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# The Source of International Legal Personality in the 21st Century

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# The Source of International Legal Personality in the 21st Century

by

*James E. Hickey, Jr.\**

## I. INTRODUCTION.

This essay introduces Volume 2 of the Hofstra Law and Policy Symposium by commenting on the evolution of international legal personality under international law and on some approaches that seem to be emerging regarding the source of international legal personality in the next century. In a broad sense international legal personality refers to the rights and duties held by entities under international law. This volume focuses on the legal personality of entities other than states.<sup>1</sup> A fundamental question regarding international legal personality is: From what international law source do non state entities hold substantive rights and duties, including the legal capacity to assert those rights and duties in international and domestic fora?

The source of international legal personality in international relations in the twenty first century goes to the heart of international governance in at least two respects. First, it affects how local, regional and global communities of humans will be governed. Second, it shapes the manner in which that governance, whatever form it takes, will account to populations for its actions or failures to act.

An underlying issue raised by any inquiry into source is whether the

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1. By definition, a state has international legal personality. One of the definitional requirements for statehood is a capacity to enter into relations with other states. Among the consequences of statehood is sovereign status as a subject of international law with international law rights and duties.



assertion of international *political identity* by a non state entity should establish, without more, international *legal personality* as a matter of international law? If entities and actors other than states are able to successfully assert independent international legal personality in their own right in the international legal system, the present system of state accountability to the world's population for the creation of international law rights and duties will be diluted and the source of international legal personality will shift away from states.

In the last 50 years, new approaches to the source of international legal personality have begun to emerge in response to the dramatic changes in the economic, political, cultural and social world order. Those changes are reflected in at least six global developments, most of which have yet to be completed.

First, the disintegration of the Soviet Union in the early 1990's signaled the end of the political and military "empire" system of world governance — a process that began in earnest at the close of World War II with the movements to replace colonies with independent states. Second, the early 1990's also signaled the end of the Cold War and an accelerating movement toward global economic integration and political cooperation on regional and global fronts. Third, states increasingly have moved to embrace both democratic forms of government and privatized free market economies. Fourth, the computerized information age has arrived, which has made news and data of every kind and description available instantaneously to an increasing portion of the world's population. Fifth, the global problems needing global responses have increased dramatically in the last half decade in such areas as crime, energy, the environment, finance, food, human rights, intellectual property, natural resources, and trade, all of which have involved varying degrees of international effort to resolve. Sixth, the number of entities, state and non state, that have become involved in those global issues has multiplied exponentially and now collectively number in the thousands.<sup>2</sup>

If, as is likely, the trend of these developments continues, the source of international legal personality in the 21st century may be fundamental-

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2. The number of states that are members of the United Nations has grown from 51 founding members in 1945 to 185 in 1995. XXXII U.N. Monthly Chron. no.2, June, 1995, Backcover. Non state entities — international organizations (regional and global), specialized agencies of the United Nations, corporations (national and multinational), nongovernmental organizations (NGO's), and humans (individually and collectively). — involved in global issues have also increased dramatically in number and variety. For a discussion of the role of NGOs in international decision making see, Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, THE WASHINGTON QUARTERLY 45 (Winter 1995).



ly different than it has been in the past.

The primary non state entities that are affected by the presence or absence of international legal personality under international law are international organizations, United Nations specialized agencies, regional organizations, human beings, corporations, nongovernmental organizations, and subnational governments.

This essay briefly lays out the legal historical evolution for the emerging approaches to the sources of international legal personality for non state entities, broadly classifies the approaches to the source of international legal personality that seem to be emerging, and concludes that the source of international legal personality for non state entities in the twenty first century ought to continue to be derived from states provided states generally both adhere to concepts of popular sovereignty and respond adequately to the changing realities of global integration.

## II. THE EVOLUTION OF INTERNATIONAL LEGAL PERSONALITY.

From the Peace of Westphalia in 1648 until the second half of this century, the source of international legal personality was, for the most part, relatively easy to determine. States were subjects of international law with international legal personality and other entities were not, unless either states specifically conferred personality on them (through some discernable legal principle, a municipal law statute, or an international law instrument such as a treaty), or states by acquiescence accepted their personality.<sup>3</sup>

The evolution of international legal personality for non state entities has focused principally on international organizations, specialized agencies, regional organizations, and human beings.

### 1. *Global International Organizations.*

International legal personality for non state entities began with the evolution of the international organization out of multilateral diplomacy.<sup>4</sup> The first form of structured, multi-state cooperation was the practice of states to hold ad hoc multi-state conferences in situations where bilateral

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3. *See generally*, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 58 (4th ed. 1990); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (Clarendon Press 1979).

4. *See generally*, DEREK W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* (1982).



diplomacy proved inadequate. For example, the Peace of Westphalia itself was the product of such an international conference as was the Congress of Vienna in 1815.

A significant limitation of ad hoc conferences, especially the nineteenth-century conferences, was a fastidious adherence to the principle of the sovereign equality of states. This tended to limit participation only to states that reached decisions unanimously on the basis of complete equality in voting. Unanimity and equal voting were necessary because majority voting or weighted votes would allow one group of states to assert their will over others contrary to strict notions of sovereign equality. These types of temporary conferences, while certainly useful, are not particularly well suited to deal comprehensively, and in a timely manner, with long term, continuing problems of substantial concern to the international community.

More permanent and enduring international structures may need to be established. For example, recent attempts to deal with land mines and global warming have not relied on ad hoc international conferences alone, but have combined conferences with proposals for a subsequent treaty regime to address the long term issues.

Parallel to the system of ad hoc conferences, administrative public international unions developed to address specific human needs. These public international unions were, more or less, continuing associations of states organized through a permanent administrative or deliberative organ of some kind to carry out the purposes of the union. They were created by states through multilateral treaties. The public unions were primarily functional, nonpolitical, entities and included the international river commissions, the postal, telegraphic and railway unions, and the metric, copyright and sugar unions. Interestingly, some of these state-created unions, like the Metric Union and the International Labor Organization (ILO), were established to augment, replace or institutionalize private unions, which had been formed by private individuals or corporations located in more than one state to address their private international interests.<sup>5</sup>

The significance of the public administrative unions for purposes of the source of international legal personality is threefold. First, the legal personality of the public unions, to the extent it existed, emanated from states. Second, the relinquishment of sovereignty by states that this entailed was at times extraordinary. For example, the International Sugar

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5. *Id.* at 4-6.



Union founded in 1902 “had a permanent commission which, by majority vote, could order a change in municipal legislation” of participating states.<sup>6</sup> Third, the public unions demonstrated an ability of states generally to adapt to international needs and to meaningfully respond to the concerns originally raised by private nongovernmental international actors about specific pressing problems of international scope.

During the twentieth century, states collectively also began to address international political problems in the aftermath of the two world wars through permanent international organizations — first, with the founding of the League of Nations and, later the United Nations. The source and extent of the international legal personality of the League, and especially the U.N. Organization, ultimately was expressed in their founding charters created by the member states — The Covenant of the League of Nations and the United Nations Charter.

Here, authority was not vested collectively in the individual members (like unincorporated associations or partnerships at municipal law) but rather in the international organization as a distinct legal personality, although this need not have been the case should the member states have so provided.<sup>7</sup> This approach to international organizations means that states impliedly conferred on the organization the international legal personality needed to carry out the functions assigned to it consistent with the purposes and principles specified in the legal instrument creating it. As the ICJ put it in its advisory opinion in the *Reparations* Case regarding the capacity of the U.N. Organization to bring an international claim for injury to its personnel:

In the opinion of the Court, the [U.N.] Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members [as expressed in the U.N. Charter as a whole], by entrusting certain functions to it, with the attendant duties and responsibilities,

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6. *Id.* at 8.

7. See Exchange of Greek and Turkish Population Case, PCIJ, Series B No.10; Reparation for Injuries Suffered in the Service of the U.N., [1949] I.C.J. Rep. 174. (*Reparations Case*).



have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to the conclusion that the Organization is an international person.<sup>8</sup>

This implied powers approach to international legal personality has now expanded beyond that directly and absolutely necessary to the functioning of an international organization to include indirect powers "relating to the purposes and functions specified in the constitution" of the organization.<sup>9</sup>

An unresolved question about the international legal personality of international organizations like the U.N. is whether its personality, once established, contains any inherent legal capacity to act apart from that explicitly conferred or implied in the founding instruments. If not, then acts of international organizations not expressly or impliedly contained in the controlling legal instruments of the organization may be *ultra vires*.<sup>10</sup> If an inherent legal capacity does exist, then the international organization might have to be viewed "as a dynamic institution, evolving to meet changing needs and circumstances and, as time goes by, becoming further and further removed from its treaty base".<sup>11</sup> In either event, the ultimate power over international organizations remains with states, if, for no other reason, than that states may always choose to dissolve an international organization that they have created. Of course, the more removed that the exercise of international legal personality by an international organization is from its constitutional roots the more difficult becomes any decision of states to dissolve such an organization.

## 2. *Specialized Agencies.*

Certain global international organizations have evolved with limited functional competence and with a direct and special relationship with the General Assembly and the Economic and Social Council (ECOSOC) of the United Nations. These intergovernmental organizations are "specialized agencies", which are "brought into relationship with the United Nations" and which have "wide international responsibilities" in "economic, social, cultural, educational, health and related fields." <sup>12</sup>

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8. Reparations Case, *supra* note 7 at 178.

9. Bowett, *supra* note 3 at 338.

10. See Advisory Opinion on Certain Expenses of the United Nations [1962] I.C.J. Rep. 163.

11. See Bowett, *supra* note 3 at 338.

12. Articles 57 and 63 of the U.N. Charter.



The "wide international responsibility" characteristic generally precludes regional entities from specialized agency status.<sup>13</sup>

The specialized agencies include the Food and Agricultural Organization(FAO), the General Agreement on Tariffs and Trade(GATT), the International Bank for Reconstruction and Development(IBRD), the International Civil Aviation Organization(ICAO), the International Development Association(IDA), the International Finance Corporation(IFC), the International Fund for Agricultural Development(IFAD), the International Labor Organization(ILO), the International Monetary Fund(IMF), the International Maritime Organization(IMO), the International Telecommunications Union(ITU), the Multilateral Investment Guarantee Agency(MIGA), the United Nations Educational, Scientific and Cultural Organization(UNESCO), the United Nations Industrial Development Organization(UNIDO), the Universal Postal Union(UPU), the World Health Organization(WHO), the World Intellectual Property Organization(WIPO), and the World Meteorological Organization(WMO).<sup>14</sup>

ECOSOC carries out the U.N.'s relationships with specialized agencies, coordinates the tasks of the specialized agencies, and makes recommendations to specialized agencies under intergovernmental agreements approved by the U.N. General Assembly.<sup>15</sup> The intergovernmental agreements approved by the General Assembly confer varying degrees of autonomy upon the specialized agencies. The agreements also generally address the membership of states, reciprocity and cooperation among specialized agencies, the role of the U.N. Organization, budget and finance matters, and the non-voting participation by non state entities (typically by conferring on them "associate membership" in the agency).

As with international organizations, the specialized agencies derive their international legal personality and autonomy to act from specific legal instruments (i.e. the U.N. Charter and the intergovernmental agreements approved by the General Assembly) and from the state governments that are party to the instruments creating specialized agencies. Most specialized agencies, under the U.N. Charter and their respective intergovernmental agreements, have *locus standi* to seek advisory opinions of the International Court of Justice on "legal questions arising within the scope of their activities".<sup>16</sup>

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13. See discussion of regional organizations below.

14. XXXII UN Monthly Chron.(No. 2), June 1995, Backcover.

15. Article 63 of the U.N. Charter.

16. Article 96 (2) of the U.N. Charter.



Special mention should be made of the voting and participation procedure that the ILO has had for nongovernmental employers and employees because it "illustrates very forcibly the kind of problems which may be encountered once interests are represented, other than State interests, side by side with States."<sup>17</sup> Historically, voting rights in the ILO were conferred on three distinct groups — States, employers and employees — on the assumption that each group was independent from the others. That assumption of independence, of course, did not necessarily apply to socialist or communist states in which states may be the employer and in which the employees work for the state. The voting rights in those circumstances inherently were skewed and tipped in favor of the socialist and communist states because the employer group effectively became an additional voting delegate of those states in the General Conference of the ILO.

The "unhappy history" of the ILO's attempts to accommodate voting representation for both state and non state interests indicates that great caution needs to be exercised in altering the future representative character not only of specialized agencies but of international and regional organizations as well.<sup>18</sup> That history also generally underscores the "devil-in-the-details" of conferring, as a matter of international law right, full, unfettered, international legal personality, on a par with states, upon such non state entities as private corporations, special interest nongovernmental organizations, and subnational governmental units.<sup>19</sup>

### 3. *Regional International Organizations.*

Regional international organizations are organizations created by states that share a common, geographic or policy, bond. Regional international organizations have been in existence since the beginning of this century.<sup>20</sup> Originally, they were created for security reasons but more recently they have embraced political and economic purposes as well.

Regional international organizations include the Arab League, the

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17. Bowett, *supra* note 3 at 123.

18. *Id.*

19. See discussion of the factual realist approach below.

20. For example, Article 21 of the Covenant of the League of Nations recognized the legitimacy of regional groupings of states for security reasons:

Nothing in this Covenant shall be deemed to affect the validity on international engagements such as treaties of arbitrations or regional undertakings like the Monroe Doctrine for securing the maintenance of peace.



Association of South East Asian Nations (ASEAN), the British Commonwealth, the Commonwealth of Independent States (CIS), the Conference on Security and Cooperation in Europe (CSCE), the Council of Europe, the European Commission (EC), the European Union (EU), The South American Common Market (MERCOSUR), the North American Free Trade Association (NAFTA), the North Atlantic Treaty Organization (NATO), the Organization of African Unity (OAU), the Organization of American States (OAS), the Organization for Economic Cooperation and Development (OECD), and the defunct South East Asia Treaty Organization (SEATO) and the Warsaw Pact.

Generally, the same international legal personality considerations that apply to global international organizations apply also to regional organizations. That is, the international legal personality of these varied regional organizations is, like international organizations, grounded in the international legal instruments agreed to by the states that create them and in the implied powers exercised and functions carried out by those organizations.<sup>21</sup>

There is a potential tension between regional organizations and global international organizations. That tension may exist where regional organizations stress special interests peculiar to a region at the expense of efforts to achieve global or universal cooperation through the United Nations or other international bodies. For example, regional "positions" are developing in the areas of human rights, international trade and the environment which may be viewed, in certain respects, as being at odds with the efforts of global international organizations to deal with these subjects. A settled approach to the source of international legal personality for global and regional international organizations might help to resolve some of those tensions in the future.

#### 4. *Human Beings.*

Historically, individuals and groups of individuals, for the most part, were treated as objects of international law without international legal

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21. For example, the European Court of Justice has opined that the power of the European Community to bind the Community to international commitments with third states "flows by implication from the provisions of the Treaty [of Rome] creating the internal power and in so far as the participation of the Community in the international agreement is . . . necessary for the attainment of one of the objectives of the Community." (emphasis added). Opinion 1/76, [1977] E.C.R. 741 at 755.



personality.<sup>22</sup> That is, international law did not acknowledge that human beings as such had international law rights. International law rights existed in states (the subjects of international law) in their relations with other states. Humans, individually and collectively, generally had no direct international legal personality in the absence of some cognizable and specific legal capacity accepted by the general practice of states or established by treaty.

The evolution of generic international legal personality for humans, more or less, has divided into three substantive stages that have been termed the human rights "generations."<sup>23</sup> The first generation of human rights is least controversial and comprises civil and political rights.<sup>24</sup> The second generation of human rights is comprised of economic, social and cultural rights.<sup>25</sup> The third, and most controversial, generation of human rights addresses collective or solidarity rights which include, among others, claims of human rights to develop, to peace, and to a healthy and safe environment.

With certain important and limited exceptions, the international legal personality of humans remained, until after World War II, derivative and merely a vehicle for states to assert claims among themselves.<sup>26</sup> Individual or collective "rights" of human beings under international law only existed indirectly and to the extent that states chose to take up the cause of their own nationals and assert them against another state.<sup>27</sup> The notion here was that any injury to humans to be protectable under international law had to constitute an injury to the state of which the humans were nationals.<sup>28</sup> State sovereignty generally precluded states from taking up the causes or claims of the nationals of other states on the theory that no other state's legal interest was involved when a state

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22. To a much lesser extent this remains true even today.

23. See Richard B. Lillich and Hurst Hannum, *INTERNATIONAL HUMAN RIGHTS* (3d ed.) 1995 at 194-201.

24. See International Covenant on Civil and Political Rights, adopted 1966, entered into force 1976, 999 U.N.T.S. 171.

25. See International Covenant of Economic, Social and Cultural Rights, adopted 1966, entered into force 1976, 999 U.N.T.S. 171.

26. See *Mavrommatis Palestine Concessions* (Jurisdiction), P.C.I.J., Ser.A, No.2, p.6 (1924).

27. *Id.* at 12. ("Once a State has taken up a case on behalf of its subjects before an international tribunal in the eyes of the latter the State is the sole claimant.")

28. See *The Nottebohm Case* (*Lichtenstein v. Guatemala*), 1955 ICJ 4, -- ("[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.")



mistreated its own nationals.<sup>29</sup> On the same theory, stateless persons were without even derivative international legal personality because no state was entitled (i.e. had jurisdiction) to take up their cause.

To the extent international legal personality for humans existed, it tended to apply only selectively to human beings in specific roles. That is, human beings were "protectable" if states having the necessary legal interest in those human beings chose to take up their protection and if human beings were, for example, aliens, prisoners of war, civilians in war time, populations in mandate or trust territories, or diplomatic agents. Similarly, human beings were "prosecutable" by states if human beings were, for example, high seas pirates or slave traders.

A more prominent status for humans in their own right began to evolve after World War II when states, through Articles 55 and 56 of the U.N. Charter, "pledged" "to take joint and separate action in co-operation with the [U.N.] Organization" to achieve "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>30</sup> Over the past 50 years, since the adoption of the U.N. Charter, states have gradually taken actions in a large number of international treaties and instruments both to acknowledge the existence of a considerable variety of specific human rights for all humans and to accept in principle, and increasingly in practice, certain rights and duties with regard to all humans.<sup>31</sup>

### III. APPROACHES TO INTERNATIONAL LEGAL PERSONALITY IN THE 21ST CENTURY.

If the universe of international legal personalities were limited to states, international organizations (global and regional), U.N. specialized

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29. An exception to this rule that a state had exclusive jurisdiction over its nationals inside its territory which could not be interfered with by other states was the doctrine of humanitarian intervention. Humanitarian intervention recognized that states could use force against another state if that other state treated its nationals in a way that shocked the conscience of civilized states. Historically, the doctrine, more often than not, was wrongly invoked to justify invasion by states and did not constitute very substantial evidence of state recognition of a general international legal personality for humans.

30. 59 Stat. 1031, T.S. No. 993, 3 Bevans 11553 (1969).

31. The foundational instruments conferring and accepting the international legal personality of humans regarding human rights are contained in the "international bill of human rights" which is comprised primarily of the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights.



agencies, and human beings (individually and collectively), the source of international legal personality would not appear to impose especially difficult jurisprudential issues in the 21st Century, apart from the relatively limited problem of the extent of implied powers for international organizations and specialized agencies of the UN. In each case, there must exist some constitutive legal instrument, some legal principle, or some general practice of states accepted as law that may be examined to determine the source of a non state entity's legal rights and duties, its legal capacity, or its legal interest.

In recent decades, however, a plethora of new political identities — such as multinational corporations, subnational governments and nongovernmental organizations — have emerged as new actors in international relations. Unresolved with these new international political identities is the source, if any, of their international legal personality. That lack of resolution poses several fundamental questions for international law in the 21st Century including the following: Must these new international political identities, as non state entities have had to do in the past, establish their international legal personality by pointing to some public international law source (treaty, general practice of states accepted as law, or general principle of law)?; May they claim international legal personality, in their own right, apart from state-created international law?; If so, to what extent may they exercise that international legal personality by claiming rights to participate in international conferences, assemblies of international organizations and by acquiring *locus standi* in international courts and tribunals?; May they participate directly (i.e. by voting or by litigating), as a matter of right, in the formation of future international law?

The suggested answers to such questions, as could be expected, vary widely and reflect a combination of agendas, values, perceptions, and philosophies on world governance and accountability.

There seem to be at least three broad classifications emerging regarding the source of international legal personality for these new political identities: 1. the legal traditionalist approach; 2. the factual realist approach; and 3. the dynamic state approach.

### *1. The legal traditionalist approach.*

The legal traditionalists tend to approach international legal personality for new, international, non state, political, identities from the position that sovereign states have primacy over all other entities and actors. That primacy places full international legal personality, in the first



instance, in states in the sense that states are the ultimate source for rights, duties, privileges and immunities under traditional international law. Legal traditionalists would require new international political identities to establish that they directly or impliedly derive claimed international legal personality in some manner from states in the same way that existing non state legal personalities, like international organizations do.<sup>32</sup> Here, the international legal personality of non states entities must be discernibly transferred from states to the nonstate entity through some legal instrument, general principle of law, or rule of customary international law (the general practice of states accepted as law). Without that transfer, non state entities should not be taken to have either international legal personality or the consequent legal standing or legal capacity to assert international law rights and duties directly in international law fora.

An underlying rationale for the legal traditionalist approach to the source of international legal personality is a powerful one: States under the international legal system are "the repositories of legitimated authority over peoples and territories" and appropriately must be the ultimate legally traceable source for the international legal personality for all non state entities.<sup>33</sup> Legal traditionalist stress that an inherent definitional requirement for statehood, absent in all other non state entities, is a stable population living in a defined territory. As such, all international law rights and obligations properly flow from states. Otherwise, state populations could be bound by international law formed and applied without their consent expressed through their state governments contrary to notions of law based on a source of representative government. The traditional international law approach to international legal personality finds support in the movement of states away from absolute sovereignty to popular sovereignty which accepts that the authority of state government rests with its population and is accountable

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32. The International Court of Justice opined that the U.N. Organization had international legal personality, at least where the source of U.N. legal personality may be fairly implied from the U.N. Charter, where the functioning of the United Nations requires that it be treated as a legal personality, and where subject matter is involved over which states have recognized U.N. competence (Reparation for Injuries Suffered in the Service of the U.N., 1949 I.C.J. Rep. 174, 182):

Under international law the Organization must be deemed to have those powers, which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.

33. WOLFGANG G. FREIDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 213 (1964).



to its population for its governance acts or failures to act.<sup>34</sup> In this way, at least theoretically, the seat of sovereignty and formal international law making remains ultimately with the populations of defined geographic territories.

For the most part, legal traditionalists would treat non state entities at the international level no differently than non state entities are treated under municipal law, at least as to the legal source of their rights and duties. That is, citizens, groups, corporations, and subnational governments to successfully claim legal personality under municipal law must be able to ground claimed rights and duties flowing from that personality to some accepted municipal law principle, statute, or regulation. Similarly, the legal traditionalist approach would firmly tether international legal personality for new international political identities to the state in the international legal system more or less as it has been in the past.

## 2. *The Factual Realist Approach.*

The factual realists generally assert, as a matter of fact, that the state is irretrievably in decline and that new non state entities are increasing in number and influence in international relations. Those facts, in turn, require complementary and fundamental changes in the legal source of international legal personality under international law, especially if the trend of those facts continues into the 21st Century.

Under the factual realist scenario, there would arise in the place of states, presumably, either of two international structures. The first possible structure would be some sort of monistic international governmental entity like a unitary global super state. The second, alternative, structure would be a non-territorially based more fluid global system in which states, although they may continue to exist, are dominated by a world wide web of international organizations, public and private interest groups, corporations, and subnational governments operating through interconnected economic, financial, and political relationships.

As to the decline of the state, factual realists point to global integration on all fronts, which they posit is reducing the nature and relevance of the state, at least as the ultimate source of international legal personality for non state entities. In this new world order, the primacy of states is increasingly anachronistic because the factual predicate for the

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34. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 87 (ed. J.W. Cough) (1956).



continued dominance of territorially-based political economies epitomized by the state is eroding. Factual realists point to the increasing movement and mobility of humans, the growing acceptance of dual or multiple nationalities for humans,<sup>35</sup> and the emergence of non-territorial international markets (underscored by cyberspace and the internet). As a result of such facts, states, viewed from an international perspective, are becoming increasingly removed and separate from their populations on a growing number of fronts. Populations, in turn, are relying increasingly upon a growing number of non state entities to represent and pursue an expanding variety of international interests. Factual realists also assert that the passive-reactive response of states to new international problems makes their position as the legal source of international legal personality for non state entities out of date. As a result of this new factual reality, states in the future should no longer be the sole international law source of the international legal personality of non state entities.

As to the rise of non state entities, factual realists point to the explosion in the total number of international and regional organizations, NGOs, corporations (national and multinational), subnational governments, joint ventures, and other international political identities that, in fact, are exercising growing influence in reshaping international law to respond to changes in international society. As a result, non state entities, in addition to relying on states for their international legal personality and *locus standi*, ultimately ought to be able to establish for themselves their international legal personality and capacity. That is, once a non state entity factually establishes an ability to influence and shape the content and application of international law, it should have international legal personality with, or without, the permission of states. In these factual circumstances, the legal traditionalist approach comes under increasing pressure. Factual circumstances alone may not justify directly bypassing the framework of nation states to create a wholly new concept of international legal personality. However, changes in fundamental facts need to be accommodated, in some manner, by international law. Otherwise, there is a risk that international law will have a greatly diminished role in the governance of modern international society that is limited to traditional state-to-state relations.

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35. For a comprehensive examination of dual nationality, see Peter J. Spiro, *Dual Nationality And The Meaning Of Citizenship*, 46 EMORY L.J. 1411 (1997).



### 3. *The dynamic state approach.*

The dynamic state approach takes, more or less, a middle position between the legal traditionalist and the factual realist approaches on the source of international legal personality for new non state international political identities. The dynamic state approach generally views that both legal traditionalists and factual realists assume a static, rigid body of international law: the legal traditionalists tend to preserve it; the factual realists tend to ignore it. The dynamic state approach posits a more fluid and accommodating relationship between international law and international facts. It suggests that an increasingly vibrant interaction exists among municipal and international law, states and other international players, and the source of international legal personality.

Under this approach to international legal personality, the state is viewed as a dynamic and resilient entity that is increasingly responsive to changes in international facts.<sup>36</sup> Far from being in decline, the governance entity of choice, of course, among the populations of the world is the state.<sup>37</sup> For example, after the demise of the Soviet Union, the political aspirations of the former Soviet Union populations led to the establishment of a number of new independent states as the most desirable form of governance. In the 1990's alone 29 new states became members of the United Nations.<sup>38</sup>

The dynamic state approach to the source of international legal personality takes the view that, over the long term, states have responded satisfactorily to changes in international facts in several respects. First, states, in response to changes in political philosophy, have moved away from notions of absolute state sovereignty to acceptance of popular sovereignty in which state governments have direct accountability to their populations. Second, states have directly and impliedly conferred on a growing number of international and regional organizations and agencies the competence necessary to address an impressive array of international problems including peace-keeping, health, food, global finances, global and regional environments, human rights, and energy. Third, for at least a half century, states have made explicit provision, in a variety of settings, for the participation of new international political identities in

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36. See, Mark L. Movsesian, *The Persistent Nation State and The Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083 (1996).

37. *Supra*, note 2.

38. *Id.*



international law fora.<sup>39</sup>

State dynamists also point to the substantial changes made by states to international law that demonstrate a capacity to adapt to changing international facts on many fronts. For example, in the international law on the environment states have long embraced aspects of strict state responsibility for the extraterritorial effects of pollution.<sup>40</sup> And states are in the process now of embracing the precautionary principle under which states assume obligations to prevent certainty emissions and discharges even in the absence of scientific certainty that harm will result.<sup>41</sup> In addition to the environment, new state-created international law is being fashioned to address changing facts and new realities, for example, in intellectual property, trade, human rights, energy, oceans, space and cyberspace.

State dynamists, however, would continue to insist that new international political identities to claim international legal personality must be able to point to some international law treaty, custom, or general principle of law. The reason for this is that the state remains the sole seat of representative governance accountable to world populations at the international level.<sup>42</sup> State dynamists argue that formal representative government should not be cut off at the municipal law pocket by doing away with the state as the ultimate source of international legal personality. If new international political identities may determine for themselves whether or not they are international legal personalities this would precisely be the result.

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39. For example, Article 71 of the U.N. Charter adopted in 1945 explicitly authorizes the Economic and Social Council to provide for the non voting participation of NGO's in Council and specialized agency deliberations. More recently, Article V (2) of 1994 Marakesh Agreement Establishing the World Trade Organization authorizes the General Council to have "effective cooperation" with NGO's.

40. See the Trail Smelter Arbitration (United States-Canada), 3 R. Int'l Arb. Awards 1905 (1949), 35 AM. J. INT'L L. 684 (1941) ("[N]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another....")

41. See, THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW, THE CHALLENGE OF IMPLEMENTATION (David Freestone and Ellen Hey eds., 1996); James E. Hickey, Jr. and Vern Walker, *Refining The Precautionary Principle In International Environmental Law*, 14 VIRGINIA ENVIRONMENTAL L. J. 423 (1995).

42. New international political identities, for the most part, do not act in a representative capacity for populations but rather represent special interests. For example, multinational corporations primarily represent shareholders and corporate officers. NGOs primarily represent donors and staffs.



#### IV. CONCLUSION.

The 20th Century has seen the rise and expansion of non state international legal personalities. International and regional organizations, specialized agencies of the U.N. and human beings have all had international legal personality conferred on them directly or indirectly by states. That conferral has been accomplished mainly through treaties concluded by states.

In recent decades, a growing number of new international political identities have emerged as participants in the international political, social, and economic process. These include nongovernmental organizations, multinational corporations and to some extent, subnational governments. An important question for international law in the 21st Century is whether these new political identities should have international legal personality (in the sense of having international law rights and duties including the capacity to directly assert those rights and duties in international law fora) and if so, from which source? That is, should these new international political identities be required to look to states for the source of their international legal personality as other non state entities have had to do in the past? Or should these new political identities be able to claim international legal personality in their own right with, or without, the permission of states? The answers to these questions will have profound implications for the configuration and operation of the international law making process in the decades ahead and the role of the world's populations in that process.

This is a time in history when an increasing number of global issues are the object of international debate and decision and when states are becoming more representative and more responsive to their populations than ever before. That responsive representation ought not to be curtailed in international law by marginalizing the state's role in determining international legal personality. If states continue to demonstrate an ability to respond adequately to the international needs of their populations, it is perhaps advisable not to adopt an approach to the source of international legal personality that stifles representative government's role at the international law level.