of this concept); ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANIZATIONS IN INTERNATIONAL LAW 63 (2005).
122 See UNGA Res. 34/111 (Dec. 14, 1979); UNGA Res. 35/55 (Dec. 5, 1980).
123 See 1983 UN JURID. YB 212; 1981 UN JURID. YB 154-5
124 See International Agreement for the Establishment of the University for Peace and with the Charter of the University for Peace, 1233 UNTS ___, UN Reg. No. 1-19735.
125 See Agreement concerning the headquarters of the University for Peace, Mar. 29, 1982, Univ. Peace-Costa R., 1288 UNTS 8; Agreement between the Government of the Republic of Colombia and the University for Peace for the establishment of a world research and training centre for conflict settlement, July 30, 1986, 2272 UNTS ___, UN Reg. No. 40469. Also see 1 UNTS 15, 90 UNTS 327, 885 UNTS 13. Although this University as party to a treaty appears to be unique. Cf. Project Agreement – Technical Specification and Market Study of Potentially Important Jute Geotextile Products, May 11, May 17, June 27, 1994, Comm. Fund for Commodities-Int’l Jute Org-Cranfield Univ., 1792 UNTS 452 (entered into force June 27, 1994), which would not be properly considered a treaty, notwithstanding its other parties and registration with the UNSG.
126 See Agreement concerning the headquarters of the University for Peace, Mar. 29, 1982, Univ. Peace-Costa R., 1288 UNTS 8, art. 2.
enable it to fulfill its purposes and objectives.\textsuperscript{127} Its headquarters are deemed inviolable\textsuperscript{128} and the institution and staff enjoy certain immunities akin to those of the UN.\textsuperscript{129} Despite its appearance and functions, this entity is not an NGO under domestic law, but instead an international organization.

Corporations have been created by states under domestic law and are more clearly understood as normal domestic entities,\textsuperscript{130} but this is not always the case. Where a treaty formed the basis for the agreement to incorporate under domestic law, the corporation might function as an international organization. Both the Bank for International Settlements (BIS)\textsuperscript{131} and Eurofirma (European Company for the Financing of Railroad Rolling Stock)\textsuperscript{132} are technically domestic corporations, created by treaties but incorporated under domestic law, that have been considered to be \textit{de facto} international legal persons. The BIS unusually included private corporations as parties to the treaty alongside states, but that participation does not appear to have changed its status as a treaty. Although perhaps we can wonder whether JP Morgan Bank is now a quasi-international person.

Similarly, states have also created NGOs, sometimes by treaty yet incorporated under domestic law, and those entities can be international persons. Setting aside the unusual situation of an NGO incorporated under US law in order to discharge the personality of Taiwan\textsuperscript{133} (although not completely unique\textsuperscript{134}), there are more clear examples. Just as with the BIS, the participation of a non-international person in the formation of the NGO does not necessarily result in either defeating the international personality of the new entity or in raising the non-international person to the international plane. For example, the Global Alliance for Vaccines and

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\textsuperscript{127} See Agreement concerning the headquarters of the University for Peace, Mar. 29, 1982, Univ. Peace-Costa R., 1288 UNTS 8, art. 2.
\textsuperscript{128} See Agreement concerning the headquarters of the University for Peace, Mar. 29, 1982, Univ. Peace-Costa R., 1288 UNTS 8, art. 5.
\textsuperscript{129} See Agreement concerning the headquarters of the University for Peace, Mar. 29, 1982, Univ. Peace-Costa R., 1288 UNTS 8, art 8
\textsuperscript{130} Although some authorities have even viewed these entities as having “limited international legal personality”. \textit{See e.g.} James A.R. Nafziger, \textit{The Future of International Law in its Administrative Mode}, 40 Denv. J. Int’l L. & Pol’y 64 (2011-12). These organizations included public international utility corporations with limited international legal personality such as the Scandinavian Airlines System (“SAS”), the Basel-Mulhouse Airport, the Franco-Ethiopian Railway Company, the International Moselle Company, and the Central African Power Corporation.
\textsuperscript{133} See Taiwan Relations Act, Publ. L. 96-8 (Apr. 10, 1979), 93 Stat. 14; Agreement on Privileges, Exemptions and Immunities, Feb. 4, 2013, Am. Inst. in Taiwan (AIT) - Taipei Economic and Cultural Representative Office in the United States (TECRO) (replacing the Agreement on privileges, exemptions and immunities, Oct. 2, 1980, AIT-TECRO), available at www.ait.org.tw/en/ait-tecro-privileges-and-immunities-agreements.html. The “Taipei Economic and Cultural Representative Office in the United States”, which is \textit{de facto} the embassy of the ROC receives privileges and immunities, a grant not enjoyed by any other NGO in the US. Moreover, the grant is authorized, not by the US Government, but by another NGO, the “American Institute in Taiwan”, which is \textit{de facto} the embassy of the US in Taipei.
\textsuperscript{134} Another example would be the ASEAN+3 Macroeconomic Research Office ("AMRO") which was incorporated under Singaporean law to discharge “sovereign” macroeconomic and monetary analysis duties conferred on it by ASEAN. See Chien-Huei Wu, \textit{Monetary Cooperation in the East Asian Context: Progress and Challenges}, 8 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 583 (Sep. 2013)
Immunisation (GAVI)135 and The Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund)136 appear to be well-positioned to enjoy enhanced personality in the near future. GAVI is already considered an international legal person by Switzerland, though only for purposes of its headquarters agreement137 (similar to the treatment of the Global Fund138). Yet GAVI might be better understood as a public-private partnership, as it brings together the United Nations Children’s Fund (“UNICEF”), International Bank for Reconstruction and Development (the “World Bank”), World Health Organization (the “WHO”) and the Bill & Melinda Gates Foundation. Of course, there is no serious debate over whether the Gates Foundation is an international person.

However, the situation changes when the private entity is incorporated purely by individuals without state participation, though there are exceptions here too. Normally domestic NGOs and corporations are not considered international persons; the ICJ has rejected an agreement between a corporation and a state as being a treaty.139 However, the question before the Court in the Anglo-Iranian Oil Company case was not whether the agreement was legally binding between international persons, but rather whether it was the type of agreement over which the ICJ would have jurisdiction, being an agreement between a private company and Iran.140 Thus the dismissal of the case cannot necessarily be understood as a refusal to consider the Anglo-Iranian Oil Company as an international legal person. There may be other reasons why it is not, but the result in the case is not definitive on that question. The UNOLA has been very cautious about the subject of new non-state international legal persons, although it has opined that autonomous public entities that are not themselves international legal persons might be able to constitute an international legal person.141 Despite this position, it is increasingly being argued that a corporation itself can be held responsible under international

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135 Not only is GAVI functionally an international legal person in the view of Switzerland, it is relatively an international legal person in that the US does not regard it as an international legal person at all. This situation results in the odd arrangement where GAVI staff in Switzerland enjoy immunities but those seconded to Washington, D.C., do not. Also see generally Davinia Izziz’ excellent article on the pressure to extend privileges and immunities to the GAVI and other similar organizations on functional grounds. Davinia Abdul Aziz, Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria 6 INT’L ORG. L. REV. 383 (2009), Gian Luca Burci, Public/Private Partnerships in the Public Health Sector, 6 INT’L ORG. L. REV. 359 (2009).


137 See Accord entre le Conseil fédéral suisse et GAVI Alliance (Global Alliance for Vaccines and Immunization) en vue de déterminer le statut juridique [Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland], Jun. 23, 2009, Switz.-GAVI, available at http://www.admin.ch/ch/f/rs/1/0.192.122.818.12.fr.pdf (original French); http://www.theglobalfund.org/documents/HQ_agreement_en.pdf (unofficial English translation). Not only is GAVI functionally an international legal person in the view of Swiss law, it is relatively an international legal person in that the US does not regard it as an international legal person at all. This situation results in the odd arrangement where GAVI staff in Switzerland enjoy immunities but those seconded to the office in Washington, D.C., do not. For its part, GAVI appears to consider itself an international organization: “Created in 2000, Gavi is an international organisation - a global Vaccine Alliance, bringing together public and private sectors with the shared goal …” GAVI, About Gavi, the Vaccine Alliance, available at http://www.gavi.org/about/; however, it may be that this text was not vetted by GAVI counsel.


141 See 1971 UN JURID. YB 215–18.
law for international crimes. Usually individuals are held responsible under international criminal law, not corporations.142 Certainly entities like Greenpeace are legal persons in their respective domestic legal orders and perhaps even enjoy certain rights aimed at natural persons,143 they do not appear to be treated as an international legal person, yet. This position appears to be potentially on the cusp of shifting. One of the more important recent developments was the Special Tribunal for Lebanon decision on contempt proceedings against a corporation.144 Part of the reasoning of the Tribunal was the changing nature of corporations in the international area,145 and so the tribunal looked at the situation from a functional perspective.146

Shifting from corporations to NGOs, certain NGOs created by private individuals have also been held to enjoy a degree of relative personality depending on the way other international legal actors interact with the entity.147 The most prominent of these bodies is the ICRC.148 Not only has Switzerland concluded a headquarters agreement with the NGO and acknowledged its international legal personality (at least as concerns the Swiss legal order),149 the ICTY has also recognized its personality.150 Part of the reasoning in the Simić case at the ICTY was not that the ICRC was created by individuals, but that the organization was vested with important international duties by treaty with widespread adherence,151 which suggests that the Chamber might have been considering the Geneva Conventions as somehow constitutive of the ICRC’s international legal personality,152 But the Chamber later observed that “the ICRC possesses international personality because states have tacitly

147 See e.g. Agreement for the establishment of a world research and training centre for conflict settlement, July 30, 1986, Univ. Peace – Colomb., 2272 UNTS ___, UN Reg. No. 40469.
recognized it as an international person”, reaffirming the understanding that personality for that entity is relative and subjective.

But the ICRC is not alone. Other incorporated entities based on domestic law might be contenders for international legal personality. The International Air Transport Association (IATA) and the World Anti-Doping Agency (WADA) are considered to have some degree of international personality comparable to that enjoyed by international organizations based on their functions. The IOC also enjoys special status, although whether it enjoys truly international rights and duties is still unclear.

Other private entities are potential candidates to begin receiving treatment as international legal persons in the near future. The Internet Corporation for Assigned Names and Numbers (ICANN) and Basel Institute on Governance’s International Centre for Asset Recovery (ICAR) discharge quasi-governmental roles with increasing independence from governments, yet with international impact, and may eventually transition into international legal persons based on their roles. More peculiar examples might include the International Organization for Standardization (unintuitively shortened to “ISO”) which is a private organization, founded by individuals, but it was largely considered a successor organization to the International Standards Association and the United Nations Standards Coordinating Committee, and has a strong role in establishing international legal personality. The International Legal Personality of the International Air Transport Association (IATA) and the World Anti-Doping Agency (WADA) are considered to have some degree of international personality comparable to that enjoyed by international organizations based on their functions. The IOC also enjoys special status, although whether it enjoys truly international rights and duties is still unclear.

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legally binding standards. Its membership includes various scientific associations, many of which are government bodies. At some point, its significance may justify special treatment truly as an international legal person, at least for certain purposes. Similarly, the European Broadcasting Union that produces the “Euronews” channel and the “Eurovision” song contest might be another entity with personality poised for transition. One the one hand, it is clearly an association incorporated under Swiss law that does not assert state immunity or similar treatment, yet on the other hand, it receives considerable financial support from the European Union and benefits from unusual privileges due to its important role generally in European cooperation and integration.

Other entities participate, sometimes very intimately so, with other international persons, yet it is difficult to consider them international persons, although this functional analysis might give us pause. For example, consider the Carnegie Foundation. In private diplomatic correspondence, the Carnegie Foundation is considered a “private foundation.” That being said, it has entered into an agreement with the UN for the ICJ to use the Peace Palace and that agreement was registered with the UN Secretary General and published in the UN treaty series. Notwithstanding the ICJ’s holding in Anglo-Iranian Oil, we occasionally see agreements between international persons and private companies and corporations, probably mistaken or perhaps for lack of a better vehicle, deposited with the UN Secretary-General as if they were treaties, so this fact alone is not surprising. However, the UN-Carnegie Foundation agreement notes that it is “expressly understood that the question of the establishment of the [ICJ] at the Peace Palace exclusively concerns the [UN] and the Carnegie Foundation, and is consequently outside the jurisdiction of any other organization …” The unexpected use of the expression “jurisdiction” coupled with “organization”, is not completely clear. Normally “jurisdiction” is reserved for the lawful authority of states, not organizations. Perhaps then this phrase is meant to exclude the Permanent Court of Arbitration, Peace Palace Library and Hague Academy of International

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161 See Eur. Broadcasting Union, Statutes of the European Broadcasting Union (June 2013) available at http://www3.ebu.ch/files/live/sites/ebu/files/About/Governance/Statutes%202013_EN.pdf (“Article 1: Legal Basis, Purposes and Seat. 1.1. The European Broadcasting Union (EBU) is an association of broadcasting organisations which is governed by Swiss law and by these Statutes…. 1.3. The association has legal personality.”)


165 See UNGA Res. 84(I) Agreement between the United Nations and the Carnegie Foundation concerning the use of the premises of the Peace Palace at The Hague, and concerning the repayment of loans (Dec. 11, 1946), Ann. A., art XV

166 See USDOS, Cable No. 08-MADRID-52, paras. 1, 4 (Jan. 18, 2008) (reporting on the “First Forum of the Alliance of Civilizations” attended by the Carnegie Foundation as a “private foundation”)

167 See UNGA Res. 84(I) Agreement between the United Nations and the Carnegie Foundation concerning the use of the premises of the Peace Palace at The Hague, and concerning the repayment of loans (Dec. 11, 1946), Ann. A.


169 See UNGA Res. 84(I) Agreement between the United Nations and the Carnegie Foundation concerning the use of the premises of the Peace Palace at The Hague, and concerning the repayment of loans (Dec. 11, 1946), Ann. A., art. XV
Law from interfering with the establishment of the ICJ. In any event, it appears that this agreement is not a mere rental contract under Dutch law. And if that is the case, then that conclusion must mean that the Foundation has some power to conclude an agreement that is not a normal domestic law agreement, and perhaps on that basis is not a mere run-of-the-mill Dutch Stichting (foundation). Notwithstanding this unusual “international” agreement and the public function that the foundation serves, it seems uncomfortable to view the Foundation as an international person, even though parallels with the ICRC are difficult to avoid.

In addition, some authorities have asserted that transnational corporations and NGOs are all already enjoying a degree of international personality beyond the isolated and peculiar examples cited above. Of course, corporations are increasingly seen as potentially responsible for international crimes and they are leaders in setting international standards, similar in some ways to the work of ISO. Also litigation on the international plane between states and international corporations is becoming commonplace and some treaties directly provide for corporate international personality; see, e.g., the Pretence of Exclusion Agreement’s Chapter Eleven.

None of these activities, though, are participation on the international plane in the classic sense. Some


170 See J. Kyriakakis, Developments in international criminal law and the case of business involvement in international crimes, 94 (887) INT’L REV. RED CROSS 981-1005 (2012).


175 See U.N. Charter art. 71 (“The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”); ECOSOC Res. 1996/31 Consultative Relationship Between the United Nations and Non-Governmental Organizations (July 25, 1996).
authorities have even suggested that NGOs and corporations should now have a role in contributing to customary international law, and otherwise forming new international norms. These developments have led some to conclude that corporations now enjoy limited international legal personality linked to their functions and especially in the investment dispute context, one where the personality is relative and limited to the parties to the dispute, not *erga omnes*.

This possible development is not without precedent. Historically many colonial companies on the East India Company model entered into agreements with indigenous peoples and European states that are formally not treaties under contemporary international law, but are substantively comparable and may have been regarded at the time as truly being treaties under international law. While not dispositive, many of these agreements, after all, are titled “treaty.” One reason we can infer that the parties regarded them as treaties under international law is that some of the topics covered in such agreements involve matters normally covered by


177 See Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award (2006); CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (2005). Also see e.g. Texaco Overseas Petroleum Co. v. Libya, 17 I.L.M. 1 (1978) (where parties selected international law as the governing law); SGS Société Générale de Surveillance S.A. v. Paraguay, ICSID Case No. ARB/07/29, Dec. on Juris., para. 176 (2010); Julian Arato, Corporations as Lawmakers, 56 Harv. Int’l L.J. ___ (2015 forthcoming) (arguing that private corporations are increasingly able to create new rules of international law).


179 See VCLT, art. 2(1)(a) (“Treaty means … [the following elements] … “whatever its particular designation”).

180 See e.g. Treaty between the Danish West India Company and Brandenburg, Nov. 24 (Dec. 4), 1685, 17 CTS 387; Asiento between Spain and the Portuguese Guinea Company, July 12, 1696, 21 CTS 151; Agreement between the Netherlands West Indies Company and Hanau, July 24, 1669, 11 CTS 173; Asiento for the Introduction of Negro Slaves into Spanish America between the French Guinea Company and Spain, Aug. 27, 1701, 23 CTS 489; Asiento between Spain and the East India Company (Great Britain), Mar. 26, 1713, 27 CTS 425; Treaty between Prussia and the Netherlands West India Company, Dec. 18, 1717, 30 CTS 203; Convention between the British East India Company and the Swedish East India Company, Oct. 6, 1740, 36 CTS 95; Treaty between the East India Companies of Great Britain and the Netherlands, Dec. 1, 1759, 41 CTS 359; Capitulations between the East India Co. (Great Britain) and the Netherlands (Batavian Republic), Aug. 26, 31, Sep. 28, 1795, Feb. 15, 1796, 53 CTS 49; Treaty between the East India Co. (Great Britain) and the Imam of Senna (Yemen), Jan. 15, 1821, 71 CTS 335. In an odd twist, these agreements were often adopted by the state of the corporation’s incorporation (“nationalized”) at a later date and discharged as public law/treaty obligations, not mere contractual obligations. If they were not initially treaty obligations, then the adoption would have had the effect of “treaty-izing” the obligations, a process heretofore unknown in international law. Therefore, they must have been treaty obligations *ab initio*. 26
public law, such as raising a military, establishing a protectorate, and cessation of territory. In addition, in the 18th century, the unique entity of the Hanseatic League operated on the international plane as a trade confederation with leadership vested in the cities of Hamburg, Lubeck and sometimes also Bremen, and, here as well, some of these agreements are clearly dealing with matters of public law. These latter examples of East India type state-corporation treaties are of course removed from contemporary international law, but not so distantly as we might think, one was concluded as late as 1914. The strange situation of international colonial companies in international law, while initially tempting to view it in contemporary corporate terms, is probably more accurately viewed as a hybrid state/corporate, quasi-national entity. In any event, this historical study could suggest that international legal personality, as the exclusive quality we see today, might have been far more fluid and liberal in the past.

Religious Organizations

Turning from private organizations to religious organizations, these entities are also operating on the international plane to some degree. While religious organizations do not appear to have a unique legal status in international law based on their mission, they are capable of bearing international legal personality and have at times been accorded personality on a functional basis.

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181 See e.g. Agreement between Denmark and Brandenburg regarding the Supply of Troops and the Composition of Differences at St Thomas between the Danish and Brandenburg West India Companies, Apr. 11 (21), 1692, 19 CTS 467.
182 See e.g. Agreement between Great Britain and the British North Borneo Company for the Establishment of a Protectorate, May 12, 1888, 171 CTS 53.
183 See e.g. Contract of Sale and Cession of the Island of St. Croix between France and the Danish West India Co., June 15, 1733, 34 CTS 47.
184 See e.g. Convention of Commerce between Great Britain and the Hanseatic Republics of Lubeck, Bremen and Hamburg, Sep. 29, 1825, 75 CTS 385; Convention of Friendship, Commerce and Navigation between the Hanseatic Republics (Bremen, Hamburg and Lubeck) and the United States, Dec. 20, 1827, 77 CTS 477; Convention of Commerce and Navigation between Great Britain and the Hanse Towns (Bremen, Hamburg and Lubeck), Aug. 3, 1841, 92 CTS 21; Declaration between the Hanse Towns (Bremen, Hamburg and Lubeck) and Sardinia for the Extension to Monaco of the Navigation Convention of 18 July 1844, Jan. 27, 1846, 99 CTS 295; Additional Act for the Navigation of the Elbe between Anhalt, Austria, Denmark, Hanover, the Hanse Towns of Hamburg and Lubeck, Mecklenburg-Scherwin, Prussia and Saxony, Apr. 13, 1844, 96 CTS 307-1; Convention between Anhalt, Austria, Denmark, Hanover, the Hanse Towns of Hamburg and Lubeck, Mecklenburg-Scherwin, Prussia and Saxony on the Publication of Uniform Police Ordinances for the Elbe, Apr. 13, 1844, 96 CTS 307-3; Additional Commercial Convention between the Hanse Towns of Bremen, Hamburg and Lubeck, and Sardinia, Sep. 20, 1860, 123 CTS 49; Additional Treaty of Amity, Commerce and Navigation between the Hanseatic Cities of Bremen, Hanover and Lubeck, and Turkey, Sep. 27, 1862, 126 CTS 299.
185 See e.g. Consular Convention between the Hanseatic Republics (Bremen, Hamburg and Lubeck) and the United States, Apr. 30, 1852, 108 CTS 91. Also see Convention between France, Great Britain and the Hanse Towns (Bremen, Hamburg and Lubeck), for the Accession of the Latter to the Slave Trade Conventions, June 9, 1837, 87 CTS 19 (providing for accession to a treaty of general application to subjects of international law).
186 See Agreement between the British South Africa Co. (Great Britain) and Portugal amending the Agreement of 28 August 1913 relative to the Recruitment of Native Labourers for Rhodesia, July 4, 1914, 220 CTS 152.
188 See generally IOANA CISMAS, RELIGIOUS ACTORS AND INTERNATIONAL LAW (2014).
Some of these bodies clearly have international legal personality. The most obvious example is the Holy See, which is well accepted as an international legal person. The Holy See is not a state, although it is sometimes referred to as a state, or otherwise treated as if it were a state, without apparently much consideration of its unusual nature. For example, the Holy See’s practice is usually considered alongside the practice of states for the formation of customary international law. The distinction between the Holy See on the one hand and other actors in this study is often argued, similar to that of states, to be the difference between original and derivative personality. The Holy See claims, like states, it has “original, non-derived legal personality”. As the ICJ held in the Legality of the Use by a State of Nuclear Weapons in Armed Conflict advisory opinion request by the World Health Organization, the crucial factor between these two types of personality focuses on which entity can create another and “invest” it with powers. The difficulty is that some authorities have asserted implicitly that only states are original persons. In addition, the very notion of originality is relative; international organizations have capacity to create other international organizations and invest them with powers, so in that relative sense an international organization could be said to be the original person and the new organization, the derived one. Nevertheless, the argument is that personality of the Holy See does not depend on an act of creation by another international legal person.

However, the Holy See is not completely unique. Other religious entities exist with partial, functional, international personality. Probably most well-known of these strange cases is the Sovereign Military Order of

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189 See e.g. Agreement between the Holy See and Prussia, July 16, 1821, 72 CTS 81; Agreement between Hanover and the Pope, Mar. 26, 1824, 74 CTS 111; Accord between France and the Holy See, Apr. 16, 1832, 82 CTS 381; Agreement between the Holy See and Prussia, Sep. 22, 1834, 84 CTS 413; Agreement between Belgium and the Holy See Relative to Navigation etc., Apr. 7-11, 1840, 90 CTS 83; Agreement between Austria, the Holy See, Modena, Parma and Tuscany respecting the Central Italian Railway, May 8, 1856, 115 CTS 47; Agreement between the Holy See and Modena respecting Ecclesiastical Property, June 23, 1857, 117 CTS 75; Convention for the Amelioration of the Condition of the Wounded in Armies in the Field [Geneva Convention], Aug. 22, 1864 (entry into force 115 CTS 47; Agreement between the Holy See and Modena respecting Ecclesiastical Property, June 23, 1857, 117 CTS 75; Convention for the Amelioration of the Condition of the Wounded in Armies in the Field [Geneva Convention], Aug. 22, 1864 (entry into force

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190 See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 43-44 (2d ed., 2007); but see DUURSMA, FRAGMENTION 374-419


195 See MALCOLM SHAW, INTERNATIONAL LAW 247-8 (6th ed. 2008) 261 (6th ed. 2008) (“[s]tates are the original and major subjects of international law”)

196 See Joint Vienna Institute, July 27, 29, Aug. 10, 19, 1994, 2029 UNTS 391 (evidencing an international organization created purely by other international organizations).
Malta (SMOM), or “Knights of Malta”, but the phenomenon of sovereign military orders has historically included entities other than the SMOM. Following the analysis of this study, the personality of the SMOM has been described as “functional”. In addition to the SMOM, we also have the curious Paréage of Andorra adopted in 1278 between the Count of Foix and the Bishop of Urgell, establishing joint sovereignty over Andorra, a situation that lasted until 1993 when the entity adopted its modern constitution and became a modern state. At that time, the contemporary heirs to the Paréage were the President of France and Bishop of Urgell, functioning as “Co-Princes”. The arrangement was sometimes termed a “condominium” although it is not clear that this term is correct when the governance is not by two states sharing sovereignty, but rather two individuals acting as co-Heads of State. In any event, apparently as late as 1993, the international community accepted the possibility of a Bishop being able to have the functional capacity to dispose of the sovereignty of a state.

The Dalai Lama is another religious case. This religious leader enjoys some aspects of international respect, although the personality of this leader is difficult to separate from the personality of Tibet and/or the Tibetan Government in Exile, perhaps overlapping with a government in exile or NLM movement. It often remains a bit blurred whether the engagement with the person or office is on the political international plane or on a personal/professional/spiritual level. Certainly the Dalai Lama has a significant international influence on


198 See e.g. Convention between the Teutonic Order and the States of the Former Confederation of the Rhine, Aug. 15, 1813, 62 CTS 343; Convention between the Teutonic Order and Wurttemberg, Aug. 15, 1813, 62 CTS 351. Also see Treaty between Brandenburg and the Equestrian Order of Prussia, Nov. 12, 1655, 4 CTS 21; Karol Karski, The International Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta, 14 INT’L COMM. L. REV. 19 (2012) (“After losing its state in 1525, the Teutonic Order lost its attribute of an independent subject of international law.”); 2 JHW VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 32-7 (1968) (discussing possible international legal personality of the Jesuits).

199 See AC Breycha-Vautier, Order of St. John in International Law: A Forerunner of the Red Cross, 48 AM. J. INT’L L. 554, 561 (1954) (reporting on the conclusions of a papal tribunal that “[t]he status of the Order … is functional, that is to say, intended to assure the film and of the scope of activities of the Order and its development throughout the world”); Sovereign Order of Malta v Brunelli, Tacali & Others (Ct Cass, Ital., 1931) reported at 6 INT’L L. REPS. 46 (SMOM has sovereign immunity “corresponding to the needs of its autonomy”).


201 But see arguments that the French President used his Princely office for the benefit of France, a state foreign to Andorra.

202 See e.g. Agreement amending the Trade Regulations of 5 December 1893, Apr. 20, 1908, Gr. Brit. – China – Tibet, 206 CTS 412; Convention, Sep. 7, 1904, Gr. Britain – Tibet, 196 CTS 312; Exchange of Notes regarding the India-Tibet Frontier, Mar. 24-25, 1914, Gr. Britain – Tibet, 219 CTS 339; Convention, July 3, 1914, China – Gr. Britain – Tibet, 220 CTS 144; Trade Regulations, July 3, 1914, Gr. Britain – Tibet, 220 CTS 148. However, there are no agreements registered with the UNSG that have Tibet or the Dalai Lama as a party. Also see Robert D. Sloane, The Changing Face of Recognition in International Law: A Case Study of Tibet, 16 EMORY INT’L L. REV. 107 (2002)

203 See e.g. USDOS, Cable No. 1973-ROME-5798, para. 1-3 (June 22, 1973) (reporting on Dalai Lama’s contacts with Italian government and noting that if the PRC demanded an explanation, the Government of Italy would explain that the visit was “religious and cultural”); USDOS, Cable No. 1973-COPENHAGEN-2125 (Sep. 5, 1973) (reporting on PRC pressure on Danish Embassy to refuse a visa to the Dalai Lama, and Danish reply that the visit was purely as a “religious leader” and not as a “political figure”); USDOS, Cable No. 1973-ROME-9464, para. 2 (Sep. 11, 1973) (reporting that discussions within EC resulted in view that Dalai Lama trip to Europe was “unwelcome” but that “as democratic countries, they would find it difficult to refuse visa for private visit” but would issue a visa if the Dalai Lama agrees to “foreswear any sort of political activity”); USDOS, Cable No. 1973-VIENNA-7734, para. 2 (Sep. 19, 1973) (noting that Austria agree to issue a visa on condition of “commitment from Dalai Lama to refrain from all political activity”); USDOS, Cable No. 06-ULAANBAATAR-634, para. 3 (Aug. 18, 2006) (“the U.S. likely would reiterate publicly
Looking at another example, we can consider the Ismaili Imamat\textsuperscript{205} to find another religious actor with unclear personality. Less well known that the Dalai Lama or Pope, and therefore calling for more explanation, this entity is the religious leadership of the global Ismaili community, headed by the Aga Khan and having its own internal governing instrument.\textsuperscript{206} While his position has been compared to that of the Roman Catholic Pope\textsuperscript{207} with an unusual mixture of religious and temporal authority,\textsuperscript{208} his precise position within the Ismaili religious

our belief that the Dalai Lama is an international man of peace who should be allowed freedom to travel.

See e.g. UNGA Res. 1353(XIV) Question of Tibet, UNGAOR 834 mtg (Oct. 21, 1959) (“Gravely concerned at reports, including the official statements of His Holiness the Dalai Lama, to the effect that the fundamental human rights and freedoms of the people of Tibet have been forcibly deprived them …”) (author’s emphasis); USDOS, Cable No. 1973-ROME-5798, para. 1-3 (June 22, 1973) (reporting on Dalai Lama’s representative contacts with Italian Foreign Ministry and other multiple European governments); USDOS, Cable No. 1975-NEWDELHI-13760 (Oct. 15, 1975) (discussing a proposed meeting between Embassy Political Section officials and Dalai Lama’s representative); USDOS, Cable No. 1973-NEWDELHI-5717, para. 1 (May 16, 1973) (reporting on plans for a meeting between Swiss officials and Dalai Lama’s brother, Byalo Thondup); USDOS, Cable No. 06-ULAANBAATAR-634, para. 1 (Aug. 18, 2006) (… Enkhbold quoted from a Dalai Lama speech in March which underlined that he sought autonomy for Tibet, but not independence; would that moderate the Chinese reaction, he wondered.); USDOS, Cable No. 07-BEIJING-4457 (July 3, 2007) (reporting on travels of the Dalai Lama’s “Special Envoy”); USDOS, Cable No. 08-NEWDELHI-808, para. 1 (Mar. 18, 2008) (reporting on meeting between US Ambassador and Dalai Lama); USDOS, Cable No. 08-BEIJING-1697 (Apr. 30, 2008) (discussing PRC decision to reopen talks with the Dalai Lama’s representatives); USDOS, Cable No. 08-BEIJING-1715, para. 3 (May 5, 2008) (discussing PRC leadership representatives meeting with private representatives of the Dalai Lama); USDOS, Cable No. 08-BEIJING-2666, para. 3 (July 8, 2008) (reporting on “contact” between “Competent parties” in the Chinese Government and the representatives of the Dalai Lama); USDOS, Cable No. 08-BEIJING-4168, para. 1 (Nov. 7, 2008) (reporting on discussions between representatives of the Dalai Lama and the Communist Party’s United Front Work Department); USDOS, Cable No. 08-NEWDELHI-12884, para. 4 (Nov. 7, 2008) (reporting that the PRC suspects that the Dalai Lama position was “independence disguised as autonomy.”); USDOS, Cable No. 09-NEWDELHI-1667, para. 7 (Aug. 10, 2009) (reporting on meeting between US Ambassador and Dalai Lama); USDOS, Cable No. 09-CHENGDU-248, paras. 4, 10 (Nov. 6, 2009) (discussing that “From 2002-2008, there were nine rounds of talks held with the personal representatives of the Dalai Lama”; reporting that the Dalai Lama’s speech to the European Parliament where he advocated the creation of a self-governing democratic Tibet “in association with the People’s Republic of China”).

See e.g. Treaty for the establishment of the University of Central Asia, Aug. 28, 30, 31, 2000, Kyrgyzst.-Kazakhst.-Tajikst.-Ismaili Imamat, 2159 UNTS ___, UN No. 37742. The text and language of the agreement is clearly intended to be a treaty, although it is not entirely clear whether the Imamat was truly considered a treaty partner or if the agreement was a treaty only because there was more than one state in agreement. Also see USDOS, Cable No. 06-DUSHANBE-402, para. 10 (Mar. 1, 2006) (noting that the Aga Khan is “revered […] as a sovereign” in the Gorno Badakhshan Autonomous Oblast in Tajikistan, is accorded “almost quasi-governmental status [in Tajikistan] because it essentially provides the lion’s share of all development and even basic social support to the Pamiri people of Badakhshan” and that “The current conventional political wisdom is that no one dares challenge the political power of the ‘Khan of Tajikistan,’ [the Aga Khan]”). But see Aga Khan IV v. Tajdin, Jiwa, et al., Docket T-514-10, 2011 FC 14, Judgment, paras 25, 58-9 (Fed. Ct., Can., Jan. 7, 2011) (Harrington, J) (also observing that the Aga Kahn submitted himself to a discovery interview apparently without any considerations of immunity); USDOS, Cable No. 08-MADR 52, paras. 1, 4 (Jan. 18, 2008) (reporting on the “First Forum of the Alliance of Civilizations” attended by the UN Sectary-General and many heads of state, including a representative of the Aga Khan, but also, alternatively, describing the Aga Khan as a “private foundation” akin to the Carnegie Foundation, although see the discussion of the Carnegie Foundation supra in this article).

See Aga Khan IV v. Tajdin, Jiwa, et al., Docket T-514-10, 2011 FC 14, Judgment, para 53-4 (Fed. Ct., Can., Jan. 7, 2011) (Harrington, J) (making reference to the 1986 and 1998 “Constitutions” of the Imamat). USDOS, Cable No. 09-KABUL-3383, para. 2 (Oct. 21, 2009) (“The Agha Khan became Imam of the Shia Imami Ismaili Muslims in 1957. He is the 49th hereditary Imam of the Shia Imami Ismaili Muslims and a direct descendant of the Prophet Muhammad though his cousin and son-in-law Ali, the first Imam, and his wife Fatima, the Prophet Muhammad’s daughter. The Ismailis live in 25 countries, mainly in West and Central Asia, Africa and the Middle East, and North American and Western Europe.”); USDOS, Cable No. 1974-LOUREN-275, para. 1 (Apr. 25, 1974) (“We have heard a rumor circulating around Lourenco Marques’ Indian community that Aga Khan followers (Ismaili) have been instructed by Aga Khan to leave Mozambique and establish themselves in another country with more promising economic climate – e.g. either metropolitan Portugal or Canada.”). The Imamat maintains a constitution, enacted by religious decree. See Mumtaz Ali Tajuddin, Ismaili Constitution, ENCYCLOPAEDIA OF ISLAM, available at http://ismaili.net/heritage/node/10433

See Thomas Thompson, Three Faces of the Fourth Aga, 63(2) LIFE 43 (Nov. 17, 1967) (comparing the Aga Khan to the Catholic Pope).

See Haji Bibi vs Aga Khan III, 2 Ind. Cas. 874, para 130 (High Ct., Bombay Sep. 1, 1908) (Russell, J) (finding that the religious, monetary offerings made to the Aga Khan by his followers is his personal property); Aga Khan IV v. Tajdin, Jiwa, et al., Docket T-
community defies parallels to Western notions of religious leaders. There have been four Aga Khans including the present one, though the lineage, and the respect according to each successive hereditary imam, has been in existence for centuries, claiming descent from the Prophet Muhammad. The Aga Khan is a British citizen but is also granted the privilege of using a French diplomatic passport. He is sometimes even today considered a “royal” or even “sovereign” person, though without territorial sovereignty.

If we were to attempt to identify international rights such as treaty, legation and claim, we come up short on the general international legal personality of the Imamat, though there may be some rudimentary, functional rights. The Imamat is party to at least one treaty registered with the UN Secretary-General. In 2000, the states of Tajikistan, Kyrgyzstan, and Kazakhstan agreed with the Ismaili Imamat to create the University of Central Asia (UCA). Of course, the founding of a university by treaty is not entirely unusual, even a treaty that includes a non-international legal person as a party. We are reminded of the BIS and GAVI in this


See e.g. Aga Khan IV v. Tajdin, Jiwa, et al., Docket T-514-10, 2011 FC 14, Judgment, para 44 (Fed. Ct., Can., Jan. 7, 2011) (Harrington, J) (observing that the defendants had great difficulty explaining the relationship of the Aga Khan and his followers outside of the Ismaili frame of reference); Haji Bibi vs Aga Khan III, 2 Ind. Cas. 874, para 130 (High Ct., Bombay Sep. 1, 1908) (Russell, J).

Also see generally TEENA PUSHRIT, THE AGA KHAN CASE: RELIGION AND IDENTITY IN COLONIAL INDIA (2012) (arguing that the Bibi case misunderstood the relationship in its attempts to bring the matter in to the Western legal tradition)


See USDAID, Cable No. 09-KABUL-3383, para. 2 (Oct. 21, 2009) (“The Aga Khan became Imam of the Shia Imami Ismaili Muslims in 1957. He is the 49th hereditary Imam of the Shia Imami Ismaili Muslims and a direct descendant of the Prophet Muhammad though his cousin and son-in-law Ali, the first Imam, and his wife Fatima, the Prophet Muhammad’s daughter. The Isma’ili live in 25 countries, mainly in West and Central Asia, Africa and the Middle East, and North American and Western Europe.”) The Aga Khan claims to be a descendant of the Prophet through his daughter Fatima and then through the former rules of the Fatimid Empire and notable Persian nobles. See e.g. His Highness the Aga Khan, AGHA KHAN DEVELOPMENT NETWORK (last accessed) available at http://www.akdn.org/about_agakhan.asp


See USDAID, Cable No. 08-MADRID-52, paras. 1, 4 (Jan. 18, 2008) (reporting on the “First Forum of the Alliance of Civilizations” attended by the UN Secretary-General and many heads of state, including a representative of the Aga Khan, but also, alternatively, describing the Aga Khan as a “private foundation” akin to the Carnegie Foundation); USDAID, Cable No. 06-DUSHANBE-402, para. 10 (Mar. 1, 2006) (noting that the Aga Khan is “revered […] as a sovereign” in the Gorno Badakhshan Autonomous Oblast in Tajikistan, is accorded “almost quasi-governmental status [in Tajikistan] because it essentially provides the lion’s share of all development and even basic social support to the Pamiri people of Badakhshan” and that “the current conventional political wisdom is that no one dares challenge the political power of the ‘Khan of Tajikistan,’ [the Aga Khan]”); Five Things to Know About the Aga Khan, RADIO FREE EUR. / RADIO LIBERTY (Feb. 23, 2014) available at http://www.rferl.org/content/agha-khan-explainer/24686969.html (observing that the Aga Khan is “a prince without a realm”); Aga Khan holds up Canada as model for the world, VANCOUVER SUN (Nov. 23, 2008) available at http://www.canada.com/vancouversun/news/story.html?id=9c5e7816-0ee5-4cfe-b19e-441b1156cb31 (“In his role as a temporal leader, he moves as an equal among world leaders, but he has no country.”) Curiously, Forbes magazine lists him as the only non-territorial sovereign in its annual list of the ten richest royals. The Ismaili community within India and Africa enjoyed a certain degree, though imprecise, of judicial independence. See Mumtaz Ali Tajddin, ISMAILI CONSTITUTION, ENCYCLOPAEDIA OF ISLAMISM, available at http://ismaili.net/heritage/node/10433 (citing e.g. Civil Case No. 89, [1919] Zanzibar L. Reps. 46 (Zanzibar, 1894)).

See Treaty between the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat for the establishment of the University of Central Asia, 28-31 Aug. 2000, 2159 UNTS 161 (entered into force Feb. 9, 2001). Note that the Imamat was represented by the Aga Khan as Imam.

See Treaty between the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat for the establishment of the University of Central Asia, 28-31 Aug. 2000, 2159 UNTS 161 (entered into force Feb. 9, 2001).

See e.g. Convention setting up a European University Institute, Apr. 19, 1972, as amended June 18, 1992 available at http://www.eui.eu/Documents/AboutEUI/Convention/ConsolidatedConventionRevising.pdf

For example, the Riga Graduate School of Law was created in 1998 as a limited liability non-profit corporation under Latvian law by an international agreement between Sweden and Latvia, and the Soros Foundation, which also gifted the school its building. Over
time, the shares in the school were transferred from the states to the University of Latvia, though the Soros Foundation retained its ownership interest. See Inside RGSL / History, available at http://www.rgsl.edu.lv/en/inside-rgsl/about/history/

218 See Agreement concerning the headquarters of the University for Peace, Mar. 29, 1982, Univ. Peace-Costa R., 1288 UNTS 8, art. 5 (“The Headquarters seat shall be inviolable and shall be under the control and authority of the University.”), art. 6. (“The University premises, its assets, income and other property shall enjoy the same terms and protection as United Nations premises, assets and income in Costa Rica.”); Convention setting up a European University Institute, Apr. 19, 1972, as amended June 18, 1992, Treaty between the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat for the establishment of the University of Central Asia, 28-31 Aug. 2000, 2159 UNTS 161 (entered into force Feb. 9, 2001), art. 2.


220 See Treaty between the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat for the establishment of the University of Central Asia, 28-31 Aug. 2000, 2159 UNTS 161 (entered into force Feb. 9, 2001), art. 2. (“Except as specifically authorised in Article 16 of the Charter, this Treaty and the Charter shall not be amended without the unanimous written agreement of each of the Founders …”), art. 9 (“This Treaty is executed in five original copies by the Founders in the Tajik, Kyrgyz, Kazakh, Russian and English languages …”), art. 11 (“This Treaty can be renounced by any Founding State in accordance with its national legislation and with the approval of the Parliament …”), art. 13 (“This Treaty may be executed in five counterparts, each of which shall be deemed an original …”), and Ann. A, Charter of the University of Central Asia, art. 2.13 (“ ‘Treaty’ means the Treaty of the Founders of the University of Central Asia signed as of August 31, 2000 which is an international Treaty entered into among the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat.”)

221 VCLT, art. 2.

222 See Treaty between the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat for the establishment of the University of Central Asia, 28-31 Aug. 2000, 2159 UNTS 161 (entered into force Feb. 9, 2001), art. 7, 8 (“All differences arising out of the implementation of this Treaty shall be resolved amicably …”), 9, 11, 12 (“The Charter shall be an integral part of this Treaty.”), 13.

223 See Treaty between the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat for the establishment of the University of Central Asia, 28-31 Aug. 2000, 2159 UNTS 161, pmbl.

This Treaty (the “Treaty”) is entered among: The Republic of Tajikistan… The Kyrgyz Republic …; and the Republic of Kazakhstan Each of the foregoing Republcs are hereinafter collectively referred to as “the Founding States”. And The Ismaili Imamat represented by his highness the Aga Khan the 49th Hereditary Imam of the Shia Imami Ismaili Muslims (the “Ismaili Imamat”); The Founding States and the Ismaili imamat are hereinafter collectively referred to as the “Founders.”
Turning to the other international capacities, however, we find that the Imamat does not appear to be generally considered an international legal person. For example, we cannot find examples where the Aga Khan has invoked sovereign immunity. The current Aga Khan and his predecessor have sued and been sued as plaintiff and defendant in civil proceedings in India and Canada. In addition, the Imamat does not appear to engage in active and passive legation. The Aga Khan is intensely involved in international politics and is accorded considerable respect and attention in diplomatic circles, but his precise legal authority fluctuates between quasi-governmental authority and unofficial capacity. The one representative office of the Imamat, located in Canada, is careful to refer to itself as a cultural “delegation” and not a political office. Part of the explanation for the regard of the Aga Khan might be due to his religious and traditional capacity, but also due to his wealth and management of the prominent NGO, the Aga Khan Development Network. The conclusion

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224 See Aga Khan IV v. Tajdin, Jiwa, et al., Docket T-514-10, 2011 FC 14, Judgment, para 59 (Fed. Ct., Can., Jan. 7, 2011) (Harrington, J) (also observing that the Aga Khan had authorized the lawsuit as plaintiff); paras 25, 58-9 (also observing that the Aga Khan submitted himself to a discovery interview); Haji Bibi vs Aga Khan III, 2 Ind. Cas. 874, [1908] 11 Bom. LR 409 (High Ct., Bombay Sep. 1, 1908) (Russell, J) (ability to sue in personal capacity).


226 See USDOS, Cable No. 09-KABUL-3383 (Oct. 21, 2009) (reporting on the multiple meetings and diplomatic-level conversations on the future of Afghanistan involving the Aga Khan)

1. (C) Summary and Comment. The very well-informed Aga Khan told assembled ambassadors 14 October that he had met separately with President Karzai and leading opposition candidate Abdullah Abdullah, and had told them that the political process in Afghanistan has failed. … With his access and the high level of assistance the Aga Khan Development Network (AKDN) affords to Afghanistan, the Aga Khan is a serious voice that Afghans, including Hamid Karzai, respect and listen to.

3. (C) On 14 October the Aga Khan met with Ambassadors of the United States (Eikenberry and Carney), France, UK, India, Pakistan, Germany, EU, and the Commander of International Security Assistance Forces (ISAF). The Aga Khan's representative, Ali Mawji, organized the event. After presentations by the assembled guests that generally emphasized Afghanistan's perilous security and political conditions, the Aga Khan embarked on an informative tour d’horizon, including details of his suggestions following earlier meetings with President Karzai and Dr. Abdullah. …

6. (C) The Aga Khan’s third point centered on the political situation. The Aga Khan explained that he had solicited Karzai’s and Abdullah’s views on the future of the country in the face of a failed political process. He recounted that he had advised both candidates that, regardless of the election outcome, they should work together. …

8. (C) In his presentation, the Aga Khan mentioned his awareness that the Afghan Constitution does not allow for a prime minister; whatever position Abdullah would occupy must be constitutional and must factor in parliamentary sensitivities. … He took on board without comment the French Ambassador’s suggestion that a “Senior Minister” be named who could perform the role of a PM, without the title, but that ensuring parliamentary acceptance would be vital.

9. (C) In response to questions and observations, the Aga Khan noted that he does not favor changing the Constitution.

227 See USDOS, Cable No. 06-DUSHANBE-402, para. 10 (Mar. 1, 2006); Five Things to Know About the Aga Khan, RADIO FREE EUR./RADIO LIBERTY (Feb. 23, 2014) available at http://www.rferl.org/content/aga-khan-explainer/24686969.html (discussing that the Aga Khan is treated with “a certain degree of suspicion” or “caution in some political circles in Tajikistan” because Gorno-Badakhshan autonomous province is the only predominantly Ismaili region in the world, is occasionally agitating for independence from Tajikistan, and “the local populations there have more faith in and respect for the Imam Aga Khan than for President Emomali Rahmon”)

228 See USDOS, Cable No. 06-DUSHANBE-402, para. 10 (Mar. 1, 2006) (reporting that the Aga Khan was building a luxurious Ismaili Center in Tajikistan); USDOS, Cable No. 02-ROME-1797 (Apr. 10, 2002) (reporting that the Aga Khan loaned the airplane used by the former Afghan king’s son-in-law who was arranging for the former king’s return to Afghanistan); USDOS, Cable No. 1974-KARACHI-1414, para. 10 (July 5, 1974) in (context of a calling for bids for construction of hospital, describing “Project being built by Aga Khan Hospital and Medical College, a charitable foundation in Pakistan supported by the wealthy international Muslim sect called Ismaili led by His Highness, the Aga Khan”); Aga Khan holds up Canada as model for the world, VANCOUVER SUN (Nov. 23, 2008) available at http://www.canada.com/vancouversun/news/story.html?id=9e5e7816-0ee5-4cfe-b19e-441b1156cb31 (“[The Ismaili community’s] initial success was facilitated by the intervention of the Aga Khan himself with his friend, then-prime minister Pierre Trudeau, who helped pave the way for the diaspora.”)

must be that the Imamat commands a certain degree of reverence on the international plane, but does not operate there to the full scope of an international legal person, and certainly not to the scope enjoyed by the Holy See. Thus, our functional analysis concludes that it is not an international legal person in the broadest sense, although it may be treated as such from time to time on a functional level.

**The Individual**

The last category for comparative purposes is the individual. Historically, certain persons, usually members of royal houses, but not exclusively so, were seen to have international personality to conclude international agreements on everything from military arrangements (which are inherently agreements under public law) to marriage and inheritance (which are not, at least to modern ears). In many of these cases, though, it is not entirely clear whether the contracting entity was the person in private capacity or in the public capacity of the state, and anyway such distinctions many centuries ago before widespread democratic sovereignty were not made. In this way, the treaties with Napoleon on the one hand and the King of France on the other, which appear to be personal treaties, are not so surprising, though perhaps anachronistic already

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230 See e.g. Treaty between the Princess Dowager of Orange and the Elector of Brandenburg, Aug. 13, 1651, 2 CTS 375; Treaty between the Elector of Brandenburg and the Duke of Neuburg, Oct. 11, 1651, 2 CTS 383; Hereditary Agreement between Members of the Ducal House of Saxony, April 22, 1657, 4 CTS 275; Agreement between the Dukes of Saxony, Sep. 23, 1659, 5 CTS 303; Agreement between the Elector of Brandenburg and the Princes of Anhalt, Jan. 7, 1681, 16 CTS 47; Agreement between the Emperor and the Elector of Brandenburg, Sep. 30 (Oct. 10), 1687, 18 CTS 167; Monetary Agreement between the Electors and Princes of the Empire, Sep. 16, 1691, 19 CTS 33. Although now, royal family members are considered to be nationals of their states, or former states.

231 See e.g. Concordat between the Abbess and Foundation of Quedlinburg and the Elector of Saxony, Feb. 18, 1685, 17 CTS 199; Agreement between Brandenburg, Duke August of Saxony (as Administrator of Magdeburg) and the Council of the City of Magdeburg, May 29, 1666, 9 CTS 179; Preliminary Agreement pursuant to the Agreements of 1(11) February 1693 and 4(14) March 1694 for the Maintenance of the Harmony of the Empire etc. between the Bishop of Worms (also Head of the Teutonic Order), the Bishops of Wurzburg, Constance and Munster, the Abbot of Fulda, the Duke of Saxe-Gotha and Margrave of Baden-Durlach, the Dukes of Wolfenbuttel, the Landgraves of Hesse-Cassel and Hesse-Darmstadt, the Margrave of Baden-Baden, the King of Denmark (as Duke of Holstein) and the House of Anhalt, Feb. 5(15), 1700, 22 CTS 449. Also see Paréage creating Andorra, op cit.

232 See e.g. Treaty of Defensive Alliance between the German Princes, Aug. 22, 1667, 10 CTS 319; Defensive Armed Union between the Princes of the Empire (Wurzburg, Munster. Worms, Eichstadt, Saxe- Coburg, Baden-Durlach, Brandenburg-Culmbach, Brandenburg-Onolzbach, Hesse-Darmstadt, Denmark (Holstein), Brunswick-Wolfenbuttel, Baden-Baden and Saxe-Eisenach), July 15, 1700, 23 CTS 35; Agreement between the Princes of the Empire in Opposition to the Ninth Electorate, July 1701, 23 CTS 447.

233 See e.g. Inheritance Agreement between the Elector and the Margrave of Brandenburg, Mar. 3, 1692, 19 CTS 397; Matrimonial Treaty between Maximilian Emmanuel, Elector of Bavaria, and John III, King of Poland, in the name of his Daughter, the Princess Theresa Cuneugunda, May 19, 1694, 20 CTS 369; Treaty for the Marriage of King John V and the Archduchess Maria Anna, between the Emperor and Portugal, June 24, 1708, 26 CTS 185; RETHA M. WARNICKE, THE MARRYING OF ANNE OF CLEVES: ROYAL PROTOCOL IN TUDOR ENGLAND 101 (2000); XIV(II) J.S. BREWER, ET AL., LETTERS AND PAPERS, FOREIGN AND DOMESTIC OF THE REIGN OF HENRY VIII 286.

234 See e.g. Agreement between the Palatinate, the Dukes of Brunswick-Wolfenbüttel, Brunswick-Zell and Wurtemberg, and the Landgraves of Hesse-Cassel and Hesse-Darmstadt, Apr. 10(20), 1662, 7 CTS 131; Postal Treaty between Prussia and Thurn and Taxis, May 22, 1722, 31 CTS 375; Agreement between Hamburg and the House of Holstein, May 27, 1768, 44 CTS 187; Treaty for the Marriage of King John V and the Archduchess Maria Anna, between the Emperor and Portugal, June 24, 1708, 26 CTS 185; Treaty of Confederation of the States of the Rhine (France, Bavaria, Wurtemberg, Mayence, Baden etc.), July 12, 1806, 58 CTS 459; Accord between the Archduke Leopold of Austria (as Grand Master of the Teutonic Order) and The Netherlands, June 14, 1662, 7 CTS 181. Also see op cit. 6 JACQUES-ANTOINE DULAURE, HISTOIRE DE PARIS 298 (1834) (citing the French King’s Address to the Parliament of Paris of April 13, 1655, in which he uttered the famous “L’état c’est moi”, although the quote is probably apocryphal).

235 See Treaty of Fontainebleau, Apr. 11, 1814 reprinted in 1(Bk. 9) ALPHONSE MARIE LOUIS DE LAMARTINE, THE HISTORY OF THE RESTORATION OF MONARCHY IN FRANCE 201-6 (1854) (Michael Rafter, trans.) (“His Majesty the Emperor Napoleon on the one part, and their Majesties the Emperor of Austria, King of Hungary and Bohemia, the Emperor of all the Russians, and the King of Prussia, stipulating in their own names, as well as in that of all the allies, on the other; …”). Also see Treaty of Eternal Peace and Alliance...
at the time of their conclusion. This author could find only one international agreement made by and in the name of the Pope, as opposed to the person of the Holy See or Vatican City State, although perhaps it was the true intention of the parties to bind the institution and not the person. Historically, therefore, international legal personality for sovereign (and comparable) individuals was not too surprising though it has been phased out of practice in contemporary international law. Where questions are now being raised is whether every individual has some capacity for international personality.

There are arguments that international law is now evolving to embrace the individual. Even in inter-state disputes, the concern for and protection of the individual is increasingly important. Certainly individuals can be held to international criminal law already. In addition, the UN Security Council has issued resolutions directly imposing obligations under international law on individuals. Furthermore, individuals have been granted rights directly under international law, for example, in human rights treaties and bilateral investment treaties. Surely international law thus contemplates that individuals can bear duties and rights directly under international law, but what remains unclear is whether all individuals have the kind of capacity that ancient sovereigns might have had to enjoy a wider scope of international legal personality. In his trial at the ICTY, Karadžić argued that his agreement with Holbrooke, though ultimately not proved to exist, would have


236 See Agreement between Hanover and the Pope, Mar. 26, 1824, 74 CTS 111.

237 Thus, contemporary treaties in the name of monarch are always regarded as being in effect in the name of the state, see e.g. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 16 (3d ed., 2013).


239 See Qs Relating to the Oblig. to Prosecute or Extradite (Belg. v Senegal), Req. for the Indication of Prov. Meas., Order, 2009 I.C.J. Reps. 139 (May 28, 2009) (Cançado Trindade, J., diss. op., para 21)

Nostalgics of the past, entrapped in their own dogmatism, can hardly deny that, nowadays, States litigating before this Court, despite its inter-State contentious procedure, have conceded that they have no longer the monopoly of the rights to be preserved, and, much to their credit, they recognize so, in pleading before this Court on behalf also of individuals, their nationals, or even in a larger framework, their inhabitants.


241 See e.g. UNSC Res. 2178 (2014), para. 1 (“demands that all foreign terrorist fighters disarm and cease all terrorist acts and participation in the conflict.”) Also see UNSC Res. 814 (1993); UNSC Res. 1010 (1995); UNSC Res. 1160 (1998); UNSC Res. 1199 (1998); UNSC Res. 1203 (1998); UNSC Res 1306 (2000); UNSC Res. 1333 (2000) (creating a committee for imposing sanctions on individuals); UNSC Res. 1474 (2003) (potentially addressing obligations to “States and other actors”); UNSC Res. 2000 (2011). But see UNSC Res. 1267 (1999) (addressing obligations to control individuals’ acts to states only); UNSC Res. 1343 (2001); UNSC Res. 1540 (2004); UNSC Res. 1624 (2005); UNSC Res. 1838 (2008); UNSC Res. 2136 (2014).

242 See e.g. Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 302; Asian Agri. Prods Ltd (AAPL) v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award (ICSID, June 27, 1990) reprinted at 6 ICSID REV.-FOR. INVEST. L.J. 526 (1991) (rendering an award in the first investor arbitration claim case of its kind brought under a Bilateral Investment Treaty). Cf. J.L. BRIERLY, THE LAW OF NATIONS 277 (6th ed., 1963) (discussing the dissatisfaction with the rules of diplomatic protection compared to the right of an individual to exercise one’s own claim). Also see ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 272(2010) (“any entity that is addressed by an international norm is an international person.”)
externally constituted an agreement under international law to grant him immunity. This claim was rather dubious, but does tap into ancient practice. Some scholars have argued that individuals, or at least collective groups of individuals in the sense of civil society, should contribute to the formation of customary international law, instead of or alongside the state. Some have even asserted that the individual is the only original, natural person in international law, which harks back to this author’s skepticism above over the original/derived personality distinction. Once again, practice evolves to address the “requirements of international life” with individuals occasionally enjoying a functional, relative degree of personality. Our conclusion must be that the existence and degree of international legal personality in individuals is fluctuating and relative, depending on the state of international law and the needs of the international community, potentially keeping the door open for future expansion of personality.

Conclusion

Some scholars have argued that personality as a notion should effectively be abandoned in favor of “participation”. This step has an attraction and can certainly be taken, but for now personality retains an important status. The difficulty is that the rights of personality are fragmenting and we need to develop a coherent understanding of how to identify personality and draw consequences from personality.

Following the survey of the various ways that personality is understood in international law, the common thread is one of functionality. International organizations are the most obvious entity based on functional existence, but what we find are also quasi-international organizations, entities that may be treated as if they were international organizations depending on their function. We also find other collective entities, such as corporations and NGOs, as well as singular entities (individuals), that similarly enjoy aspects of international legal personality based on how they are functioning within the international legal order. Some of these entities, such as NLMs, indigenous peoples or insurgents, have some kind of territorial existence and their personality blurs into statehood, the most obvious of these is the collective triumvirate of the Palestinian Liberation Organization, Palestinian Authority and State of Palestine. In each of these cases, the distinction between being an international legal person and being treated as international legal person dissolves and we are left with relative rights and duties as the basis for or manifestation of personality.

The dominant paradigm of the functionalist premise for the law of international organizations assumes that organizations are functions in that they are cooperative endeavors between states. However, for the other entities in this study, each function was political in that the entity was held to have personality for the purpose of promoting the norms at stake. More importantly, this paper has concluded that questionable entities may be regarded as relative international legal persons depending on the function at issue. For example, insurgents are held to have personality as a basis for the application of international humanitarian law, NGOs may be


246 See Reparation for Injuries Suffered in the Serv. of the UN, Adv. Op., 1949 I.C.J. Reps. 174, 179 (Apr. 11); Legality of the Use by a St. of Nuclear Weapons in Armed Confl., Adv. Op., 1996 I.C.J. Reps. 66, 79 (July 8). Also see id. at 198 (Koroma, J. Dissent. Op.) (“I agree with the Court that because of the necessities of international life, it is accepted that international organizations can exercise implied powers, which are not in conflict with their constitution and are required to ensure their effectiveness”).


held to have personality in order to insulate them from state politics, certain religious organizations are held to have personality for the promotion of the religious mission, etc. In this way, the functionalist, analytical approach that forms the core of the theory of the law of international organizations is also the better approach to assessing the personality of questionable entities in the international legal system.

Perhaps then it is time to retire the notion of the monolithic, singular status of international legal person and instead recognize that personality is essentially a status of holding rights and duties, and that rights and duties fluctuate based on functions. We might still place states in a special category as the grantors of rights, but we need to acknowledge that other entities are increasingly enjoying relative personality based on their functions.