I. General Introduction

As the builders say, the larger stones do not lie well without the lesser.
Plato

A. Introduction

It is a small observation of mine that most people who are not trained in international law have little understanding of what we mean when we talk about international legal personality. In attempting to explain our understanding of the concept, I often find myself instead forced to defend the practice of international law. The average person – or so it would seem – perceives international law to be nothing more than a game played between bickering nations, like petulant schoolboys roughhousing on the playground. Rwanda, Iraq, Darfur: why does international law let them happen? Why do so many people have to die? These are questions that I have not been able to satisfactorily answer; or at least not to the satisfaction of my lay interrogators. It has since occurred to me that perhaps international law has in some way lost sight of what should be its essential motivation as a legal system: to assure Man’s survival and wellbeing.

Through the concept of international legal personality (hereafter ILP), international law has a mechanism by which to regulate participation in the creation and application of international legal rules. My concern rests with the dominant definition of ILP in which states alone hold the exclusive title of ‘supreme’ legal being. Indeed, one need not search hard to find clues that something may be amiss in the world of ILP. The very name ‘international legal personality’ portraits remarkable irony as the original ‘prototype’1 legal person – the human being – is only accorded a minor rank in the dominant

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a definition of ILP. Quite unlike the situation at municipal law, where the natural person is in actual fact supplemented by a variety of fictional persons (corporations, municipalities, associations etc.), the top rank of international law is composed exclusively of fictional persons – those being, of course, states. The exclusion of individuals from the highest orders of international law cannot be blamed on practical considerations alone (like the decentralized structure of international law) – it is an exclusion which is deeply rooted in our dominant legal theory. The supreme legal actor in effect sets the motivation for all subsequent legal activity and thus poses far-reaching theoretical concerns for us as legal scholars.

B. Problem and Purpose

Legal personality is perhaps the most fundamentally important concept in the totality of judicial science. The reason for this is clear and simple: without legal personality, an entity does not exist in the eyes of the law. Without this quality, it is impossible for an entity to participate meaningfully in legal life. Of course, the objective existence of a given entity is unassailable by a mere legal conception and continues regardless of its status in law. This distinction between mere factual existence and legal standing boils down to the capacity to be the holder of rights and duties. These twin elements constitute the very foundation of international legal life as together they allow complex interaction to take place and permit the possibility of meaningful and predictable outcomes. It can thus be said that in the subjective world of modern international law, legal personality is the entry ticket to existence.

Whilst recognizing that being extensively deprived of ILP likely has only a marginal impact on people’s daily lives, it is open to discussion whether the same can be said about the theoretical implications to international law as a whole. It is my essential proposition here that the current iteration of ILP centred on the state (as opposed to the individual) fails to exhibit a sufficiently robust logical consistency to serve as a basal notion of international law. By this I mean that when we superimpose the meaning and effect of state-centric ILP on our present-day globalized reality, an ideal theoretical model for the regulation of involvement in international law fails to materialize from our dominant conceptual approach to ILP. A notional solution which does not hold up against an examination of its logical foundations down to the lowest levels of abstraction is highly significant. Whilst it may not necessarily be a problem of immediate practical

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3. For example, a swath of land may possess an uncontroverted physical existence and yet not be considered a state at international law.