

# IUS GENTIUM



## Legal Personality

SPRING 2005

---

VOLUME 11

---

---

---

---

IUS GENTIUM  
Journal of the University of Baltimore  
Center for International and Comparative Law



Spring 2005  
Volume 11

Copyright 2005  
ISSN: 1534-6781

---

---

### ***Editor***

Mortimer N.S. Sellers  
*University of Baltimore*

### ***Board of Editors***

Myroslava Antonovych  
*Kyiv-Mohyla Academy*

Nadia de Araujo  
*Pontificia Universidade  
Católica do Rio de Janeiro*

Jasna Bakšić-Muftić  
*University of Sarajevo*

Loussia P. Musse Felix  
*Universidade de Brasília*

Emanuel Gross  
*University of Haifa*

James E. Hickey Jr.  
*Hofstra University*

Jan Klabbers  
*University of Helsinki*

Claudia Mina Marques  
*Universidade Federal do Rio  
Grande do Sul*

Eric Millard  
*Institut Universitaire de France*

David L. Carey Miller  
*University of Aberdeen*

Gabriël Moens  
*The University of Notre Dame  
Australia*

Raul C. Pangalangan  
*The University of Philippines*

Mizanur Rahman  
*University of Dhaka*

Keita Sato  
*Chuo University*

Poonam Saxena  
*University of New Delhi*

Gerry Simpson  
*London School of Economics*

Eduard Somers  
*Universiteit Gent*

Xinqiang Sun  
*Shandong University*

Jaap W. de Zwaan  
*Erasmus Universiteit Rotterdam*

IUS GENTIUM · *Spring 2005*

---

---

***Managing Editor***

Morad Eghbal  
*University of Baltimore*

***Student Editors***

Hazvinei Mugwagwa  
*University of Baltimore*

Julia Oaten  
*University of Baltimore*

Maher Shomali  
*University of Baltimore*

***Administrator***

Joyce Bauguess  
*University of Baltimore*

---

---

This issue of *Ius Gentium* contains the proceedings of the May 2004 meeting of the European–American Consortium for Legal Education (EACLE), which took place at Hofstra University in Hempstead, Long Island. The next EACLE conference on “Agreements” will meet at the University of Ghent in May 2005.

# IUS GENTIUM

## CONTENTS

Evolving Legal Personality: The Case of  
European Union Citizenship  
*by Flora Goudappel and Sylvia Romein* .....1

The Concept of Legal Personality  
*by Jan Klabbers*.....35

International Legal Personality  
*by M.N.S. Sellers*.....67

Measuring Evolvability of Legal Personality  
*by Nary Subramanian and Lawrence Chung*...79





# Evolving Legal Personality: The Case of European Union Citizenship

*Flora Goudappel*  
*Erasmus University Rotterdam*

*Silvia Romein*  
*Erasmus University Rotterdam*

## I. INTRODUCTION

In 1992, the concept of European Union citizenship was first introduced within the structure of the European Union. At that time, it was meant to be an almost completely symbolic change.<sup>1</sup> As the text of Article 17 E.U. stated:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the

---

<sup>1</sup> A.P. van der Mei, *Migrantenrecht* 8, 2003, p. 268.

## *Goudappel & Romein*

Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

The text did not add anything to the rights that citizens of E.U. Member States had already under European Community Law. Since then, E.U. citizenship has evolved in many different ways. Both secondary E.U. legislation and the case law of the European Court of Justice have referred to E.U. citizenship and attached (implicit) rights and duties to it. In the draft European Constitution, the concept of E.U. citizenship was given a prominent place.

What the European notion of citizenship entails, however, remains in question. This paper will address this question from a number of different perspectives to clarify the rights and duties of European citizens. First, the contents of prior existing ideas of citizenship will be discussed, most notably the long established citizenship in the U.S.A. Second, the evolution and development of E.U. citizenship will be discussed on the basis of primary and secondary legislation, as well as on the basis of case law. The third and central question in this discussion will be about this evolving conception of citizenship and

## *Evolving Legal Personality*

whether it leads to equality or to inequality between inhabitants of the Member States. Any concept aimed at giving rights to inhabitants is meant to be an improvement of their position. Yet, since European citizenship rights exist at both the national and at the supranational European level, problems arise concerning the position of those affected and those not affected by citizenship requirements.

### II. A THEORY OF CITIZENSHIP

Citizenship is a basic notion in many constitutional structures, such as the U.S.A. and Australia. Although citizenship used to be referred to as a basis of rights in seventeenth century Holland (“*burger*”) and during the French Revolution (“*citoyen*”), recently Western Europe citizenship has largely been supplanted by the concept of nationality.<sup>2</sup> Focus on nationality, at least in theory, attempts to define a basic distinction between nationals and non-nationals. The meaning of citizenship differs from state to state. For this paper, the focal point will be the legal status of a citizen, not the popular idea of personal loyalty to a state. Citizenship is “a core concept in our political and moral vocabulary.”<sup>3</sup>

---

<sup>2</sup> ‘Nationality’ is also often seen as the international law aspect, while ‘citizenship’ refers to its implications in national law. See Stephen H. Legomski, Comment: Why Citizenship?, in: 35 *Va.J.Int’l L.*, 1994, pp. 279 ff.

<sup>3</sup> Linda Bosnia, Citizenship Denationalized, 7 *Ind. J. Global Leg. Stud.* 447.

### *Goudappel & Romein*

In fact, citizenship is a legal status, granting rights and duties to inhabitants. The extent of those rights and duties has traditionally depended on the nation-state,<sup>4</sup> yet citizenship has rapidly expanded its scope, and becomes increasingly subject to global standards, which transcend the purpose of citizenship.

As indicated, the European Union appears to have given the notion of citizenship a new, specifically European, interpretation. The Union defines purpose of citizenship in a proposal, created for a Council Decision to establish a Community action programme, to promote active European citizenship (civic participation).<sup>5</sup> It states:

[...] stresses the principle of citizen participation in devising and carrying out policy, of involvement of civil society and its component organizations. Moreover, the Community and the Member States have as their objectives the promotion of employment, improved living and working conditions, proper social protection, the development of human

---

<sup>4</sup> Keith Faulks, *Citizenship*, London & New York 2000, pp.7-8.

<sup>5</sup> Community action programme to promote active European citizenship (civic participation), /\*COM/2003/0276 final – CNS 2003/0116\*.

## *Evolving Legal Personality*

resources with a view to lasting high employment and the combating of exclusion.

Thus, the European Union places more emphasis on the social policy elements of citizenship than on nationality. This different approach is a new development in the concept of citizenship. The inclusion of the basic contents of citizenship, as described above, is assumed to be included in its fundamental definition.

In the following paragraphs, the notion of citizenship will be discussed in observation of two important and developing notions of citizenship: the American conception and the European conception. Each has different implications for the concept of legal personality.

### A. Elements of American Citizenship

It has often been said that traditional citizenship in the U.S.A. involves the following rights and duties: the right to travel throughout the state, the right to domicile anywhere in the U.S.A., the right of suffrage, the right to qualify for public office, the right to serve as jurors, and the right to attend public schools.<sup>6</sup> Of this list, the right to serve as

---

<sup>6</sup> Chester James Antieau, *The Intended Significance of the Fourteenth Amendment*, Buffalo N.Y., 1997.

### *Goudappel & Romein*

jurors cannot be considered part of citizenship in each nation-state, but is more part of the Anglo-American legal tradition. Originally, U.S. citizenship was linked to state citizenship or nationality,<sup>7</sup> giving similar rights to citizens in the other states.<sup>8</sup> Now it is linked to the nationality of the whole federation of the U.S.A. This was not originally the case for all inhabitants of the U.S.A., or at least for all those born in the U.S. The American discussions concerning citizenship do not necessarily focus on the different elements establishing citizenship. Rather, it focuses on the necessity of citizenship. It poses the questions: Is dual citizenship necessary within the U.S.?<sup>9</sup> What are the requirements and uses of naturalization?<sup>10</sup>

The basis of American citizenship was laid down in the U.S. Constitution in Article IV, section 2. During the nineteenth century, some jurists made an exception for slaves and Indians. The struggle of the Afro-American population for equal rights and, thus, for full citizenship, continued for over a century. Only after amending the U.S. Constitution and a subsequent series of federal

---

<sup>7</sup> James H. Kettner, *The Development of American Citizenship, 1608-1870*, Williamsburg 1978, pp. 336-338.

<sup>8</sup> Antieau, *op.cit.*, pp. 11-13.

<sup>9</sup> Yaffa Zilbershats, Reconsidering the Concept of Citizenship, 36 *Tex. Int'l L.J.* 689.

<sup>10</sup> Stephen H. Legomsky, Why Citizenship?, 35 *Va. J. Int'l L.* 279.

### *Evolving Legal Personality*

cases, there legally exists no such distinction according to race.<sup>11</sup>

One most prominent basic element of U.S. citizenship is the free movement of citizens within the U.S., while simultaneously limiting the freedom of immigration from other states.<sup>12</sup> The basis of citizenship is U.S. nationality. U.S. citizenship has always focused most prominently on civil rights, which necessarily<sup>13</sup> “implies equality, justice and autonomy.”<sup>14</sup> Over time, however, the notion of citizenship has become relevant in other areas, mostly in association with the welfare state.<sup>15</sup> At the least, this includes:

Federal and state government employment, private employment, eligibility for specific professions, protection of labor laws and nondiscrimination laws, public benefit programs, public education, land ownership, jury service, access to courts, eligibility for military service, conscription, and tax liability.<sup>16</sup>

---

<sup>11</sup> Antieau, *op.cit.*, pp. 5-10.

<sup>12</sup> A.P. van der Mei, Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law, 19 *Ariz. J. Int'l & Comp. Law* 803.

<sup>13</sup> See for instance Peter J. Spiro, Book Review: The Citizenship Dilemma, 51 *Stan. L. Rev.* 597.

<sup>14</sup> Keith Faulks, *op.cit.*, p. 13.

<sup>15</sup> Peter H. Schuck, Citizenship in Federal Systems, 48 *Am. J. Comp. L.* 195; A.P. van der Mei, *op.cit.*

<sup>16</sup> Stephen H. Legomsky, *op.cit.*

## *Goudappel & Romein*

Note that, while immigration legislation is generally regulated at the federal level, welfare and residency requirements are regulated at state level.<sup>17</sup>

Development concerning the contents of citizenship, sometimes referred to as social citizenship,<sup>18</sup> is not the only development. Recently, the 'automatic' link between U.S. nationality and U.S. citizenship has changed. Because of the growing immigrant population in the U.S., most notably Mexican immigration, the call to grant more civil rights has grown. As a result, legislation has given non-national or dual national inhabitants at least partial citizenship.<sup>19</sup> This means that there are at least two types of citizenship in the U.S. legal context: full citizenship for nationals and partial citizenship for a specific group of non-nationals and dual nationals. The situation is an improvement for the latter category, as the individuals had no citizenship rights or duties, and now they retain some of them. A third category of citizenship exists of non-citizens who do not fall within any of the two other categories.

---

<sup>17</sup> Hiroshi Motomura, Comment: Immigration and Alienage, Federalism and Proposition 187, 35 Va. J. Int'l L., 1994, pp. 201 ff.

<sup>18</sup> Peter J. Spiro, *op.cit.*

<sup>19</sup> Peter J. Spiro, Dual Nationality and the Meaning of Citizenship, 46 *Emory L.J.* 1411.



## *Evolving Legal Personality*

Inequality between citizens was not the starting point of the system, but the differentiation between nationality and citizenship led to this result. Options to eliminate this inequality vary from introducing possibilities for dual citizenship to a denationalizing citizenship, which would enable the federal and state governments to protect a broader group of inhabitants.

### B. E.U. Citizenship in Comparison

In understanding the notion of European Union citizenship, it is necessary to start with a study of the text of the Treaties, the primary source of E.U. law. Treaty provisions on citizenship are found in the E.C. Treaty, Articles 17 through 21 T.E.C. Article 17 introduces the concept and establishes a strong link with nationality, as will be discussed later. The following provisions, with the basis described in Article 18, contain the essential elements and dynamics of European Union citizenship in addition to the details of free movement of persons. The right of suffrage in the Member State, in which a national of one of the Member States resides, is secured at the municipal level in Article 19 T.E.C., along with similar rights for elections of the European Parliament. The remaining elements concern the right of petition (Article 21 T.E.C.) and the right to consular protection in third countries (Article

### *Goudappel & Romein*

20 T.E.C.). These provisions extend some of the more traditional elements of citizenship to the nationals of other Member States. Articles 17 and 18 T.E.C. read as follows:

#### Article 17

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

#### Article 18

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
2. If action by the Community should prove necessary to attain this objective and this Treaty has not provided the necessary powers, the Council may adopt provisions

### *Evolving Legal Personality*

with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251.

3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection.

It is proposed that this system should be complemented in the draft European Constitution.<sup>20</sup> The notion is mentioned in more detail in Part I, Article 8:

1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship: it shall not replace it.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have:

---

<sup>20</sup> Draft Treaty Establishing a Constitution for Europe, submitted by the European Convention to the European Council meeting in Thessaloniki, 20 June 2003.

*Goudappel & Romein*

the right to move and reside freely within the territory of the Member States;

the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member States of residence, under the same conditions as nationals of that State;

the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

the right to petition the European Parliament, to apply to the European Ombudsman, and to address the Institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language.

3. These rights shall be exercised in accordance with the conditions and limits defined by the Constitution and by the

## *Evolving Legal Personality*

measures adopted to give it affect.

The list resembles Articles 17 through 21 of the present E.C. Treaty. The separate elements of this new text have been given form and substance in other provisions in the text of the draft Constitution. It clarifies the approach of the notions behind European Union citizenship.

### C. The Concept of E.U. Citizenship

Since the introduction of provisions on European Union citizenship in the E.C. Treaty in 1992, the relationship between Union citizenship and freedom to move and reside has been subject to the court's review. Questions arose as to the extent to which rights may be derived. No clarity is needed with respect to Articles 19 through 21, so these articles will not be examined any further.

Free movement of persons (Articles 39 through 42 T.E.C.) is an important factor in the structure of the European Union, most notably for the economically active nationals of the Member States. This feature is explained in more in the E.C. Treaty under secondary legislation and regulations.<sup>21</sup> It includes rights of family members of workers,<sup>22</sup> rights of students,<sup>23</sup> and rights of

---

<sup>21</sup> Regulation 1612/68 lays the basis for this system.

<sup>22</sup> As laid down in Regulation 1612/68.

<sup>23</sup> Good examples are the famous EC student exchange programs ERASMUS

### *Goudappel & Romein*

retired workers.<sup>24</sup> The free movement of persons is closely linked to Article 12 T.E.C. of European Union law, the prohibition of discrimination on the basis of nationality. This principle advises that a Member State not be permitted to treat nationals of other Member States disrespectfully, as compared to its own nationals.<sup>25</sup> This is necessary in allowing free movement of persons without potential government obstacles.

Though free movement of people has existed since the foundation of the European Community in 1951, it only conferred to workers. In 1986, the Single European Act attempted to create a Europe without internal borders. It extended the right of residence in other Member States to persons who are not workers, provided they had sufficient resources and social insurance. In 1990, further steps were taken to create a general right of residence. A package of three Directives was enforced with respect to students, workers who have ceased their professional activities, and a residual category.<sup>26</sup>

---

and SOCRATES. See also H. André de la Porte & L. Zegveld, *Mobiliteit van studenten en docenten binnen de Europese Unie*, Nuffic Papers no. 4, 1996.

<sup>24</sup> Directive 90/364-366.

<sup>25</sup> R. Barents & L.J. Brinkhorst, *Grondlijnen van Europees Recht*, Deventer 2003, pp. 333-334.

<sup>26</sup> Directives 90/364-366, Pb. 1990, L 180, p. 26.

### *Evolving Legal Personality*

In addition, the Maastricht Treaty introduced a citizenship of the Union in 1993, which confers on every Union citizen a fundamental and personal right to move and reside freely without reference to economic activity.<sup>27</sup> Advocate General La Pergola stated in his opinion in *Martinez Sala*:<sup>28</sup>

The creation of Union citizenship unquestionably affects the scope of the Treaty, and it does so in two ways. First of all, a new status has been conferred on the individual, a new individual legal standing in addition to that already provided for, so that nationality as a discriminatory factor ceases to be relevant or, more accurately, is prohibited. Secondly, Article 8a (now Article 18) of the Treaty attaches to the legal status of Union citizen the right to move to and reside in any Member State.

According to the provision itself, however, limitations and conditions exist. The case law of

---

<sup>27</sup> See A. Castro Oliveira, Workers and Other Persons: Step-by-Step from Movement to Citizenship – Case Law 1995-2001, in: *Common Market Law Review*: 39: 77-127, 2002, for a detailed discussion of this development, as well as Mark Jeffery, The Free Movement of Persons within the European Union: Moving from Employment Rights to Fundamental Rights?, 23 *Comp. Lab. L. & Pol'y J.* 211.

<sup>28</sup> Opinion delivered on 1 July 1997.

## *Goudappel & Romein*

the E.C.J. can answer to how this provision should be interpreted.

### III. CASE LAW

In order to fully understand how the E.C.J. has influenced the contents of the notion of E.U. citizenship, it is necessary to study both the facts and the legal reasoning of a selection of the most important cases. By doing so, it is possible to understand the scope of each step taken by the E.C.J.

#### *A. Martínez Sala*<sup>29</sup>

In the *Martínez Sala* case, the Court of Justice ruled that a child allowance be awarded to Mrs. Matrínéz Sala, a mother from another Member State who did not have a residence permit, but possessed one previously.

Mrs. Martínez Sala is a Spanish national residing in Germany. Prior to the case, she had obtained residence permits, which virtually ran without interruption, from the various relevant authorities. A residence permit, expiring on 18 April 1995, was issued to Mrs. Martínez Sala on 19 April 1994. This permit was extended for another year on 20 April 1995. In January 1993, during

---

<sup>29</sup> Case C-85/96 (Martínez Sala), Court of Justice of the European Communities, 12 May 1998.



### *Evolving Legal Personality*

the period in which she did not have a residence permit, she had applied to Freistaat Bayern for a child-raising allowance, as her child was born that month. Subsequently, the single document she retained certified that she had only applied for an extension of her residence permit. Freistaat Bayern rejected her application on the ground that she did not have German nationality, a residence entitlement, or a residence permit. The Sozialgericht (Social Court) Nürnberg dismissed Mrs. Martínez Sala's action against that decision, on the ground that she was not in possession of a residence permit when she applied for a child-raising allowance. Mrs. Martínez Sala appealed to the Bayerisches Landessozialgericht against this judgment. Considering that certain Community Regulations could be relevant to the case, the Bayerisches Landessozialgericht stayed proceedings and referred various questions to the Court of Justice for a preliminary ruling to determine if, according to E.C. law, German authorities were obliged to grant Mrs. Martinez Sala this allowance.

The Court of Justice ruled that a benefit such as the child-raising allowance (which is automatically granted to persons fulfilling certain objective criteria without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses) falls within the *ratione materiae* of Community law.

### *Goudappel & Romein*

Community law precludes a Member State from requiring nationals of other Member States, authorized to reside in its territory, to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance. The Member States are prohibited from making this requirement because their own nationals are only required to be permanently or ordinarily a resident in that Member State.

The court briefly considered questioning Union citizenship in the *Martínez Sala* case, but did not explicitly express a view in respect to Article 18 of the E.C. Treaty, notwithstanding detailed exposition on that point of the Advocate General.

#### B. *Wijsenbeek*<sup>30</sup>

In the *Wijsenbeek* case, the Advocate General voted in favor of the direct effect of the articles on citizenship. Again, the Court did not explicitly express a view. Mr. Wijsenbeek breached applicable Dutch legislation by refusing to present his passport in order to establish his Dutch nationality when entering the Netherlands. During criminal proceedings against Mr. Florus Ariël Wijsenbeek, the Dutch District Court, Arondissementsrechtbank Rotterdam, questioned

---

<sup>30</sup> Case C-378/97 (*Wijsenbeek*), Court of Justice of the European Communities, 21 September 1999.

### *Evolving Legal Personality*

the Court of Justice in search of a preliminary ruling. The Court ruled that, as Community law stood, neither Article 7a (now Article 17) nor Article 8a (now Article 18) of the E.C. Treaty precludes a Member State from requiring any person, under threat of criminal penalties, to establish his nationality when entering the territory of that Member State by an internal border of the Community. Applicable penalties, however, must be comparable to those that apply to similar national infringements and are not disproportionate, thus creating an obstacle to the free movement of persons.

#### *C. Grzelczyk*<sup>31</sup>

During preliminary proceedings of the case involving Mr. Rudy Grzelczyk and the Public Social Assistance Centre for Ottignies-Louvain-la-Neuve, the Centre Public d'aide Sociale d'Ottignies-Louvain-la-Neuve (hereinafter the C.P.A.S.), questions concerned the decision of the C.P.A.S. to stop payment of the minimex (minimum) subsistence allowance.

Mr. Grzelczyk is a French national who moves to Belgium to study. For three years he financed his studies by taking on various minor jobs and

---

<sup>31</sup> Case C-184/99 (Grzelczyk), Court of Justice of the European Communities, 20 September 2001.

### *Goudappel & Romein*

obtaining credit facilities. During his fourth year of study he applied for an allowance, as it was much more intensive, with no extra time to earn money. The C.P.A.S. granted the allowance, but the relevant federal minister refused to reimburse the C.P.A.S. on the ground that the nationality requirement had not been satisfied. The C.P.A.S. withdrew the allowance from Mr. Grzelczyk. Mr. Grzelczyk challenged this decision before the Labor Tribunal of Nivelles, which referred to the Court of Justice for a preliminary ruling, asking clarification of the following:

1. Does not Community law apply to all citizens of the Union, including those who qualify for the principles of European citizenship and of non-discrimination (enshrined in Articles 6 and 8 of the Treaty establishing the European Community for entitlement to a non-contributory social benefit, such as that introduced in Belgian Law on 7 August 1974 regarding the minimum subsistence allowance), or is it granted only to nationals of the Member States to whom Regulation (EEC) No. 1612/68 of 15 October 1968 applies?
2. Alternatively, Articles 6 and 8a of the Treaty and Directive 93/96 of 29 October 1993 on the right of residence for students interprets that, after a student's right of

### *Evolving Legal Personality*

residence has been acknowledged, he may subsequently be barred from entitlement to non-contributory social benefits. Such entitlements may include the minimum subsistence allowance, payable by the host country; however, is this exclusion general and definitive in nature?<sup>32</sup>

In response to these opposing questions, The Court of Justice ruled that Union citizenship is destined to be the fundamental status of nationals of the Member States. The Court held that when the national of one Member State fulfills the same conditions as a national of the resident Member State, that European Union citizen is entitled to similar social benefits.

#### *D. Kaba*<sup>33</sup>

In 1994, Mr. Kaba (Yugoslavian citizen) married Ms. Virginie Michonneau (French national). They moved to the United Kingdom the same year. In 1996, Mr. Kaba requested a permanent residence permit from the U.K. The Secretary of State for the Home Department denied him a permit. U.K. law states that spouses of E.C. nationals must have been resident in the U.K. for four years before an application for indefinite leave to

---

<sup>32</sup> *Ibid.*

<sup>33</sup> Case C-356/98 (Kaba), Court of Justice of the European Communities, 11 April 2000.

### *Goudappel & Romein*

remain may be considered. On the other hand, the requirement for spouses of U.K. nationals is 12 months' residence. Mr. Kaba appealed the decision to the Immigration Adjudicator, who requested that the E.C.J. decide in a preliminary ruling whether or not this U.K. legislation constituted unlawful discrimination, contrary to E.C. law. The E.C.J. answered that it did not.

The E.C.J. found there to be no unconditional right in favor of nationals of Member States to remain in other Member States. It is inferred *inter alia* in Article 18 E.C.T. that, though citizens of the Union have the right to move and reside freely, expressed limitations, conditions, and measures adopted in the treaty are still in effect.

Relatedly important are the joint cases of *Baumbast* and *R*.<sup>34</sup> The Baumbast family (Mr. and Mrs. Baumbast, Maria Fernanda Sarmiento, and Idanella Baumbast) and R were denied the leave to remain within the territory of the United Kingdom by the Secretary of State for the Home Department.

---

<sup>34</sup> Case C-413/99 (*Baumbast and R*), Court of Justice of the European Communities, 17 September 2002.

## *Evolving Legal Personality*

### *E. Baumbast and R*

In 1990, Mr. Baumbast (German national) married Mrs. Baumbast (Colombian national) in the United Kingdom. They had two daughters. In June 1990, the family received resident permits for a period of five years. Mr. Baumbast had worked in the U.K. until 1993 when he lost his job and started working in Asia for a German company. Although he tried to find work in the U.K., his employment situation had not changed. The Baumbasts owned a house and the daughters were at school in the U.K. The family did not receive any social benefits as they had comprehensive medical insurance in Germany. They travel there for medical treatment when necessary. In May 1995, Mrs. Baumbast applied for herself and for her family for indefinite leave to remain in the United Kingdom. The Secretary of State refused her application and to renew their residence permits. In 1998, the refusal was brought before the Immigration Adjudicator (U.K.), who found Mr. Baumbast neither a worker nor a person with general rights of residence under Directive 90/364. Concerning the children, the Adjudicator decided that they enjoyed an independent right of residence under Article 12 of Regulation Number 1612/68. Under the same regulation, Mrs. Baumbast enjoyed a right of residence for a period co-terminous with that of her children. According to the Adjudicator, Mrs. Baumbast's rights flowed from the obligation

### *Goudappel & Romein*

provision of Member States to encourage the enablement of children to attend courses in the host Member State under the best possible conditions.<sup>35</sup>

Mr. Baumbast appealed this finding to the Immigration Appeal Tribunal. The Secretary of State filed a cross-appeal against the decision, regarding Mrs. Baumbast and the children.

R, a United States citizen, married a French national. Their two children carried dual French and U.S. citizenships. In 1990, R moved to the U.K. Exercising her rights, conferred by the E.C. Treaty, she was granted leave to remain in the U.K. until 1995. She and her husband divorced in 1992, and she continued to reside in the U.K. R bought a house and started an interior design business. In 1997, she married for a second time a U.K. national. The children remained with her and maintained regular contact with their father, who still resided and worked in the U.K., and who shared the responsibility in their upbringing. In 1995, an application for indefinite leave to remain in the U.K. had been made on behalf of R and her daughters. The children were granted indefinite leave to remain in the U.K. as members of a family of a migrant worker, but R's application was refused. The Secretary of State was not satisfied

---

<sup>35</sup> *Ibid.*



### *Evolving Legal Personality*

that the family situation was so exceptional as to justify leave to remain. In his view, the children were still young enough to adapt to life in the United States if they had to accompany their mother there. The refusal was brought before the Adjudicator. It was possible that the refusal would interfere with the children's Community law rights to be educated and to have the right to family life in the U.K. The Adjudicator dismissed the application and R appealed to the Immigration Appeal Tribunal.

The Immigration Appeal Tribunal, with the opinion that preliminary ruling cases rely on the Court of Justice's interpretation of E.C. law, stayed the proceedings and referred questions to that Court. Between the start of the main proceedings and the reference for a preliminary ruling, Mrs. Baumbast, R, and their respective children were granted indefinite leave to remain in the United Kingdom. Only Mr. Baumbast was denied indefinite leave to remain.

Deciding Article 18 E.C.T. has a more direct effect, the Court of Justice allowed Mr. Baumbast to rely upon it, and stated that:

[...] although, before the T.E.U. entered into force, the court had held that a right of residence, conferred directly by the E.C.T., was subject to

### *Goudappel & Romein*

the condition that the person concerned was carrying out an economic activity [...], it is none the less the case that, since then, Union citizenship has been introduced to the E.C.T. and Article 18(1) has conferred a right for every citizen to move and reside freely within the territory of the Member States.<sup>36</sup>

With this decision, it is clear that the provision of citizenship has added value for economically non-active E.U. citizens, to whom the right of equal treatment is important. As the Court clarifies, the right of residence is subject to limitations and conditions. One must not become an ‘unreasonable burden’ on the host Member State. The general principles of Community law, in particular the principle of proportionality, must be respected and acknowledged.

The use of the words ‘unreasonable burden’ is not new in this particular context. It was used in former Community legislation; in the fourth recital in the preamble to both Council Directive 90/364/EEC of 28 June 1990 on the right of residence<sup>37</sup>, and in Council Directive 90/365/EEC of 28 June 1990 on the right of residence for

---

<sup>36</sup> *Ibid.*

<sup>37</sup> OJ 1990 L 180, p. 26.

### *Evolving Legal Personality*

employees and self-employed persons who have ceased their occupational activity.<sup>38</sup>

#### F. *Garcia Avello* case<sup>39</sup>

In the *Garcia Avello* case, the court appeared to use the concept of citizenship in a rather different way. The conflict arose in a dispute between Mr. Carlos Garcia Avello, who acted as the legal representative of his children, and the Belgian government, who were concerned with Mr. Garcia Avello's application to change his children's surnames.

Garcia Avello (Spaniard) and his wife, Isabelle Weber (Belgian), lived in Belgium with their two children. The children possess dual nationality. According to Belgian law, the children carry the name of their father; so on their birth certificate the name Garcia Avello is recorded. In Spain, however, children carry the surnames of both parents, first the father's and then the mother's. With respect to the Spanish custom, the parents requested the Belgian authorities to change the surnames of the children from Garcia Avello to Garcia Weber. If the name change was not done, Mr. Garcia Avello feared Spanish people might think the children were his siblings and not see

---

<sup>38</sup> OJ 1990 L 180, p. 28.

<sup>39</sup> Case C-148/02 (*Garcia Avello*), Court of Justice of the European Communities, 2 October 2003.

### *Goudappel & Romein*

the children's relationship with their mother. Additionally, the fact that the children would carry different names in Spain and in Belgium could lead to confusion and practical problems. The request was found to be against Belgian practice and, therefore, denied. Mr. Garcia Avello appealed the decision at the Belgian *Raad van State*. This body referred preliminary questioning to the Court of Justice to ascertain whether the denial of the Belgian authorities to change the name of the children is in conflict with European Community law, specifically with the rules on European citizenship and the free movement of citizens. The court ruled in paragraph 25 that:

Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law, *in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside freely in the territory of the Member States.*

The decision seems a farfetched interpretation of the concept of citizenship. The Court is establishing a competence for itself in a field normally reserved for the Member States, and

### *Evolving Legal Personality*

subsequently decided the Belgian rules to be an infringement of Community law. The Court is, perhaps, going too far by extending its competence through using the concept of citizenship in this way. Garcia Avello makes an interesting comment by saying:

Citizenship of the Union, established by Article 17 E.C.T., is not intended to extend the scope *ratione materiae* of the Treaty to internal situations, which have no link with Community law.

The Court refers to *Uecker and Jacquet*.

G. *Uecker and Jacquet*<sup>40</sup>

In *Uecker and Jacquet*, the foreign spouses of two E.U. citizens were refused residence. Uecker (Norwegian national) and Jacquet (Russian national) both taught at German universities. Both were married to employed German nationals and resided in Germany. The Court of Justice ruled that, because the German husbands never used their rights of free movement, they couldn't derive rights from Community law while the situation is purely internal.

---

<sup>40</sup> Case C-64/96 (*Uecker and Jacquet*), Court of Justice of the European Communities, 5 June 1997.

## *Goudappel & Romein*

### H. *Carpenter*<sup>41</sup>

It is interesting to compare the latter case with the *Carpenter* case. Mrs. Carpenter (Philippine national) married Peter Carpenter (U.K. national). The situation was similar to the *Uecker* and *Jacquet* cases except that, in this instance, Mr. Carpenter provided services to other Member States from the U.K. His business sold advertising space in medical and scientific journals, and also offered administrative and publishing services to the editors of those journals. The business was established in the U.K. where the publishers of the journals are based. A significant portion of the business is with advertisers, established in other Member States of the European Community. Mr. Carpenter traveled to various Member States on business.

The Court ruled that the case was not a purely internal matter, and the spouse was entitled to invoke Community law. The illegal third-country national who is married to an E.U. citizen could not be extradited because she made it possible for the European Union citizen to exercise his right to free movement. It is sobering to think that, if the husband had only owned a local shop with local buyers, the spouse would have had to leave.

---

<sup>41</sup> Case C-60/00 (*Carpenter*), Court of Justice of the European Communities, 11 July 2002.

## *Evolving Legal Personality*

### III. GENERAL ISSUES

This selection of case law shows that, not only was the idea of citizenship brought to the European level by the Court of Justice, but also that its contents were extended beyond the traditional elements of citizenship.

E.U. citizenship has four categories of inhabitants: nationals who have exercised their right to free movement, nationals who have not exercised this right, non-nationals with E.U. citizenship, and third-country nationals. For each category, there are different rights and duties. It also creates a distinction between the treatment of Member State nationals and E.U. nationals per Member States. The basic national regulations of the Member States still exist as Article 12 T.E.C. states:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Within the European Union, there may be differences in rights and duties for each E.U. citizen. One possibility of Article 12 T.E.C. is that the nationals of the Member States may be treated worse than other E.U. nationals.

## *Goudappel & Romein*

The treatment of third-country nationals is also an interesting point. The general rule is they do not have the same rights that E.U. citizens do: the rules for the free movement of persons do not apply to them, for instance. The national rules, however, do apply to this group of inhabitants. Yet, for third-country nationals who are long-term residents, there is a new Council directive that allows them free movement, just like E.U. citizens.<sup>42</sup> This approach was already reflected in the opinion of the European Economic and Social Committee on this issue,<sup>43</sup> which pointed out that such a broad definition concurs with the European Commission's definition of 'civic citizenship,' and reflects the goals of the European Union as it is stated in Part I, Article 7.1 of the Draft Constitution concerning equality before the law.

### IV. CONCLUDING REMARKS

Does this mean that the E.U. system ensures similar protection and similar rights to citizens, as an established state would? It is important to remember that E.U. citizenship is complementary to national citizenship, or nationality of the Member States. This indicates that citizenship in

---

<sup>42</sup> Council directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

<sup>43</sup> Opinion of the European and Social Committee on "Access to European Union citizenship," 14 May 2003, 2003/C 208/19.



### *Evolving Legal Personality*

the E.U. should equal that of nationality and E.U. citizenship.

To answer the question posed in the Introduction, it can be concluded that E.U. citizenship leads to inequality between inhabitants of the Member States, above the more traditional inequality that occurs between nationals and non-nationals. This is not a unique development; it occurs in many countries, most notably in the U.S.A. Yet, this inequality is not necessarily negative. It may even be thought that it improves the rights of some groups of inhabitants, and may eventually grant all of them rights on a higher level.

Case Law of the Court of Justice shows that the notion of E.U. citizenship has broadened through Court cases, which would have otherwise fallen outside of the Court's realm; cases concerning non-workers and third-country nationals. In many ways, one can only approve of these 'humanitarian' tactics of the Court of Justice on the concept of E.U. citizenship that allow certain third-country nationals to reside in the E.U. In doing so, however, the Court creates new kinds of discrimination: in cases that are purely internal for a Member State (e.g. *Uecker and Jacquet*), the third-country spouses are not allowed such rights. Does this constitute a kind of discrimination? If so, is this discrimination justifiable? According to

### *Goudappel & Romein*

the readiness the Court shows in deciding that a situation is not purely internal (e.g. *Carpenter*), it apparently feels there might be some type of discrimination.

A system developed by the Court of Justice on the basis of primary and secondary E.U. legislation (with four basic categories of inhabitants) displays the unique possibilities and benefits offered by the European Union. It goes beyond citizenship protection, offered by the Member States. The system has developed simultaneously in secondary E.U. legislation and in Case Law by offering certain citizenship rights to third-country nationals. This development is similar to those in nation-states, like the United States.

# The Concept of Legal Personality

*Jan Klabbers*  
*University of Helsinki*

## I. INTRODUCTION

International lawyers are occasionally confronted with discussions revolving around the notion of legal personality. Such discussions took place, for instance, when the U.N. contemplated, after a U.N. appointed mediator had been killed in the Middle East in the late 1940s, whether it could start proceedings against a non-member state.<sup>1</sup> The issue also arose in the mid 1980s when the status of the International Tin Council, which had gone bankrupt, forced English courts to decide the extent to which the Member States of the Council should bear responsibility for the Council's financial sense of adventure.<sup>2</sup> In the early 1990s,

---

<sup>1</sup> See *Reparation for Injuries Suffered in the Service of the United Nations* (advisory opinion), 1949 *ICJ Reports* 174.

<sup>2</sup> For a brief discussion with references, see Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002), 303-306. The seminal analysis is Romana Sadurska & Christine Chinkin, "The Collapse of the International Tin Council: A Case of State responsibility?" 30 *Va. J. of Int'l Law* (1990), 845-890.

*Jan Klabbbers*

an English court voiced concern about the status of the Arab Monetary Fund, whose managing director had taken off with quite a few of the Funds' monies.<sup>3</sup> Also, the E.U. was created at Maastricht as an entity, scheduled to have serious and intense activities on the international scene, without any explicit grant of international or domestic legal personality.<sup>4</sup> The International Law Commission currently aims to develop rules on the responsibility of international organizations under international law, and its rapporteur suggests that personality functions are a precondition.<sup>5</sup>

As the I.L.C. rapporteur's approach to the topic of the international responsibility of international organizations suggests, the debates surrounding those incidents usually have one central theme:

---

<sup>3</sup> See *Arab Monetary Fund v. Hashim & Others*, decision of the House of Lords, 21 February 1991, in 85 *International Law Reports* 1. See also Geoffrey Marston, "The Personality of International Organisations in English Law," 2 *Hofstra L. & Pol'y Symp.* (1997), 75-115.

<sup>4</sup> The literature is rather voluminous. A representative sample of the various positions would include Esa Paasivirta, "The European Union: From an Aggregate of States to a Legal Person?" 2 *Hofstra Law & Pol'y Symp.* (1997), 37-59; Ramses A. Wessel, "Revisiting the International Legal Status of the EU," 5 *European Foreign Affairs Review* (2000), 507-537; Armin von Bogdandy & Martin Nettesheim, "Ex Pluribus Unum: The Fusion of the European Communities into the European Union," 2 *European Law Journal* (1996), 267-289; and Jan Klabbbers, "Presumptive Personality: The European Union in International Law," in Martti Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague: Kluwer, 1998), 231-253.

<sup>5</sup> See Giorgio Gaja, "First Report on Responsibility of International Organizations," UN Doc A/CN.4/532, 26 March 2003, paras. 15-20.

### *The Concept of Legal Personality*

international legal personality is thought to be a *conditio sine qua non* for the possibility of acting within a given legal situation. Personality is considered to be a threshold, which must be crossed. Without legal personality, those entities do not exist in law. Accordingly, they can neither perform the sort of legal acts that would be recognized by that legal system nor be held responsible under international law.<sup>6</sup> Without international legal personality, the U.N. is unable to start proceedings under international law against a State. Also, without international legal personality, the E.U. is not capable of concluding treaties or performing other international legal acts. Without personality under English law, or personality recognized under English law, the Arab Monetary Fund is unable to sue its former managing director.

Some might take offense to this extremely general position. One may readily concede that a certain measure of personality is required before a would-be litigant has standing to sue; however, this devolves from rules on standing (and standing circumstances are usually granted only sparingly), rather than from personality as such.<sup>7</sup> Exem-

---

<sup>6</sup> As Gaja puts it: "... norms of international law cannot impose on an entity ... obligations unless that entity has legal personality under international law." See Gaja, First Report, note 4 above, para. 15.

<sup>7</sup> See however Amerasinghe, who suggests that without personality organizations, would not be entitled to appear in legal proceedings. See C.F.

## *Jan Klabbers*

plified by the possibility that other acts are perfectly possible, one does not need legal personality to conclude treaties, to make unilateral promises, to perform acts of recognition, to impose conditions on others, or indeed, to violate international law.<sup>8</sup>

What, then, does legal personality signify, if it does not constitute a threshold condition for performing legal acts? What is the point of legal personality if it seemingly has no discernible practical ramifications, and if one can perform various legal acts without it? This paper contends that a plea for personality, and the consequent acceptance thereof, has more to do with political recognition of relations between actors and those relations' relevancies, than with anything else.<sup>9</sup> First to be discussed are the ambivalences inherent in the idea of legal personality, and the

---

Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 1996), at 69.

<sup>8</sup> Organized crime is a case in point, and it surely is no accident that entities considered devoid of personality are nonetheless often considered capable of committing crimes. Thus, e.g., Jolowicz can observe that "[t]he Roman slave was a human being incapable of rights and duties (apart from the criminal law)...." See H.F. Jolowicz, *Roman Foundations of Modern Law* (Oxford: Clarendon Press, 1957), at 107.

<sup>9</sup> By and large, I share David Bederman's concern about the misleading potential of the notion of personality, and agree that perhaps collectivities may be better regarded in relational terms than as "persons." For a more detailed elaboration, see David Bederman, "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel," 36 *Va. J. of Int'l Law* (1996), 275-377.

## *The Concept of Legal Personality*

idea of personality as a threshold for action within a legal system.

### II. AN AMBIVALENT CONCEPT

While personality may constitute one of the greater puzzles occupying legal thought, its immediate function is reasonably obvious. As Kelsen has noted, with characteristic swagger, the law cannot just think in terms of rights and duties, but also needs to be able to point to someone or something possessing those rights and duties: “[t]here must exist something that ‘has’ the duty or the right.”<sup>10</sup>

The question then arises: how does the law point out which entities can “have” rights or duties, and under what conditions? The ambivalence of the concept of personality manifests itself. On the one hand, the law may be expected to stimulate a sense of certainty by instilling in its subjects an awareness of (when they organize themselves in a certain way, reach a certain age, or are of sound mind) entitlement of rights and duties of their own. Thus, a six-year old may be a subject of the law, but does not usually have her own legal personality just yet.<sup>11</sup>

---

<sup>10</sup> See Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1945, Wedberg trans.), at 93.

<sup>11</sup> That said, the law can, and occasionally does, achieve curious results. Thus, Keeton notes that in Greek law, animals and trees were being tried, which

## *Jan Klabbers*

By the same token, a person with a serious mental handicap may not everywhere be regarded as a legal person, though undoubtedly a natural person. The same might have been said about slaves at one time.

Something similar would apply to groups of human beings working together in one form or another. It may be very useful for groups to know that, once they organize themselves as a non-profit organization with certain specified internal procedures, they may qualify as a foundation in the eyes of the law and be subject to all of the consequences this entails. Similarly, larger sums of money are available to certain types of corporations as long as the investment projects are managed in accordance with the conditions the law sets for personal liabilities. A local soccer club may enjoy using balls and practice fields as property owned by itself, rather than by its members in the aggregate, if it takes on a certain form.

Yet the law cannot envisage every type of situation, impairment, or form of association (in

---

would seem to assume some form of legal personality on their part. Something similar was not uncommon in medieval times, as Keeton helpfully explains: "In Germany, a cock was solemnly placed in the prisoner's box, and was accused of contumacious crowing. Counsel for the defendant failed to establish the innocence of his feathered client, and the unfortunate bird was accordingly ordered to be destroyed." See G.W. Keeton, *The Elementary Principles of Jurisprudence* (London: Pitman & Sons, 1949), at 149.



### *The Concept of Legal Personality*

the generic sense) between human beings. The law might simply be reluctant to attach personality to some associations for reasons wholly unconnected to their activities. The non-personality of the English village is a case in point<sup>12</sup> as was, according to some, the reluctance to grant international legal personality to the European Union.<sup>13</sup> Thus, there will inevitably be gaps; forms of human association will arise which do not fit into one of the pre-conceived categories of the law. The explanation for this state of affairs seems to be reasonably obvious: people tend not to follow blueprints when organizing their lives together, and the demand for certainty will often be countered by a demand for flexibility.

The law must answer to both demands simultaneously, and will inevitably develop ways, means, or institutions to accommodate these twin demands. The legendary Maitland opined that, in English law, the quintessential English legal institution of the trust takes this intermediate position.<sup>14</sup> It is capable of being attached to all possible forms of human association, but even this

---

<sup>12</sup> See H.A.L. Fisher, "Maitland's Theories of Corporate Personality" in F.W. Maitland, *The Frederick William Maitland Reader* (New York: Oceana, 1957, V.T.H. Delany ed.), 201-206, at 205.

<sup>13</sup> See generally J.W. de Zwaan, "The Legal Personality of the European Communities and the European Union," 30 *Netherlands Yearbook of International Law* (1999), 75-113.

<sup>14</sup> See F.W. Maitland, "The Unincorporate Body" in Maitland, *The Maitland Reader*, note 12 above, 130-142.

### *Jan Klabbers*

seems insufficient. The recognition of the courts of England on the capacity of suing a trade union in the early 20th century<sup>15</sup> (which inspired some of Maitland's writing on the topic), would be difficult to explain if it were to treat a trade union as a trust.<sup>16</sup>

Since it is such a puzzling concept, it comes as no surprise that the concept of personality has inspired a variety of theories. Two contending theories of personality appear most prevalent.<sup>17</sup> Von Savigny is said to have modernized the classic idea of personality into a fictional idea.<sup>18</sup> According to his model, the legal person is distinct from the natural person, and lacks any innate personality. The legal person has no will, no mind, and no ability to act, except to the extent that the law imputes such will and ability to the legal person in question.<sup>19</sup> This theory proves

---

<sup>15</sup> This refers to the 1901 decision of the House of Lords in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, a decision which is mentioned in well-nigh all English writing on legal personality.

<sup>16</sup> Figgis goes further, and unkindly suggests that the notion of the trust "has probably delayed the victory of the true conception, by enabling us to "muddle through" with a false one." See J. Neville Figgis, "Respublica Christiana," in Julia Stapleton (ed.), *Group Rights: Perspectives Since 1900* (Bristol: Thoemmes, 1995), 38-60, at 39.

<sup>17</sup> See Keeton, *Elementary Principles*, note 11 above, at 168. Derham identifies two additional theories, a symbolist theory and a purpose theory, but neither appears to have gained a large following. See David Derham, "Theories of Legal Personality," in Leicester C. Webb (ed.), *Legal Personality and Political Pluralism* (Melbourne: University of Melbourne Press, 1958), 1-19, at 10-11.

<sup>18</sup> *Ibid.*, at 8-9.

<sup>19</sup> Figgis refers to much the same under the heading of "concession theory."

### *The Concept of Legal Personality*

difficult to reconcile, as much of the law works on the premise of mental and practical abilities. Contract is said to rest on intent; we willfully do certain things and refrain from others. Criminal acts usually presuppose *mens rea*.<sup>20</sup> As Maitland scathingly retorted on the artificiality of this notion:

It seems seriously questionable whether a permanently organized group, for example a trade union, which has property held for it by trustees, should be suffered to escape liability for what would generally be called “its” unlawful acts and commands by the technical plea that “it” has no existence “in the eye of the law.”<sup>21</sup>

The contending theory, mainly developed by Gierke, is one popularized by Maitland himself: the realist theory.<sup>22</sup> Under this theory, an entity

---

See Figgis, *Respublica*, note 16 above, at 38.

<sup>20</sup> See already Otto Gierke, *Political Theories of the Middle Age* (Bristol: Thoemmes, 1996, reprint of the 1900 edition, Maitland trans.), esp. 69-70.

<sup>21</sup> Gierke's work (see previous note) was introduced at length by F.W. Maitland. See Maitland, Introduction to Gierke, at xxxviii. A useful overview of Maitland's thoughts on the topic is Samuel J. Stoljar, 'The Corporate Theories of Frederick William Maitland', in Webb (ed.), *Legal Personality*, note 17 above, 20-44.

<sup>22</sup> Its contours are sketched in Gierke, *Political Theories*, note 20 above, 67-73, and further commented upon (drawing on other work by Gierke) in Maitland's Introduction, vii-xlv.

*Jan Klabbers*

possesses a real existence, including its own will, distinct from that of other members. He would constitute, indeed, a real person. Not surprisingly, the main drawbacks mirror that of the fictional theory: how does one ultimately distinguish the will of the entity from that of its members? And: is it artificial to impute a real will to an entity that exists only as a legal person, but not as one of flesh and blood, heart and soul?<sup>23</sup>

This foreshadows a second ambivalence in the notion of personality, most visibly in the work of Kelsen; that is, the separation of legal persons completely from the human beings that compose them, and assimilating the two. On the one hand, much of the concept of personality seems to owe its *raison d'être* to the creation of a corporate veil. Should a corporation buy a house, the house belongs to that corporation, rather than its individual members. Even though members may come and go, and shareholders may buy and sell, the constant factor is the corporation itself. Hence, the law places a premium on positing a distinction between the entity and the human

---

<sup>23</sup> As Lauterpacht once put it when discussing responsibility, “there is cogency in the view that unless responsibility is imputed to persons of flesh and blood, it rests with no one.” See Hersch Lauterpacht, “The Subjects of the Law of Nations,” 63 & 64 *Law Quarterly Review* (1947 & 1948), 438-460 & 97-119, at 107.

## *The Concept of Legal Personality*

beings composing it, for only this can guarantee some measure of continuity.<sup>24</sup>

On the other hand, the law will, given the right circumstances, ignore the dichotomy of its own creation. Under some circumstances the corporate veil may, perhaps even must, be pierced emblematically.<sup>25</sup> This suggests that, whatever the legal niceties, the behavior of human beings is what matters, and not the legal persons in abstraction.<sup>26</sup> No clearer formula has ever been devised than that of the Nuremberg Tribunal, which states that: “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>27</sup>

Notwithstanding this ambivalence (and the earlier one between flexibility and rigidity), it is fair to suggest that the most popular theory is the Kelsenian theory; that, in essence, personality is

---

<sup>24</sup> Continuity was already singled out by Gierke as a most important consideration. See Gierke, *Political Theories*, note 20 above, at 69 (distinguishing states from governments).

<sup>25</sup> With respect to international organizations, see e.g. Moshe Hirsch, *The Responsibility of International Organizations Toward Third States: Some Basic Principles* (Dordrecht: Martinus Nijhoff, 1995).

<sup>26</sup> Note also that holding corporations criminally responsible is not unproblematic. See Eric Colvin, “Corporate Personality and Criminal Liability,” 6 *Criminal Law Forum* (1995), 1-44.

<sup>27</sup> See *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964, at 41.

*Jan Klabbers*

but “the personified unity of a set of legal norms.”<sup>28</sup> Perhaps, however, it can be stipulated that the most accepted version is a pragmatic quasi-Kelsenian version, which assimilates personality with concrete rights, competences, and obligations, but is neither interested in its Kelsenian origins nor keen on systematic and coherent theorizing on personality. In short, it is a belief that personality is a bundle of rights, competences, and obligations.<sup>29</sup> As Julio Barberis once put it:

*Le droit ne peut pas prescrire dans une norme juridique que “X est sujet de droit,” parce que cela serait dépourvu de sens. Même si un ordre juridique contenait une norme énonçant que “X est sujet de droit,” X ne serait pas sujet si cet ordre juridique ne lui attribuait pas au moins un droit ou une obligation.<sup>30</sup>*

---

<sup>28</sup> See Kelsen, *General Theory*, note 10 above, at 93.

<sup>29</sup> Similarly Jolowicz, *Roman Foundations*, note 8 above, at 127 (“... the questions at issue are closely bound up with those which concern the nature of subjective rights and the purposes for which they exist.”).

<sup>30</sup> “The law cannot prescribe in a legal norm that “X is a subject of the law”, for this would be senseless. Even if a legal order would contain a norm enunciating that “X is a subject of the law,” X will not be a subject if that legal order would not at least attribute to it a right or an obligation.” See Julio A. Barberis, “Nouvelles questions concernant la personnalité juridique internationale” 179 *Recueil des Cours* (1983), 145-285, at 169.

## *The Concept of Legal Personality*

The concept of personality as a bundle of rights, obligations, and competences has the great advantage of nullifying the detrimental effects of the first ambivalence. It precludes the possibility of a gap between personality and non-personality. When personality is a bundle of rights, obligations, and competences, there cannot exist a gap between recognized and unrecognized groups. Rather, the extent to which groups are not recognized as legal persons will simply be because they have no rights, obligations, or competences resting upon them. Hence, the first ambivalence is apparently deflected. All the more so, as it suggests that personality is flexible, rather than an all-or-nothing concept: one can have personality in various gradations.<sup>31</sup>

The second ambivalence is more difficult to tackle: legal persons wavering between the group and those composing it. Kelsen solves this by treating individuals as organs of the corporation,<sup>32</sup> going so far as to claim that duties and rights,

---

<sup>31</sup> This conception also underlies the dictum of the International Court of Justice in *Reparation for injuries*, note 1 above, at 178, to the effect that “[t]he subjects of law in any given 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.” Incidentally, both the Court's conception of personality (stressing social necessity) and its methodology (looking for practice) owe much to Lauterpacht's seminal paper. See Lauterpacht, *The Subjects*, note 23 above.

<sup>32</sup> To some extent, in international organizations the member states are partly considered as organs of the organization. For a brief discussion, see Klabbers, *An Introduction*, note 2 above, 193-195.

*Jan Klabbers*

conferred upon corporations, are “indirectly” given to individuals.<sup>33</sup> This claim, surely, meets with two objections. First, it borders on the artificial and negates, rather than compromises, the separate existence of any legal persons other than individual human beings. It does not allow for any piercing of the corporate veil but, instead, assumes that there is no such thing as the corporate veil, or that it comes and goes in accordance with the wishes of the analyst.

Second, and possibly of greater practical relevance, it seems to ignore the bylaws or other internal rules of the association. Surely, one could argue that; if an association exists because some people wish to devote their energy to a common project (be it the spread of the gospel where a church is concerned, the making of profit where a corporation is concerned, or anything else), it should be part of that group’s responsibility to decide how to go about doing things. There is no point in being granted autonomy (however relative) if nothing is done with that autonomy. If the rights, competences, or obligations of a church merely coincide with the aggregate of those held by its individual members, then there is little point in granting

---

<sup>33</sup> See Kelsen, *General Theory*, note 10 above, at 100.



## *The Concept of Legal Personality*

personality to any entity other than the individual.<sup>34</sup>

Either way, both ambivalences combined raise the next question: what, then, does personality mean? It is now that the threshold question presents itself. Many hold that, without personality, one cannot act in law; thus, personality ought to be established before one can have any rights, obligations, or competences. An obvious circularity sets in: one needs to be a person to have a right, yet having a right implies that one is a person.<sup>35</sup> Practically, this may not matter too much; but theoretically, such circularity is less than elegant, and it leaves unexplained precisely that which the concept of personality ought to explain.

### III. THE THRESHOLD THESIS

It is often suggested (usually implicitly) that actors can only perform legal acts if they possess personality granted—or, at least, recognized and accepted—by the particular legal system in which

---

<sup>34</sup> On internal affairs, see Samuel J. Stoljar, “The Internal Affairs of Associations,” in Webb (ed.), *Legal Personality*, note 17 above, 66-92.

<sup>35</sup> A good example is Gaja, First Report, note 4 above, who first opines that it takes personality to violate an obligation, but later holds that the very possibility of performing a certain legal act shows that the entity has legal personality. Unless violating an obligation does not qualify as a legal act (by which is meant an act having legal effects, rather than an act which is not illegal), this amounts to the well-nigh inevitable circularity described above.

*Jan Klabbers*

they wish to act.<sup>36</sup> This position makes some intuitive sense: a legal community (be it a State or something else) must have the capability of establishing what behaviors it tolerates and, almost as necessarily, what activities it tolerates.

This is strongly suggested by the leading Case Law on the topic of both the I.C.J. and the E.C.J. The I.C.J., as intimated, was questioned as to whether the U.N. could possibly bring a claim against Israel (a non-member State at the time) over the death of Count Folke Bernadotte and some of his associates. For reasons unknown, the Court found it necessary to approach the case by analyzing whether or not the U.N. had international legal personality; thereby strongly suggesting that, without such personality, it would have been possible to bring a claim. Indeed, the Court was quite frank, stating thus:

[...] has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in

---

<sup>36</sup> It is here, perhaps, that the difference between public international law and other legal systems might be most pronounced, as public international law does not know any regular procedure for conferring personality except the decentralized one of recognition.

### *The Concept of Legal Personality*

regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality?<sup>37</sup>

This passage is intriguing and intricate: well worth a closer look. First, and perhaps least important for general purposes, it is noticeable that the Court only concerns itself with the position of the U.N. *vis-à-vis* its members, at this juncture. It does not, yet, address the position of non-members.<sup>38</sup>

Second, it seems to use personality as a shorthand way of describing rights of the Organization. If it has certain rights against its members, it has international personality.<sup>39</sup>

Third, the Court strongly suggests that personality ought to flow from the Charter: i.e., we may presume from the intentions of the founders, rather than from anything objectively given. This is belied later on, perhaps, when it is clear that the Charter does not explicitly endow the U.N. with personality of any kind and,

---

<sup>37</sup> See *Reparation for injuries*, note 1 above, at 178.

<sup>38</sup> This would be discussed a bit later in the Court's opinion. See *ibid.*, at 184-185.

<sup>39</sup> In a similar vein, James E. Hickey, Jr., "The Source of International Legal Personality in the Twenty First Century," 2 *Hofstra Law & Policy Symposium* (1997), 1-18.

*Jan Klabbers*

therefore, the Court feels compelled to look elsewhere. For the time being, it is noteworthy that the source of personality is recognized as the Charter.<sup>40</sup>

Fourth, and most relevant for present purposes, the Court reiterates the question as to whether or not the U.N. can bring a claim by asking: does the U.N. have international personality? It is this, which raises the suggestion that personality is a *conditio sine qua non*. If the U.N. lacks personality, as the Court suggests, it may not be able to bring a claim against anyone, let alone a non-member State.

This approach is amplified in the relevant decision by the E.C.J. in *ERTA*.<sup>41</sup> Here, the issue was to decide whether the E.C., as it was then, has the power to conclude a treaty with Switzerland on road transportation, or whether the power to conclude such agreements still rested (in whole or in part) with the Member

---

<sup>40</sup> Note, however, that Lauterpacht had already observed that the Charter does not address international personality, and that the omission was far from accidental. See Lauterpacht, *The Subjects*, note 23 above, at 447. On the other hand, perhaps the Court is only being consistent here: it would find an implied power to initiate proceedings; implied powers, conceptually, derive from the member states “by necessary intendment” (see *Reparation for injuries*, note 1 above, at 184) and are thus traceable to the Charter; personality is merely the aggregate of powers *et cetera*; hence, personality can be said to flow from the Charter.

<sup>41</sup> Case 22/70, *Commission v. Council* [1971] ECR 263.

### *The Concept of Legal Personality*

States. As did the I.C.J. in *Reparation for injuries*, so did the E.C.J. in *ERTA*: it seemed to approach the issue by analyzing the legal personality of the E.C., finding that such personality would cover international law (which may not be self-evident),<sup>42</sup> and deriving from this international personality a power to conclude treaties in the field of transportation.

Both cases heuristically suggest that personality precedes action. Taken to the extreme, this might be interpreted that, without personality, no action would be possible. Yet, it is also useful to point out that both decisions were quite ambivalent on the issue,<sup>43</sup> and can also be read in a different manner. While the way the Courts structure arguments suggests that personality acts as a threshold, the actual wording of both judgments leaves room for different interpretations. Sufficient room is available to raise questions about the standard reading.

---

<sup>42</sup> See *ERTA*, note 41 above, para. 14. The Court interprets the rather pithy phrase in what used to be Article 210 (now Article 281) of the EC Treaty that the Community “shall have legal personality” to refer to international personality, without any further explanation.

<sup>43</sup> As Elihu Lauterpacht has astutely observed, both were predominantly internally oriented, making a point about internal distributions of power: ‘the existence of personality was not the controlling consideration.’ See Elihu Lauterpacht, “The Development of the Law of International Organization by the Decisions of International Tribunals,” 152 *Recueil des Cours* (1976), 377-478, at 409.

*Jan Klabbers*

Perhaps *ERTA* is the clearer case of the two. The Court only proceeds by analyzing personality, after having found that there are no specific provisions in the E.C. Treaty, creating an external treaty-making power in the field of transport.<sup>44</sup> Clearly, the drafters had endowed the E.C. with internal transport powers, but had not added any external transport powers. It was only for this reason that a further quest was undertaken; but the Court seems to indicate that, if the Treaty had granted only external powers, it would not have begun to enquire about personality. This, in turn, raises the possibility that personality does not constitute a threshold for acting in a legally recognizable manner.

Similarly, in *Reparation for injuries*, the Court equated the idea of the U.N.'s international legal personality with the U.N.'s rights *vis-à-vis* its Member States, "which it is entitled to ask them to respect."<sup>45</sup> Also, the Court specified that when the term "international personality" is used, it implies that the organization concerned "is an entity capable of availing itself of obligations incumbent upon its Members."<sup>46</sup> Quite apart from

---

<sup>44</sup> For a more general commentary on *ERTA* and related cases, see Alan Dashwood & Joni Heliskoski, "The Classic Authorities Revisited," in Alan Dashwood & Christophe Hillion (eds.), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), 3-19.

<sup>45</sup> See *Reparation for injuries*, note 1 above, at 178.

<sup>46</sup> *Ibid.*

### *The Concept of Legal Personality*

what “capable of availing itself” might possibly mean, it transpires that the Court does not regard personality, beyond specific rights and obligations.

This turns focus back to a familiar problem: if personality is not much more than a short-hand way to indicate an entity’s rights, obligations, or competences, then personality seems to have no separate meaning (this statement is a *petitio principii*, but nonetheless useful). More importantly, perhaps, is that personality is not necessary for the actual exercise of those rights, obligations, or competences. In terms borrowed from statehood doctrine: personality would be merely declaratory.

While (by and large) this appears correct, there remains a nagging sense that: if personality is merely declaratory, then why bother? Why, if personality is merely declaratory, do the Courts spend so much time looking for evidence of it (sometimes to the point of looking in the wrong places)?<sup>47</sup> Why have politicians spent more than ten years debating the possible legal personality of

---

<sup>47</sup> It remains curious that the ICJ, in *Reparation for injuries*, seemed to indicate that the existence of the 1946 Convention on the UN's Privileges and Immunities was evidence of the UN's legal personality, given the awkward circumstance that the UN was not (and still is not) a party to that Convention. See *Reparation for injuries*, note 1 above, at 179.

### *Jan Klabbbers*

the E.U. only to find that the E.U. is a legal person and, perhaps, may have been one all along?<sup>48</sup>

The answer may reside in the awkward circumstance that (resorting to the jargon of statehood doctrine): personality is not merely declaratory, but is also, in a peculiar way, constitutive.<sup>49</sup>

#### IV. CONSTITUTIVE RECOGNITION

Personality, as noted, is often held to be a threshold for the performance of legal acts. Some think this is a mistaken belief; as entities tend to act whether or not they are endowed with legal personality and, as people, tend to act together whether or not their entity is properly regarded as a legal person.<sup>50</sup> Legal textbooks may mention, without any sense of irony or self-contradiction, that entities can be formed and act under their own name and, in some cases, with their own

---

<sup>48</sup> Compare Article 6 of the Draft Treaty Establishing a Constitution for Europe (available at < <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> > last visited 1 September 2003). For a brief analysis of some of its more salient points, see Jan Klabbbers & Päivi Leino, "Death by Constitution? The Draft Treaty Establishing a Constitution for Europe," 4 *German Law Journal* (2003), 1293-1305.

<sup>49</sup> See more generally Jan Klabbbers, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors," in Jarna Petman & Jan Klabbbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden: Brill, 2003), 351-369.

<sup>50</sup> As Maitland, in his own inimitable style, put it with respect to Germany: the law is able "to see personality wherever there is bodiliness." See Maitland, Introduction to Gierke, note 20 above, at xxxviii.



## *The Concept of Legal Personality*

property without ostensibly qualifying as legal persons. Dutch law accepts the personhood (if not, strictly, the legal personality) of partnerships (*maatschap*), as well as certain corporate forms (*vennootschap onder firma* and the *commanditaire vennootschap*), without treating these as legal persons.<sup>51</sup>

On the international level, entities usually act first and ask questions later. A wonderful example is the agreement concluded some years ago, on the E.U.'s administration of Mostar.<sup>52</sup> This not only involved the E.U. (of which many thought devoid of personality to begin with), but also the local communes of East Mostar and West Mostar (which are not thought of by many to have international legal personality). Much the same would apply to the Croats of Bosnia and Herzegovina, who were also involved.

This suggests that performing legal acts evidence of personality as well as a simultaneous constitutive of personality. The very conclusion of a treaty involving Mostar indicates that the local communities of East Mostar, West Mostar,

---

<sup>51</sup> See J.W.P. Verheugt, B. Knottenbelt & R.A. Torringa, *Inleiding in het Nederlandse Recht* (Arnhem: Gouda Quint, 1992), 278-280. The authors note that the *commanditaire vennootschap* was scheduled to be granted legal personality in new provisions to be added to the Dutch Civil Code, without, however, this in any way seeming to affect the possibility of such entity to act.

<sup>52</sup> For a brief discussion, see Klabbers, Presumptive Personality, note 5 above, at 251.

*Jan Klabbers*

the Croats of Bosnia, and Herzegovina, are all legal persons, to the extent that they were able to conclude precisely that agreement. This may have been the only expression of their international legal personality, but is nonetheless relevant.

International law is far from unique in this respect; essentially the same observation has been in regard to the position of trade unions in English law. As Martin states:

[...] the English courts have held that a registered trade union, as such and not merely through the medium of trustees or a representative action, may sue and be sued in tort, may have an injunction issued against it on the suit of either a member or an outsider, may be sued by an expelled member for damages for breach of contract, and is subject to the doctrine of *ultra vires* the statute in regard to legislation that does not incorporate it.<sup>53</sup>

---

<sup>53</sup> See Ross M. Martin, "Legal Personality and the Trade Union," in Webb (ed.), *Legal Personality*, note 17 above, 93-142, at 96 (*italics in original*).

### *The Concept of Legal Personality*

Martin ascribes this (none too subtly) to the court's needs to keep in line with social realities.<sup>54</sup> He helpfully reminds us that the correlation between factual personality and legal personality "is ethical, not logical."<sup>55</sup> Similarly, Lauterpacht argues that the interests and needs of international society would make recognition of new subjects of international law well nigh mandatory.<sup>56</sup>

As a practical matter, pointing to a presumptive thesis of personality may sum all this up: entities, in whatever legal system, may be presumed to have legal personality unless the opposite is demonstrated<sup>57</sup>. As a theoretical matter, though, one final issue remains to be discussed: if the concept of personality is, as a matter of law, both declarative and constitutive at the same time, and not decisive of whether or not an entity can act, then what is its role?

The answer is twofold. The practical answer is that personality, in any particularly recognized form, may entail the ramifications that the law

---

<sup>54</sup> *Ibid.*, at 110.

<sup>55</sup> *Ibid.*, at 103. See also Sawyer: "If a group activity in fact displays personality attributes distinct from those of members of the group, there is no reason why the law should not attach legal consequences to those attributes." See Geoffrey Sawyer, "Governments as Personalized Legal Entity," in Webb (ed.), *Legal Personality*, note 17 above, 158-177, at 161.

<sup>56</sup> See Lauterpacht, *The Subjects*, note 23 above, e.g. at 450.

<sup>57</sup> For more details, see Klabbers, "Presumptive Personality," note 4 above.

*Jan Klabbers*

attaches to this particular form, circular as this may sound. Thus, creating a public enterprise means that the law relating to publicly listed companies will apply. Creating an association (*vereniging*, in Dutch) entails that profits may not be distributed among the members.<sup>58</sup> Creating an international organization and explicitly providing it (in its constituent document or otherwise) with international legal personality may result in limiting the liability of its Member States.<sup>59</sup>

Arguably, greater relevance lies elsewhere. It is potentially accurate to state that the law on personality has been dominated by corporate law concerns. Much of the writing on personality has occurred within the context of corporations. Maitland's writings, for example, deal predominantly (if not exclusively) with corporate ventures of varying descriptions,<sup>60</sup> and a leading text on jurisprudence also discusses personality in the private law section. While its author argues largely because it is traditional to discuss personality in that context (thus suggesting that personality may be relevant elsewhere), this very circumstance of tradition strengthens the

---

<sup>58</sup> See Verheugt *et al.*, *Inleiding*, note 51 above, at 289.

<sup>59</sup> This last example derives from C.F. Amerasinghe, *Principles*, note 7 above, at 255.

<sup>60</sup> See Maitland, *Introduction to Gierke*, note 20 above.

## *The Concept of Legal Personality*

suggestion that personality is most often discussed in connection with the corporate form.<sup>61</sup>

This, in turn, may overshadow the most general purpose of personality, which is to suggest that the human group is worthy of recognition (in the broadest sense of the word) in itself. Human beings tend to live and act in groups. They worship gods in churches or sects; they play sports together in football clubs, in tennis clubs, or in Little League; they aim to organize professional interests in trade unions, employer associations, or associations of independent professionals; they acquire knowledge and insight together in universities and institutions of higher learning; they give voice to their sexual identities in gay or lesbian associations; they organize along ethnic lines for various reasons; they engage in charity together by organizing themselves as foundations or otherwise; and they organize themselves in specific corporate forms to attract investors or raise money. Whatever the reason, much of what people do, they do in groups; and those groups will (more likely than not) strive for some form of recognition.<sup>62</sup>

---

<sup>61</sup> See George Whitecross Paton, *A Textbook of Jurisprudence* (Oxford: Clarendon Press, 1964, 3d edn, Derham ed.), at 247.

<sup>62</sup> In a similar vein, suggesting a link between legal personality and the promotion of ultimately political or ideological interests, Duncan Kennedy, *A Critique of Adjudication* (Cambridge MA: Harvard University Press, 1997), at 249, 255.

*Jan Klabbers*

Now the concept of personality enters the picture, and it does so in two distinctive, but related ways. The first: personality marks, quite literally, recognition of the group *qua* group (be it as a charity, a corporation, a sports club, or a gay activist group).<sup>63</sup> This recognition is considered to be important, although there is some debate as to why it is so important. Some, such as Charles Taylor, argue that it is important for people to attain group recognition because non-recognition of the group also implies non-recognition of the individuals composing the group.<sup>64</sup> Granting legal recognition to a gay activist group signals to the group members that they are taken seriously and deserve respect. This alone is sufficient to consider granting recognition of groups in the form of legal personality. Practically speaking, not much may be gained by a grant of personality, but the symbolic value of such an endowment is immense.<sup>65</sup>

Further claims would suggest that groups require recognition, not merely to be taken

---

<sup>63</sup> Kennedy ascribes the same function to rights (seemingly as elements of personality); *ibid.*, at 308.

<sup>64</sup> See Charles Taylor, "The Politics of Recognition," in Amy Gutman (ed.), *Multiculturalism* (Princeton: Princeton University Press, 1994), 25-73.

<sup>65</sup> In a similar vein, Neil MacCormick, *Questioning Sovereignty: Law, State, and Practical Reason* (Oxford: Oxford University Press, 1999), at 189 (stressing the relevance of group recognition in terms of cultural self-expression).

### *The Concept of Legal Personality*

seriously, but to be regarded as legitimate participants in struggles over scarce resources. This overtly politicized vein may include issues on the availability of football fields in a village, or the control over natural resources found on territory inhabited by an indigenous people. As Iris Young explains: “A politics of recognition ... usually is part of or a means to claim for political and social inclusion or an end to structural inequalities that disadvantage them.”<sup>66</sup>

The second reason why personality is of some relevance: it may help to shield the group from outside interference. Legal persons generally can take care of their own affairs, as long as they stay within the limits of the law. Their own by-laws, or statutes, will largely control how far they are able to manage themselves, with state (or other) authorities often reluctant to intervene.<sup>67</sup> In an age where the importance of civil society is often heralded,<sup>68</sup> legal personality is an especially useful

---

<sup>66</sup> See Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), at 105.

<sup>67</sup> Or, conversely, reluctant to accept personality. As Jolowicz recalls, “Trajan would not even allow Pliny when he was governor of Bithynia to authorize a fire-brigade for fear that it might become a centre of political agitation.” See Jolowicz, *Roman Foundations*, note 8 above, at 130.

<sup>68</sup> For a brief, critical analysis, see Peter J. Spiro, “New Global Potentates: Nongovernmental Organizations and the ‘Unregulated’ Marketplace,” 18 *Cardozo Law Review* (1996), 957-969. Perhaps the most comprehensive overview of the position of NGOs in international law is Anna-Karin Lindblom, *The Legal Status of Non-Governmental Organisations in International Law* (unpublished PhD thesis, University of Uppsala, 2001, on

*Jan Klabbers*

device for protecting the group from outside interference. This may come at a price, of course: shielding the group from outside interference may result in harm to the individuals comprising the group, or even outsiders. For that reason alone, the shield will never be (and should not be allowed to be) entirely airtight. Many will advocate a balance between the group and the individual.<sup>69</sup>

V. BY WAY OF CONCLUSION

The basic point remains: individuals do not live solely as individuals, or in the form called the state (which is an abstraction).<sup>70</sup> Instead, they form affiliations for various purposes: practical, political, or both. Some type of recognition is often strived for to protect these affiliations from interference, and this recognition often takes the form of an entity's legal personality.

This paper has briefly argued that legal personality has relevance. Its relevance resides, not in forming a threshold for action in any given legal system (as is often thought), but as a matter

---

file with the author).

<sup>69</sup> So, e.g., Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 1999).

<sup>70</sup> *Mutatis mutandis*, the same applies to the component parts of federal states, as underlined in James E. Hickey, Jr., "Localism, History and the Articles of Confederation: Some Observations About the Beginning of US Federalism," 9 *Ius Gentium* (2003).



### *The Concept of Legal Personality*

of politics. It is relevant in two ways: personality forms recognition of the group's legitimate existence, and it shields that existence from possible interference by outside authorities.

The word “personality” is derived from the Latin root *persona*, which literally means “mask,” and was particularly used to refer to the types of mask worn by actors.<sup>71</sup> While it may be misleading to think of entities as persons rather than relations between individuals,<sup>72</sup> it is oddly fitting that the word “personality” means “mask,” especially when it is connected with the political connotations of legal personality. The mask of personality not only represents, but also takes the place of the real thing; the thing it aims to hide by using the personality mask. This hiding behind the mask of personality may very well help to facilitate political behavior by creating something akin to a *theatrum mundi* (turning public life into a spectacle where raw emotions and primal interests can be channeled and sublimated through the institution of legal persons).<sup>73</sup> Thus, it may be that legal personality is not “legal” in any ordinary sense of the term but, instead, is fundamentally political. By allowing groups to band together for whatever purpose and under

---

<sup>71</sup> See, e.g., Keeton, *Elementary Principles*, note 11 above, at 149.

<sup>72</sup> See note 9 above.

<sup>73</sup> Much of this is inspired by Richard Sennett, *The Fall of Public Man* (New York: Norton, 1992 (1974)).

*Jan Klabbers*

whatever banner they choose, the law facilitates not merely commerce, but the conduct of politics in a stylized form.

# International Legal Personality

*M.N.S. Sellers*  
*University of Baltimore*

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

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

---

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

## M.N.S. Sellers

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

---

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

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

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

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

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

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

## *International Legal Personality*

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

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

---

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

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

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

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

## *M.N.S. Sellers*

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

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

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

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

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

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

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

## *International Legal Personality*

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

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

---

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

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

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

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

*M.N.S. Sellers*

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

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

---

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

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

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

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

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



### *International Legal Personality*

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

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

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

---

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

*M.N.S. Sellers*

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

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

## *International Legal Personality*

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

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

---

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

*M.N.S. Sellers*

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

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

### *International Legal Personality*

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

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

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

*M.N.S. Sellers*

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

# Measuring the Evolvability of Legal Personality

*Nary Subramanian*  
*Hofstra University*

*Lawrence Chung*  
*University of Texas at Dallas*

Evolution is considered a fundamental property of almost any legal personality. This evolution in legal personality may or may not be forced by the external environment. Interesting to many people in the legal community is the ability to measure the evolvability of legal personality. This paper presents *Nomus*, a legal measurement framework, which helps to quantify the evolvability of legal personality. This framework takes into account the different factors that affect the evolvability of a legal personality, while helping legal professionals reason about them, and calculates numeric scores that are, not only justified by the factors, but are also intuitive. In order to illustrate the application of the framework, a specific example of legal personality evolution (viz., the evolution of legal personality of human beings in international law) is considered.

## *Subramanian & Chung*

### I. INTRODUCTION

Legal personality of an entity refers to its legal rights and duties.<sup>1</sup> It has been observed that legal personality of entities has evolved. For example, a year ago,<sup>2</sup> the unborn fetus was accorded legal personality that it did not have even, say, a month earlier. Thus, the legal personality of the fetus has evolved. The evolution of legal personality is due to several factors including social changes, international relationship changes, economic reasons, or even ecological changes. In order to measure the evolution of a concept like legal personality, and others like it, we propose the legal<sup>3</sup> measurement framework, *Nomus*.<sup>4</sup> The metrics generated by *Nomus* help legal professionals to reason why (or why not) the legal personality is evolvable, and to identify the factors that need strengthening (or weakening) in order to improve evolvability. *Nomus* is a framework that formalizes, to a certain extent, the informal written descriptions. One of the advantages of

---

<sup>1</sup> J.E. Hickey, Jr., "The Source of International Legal Personality in the Twenty First Century", The Hofstra Law & Policy Symposium, 1997, Vol. 2, pp. 1-18.

<sup>2</sup> See the news article "Bush Signs Fetus Rights Legislation" at [http://story.news.yahoo.com/news?tmpl=story&cid=544&e=2&u=/ap/20040401/ap\\_on\\_go\\_pr\\_wh/bush\\_fetus\\_rights](http://story.news.yahoo.com/news?tmpl=story&cid=544&e=2&u=/ap/20040401/ap_on_go_pr_wh/bush_fetus_rights).

<sup>3</sup> The word "legal" is used in its noun form and not in its adjective form – thus we are not talking about the legality/illegality of a measurement framework; instead we are referring to a framework that can be used to measure different aspects of law.

<sup>4</sup> After the God of Law in Greek Mythology (Nomos, aka Nomus) – see <http://www.theoi.com/Kronos/Nomos.html>.



## *Evolvability of Legal Personality*

*Nomus* is that it can be formalized further, and developed into a software tool that will greatly automate the measurement of concepts, such as evolution of legal personality. The application of *Nomus* illustrates the measurement of the evolution of legal personality in human beings under international law.

This paper first discusses the evolution of legal personality, briefly followed by the detailed application<sup>5</sup> of *Nomus* to measure the evolution of international legal personality in human beings. The advantages of *Nomus*, and directions for future work, are then discussed. Finally, the conclusions from this approach are presented.

## II. EVOLUTION OF LEGAL PERSONALITY

Historical evidence supports the premise that legal personalities of entities have evolved over time: thus, since the fetus has become a legal personality, a child now has legal personality that it did not have earlier (a child can, thus, sue his or her parents), and the legal personality of non-governmental organizations has evolved. In this paper, to illustrate *Nomus*, we focus on the evolution of the legal personality of human beings under international law. Based on [1, 2, and 3], we know that the evolution of the legal personality of human beings is spoken in terms of

---

<sup>5</sup>The principles behind *Nomus* can be seen in Appendix A.

### *Subramanian & Chung*

generations; thus, the first generation comprises basic civil and political rights; the second generation consists of economic, social, and political rights; and the third generation of rights are referred to as the solidarity rights. This evolution is figuratively described in Figure 1. In Figure 1, clouds represent the entity “Legal Personality of Human Beings under International Law.” The thickness in cloud borders conveys content of rights (the thicker the border, the more the rights). The arrows convey time aspect of evolution (longer arrows mean more time); and the jump from zeroth<sup>6</sup> generation (the time before the 1<sup>st</sup> generation) to the first generation took much longer than the time between succeeding generations. Reasons for the evolution of the legal personality in human beings under the international law are listed below:<sup>7</sup>

1. Extension of rights and freedoms of human beings.
2. Creation of new sources of legal personality, such as the Universal Declaration and the International Human Rights Covenants.
3. Changes in the power of the State (the power of the State over its citizens has

---

<sup>6</sup>In this paper we have, for convenience, assumed that the rights that existed before the first generation rights to be zeroth generation rights.

<sup>7</sup>These have been obtained from [1].

## *Evolvability of Legal Personality*

been diluted, and the populations have choices in representing themselves in international interests).

Measurement of the evolution of legal personality gives us an idea of how much evolution has taken place so far, estimates how much more evolution can be accomplished, and compares evolutions of different entity's legal personalities. Evolution implies a change from one generation to another. In this paper, we will measure the closely related concept of evolvability of each generation: evolution occurred because the factors affecting the evolvability of the generation were conducive.

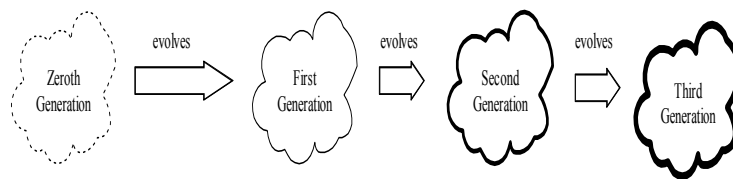


Figure 1. Evolution of Legal Personality of Human Beings under International Law

### A. Evolvability Hierarchy

In order to illustrate the application of *Nomus* to measure the evolvability of legal personality of

### *Subramanian & Chung*

human beings, we've developed a Concept Interdependency Graph (or C.I.G.).<sup>8</sup> The first step (Appendix A, Figure 2) in the C.I.G. development is to develop the legal concept hierarchy. The legal concept hierarchy that we developed is shown in Figure 2. The main concept of interest is the evolvability of legal personality (here, evolvability is *type*<sup>9</sup> of the concept, while legal personality is *topic*<sup>10</sup> of the concept) and this is represented as Evolvability [Legal Personality]. The legal personality of natural (human beings and animals) and non-natural (corporations and states) entities can evolve. Therefore, there is a decomposition of the concept Evolvability [Legal Personality] into the concepts Evolvability [Legal Personality, Natural Entities] and Evolvability [Legal Personality, Non-Natural Entities]. This is an OR-decomposition, as indicated by the double-arc<sup>11</sup> between the two child concepts. As explained in Appendix A.1, OR-decomposition means that if either of the child concepts is satisfied[1], then the parent is satisfied.

---

<sup>8</sup>For details on CIG the reader is referred to in Appendix A.2.

<sup>9</sup>Types are discussed in Appendix A.2.

<sup>10</sup>Topics are discussed in Appendix A.2.

<sup>11</sup>See Appendix A, Figure A.1 for the ontology.

## *Evolvability of Legal Personality*

We are now interested in the evolvability of legal personality of human beings (and not in other natural entities), so we decompose<sup>12</sup> the concept Evolvability [Legal Personality, Natural Entities] into the concepts Evolvability [Legal Personality, Human Beings] and Evolvability [Legal Personality, Other Natural Entities]. Next, we are interested in the evolvability of legal personality of human beings under international law (and not in, for example, the US Law<sup>13</sup>), so we decompose<sup>14</sup> the legal concept Evolvability [Legal Personality, Human Beings] into Evolvability [Legal Personality, Human Beings, International Law] and Evolvability [Legal Personality, Human Beings, US Law].

We wish to focus on the concept Evolvability [Legal Personality, Human Beings, International Law], and would like to refine its meaning. One common theme, found in literature about evolution of legal personality of human beings [1, 2, 3, and 4] under international law, are that there appear to be two aspects to this evolution: the evolution of rights granted to human beings, and the evolution of the state (one example of state evolution is the dilution<sup>15</sup> of authority over the rights granted to citizens by international

---

<sup>12</sup>This is an OR-decomposition, as well (indicated by the double arc). See Appendix A, Figure A.1 for details.

<sup>13</sup>A discussion on the differences in the treatment of legal personality under the international law and US law can be seen in [3].

<sup>14</sup>This is an OR-decomposition –Appendix A.1.

<sup>15</sup>See page 2 of [1].

### *Subramanian & Chung*

treaties). Therefore, we have decomposed the concept Evolvability [Legal Personality, Human Beings, International Law] into two concepts Evolvability [Legal Personality, Human Beings, International Law, Rights] and Evolvability [Legal Personality, Human Beings, International Law, State]. The former refers to the evolvability of human rights, and the latter refers to the evolvability of the state.<sup>16</sup> Now we refine the meanings of these two child concepts (by evolvability of rights of human beings, we mean its extensibility over time; and by evolvability of state, we mean the acceptability by the state of the legal personality accorded to human beings). This decomposition is necessary, as we found in the literature [1, 2, 3, and 4], that rights were added while (at the same time) the states had not all accepted the earlier set of rights. These are important factors for the evolution of legal personality of human beings under international law. Therefore, there are two refinement<sup>17</sup> child concepts: Extensibility [Legal Personality, Human Beings, International Law, Rights] and Acceptability [Legal Personality, Human Beings, International Law, State]. Furthermore, we

---

<sup>16</sup>This is an example of AND-decomposition (indicated by the single arc) – see Appendix A, Figure A.1 – that means that both the child concepts have to be satisfied for the parent concept to be satisfied.

<sup>17</sup>This is an example of EQUAL-decomposition – see Appendix A, Figure A.1 – that means a refinement (or clarification) of the parent concept into its child concept.

## *Evolvability of Legal Personality*

believe that acceptability by the State is important for the evolution of legal personality of human beings under international law (as per discussion in [3]: if a state does not accept the rights, its citizens are not bound by those rights under the international law).<sup>18</sup> We, therefore, indicate the concept Acceptability [Legal Personality, Human Beings, International Law, State] as a priority (or critical) concept, using the ‘!’ symbol.

Finally, we have further refined<sup>19</sup> the concept Extensibility [Legal Personality, Human Beings, International Law, Rights] into three child concepts: extensibility of individual rights, extensibility of group rights, and extensibility of rights that are yet to be decided (for example, ecological rights [2], right to moon exploration,<sup>20</sup> Mars exploration,<sup>21</sup> etc.) which we call the future rights. We have indicated these child concepts (by dropping several topics for convenience)<sup>22</sup> simply as Extensibility [Individual Rights], Extensibility [Group Rights], and Extensibility [Future Rights]. We will use this legal concept

---

<sup>18</sup>See page 388 of [3]: “... international human rights law is seldom considered part of the legal recourse available to individuals or groups in the United States today.”

<sup>19</sup>This is an OR-decomposition as well – see Appendix A.1.

<sup>20</sup>These so-called future rights are our assumption.

<sup>21</sup>These so-called future rights are out assumption.

<sup>22</sup>This is an illustration of simplifying the notation – not all the topics need be explicitly indicated if there is no loss of information or context. In subsequent CIGs we will omit listing all topics when there is no confusion.

## *Subramanian & Chung*

hierarchy in Appendix C to complete the C.I.G., and to generate metrics.

### III. APPLICATION OF *NOMUS*

In this section, we apply *Nomus* to develop metrics for the evolvability of legal personality. For details on the principles behind *Nomus*, the interested reader is referred to Appendix A. There are three steps in the *Nomus* process (Figure A.6), explained below:

#### Step 1: Development of the C.I.G.

The complete C.I.G. for the zeroth generation of human rights is given in Figure 3 (the C.I.G.s for the first, second, and third generations of human rights are given in Appendix B). In Figure 3, the zeroth generation of human rights is represented by the operationalizing concept Zeroth Generation [Human Rights], and can be refined into the human rights granted by the state (see page 10 of [1]), which is represented by the operationalizing concept Zeroth Generation [Human Rights, Granted by State] (which is simply represented as Zeroth Generation [Granted by State] in subsequent references). Arrows annotate the contributions made by the zeroth generation of rights to the concept hierarchy in Figure 2. Justifications for the contributions are captured by claim concepts c1, c2 and c3 in Figure 3. Claim c2, which says that



## *Evolvability of Legal Personality*

the “rights granted by the state were accepted by it,” refers to: if the state grants rights, then it respects those rights (i.e. the state cannot interfere with those rights).<sup>23</sup>

### Step 2: Calculating the Metrics

Step 2 of the *Nomus* process is the generation of a metrification scheme. We will be using the example single value (SV) metrification scheme given in Figure A.4. In this section we will discuss the application of the SV scheme to the C.I.G.s, developed in Step 1. For illustration, we will use the C.I.G. in Figure 3.

---

<sup>23</sup>We thank Prof. James Hickey of Hofstra University for this clarification.

## Subramanian & Chung

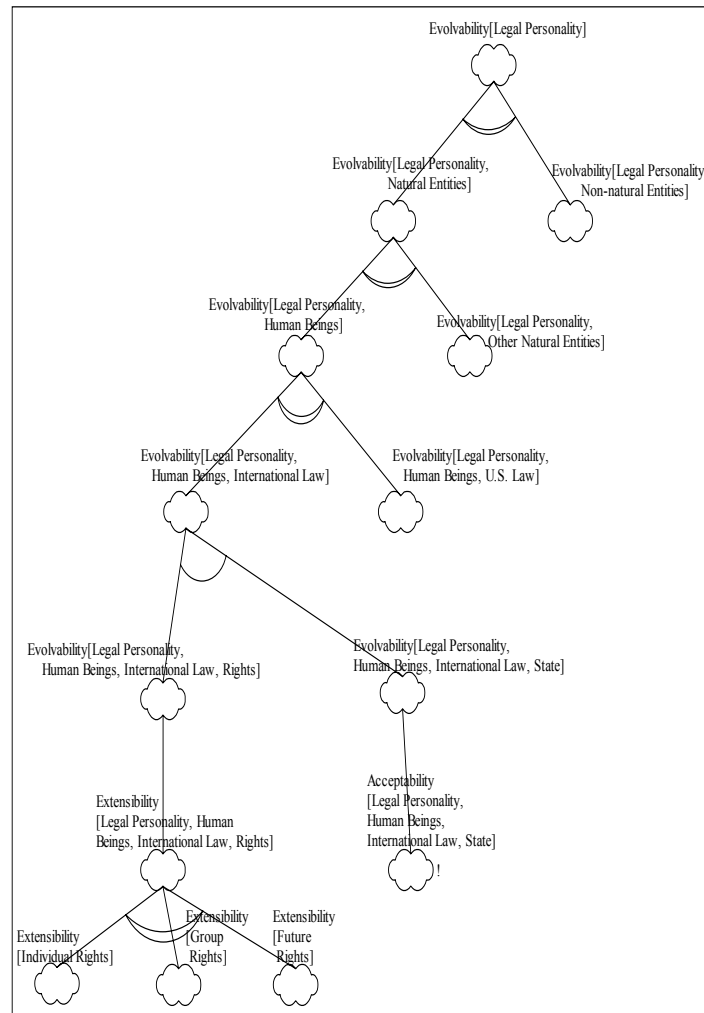


Figure 2. Decomposition of the Legal Concept Evolvability of Legal Personality

## *Evolvability of Legal Personality*

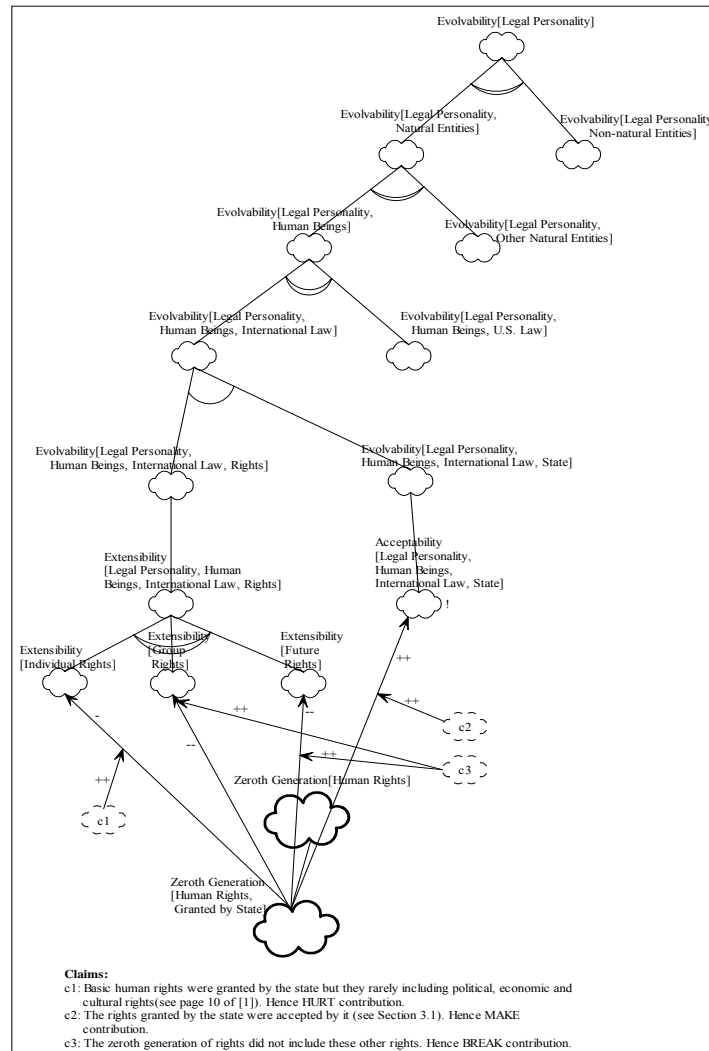


Figure 3. CIG for the Zeroth Generation of Human Rights

## *Subramanian & Chung*

### Step 3: Applying the Metrification Scheme

There are five phases in Step 3, as indicated in Figure A.5. These phases are described below:

#### Phases 1 and 2 - Applying the Metrification Scheme

Figure 4 shows the C.I.G. of Figure 3 with the metrics applied to claim concepts and its contributions. Both the claim concepts and contributions are non-critical, indicated by the absence of the criticality '!' symbol. All the claim concepts are assumed satisfied.<sup>24</sup> Hence, all the claim concepts get a metric of 1 (by SV1.1) and their criticalities a metric of 0 (by SV3.1); since all claim concepts contributions are of type MAKE, their contributions get a metric of 1 (by SV2), and the criticalities of the contributions get a metric of 0 (by SV3.2). Hence, all claim concepts propagate a metric of (by SV4) 1, because (metric of concept + criticality of concept)\*(metric of

---

<sup>24</sup>One good justification for the assumption of satisfied claim concepts is that if they are not satisfied then we can modify the claim such that they are satisfied.

### *Evolvability of Legal Personality*

contribution + criticality of contribution) =  $(1 + 0) * (1 + 0) = 1$ , to their parent contributions. Also given in Figure 4 are the initial values of the metrics for the parent contributions.

#### Phase 3 - Applying the Metrification Scheme

Figure 5 shows the C.I.G. with the metrics of the parent contributions recomputed, based on metrics propagated by the child claim concepts, using SV6. The HURT contribution, the line between operationalizing concept Zeroth Generation [Granted By State, Human Rights] and the legal concept Extensibility [Individual Rights], shows that the revised metric is +0.5 (originally -0.5) because (by SV6), (metric of contribution + its criticality metric) + minimum of all child metric propagation =  $(-0.5 + 0) + 1 = +0.5$ .

Likewise, the revised metrics for the other three contributions are computed to be the values indicated in Figure 5.

### *Subramanian & Chung*

#### Phase 4 - Applying the Metrification Scheme

Figure 6 shows the C.I.G. with metrics for the operationalizing concepts, and their contributions to their parent legal concepts. The operationalizing concepts are all satisfied (by assumption). Hence, by SV1.1, their metrics are 1; the criticalities of the operationalizing concepts are 0 (by SV3.1); their contributions are non-critical; the metrics propagated by the operationalizing concepts to their parents are given inside the parent concepts. For example, the metric propagated by the operationalizing concept Zeroth Generation [Granted By State] to the legal concept Extensibility [Individual Rights]<sup>25</sup> is, by SV4, (metric of concept + criticality of concept)\*(metric of contribution + criticality of contribution) = (1 + 0)\*(0.5 + 0) = 0.5.

By SV5.3, the metric of leaf legal concepts is the average of the

---

<sup>25</sup>The name of the concept has been simplified for convenience – only the last topic has been used.

## *Evolvability of Legal Personality*

propagated metrics. Here, there is only one child for each legal concept, so its metric equals the metric propagated by the child. The metrics propagated by the operationalizing concepts to their parents are indicated in Figure 6.

### Phase 5 - Applying the Metrification Scheme

Figure 7 shows the C.I.G. with the metrics propagated upward. Rules SV5.1 and SV5.2 are used for this purpose. The legal concept Extensibility [Rights]<sup>26</sup> is OR-decomposed into Extensibility [Individual Rights], Extensibility [Group Rights] and Extensibility [Future Rights]. The metric propagated by each of the three child concepts is given by SV4 (using the EQUAL contribution) as (metric of concept + criticality of concept)\*(metric of contribution + criticality of contribution).

The EQUAL contributions are assumed to be non-critical (due to the absence of criticality symbols).

---

<sup>26</sup>The name of the concept has been simplified for convenience – only the last topic has been used.

*Subramanian & Chung*

Therefore, the child legal concept Extensibility [Individual Rights] makes a metric contribution of  $(0.5 + 0) * (1 + 0) = 0.5$ ; the child legal concept Extensibility [Group Rights] makes a metric contribution of  $(0 + 0) * (1 + 0) = 0$ ; and the child legal concept Extensibility [Group Rights] makes a metric contribution of  $(0 + 0) * (1 + 0) = 0$ . By SV5.2, the metric of the parent legal concept is Extensibility [Rights] =  $\max(0.5, 0, 0) = 0.5$ .

Similarly, the metric of the parent legal concept Evolvability [State] (the last topic used) equals the metric propagated by its child Acceptability [State], which (by SV4) is  $(2 + 0.5) * (1 + 0) = 2.5$ . This is due to the child concept Acceptability [State] criticality, indicated by the '!' symbol, with a metric of 0.5 by SV3.1.

Likewise, the parent concept Evolvability [Rights] gets a metric of 0.5. The parent concept Evolvability [International Law] (again, the last topic used) has a metric (by SV5.1, due to the AND-contribution) of  $\min(0.5, 2.5) = 0.5$ . Thus, we know that



## *Evolvability of Legal Personality*

the metric of the legal concept:

Evolvability [Legal Personality, Human Beings, International Law] = 0.5 (i.e., the evolvability metric for the legal personality of human beings under international law is 0.5). We have now determined the metric of interest (evolvability of legal personality of human beings under international law) using *Nomus*.

We can go no further up the C.I.G., since we do know the metrics of other legal concepts, such as Evolvability [Legal Personality, Human Beings, US Law], Evolvability [Legal Personality, Other Natural Entities] and Evolvability [Legal Personality, Non-Natural Entities]. However, if we assume that the metrics for these concepts are 0, then we can find the metric of the topmost legal concept Evolvability [Legal Personality] to be 0.5 by repeated application of SV5.2 (shown in Figure 8). We have thus found the metric for the evolvability of legal personality using *Nomus*.

## Subramanian & Chung

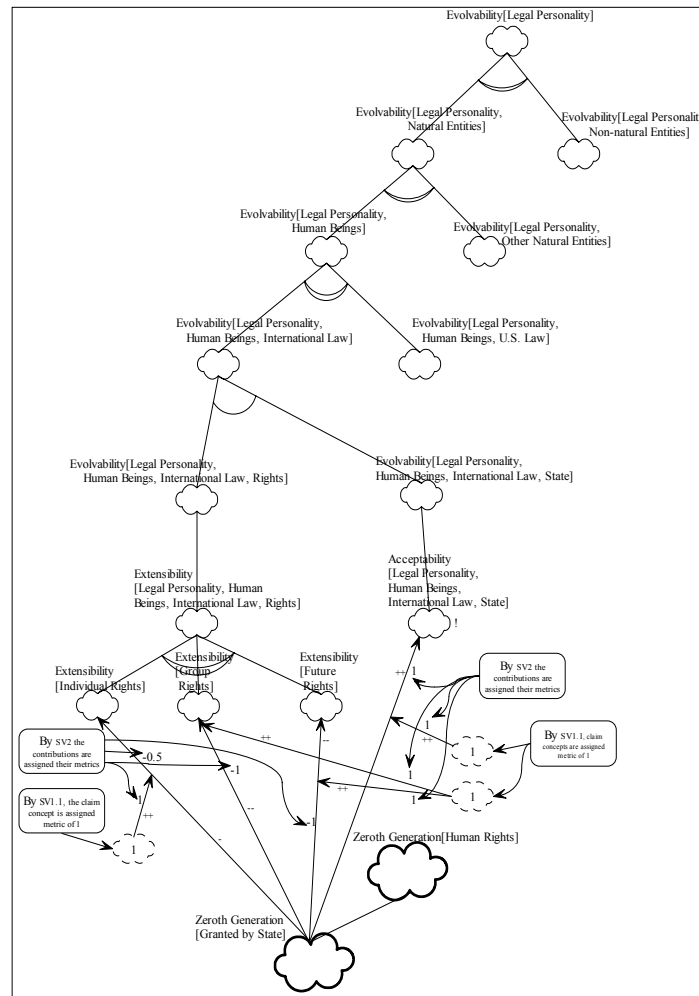


Figure 4. Application of the SV Metrification Scheme - Phases 1 and 2

## *Evolvability of Legal Personality*

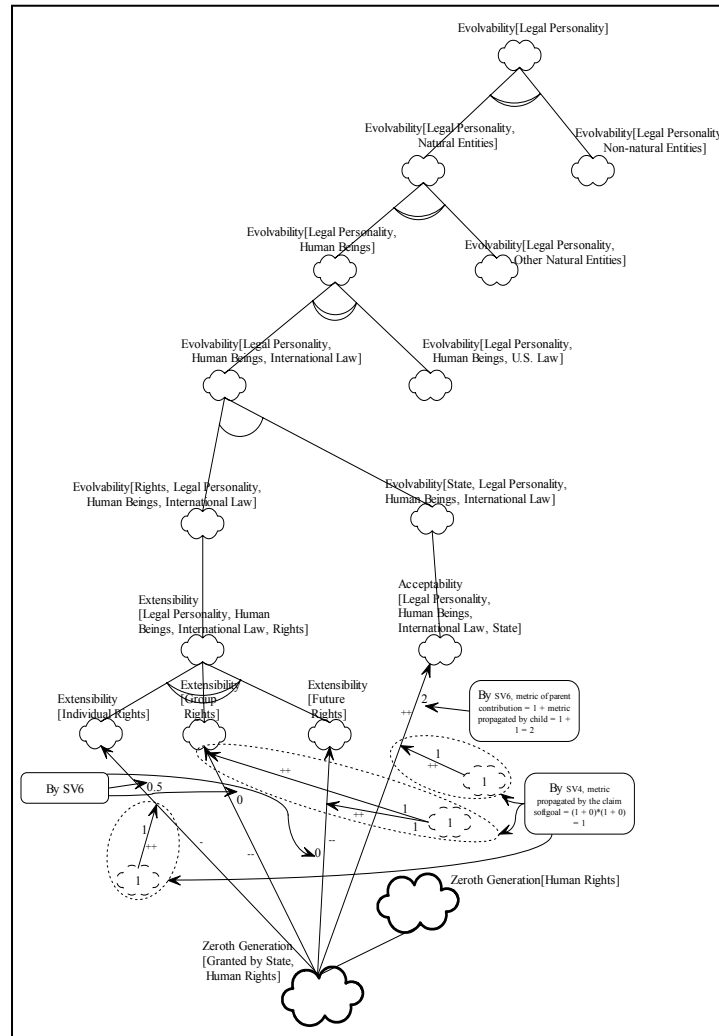


Figure 5. Application of the SV Metrification Scheme – Phase 3

## Subramanian & Chung

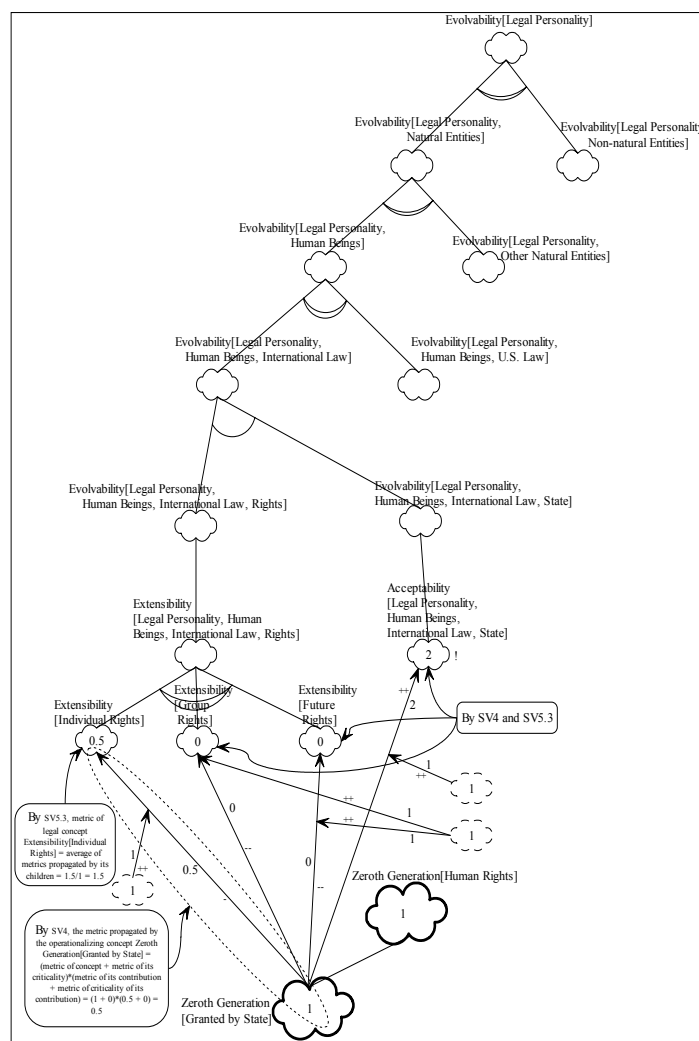


Figure 6. Application of the SV Metrification Scheme – Phase 4

## *Evolvability of Legal Personality*

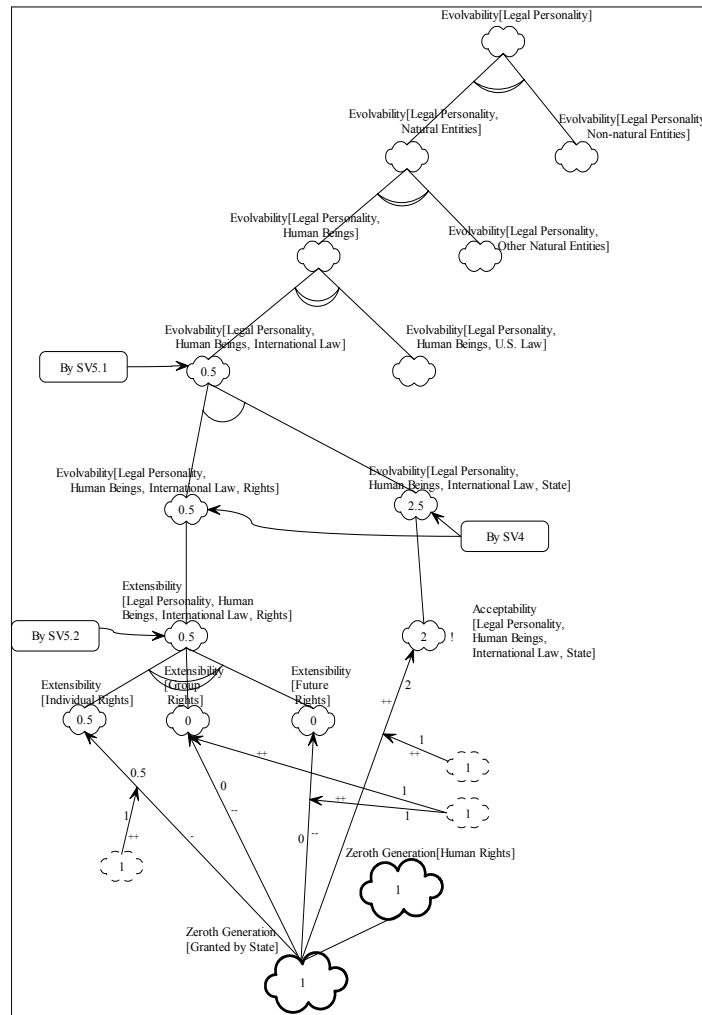


Figure 7. Application of the SV Metrification Scheme – Phase 5

## Subramanian & Chung

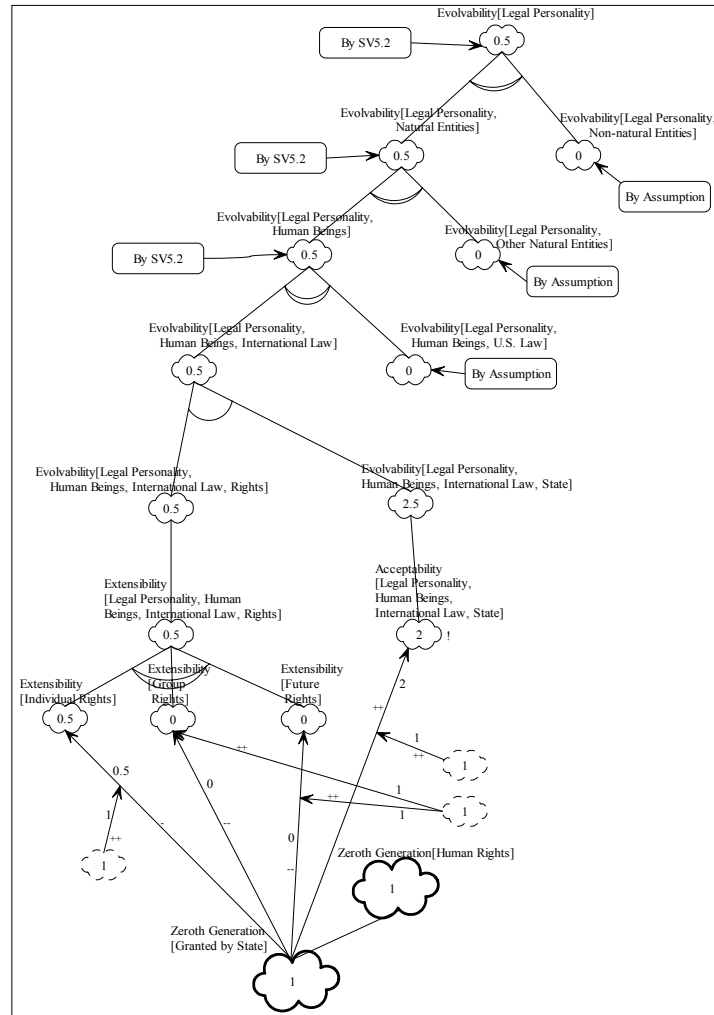


Figure 8. Applying the SV Metrification Scheme – Extending All the Way to the Top

## *Evolvability of Legal Personality*

### Calculation of Metrics for the Different Generations

As discussed earlier, the metrics for evolvability of legal personality for the first generation, second generation, and the third generation are calculated in the C.I.G.s in Appendix C. The following table summarizes the results of the metrics:

Generation	Metric for Concept Evolvability [Legal Personality, Human Beings, International Law]	Metric for Concept Evolvability [Legal Personality]
Zeroth	0.5 (from Fig. 8)	0.5 (from Fig. 8)
First	1.5 (from Figure C.1)	1.5 (from Figure C.1)
Second	2 (from Figure C.2)	2 (from Figure C.2)
Third	0.5 (from Figure C.3)	0.5 (from Figure C.3)

Table 1. Comparison of Evolvability Metrics for Different Generations

## IV. DISCUSSION OF *NOMUS* AND FUTURE WORK

Based on Table 1, we can conclude that the metrics for the evolvability of legal personality is highest for the second-generation rights, while it is lowest for the zeroth and third generation rights. Why? Because the C.I.G.s show that these are the metrics for the concepts, based on the SV metrification scheme. It should be noted that the metrics are strongly influenced by the

### *Subramanian & Chung*

contribution types. In the C.I.G.s, we give justifications for the contribution types; however, it is possible that someone else may choose different types of contributions (or a different metrification scheme) and may, therefore, arrive at a different set of relative metrics. Either way, the metrics are justifiable, that is: when we say the third generation rights have low evolvability metrics (based on a C.I.G. and a metrification scheme) we know exactly why the metrics are low, and what should be done to improve them. By looking, for example at C.I.G. of Figure C3, we can say that the Third Generation metrics can be improved (relative to First and Second Generation metrics) by improving the contribution to the legal concept Acceptability [State]. This means that if we find reason to strengthen this contribution (for example: due to the invalidation of the claim by the U.S. actively participating in the Third Generation process), then its evolvability metrics will improve. Thus, we know what should be done to strengthen (or even weaken)<sup>27</sup> the metrics. The metrics also depend on the decomposition of the legal concept hierarchy. The metrics are always valid in relation to the legal concept hierarchy; with time there may be reasons to change the hierarchy of Figure 2. In that case, the metrics may change.

---

<sup>27</sup>In some case we may desire the weaken the metrics – for example, if we are measuring crime in prisons then perhaps lower crime may be desirable.



## *Evolvability of Legal Personality*

One may ask whether these results are intuitive. Because the third generation rights have low evolvability metric, we may direct our legislative resources in another way.<sup>28</sup> It could be used as the basis for litigation tactic: a lawyer, defending the indigenous people whose right to a safe and healthy environment is being eroded by the loss of their environment (for example, the indigenous peoples of Brazil living in the rain forests being cut down), may decide that it is tougher to assert the claim in terms of Third Generation rights and have state acceptance. The lawyer may decide that if he or she articulates the challenge on the basis of First and Second Generation rights (for example, loss of economic and cultural rights), it may be more acceptable. Another effect of the metric could be on society's lawmaking: for example, a legislator may decide that it is more difficult to pursue, and perhaps to succeed, legislation in Third Generation rights terms, and change his strategy accordingly.

Also, C.I.G.s help maintain historical records. With time, the hierarchy of legal concepts, operationalizing concepts, and some of the justifications may change. By updating the C.I.G.s, we can maintain accurate metrics, as well. By looking at the changes in metrics, we have a visual record of what systemic changes took place.

---

<sup>28</sup>We thank Professor James Hickey of Hofstra University for this clarification.

## *Subramanian & Chung*

One of the important strengths of *Nomus* is its process-orientation, in a situation where dynamic changes are involved. We can think of one example for this: if a new set of laws is being drafted for the purpose of ensuring Internet security, each change in a law may affect the overall security concept. We can continually monitor the effect on security due to each change, and retain only those laws that are most suitable for our purpose.

One of the important requirements for the successful application of *Nomus* is a proper software program to automate the bulk of the process. We have developed an MS Excel-based software that can calculate the metrics, and quickly propagate changes. Figure 9 shows part of the Excel spreadsheet for this purpose. However, the MS Excel is, in some ways, a primitive tool for this purpose. The relationship between concepts has to be manually maintained; a more useful tool would be one that can generate the C.I.G.s, using stored data. Such a tool uses a knowledge base for the purpose of storing the catalogs of C.I.G. elements, and uses the catalogs for generating new C.I.G.s; should the catalogs be insufficient, then they are updated with new data. Such tools will generate C.I.G.s, and would be programmed with the metrification scheme in order to help visualize the propagation of metrics. This will help users

## *Evolvability of Legal Personality*

understand the “why” of the metrics. We have parts of such tools [7 and 8], which are being upgraded,<sup>29</sup> to be ultimately used for calculating metrics.

	A	B	C	D	E	F	G	H	I	J
1	Claim Softgoal	Metric for Claim Softgoal	Criticality of Claim Softgoal	Metrics for Criticality of Claim Softgoal	Contribution of Claim Softgoal	Metric for Contribution of Claim Softgoal	Criticality of Contribution of Claim Softgoal	Metrics for Criticality of Contribution of Claim Softgoal	Metric Propagated by Claim Softgoal	Ope Soft
2	c1		1 non-critical	0 MAKE		1 non-critical	0			Zero [Gra
3	c2		1 non-critical	0 MAKE		1 non-critical	0			1 Stat
4	c3		1 non-critical	0 MAKE		1 non-critical	0			1
5										
6										
7										

Figure 9. MS Excel Spreadsheet to Partially Automate Nomus

We believe that *Nomus* can be used for calculating several other qualities of legal systems (criminal justice system quality, law enforcement efficiency, monitoring of legal personalities of entities,<sup>30</sup> etc.). We would like to apply *Nomus* to these systems, as well.

<sup>29</sup>This work is being done at University of Texas at Dallas under the guidance of Dr. Lawrence Chung.

<sup>30</sup>We thank Professor James Hickey, Hofstra University, for suggesting some

## *Subramanian & Chung*

### V. CONCLUSION

In this paper, we have presented the legal concept measurement framework *Nomus*, and we illustrated its application in measuring the evolvability of legal personality. Legal personality of an entity refers to its legal obligations, and legal personality has a tendency to evolve. We focused on the evolution of legal personality of human beings under international law and, using *Nomus*, measured the evolvability metrics for the four Generations of legal personality of human beings (three Generations are well documented [1], and we consider the generation before the First Generation to be the Zeroth Generation). The metrics generated by *Nomus* help legal professionals reason about why (why not) the legal personality is evolvable, and identifies the factors that need to be strengthened (weakened) in order to improve evolvability. *Nomus* needs a metrification scheme that satisfies certain guidelines, and we used the single-value (SV) metrification scheme for this purpose. Based on the SV scheme, we derived metrics for the four Generations and concluded that the Second Generation is the most evolvable. *Nomus* has the following advantages:

---

of these ideas.

### *Evolvability of Legal Personality*

1. Metrics that are intuitive (we can justify the reasons for the metrics) are developed.
2. The strengths and weaknesses in metrics can be analyzed.
3. A means for representing legal concepts and artifacts is provided.
4. A method to capture justifications, as they help in making change decisions (any change decision can be recorded) is provided.
5. Metrics to the legal needs are traced.
6. An historical record, which assists in any change decisions, is maintained.

We believe that *Nomus* is a useful framework, and we hope to apply it to different legal problems. We also hope to develop a software tool to help *Nomus* users to realize its full potential.

## *Subramanian & Chung*

### APPENDIX A

#### Legal Measurement Framework – *Nomus*

In this appendix we describe *Nomus*,<sup>31</sup> the legal<sup>32</sup> measurement framework. *Nomus* consists of six major components: a set of *concepts* for representing legal qualities such as evolvability of legal personality, operationalizing concepts and claims; a set of *contribution types* for relating concepts to other concepts; a set of *methods* for refining concepts into other concepts; a set of *correlation rules* for inferring potential interactions among concepts; a *labeling procedure* which determines the degree to which an operationalizing concept satisfies a concept; and a set of *metrification schemes* to map labels to numbers. The partial ontology of *Nomus* is given in Figure A.1.

#### A.1 The Components of *Nomus*

The six components (or elements) of *Nomus* are described below:

---

<sup>31</sup>Nomus refers to the God of Law in Greek Mythology (Nomos, aka Nomus) – see <http://www.theoi.com/Kronos/Nomos.html>.

<sup>32</sup>The word “legal” is used in its noun form and not in its adjective form – thus we are not talking about the legality/illegality of a measurement framework; instead we are referring to a framework that can be used to measure different aspects of law.

## *Evolvability of Legal Personality*

1. Concepts can be of several types: the legal concepts (depicted by a cloud), the operationalizing concepts (depicted by a dark cloud), and the claim concepts (depicted by a dotted cloud). The operationalizing concept represents a legal artifact, such as the First Generation of legal personality for human beings, while a claim concept represents a claim (for any item of the Framework).
2. Contribution types connect various concepts. The links may connect several concepts to one concept in an AND-decomposition (depicted by single arc), or in an OR-decomposition (depicted by double arc). A concept may also be refined into just one concept (called “equal” decomposition).
3. Methods are ways to refine or decompose one concept into offspring concepts for the purpose of clarity and achievement of better decomposition.
4. Correlation rules help determine the interactions between different legal concepts for an operationalizing concept.
5. Labels indicate the degree to which associated concepts (links) are satisfied (satisfied<sup>33</sup> means satisfaction within limits and not absolute satisfaction). The

---

<sup>33</sup>Another way of looking at “satisficing” is that it is a more modest form of satisfaction – we do not aim for (and do not expect) perfect satisfaction but are happy to satisfy concepts within a particular range.

### *Subramanian & Chung*

various satisficing degrees are given in Figure A.1. Labels for concepts could be satisfied, denied, or unknown; labels for links could be MAKE (strongly positively satisficing), HELP (positively satisficing), HURT (negatively satisficing), or BREAK (strongly negatively satisficing).

6. Metrification schemes map qualitative labels into quantitative scores for a given architectural design. In some combinations, labels of legal concepts; operationalizing concepts; claim concepts; and links (either only one of these, any two of these, any three of these, or all of these), may be converted to numbers.

Semantically, an AND-decomposition (*Nomus*, component 2) means that all the children need to be satisfied in order for the parent concept to be satisfied; an OR-decomposition means that satisficing of any one child is sufficient for the parent concept to be satisfied; and an EQUAL-decomposition means a refinement or clarification of a concept into a child concept. Components 1, 2, 3, and 4 of *Nomus* help generate the Concept Interdependency Graph (C.I.G.). C.I.G.s are a semi-formal graphical representation of the data present in informal written documents. These C.I.G.s can be used for applying components 5 and 6 of *Nomus*. For each legal concept to be measured, a C.I.G. can be generated using *Nomus*



## *Evolvability of Legal Personality*

components 5 and 6 to derive the numerical score for the concept. In this paper, the legal concept of interest is the evolvability of legal personality. The process of C.I.G. creation is discussed in the next section.

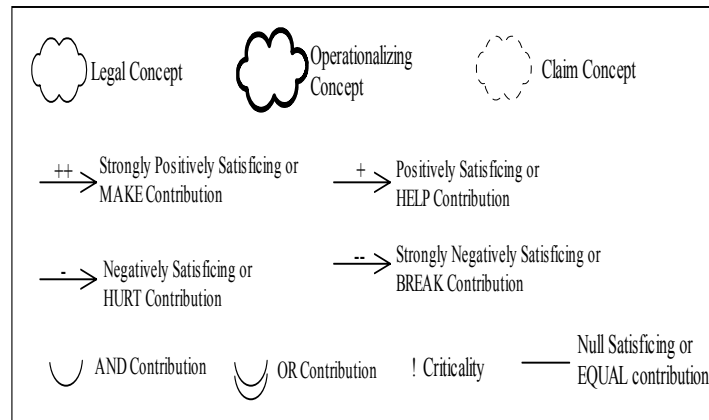


Figure A.1 Partial Ontology of Nomus

### A.2 Concept Interdependency Graph

The process of generating a C.I.G. is given in Figure A.2. The C.I.G. is a generalization of the Softgoal Interdependency Graph (S.I.G.) [5], which discusses that the goals of “evolvability,” along with other “-ilities/-ities,” are not necessarily goals to achieve. The C.I.G. provides a visual representation of the informal written description, and helps to reason the concepts.<sup>34</sup>

<sup>34</sup>An earlier work [6] proposed a qualitative goal-oriented representation scheme that was applied to a set of legal documents.

*Subramanian & Chung*

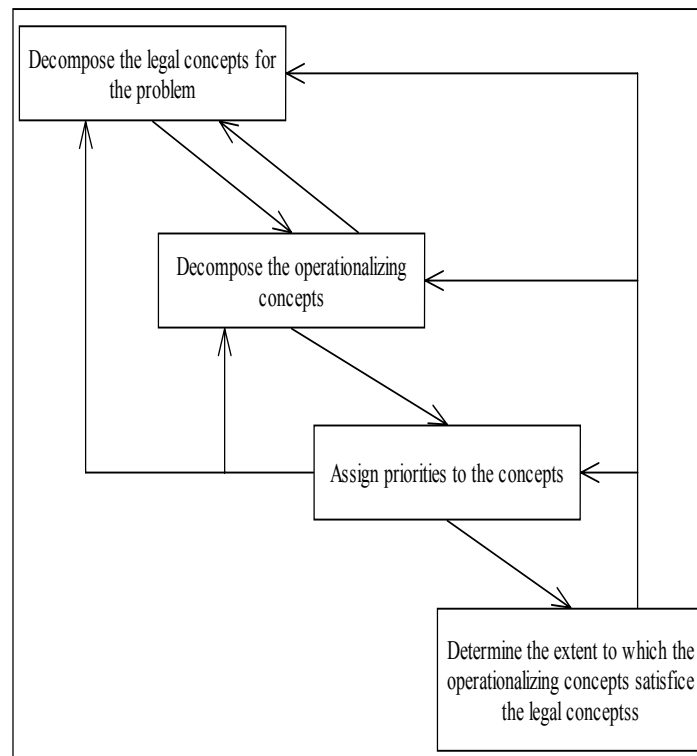


Figure A.2 Process for Creating the Concept Interdependency Graph (CIG)

The first step in the development of a C.I.G. is to decompose the legal concept(s) for the problem. A concept is named using the convention *Type [Topic1, Topic2...]*, where *Type* is a legal concept (e.g., evolvability), and *Topic* is

## *Evolvability of Legal Personality*

the artifact<sup>35</sup> to which *Type* applies (e.g., legal personality), and the decomposition can take place along *Type* or *Topic*. The decomposition involves refining the legal concept(s) until we are satisfied. The decomposition may be an AND-decomposition, OR-decomposition, or EQUAL-decomposition (A.1, component 2). Also, decomposition methods (A.1, component 3) can be used for the purpose of legal concept refinement. This decomposition creates the legal concept hierarchy. The next step is to create the operationalizing concept hierarchy by decomposing operationalizing concepts. As mentioned earlier, operationalizing concepts are legal artifacts or systems such as First Generation human rights, penal system, or copyright law. These operationalizing concepts may also be decomposed into their constituent concepts: for example, the first generation human rights consist of civil rights and political rights. The decomposition of operationalizing concepts may be AND-, OR-, or EQUAL-decomposition, and decomposition methods may be used for these concepts (just like legal concepts). The third step in the C.I.G. development is to assign priorities to the different concepts, both legal and operationalizing. Some concepts may be more important for the problem than others, and the important concepts are assigned higher priority.

---

<sup>35</sup>The topic could apply to any aspect of law – it could be for example, the criminal justice system, international law, countries, corporations, or even tangible items such as a law book, a courthouse, or a prison.

### *Subramanian & Chung*

Priorities are indicated by exclamation marks ('!' is high priority). The last step in the C.I.G. creation process is to determine the extent to which the operationalizing concepts satisfice legal concepts. The satisficing can be in one of four link labels: MAKE, HELP, HURT, and BREAK (A.1, component 5). The reasons for choosing one of these types of satisficing are captured by claim concepts; thus, a hierarchy of claim concepts.

The concepts of the C.I.G. creation process are iterative: from any one element we can go back to any other element and modify the C.I.G. Once we have a C.I.G. we can provide labels (A.1, component 5) to the concepts. The labels are satisficed, denied, or unknown. Based on the label of an operationalizing concept, the labels may be propagated up the C.I.G. through the links, to determine the extent of satisficing of legal concepts.<sup>36</sup> This will result in a qualitative evaluation for the legal concepts. We are interested in quantitative evaluation and, for this purpose; we need a metrification scheme based on the guidelines given in the next section.

---

<sup>36</sup>The propagation is accomplished using label propagation rules. The interested reader is referred to [5].

## *Evolvability of Legal Personality*

### A.3 Metrification Scheme Guidelines

Any metrification scheme, *M*, converts labels of concept into metrics and propagates the metrics up the C.I.G. In Figure A.3, guidelines M1, M2, and M3 state the rules for metrification of an element of a C.I.G.: M1 says that the label of leaf concepts converts into a metric; M2 says that the label of a contribution converts into the metric for the contribution; and M3 says that the criticality (priority) converts into the metric for criticality. Since criticalities can be assigned to two elements of the framework (the concept and the contribution), M3 is broken into two parts: M3A applies to the criticality of the concept, while M3B applies to the criticality of the contribution. M4 states that: for any leaf concept, the metric of its label; the metric of its criticality; the metric of its contribution to its parent; and the metric of its contribution's criticality, together form the metric for the individual contribution of that leaf concept. M5 says that the metric of all individual child concept contributions result in the metric for the parent concept. M6 applies to contributions that have children (for example, in the form of claim concepts), and states that the metric of the parent contribution is computed from the metric of the contributions of all child concepts of that contribution. In applying M2, the following order among the contributions should be maintained:

### *Subramanian & Chung*

MAKE > HELP > HURT > BREAK

where ">" means "stronger positive satisficing."

M1: label(leaf concept)	→	metric(leaf concept)
M2: label(contribution)	→	metric(contribution)
M3A: criticality(concept)	→	metric(criticality(concept))
M3B: criticality(contribution)	→	metric(criticality(contribution))
M4: {metric(leaf concept), metric(criticality(leaf concept)), metric (contribution), metric(criticality (contribution))}	→	metric(individual contribution of leaf concept)
M5: {metric_i(individual contribution of child concept_i)}	→	metric(parent concept)
M6: {metric_i(individual contribution of child concept_i)}	→	metric(parent contribution)

Figure A.3 Guidelines for Metrification Schemes

## *Evolvability of Legal Personality*

Several different metrification schemes satisfying the guidelines can be developed, including Min/Max scheme; Single Value scheme; probabilistic scheme; statistical scheme; and fuzzy logic scheme. In this paper, we illustrate the application of *Nomus*, using an example Single Value scheme.

### A.3.1 Example Metrification Scheme

An example single value (SV) scheme that satisfies the guidelines of Figure A.3 is given in Figure A.4. The concept metrics rules M1A and M1B allocate a metric of +1 for satisfied concepts, and a metric of -1 for denied concepts. M2 allocates metrics for contribution between +1 and -1, depending on the contribution type (it is assumed that the contributions are satisfied: if not, the contributions are given a metric of 0). Thus, a MAKE contribution gets a metric of +1; an HELP contribution gets a metric of +0.5; an HURT contribution gets a metric of -0.5; a BREAK contribution gets a metric of -1; and an EQUAL contribution gets a metric of +1.<sup>37</sup> The M3 gives the metrics for the criticalities of a concept/contribution. A non-critical concept/contribution gets a criticality metric of 0, while a critical concept/contribution gets a criticality metric of

---

<sup>37</sup>The reason for giving EQUAL the same metric as MAKE is that since EQUAL contribution is only a clarification or refinement, the child concept satisfies to the maximum positive extent the parent concept: hence the metric allocation.

### *Subramanian & Chung*

0.5. M4 gives the formula for computing the metric, propagated by a child concept to its parent, which is given by the formula: (metric of concept + criticality of concept)\*(metric of contribution + criticality of contribution). M5 gives the rules for combining propagated values from multiple children for AND, OR, and for leaf legal concepts. If a parent is connected to several children by an AND-decomposition, the metric of the parent is the minimum of the metrics propagated by its children; if a parent is involved in an OR-contribution, then its metric is the maximum of the metrics propagated by its children; and for leaf legal concepts, the metric is the average of all the metrics propagated by its children (which are operationalizing concepts). M6 gives the method to compute metrics for a contribution that has children, and is simply the product of (metric of contribution + criticality of contribution)\*(minimum of all its children's propagated values).



## *Evolvability of Legal Personality*

1. SV1: (concept metrics)
  - SV1.1: A satisfied concept gets a metric of 1
  - SV1.2: A denied concept gets a metric -1
  - SV1.3: A concept with any uncertainty gets a metric between 1 and -1
2. SV2: (contribution metrics) A contribution's metric (CM) is computed as follows:
  - MAKE =+1, HELP=0.5, HURT=-0.5, BREAK=-1, EQUAL=1
3. SV3: (criticality metrics)
  - SV3.1: A non-critical concept gets a criticality metric of 0, while a critical concept gets a criticality metric of 0.5.
  - SV3.2: A non-critical contribution gets a criticality metric of 0, while a critical contribution gets a criticality metric of 0.5.
4. SV4: The metric propagated (C) by a concept to its parent is given by: (metric of concept + criticality of concept)\*(metric of contribution + criticality of contribution)
5. SV5: For each parent concept in the SIG:
  - SV5.1: if the children are all connected by AND, the metric of the parent is the minimum of the metrics propagated by all its children.
  - SV5.2: if the children are all connected by OR, the metric of the parent is the maximum of the metrics propagated by all its children.
  - SV5.3: the metric of a parent legal concept is also a leaf (i.e., has only operationalising concepts connected to it) is given below where  $C_i$  is the metric propagated by each child: parent concept metric =  $[\Sigma\{C_i\}]/\text{no. of children}$ .
6. SV6: Metric of a parent contribution is (metric of contribution + criticality of contribution) + the minimum of its children's propagated values.

Figure A.4 An Example Single-Value Metrification Scheme

## *Subramanian & Chung*

### A.5 Process of Applying the Metrification Scheme

The process of applying the metrification scheme to generate metrics is shown in Figure A.5. As shown (Figure A.5, Phase 1), all the metrics propagated by the claim concepts to their parent contributions are computed, using the metrification rules M1, M2, M3 and M4. In Phase 2, all the contributions' metrics are computed based on their type and criticality using metrification rules M2 and M3B. In Phase 3, the contributions' metrics are recomputed using the metrics propagated by claim concepts (Phase 1), and by using the metrification rule M6. In Phase 4, the metrics propagated by operationalizing concepts are computed through the use of M1, M3A, M4, and the contributions' metrics computed in Phase 3. In Phase 5, the metrics propagated by the operationalizing concepts (Phase 4) are propagated up the C.I.G., using M5.

## *Evolvability of Legal Personality*

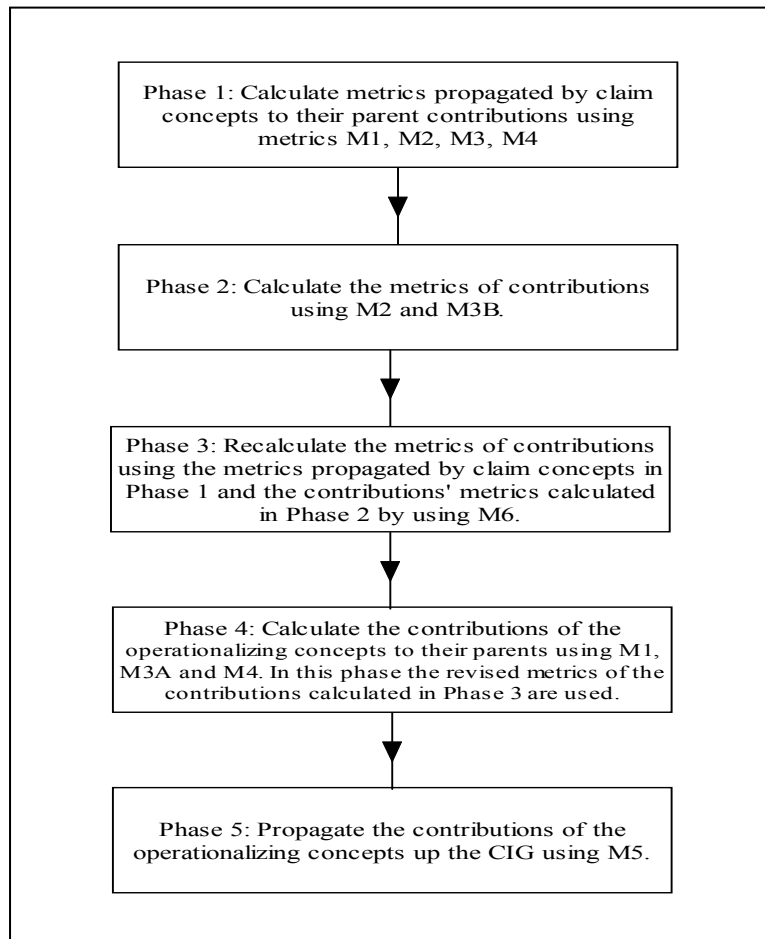


Figure A.5 The Process of Applying the Metrification Scheme

## Subramanian & Chung

### A.6 Process of Applying *Nomus*

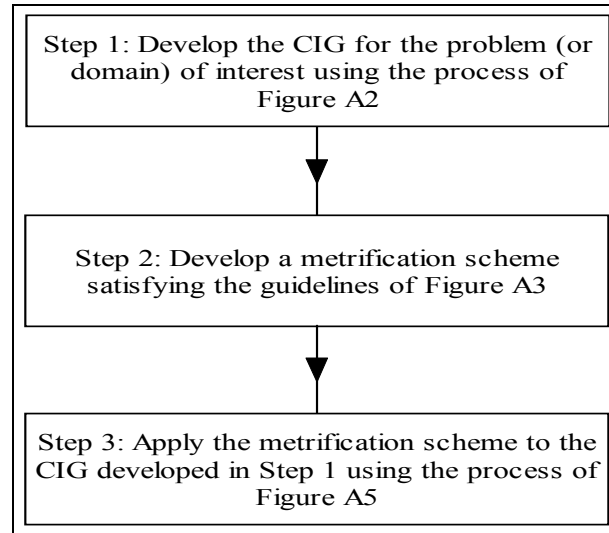


Figure A.6 The *Nomus* Process

As shown in Figure A.6, develop the complete C.I.G. for the problem of interest, using the process given in Figure A.2. In step 2 of the process of applying, develop a metrification scheme satisfying the guidelines of Figure A.3. We will use the sample SV scheme of Figure A.4. In the final step, apply the metrification scheme to the C.I.G. by using the process of Figure A.5.

## *Evolvability of Legal Personality*

### APPENDIX B

#### Complete C.I.G.s for Generations One, Two, and Three

The complete C.I.G.s for the First Generation, Second Generation, and Third Generation of human rights are given in Figures B.1, B.2, and B.3. In Figure B.1, the First Generation of human rights is decomposed into its constituent civil and political rights; in Figure B.2, the Second Generation of human rights is decomposed into its constituent economic, social, and cultural rights; and in Figure B.3, the Third Generation of human rights is refined into solidarity rights (see [1] for a discussion on these generations of rights).

## Subramanian & Chung

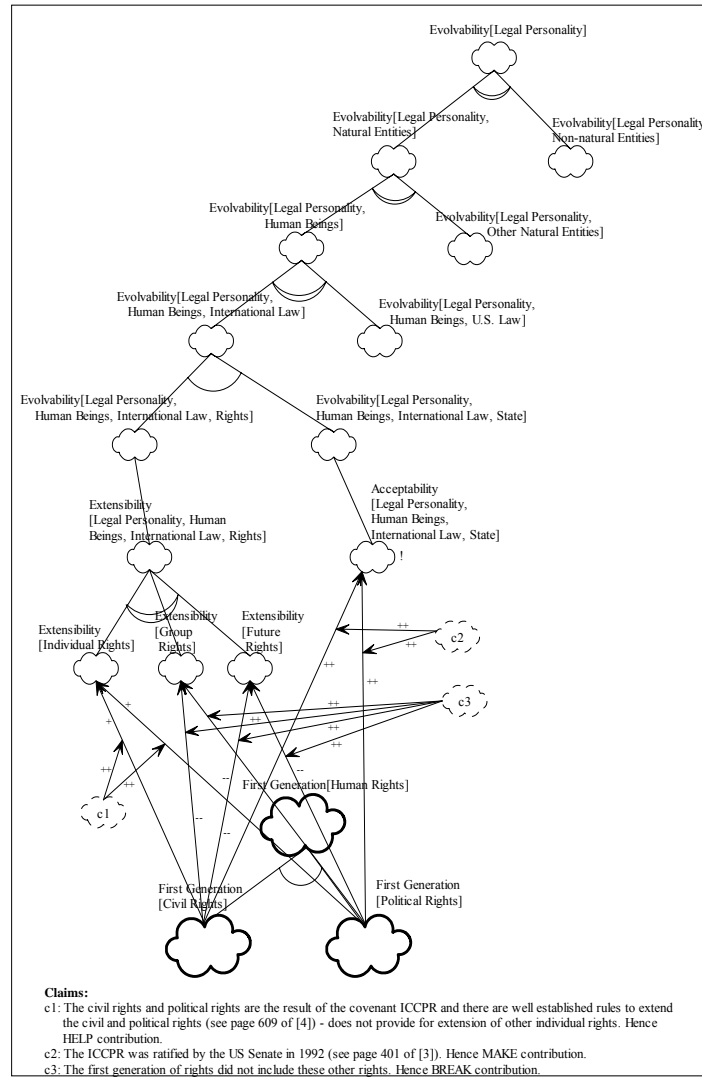


Figure B.1 C.I.G. for the First Generation of Human Rights

## *Evolvability of Legal Personality*

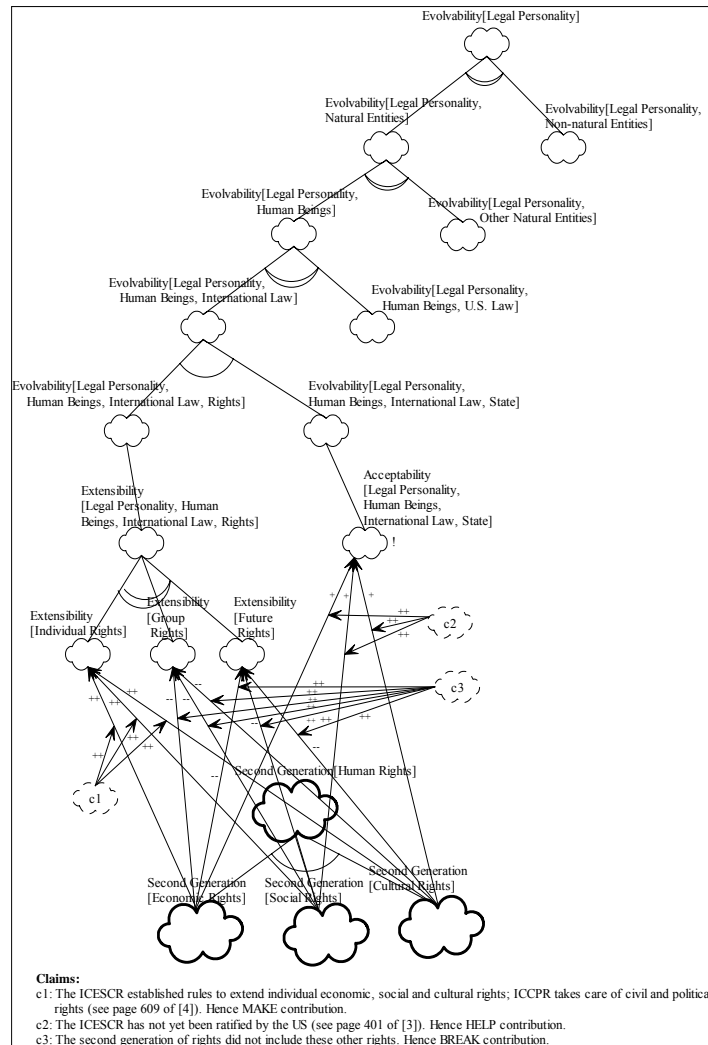


Figure B.2 C.I.G. for the Second Generation of Human Rights

## Subramanian & Chung

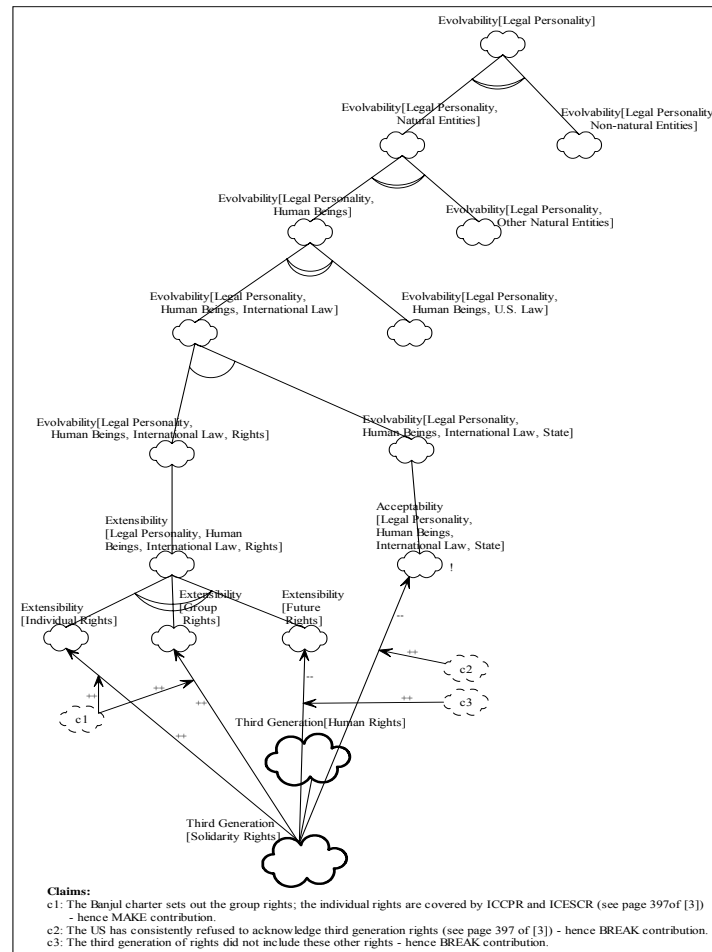


Figure B.3 C.I.G. for the Third Generation of Human Rights



## *Evolvability of Legal Personality*

### APPENDIX C

#### Calculation of Metrics for Other Generations

The metrics for the evolvability of legal personality for the First Generation, Second Generation, and Third Generation of human rights are calculated in the C.I.G.s of Figure C.1, Figure C.2, and Figure C.3, respectively. The calculations in these C.I.G.s are similar to those in *Nomus*, Step 1, Figure 3, on Zeroth Generation. The only additional rule used in Figure C.1 and Figure C.2 is the use of rule SV5.3 of the SV metrification scheme. In Figure C.1, the leaf legal concepts have two contributions each: for example, the legal concept Extensibility [Individual Rights] has two contributions from the operationalizing concepts First Generation [Civil Rights] and First Generation [Political Rights]. Therefore, the legal concept Extensibility [Individual Rights] receives metrics propagated by these two child operationalizing concepts and, by rule SV5.3, the metric of the legal concept Extensibility [Individual Rights] is the average of the metrics propagated by its children (i.e., if  $m_{CR}$  represents the metric propagated by the operationalizing concept First Generation [Civil Rights], and  $m_{PR}$  represents the metric propagated by the operationalizing concept First Generation [Political Rights], then:

### *Subramanian & Chung*

Metric{Extensibility[Individual Rights]} =  $\frac{m_{CR} + m_{PR}}{2}$ ). By SV4,  $m_{CR}$  = (metric of concept + criticality of concept)\*(metric of contribution + criticality of contribution).

From the C.I.G. (Figure C.1), metric of concept = 1; its criticality is 0 (it is not critical-no '!' marks next to the concept (First Generation [Civil Rights])). Metric of contribution = 1.5 (from the value on the contribution); its criticality also 0 (it is not marked critical with '!' marks). Therefore,  $m_{CR} = (1 + 0)*(1.5 + 0) = 1.5$ . Likewise,  $m_{PR} = 1.5$ . So, Metric {Extensibility [Individual Rights]} =  $\frac{m_{CR} + m_{PR}}{2} = (1.5 + 1.5)/2 = 1.5$ , which is indicated in the C.I.G. of Figure C.1. In this manner, SV5.3 rule is used to calculate the metrics for other leaf legal concepts in Figures C.1 and C.2. The rest of the metrics are calculated similar to that for Zeroth Generation in *Nomus*, Step 1, Figure 3.

## *Evolvability of Legal Personality*

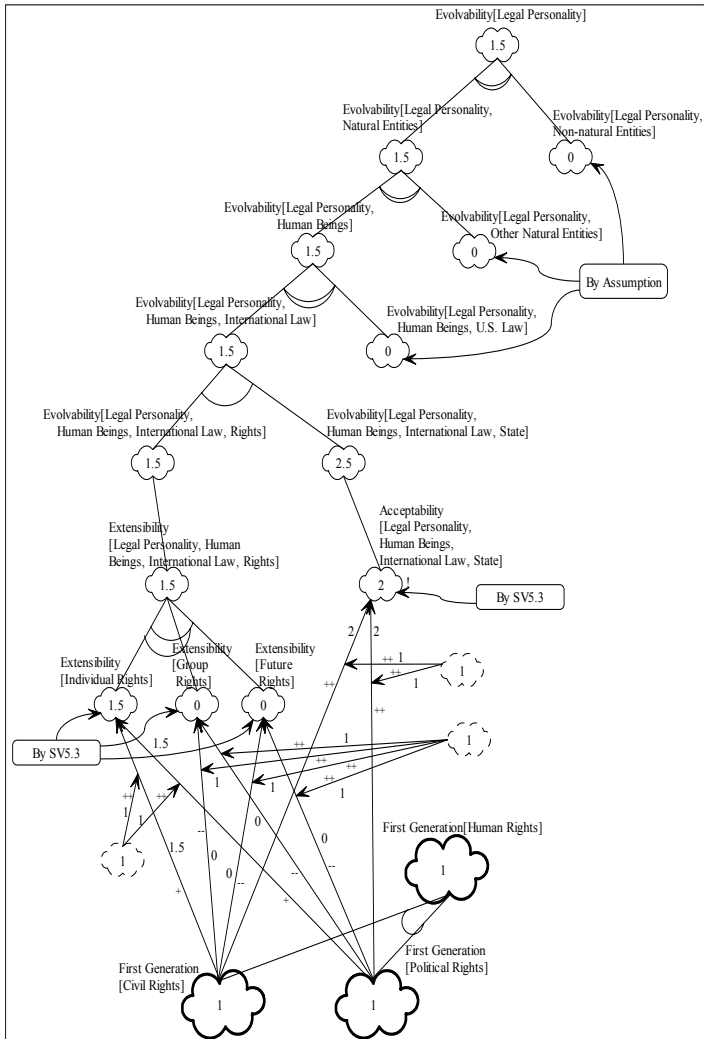


Figure C.1 Application of the SV Metrification Scheme for the First Generation C.I.G.

## Subramanian & Chung

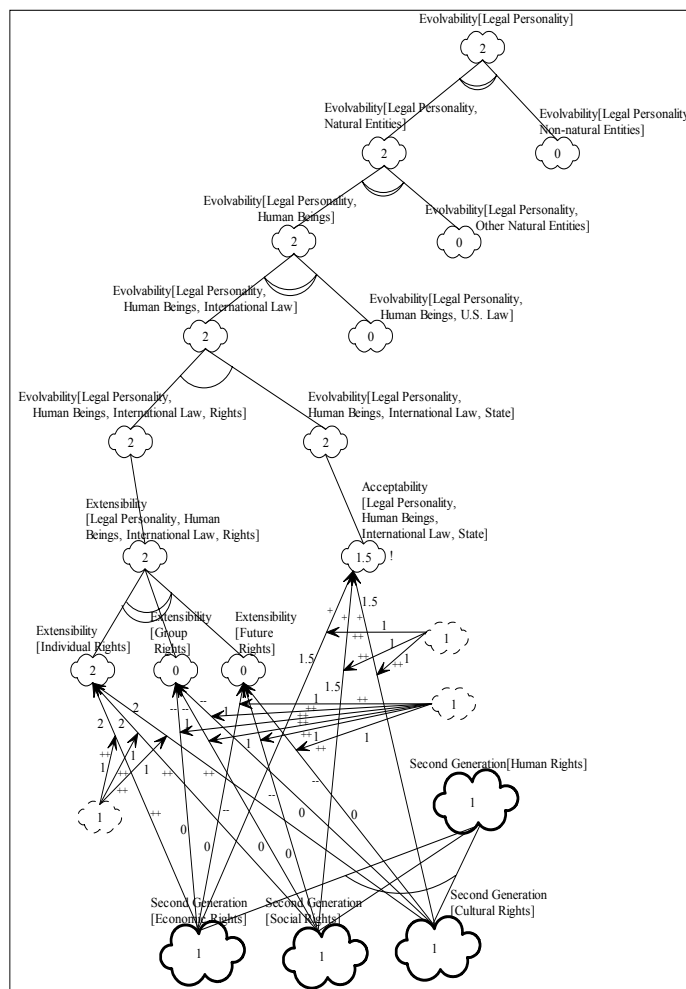


Figure C.2 Application of the SV Metrification Scheme for the Second Generation C.I.G.

## *Evolvability of Legal Personality*

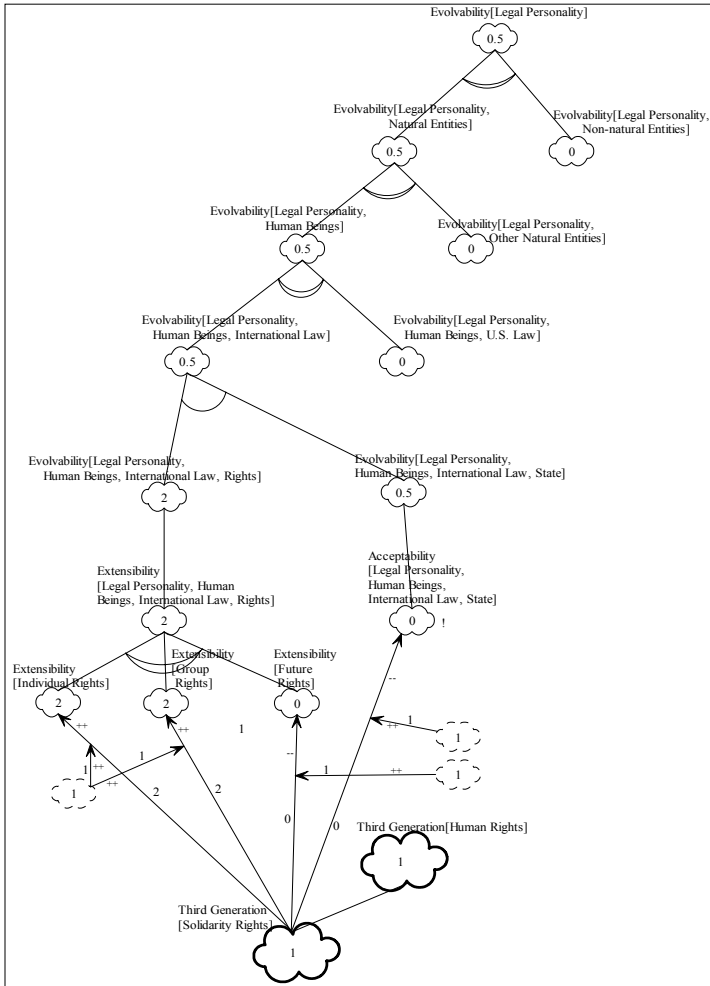


Figure C.3 Application of the SV Metrification Scheme to Third Generation C.I.G.

*Ius Gentium* (ISSN 1534-6781) is the journal of the University of Baltimore Center for International and Comparative Law. *Ius Gentium* facilitates discussion and the exchange of ideas about contemporary legal issues from a variety of national perspectives. Each issue contains one lead article and several comments, discussing the same specific legal questions, as applied to different legal systems and national traditions.

**Submissions** of lead articles or comments to *Ius Gentium* should be sent to:

Editor, *Ius Gentium*  
Center for International & Comparative Law  
University of Baltimore School of Law  
1420 North Charles Street  
Baltimore, Maryland 21201-5779  
or by e-mail to [cicl@ubalt.edu](mailto:cicl@ubalt.edu).

The **deadlines** for submission are February 15 (Spring) and September 15 (Fall) each year.

The subject of *Ius Gentium* 12 (Spring 2006) will be: "Agreements."

The views expressed in the *Ius Gentium* are those of the authors and should not be attributed to the Center for International and Comparative Law, the institutions with which the authors are affiliated, or the editors.

Except as otherwise expressly indicated, the author of each article in this issue of *Ius Gentium* has granted permission for copies to be made for classroom or other educational use so long as (1) copies are distributed at or below cost, (2) the author and *Ius Gentium* are identified, and (3) proper notice of the Center's copyright is affixed.

***Mailing Address for all correspondence:***

*Ius Gentium*  
Center for International & Comparative Law  
University of Baltimore School of Law  
1420 North Charles Street  
Baltimore, Maryland 21201-5779.

***Editorial communications:*** The editors welcome unsolicited manuscripts, or comments on forthcoming lead articles, which are posted on the *CICL* website located at [www.ubalt.edu/cicl](http://www.ubalt.edu/cicl).

***Manuscripts*** should be submitted in duplicate and on a computer disk, or by e-mail.

***Subscriptions:*** The subscription rate is \$25 per year for U.S. subscribers and \$35 for foreign subscribers.

IUS GENTIUM  
Journal of the University of Baltimore  
Center for International and Comparative Law



Spring 2005  
Volume 11  
Copyright 2005  
ISSN: 1534-6781