

Janne Elisabeth Nijman

The Concept of

An Inquiry Into the History

International Legal Personality

and Theory of International Law



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and Theory of International Law

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FOREWORD

This book is the report of a journey. The reader is invited to join the author on a trip in time and space. The trip takes its starting-point in 17th century Europe and the as yet confused post-Thirty Years War society. After some stops in the 18th and 19th century the author brings us to the post-World War I society which is as confused and is torn between ideals and despair. Then we make a stop in the post-World War II society when ideals seemingly have made place for trust in power but where we also get a glance of the fragile sapling of human rights law. And finally we pause in the post-Cold War world and try to cast a look into the future.

What is the purpose of this journey, what is the author in search of? As is clear from the title it is the concept of International Legal Personality which for many will have a rather formal and positive law connotation.

But the journey does not take us into the cabinets of Foreign Ministries or to conference-rooms or United Nations-buildings where the law is made nor to the court-rooms where the law is interpreted and modelled.

On the contrary, the trip leads us through the minds of men (and one woman) to find out what their view was, not on the concept of international legal personality, but on what the concept stands for: Who are the relevant actors on the international legal scene, who are the real addressees of international law, what can be found behind the 'mask', as the original meaning of the word 'persona' is?

And so the journey reflects not only a development of socio-political structures. The travel-story also presents a history of ideas but it does so with a very specific purpose. 'Past thought is made intelligible by its "re-enactment", and, by doing this, the historian provides us with knowledge we may use in thinking about human action', the author says. Or, as Alain Finkelkraut puts it: '*J'ai besoin des hommes anciens pour penser mon temps.*'

What makes the journey a fascinating one is the close interlinkage of – if not interaction between – social phenomena and the birth of conceptions and ideas: 'What could the author of this particular text, writing at that particular point in time and for the specific audience he addresses, actually have *intended* to communicate?' We see Hans Kelsen groping his way in the nineteen-twenties in an unstable, intolerant Vienna with its totalitarian tendencies to which his Pure Theory of Law is a reaction. The vicissitudes of the political system of the Third

French Republic – in particular during the *interbellum* – are the background for Duguit's and Scelle's legal thinking. The horrors of World War II lead both to the pessimistic realism of Niebuhr and Morgenthau and to the cautious idealism of Lauterpacht.

This contextual reappraisal of the concept of International Legal Personality as reflected in the history of international legal scholarship brings us finally to the beginning of the twenty-first century when world society finds itself in a new socio-political and conceptual quandary. At the end of her narrative (as she calls it) the author asks whether there is still a future for a concept like International Legal Personality which for so long has functioned as a beacon in a turbulent sea or – to use her own words – as the hinge of the meta-legal and the legal realm. While changing the symbol of the 'mask' for that of 'vocal cords' – which keeps us at any rate on stage – she hesitatingly comes to a positive reply.

Even if the final destination is not to the reader's liking, he will surely have made a memorable and rewarding journey.

The Hague, July 2004

P.H. KOOLJMAN
Judge, International Court of Justice

PREFACE

The crucial word in the phrase 'the concept of international legal personality,' must be personality or *personnalité*. It may have European origins – in the Latin word *persona* which in turn was derived from the Greek word used to indicate the theatrical mask – but the mask is a universally used attribute and symbol. It has an equally significant presence in African or Asian or many other cultures. It may moreover be hard to find a symbol which is equally universal with its often political connotations. Masks play a role in myths and stories both on and off stage, they become meaningful in the context of these stories and in relationships with others. The mask is an attribute used to represent, but also to *exclude* from representation. Often it functions as a symbol of authority in a closed system of representation, mostly with authoritarian and/or simplifying tendencies and rarely with positive or liberating effects. In the struggle for identity, casting off the mask liberates and sets free authenticity.

The mask is also used as a symbol or metaphor outside the theatre, for example, in poetry. It is given many meanings, among which that of the device to separate the internal from the external. Sometimes its role is political, as, for example, in what some have called the 'greatest poem of political protest ever written in English,' the 'Mask of Anarchy'. This poem was written in reaction to the 1819 massacre of St. Peter's Field¹ and the masks in the poem cover the faces of those who Shelley held responsible for the massacre: the political tyrants: 'I met murder on the way– / He had a mask like Castlereagh–.' (Who was Foreign Secretary at the time.) These rulers wear – again in the words of Shelley, this time from an earlier poem – the 'foul masks with which ill thoughts hide,' they wear the 'proud, angry looks' or 'false and hollow smiles,' which oppress truth and justice. Shelley censures the failing politicians and evokes an image of a 'masquerade' of murder, fraud and anarchy: 'And many more Destructions played / In this ghastly masquerade, / All disguised, even to the eyes, / Like Bishops, lawyers, peers, or spies.' Equally, the Mask of Anarchy shields off a political order based on fear and bloodshed, a polity which has become hollow, dark and unjust. Shelley portrays the heart of this polity as dark and empty. The only thing to prevent the eruption of chaos is fear; only the mask can bind the polity together. What will happen if the mask falls off or is cast aside and lays bare what was covered until then, the represented and the un-represented?

When the mask is removed, the law must be there as a safeguard, i.e., a body of law which is just and able to accommodate human plurality.

¹ R.H. Reiman and S.B. Powers (Eds.), *Shelley's Poetry and Prose* (1977), at 301-310.

Etymological remarks regarding 'personality' indeed tend to focus on the original meaning of *persona* as mask. Cicero however already used the word in at least three other distinct meanings,² among which that of 'distinction or dignity' (cf., 'personal style'), and this meaning soon became the basis for further transformation into the meaning of 'dignified personality' as used in relation to citizenship and representation. Contrary to the meaning of 'mask', this latter meaning does not exclude or hide the true self. 'Personality', conferring prestige and dignity, is used to indicate that 'some individuals had legal rights and obligations, and others did not.' In other words, it distinguished 'a free born citizen ... from the slave.' In addition, 'personality' acquired the meaning of 'a representative.'³ Where *persona* as mask tends to indicate a lack of truthfulness and, in a way, misrepresentation, *persona* as dignity redirects us to the dignity of the human person and to the responsible powers of the citizen. It is the person who has the right to speak and act and as such to be a participant in the polity. It recognises that the individual is a person, has an individual personality, and is not merely one of the collective. Personality as the equivalent of selfhood is also used to indicate an ethical dimension. Legal personality can build on this meaning and come to indicate the self which asserts itself in political society and the legal order; an assertion which is of existential importance.

In international law, *persona* has become the concept which handles the question of who is an actor on the international stage, or: who is allowed to participate in international law and society, and who is not. The state has been identified by the fact that it wears a mask and the concept of international legal personality has often been interpreted as conferring quasi-statehood or quasi-sovereignty. International legal personality as worn by the state functioned as the mask used to separate completely internal life from external life on the international stage. However, throughout history, as the present study will confirm, alternative conceptualisations of ILP have been proposed. The history of the concept of international legal personality is also the history of the attempts to scrutinise and interpret the mask.

When the mask is cast aside, it reveals either a legal and political black hole or the autonomous individual who is free, free from the many forms of slavery, which Shelley described so well in 'The Mask of Anarchy'.⁴ The difference lies in the presence of law and legal institutions which are just. The concept of ILP may have an important role here as the hinge between the legal and the meta-

² G.W. Allport, *Personality: A Psychological Interpretation* (1938), at 26: '(a) as one appears to others (but not really is) [i.e., the original significance of the mask]; (b) the part someone (e.g., a philosopher) plays in life; (c) an assemblage of personal qualities that fit a man for his work; (d) distinction and dignity (as a style of writing).'

³ *Id.*, at 28.

⁴ *The Mask of Anarchy*, lines 205 *et seq.*; see, e.g., for an interpretation of 'free' as having the ability to use words, lines 299-300. See, for the exhortation that law should govern between the people or, as Ricoeur would call it, that a *juste distance* should be created between people, lines 327-330.

legal, the hinge which connects man's innate right to be a person to the international realm, i.e., a person with a voice who is directed by the law to the international institutional arena where he can be heard.

This is a book about international legal thinking, it is a project that deals with the concept of international legal personality not as it is functioning in international legal documents like treaties, statutes, or case law, but as an idea that has been used in international legal scholarship from Leibniz up to the present day. Legal practice and positive international law are evidently the basis for international law scholarship, however, this study focuses on texts theorising about international law and the international society. As such, the concept of international legal personality also guides us through other important themes in the history and theory of international law. It is not intended in this study, however, to give the impression that there is a dividing wall or partition between theory and practice. On the contrary, the methodology that has been chosen aims at the interpretation of the (historical) meaning of an idea in *context*, i.e., in relation to the political, intellectual and jurisprudential context in which the scholar using the idea worked. As a result of the contextual approach chosen for this analysis the reader will search in vain for a static definition of international legal personality which may accompany him/her on this journey through the history and theory of international law. Instead, the meaning of the concept is defined by how it is used in the respective contemporary contexts. In the first chapter, I will further explain the methodology selected so as to caution the reader against simplification or anachronistic interpretations. Here, I wish to confront the question of significance or relevancy which may arise in response to my choice to present a study on 'the history of an idea.' Why is it relevant to study today how Leibniz, Kelsen or Chinkin used the concept of international legal personality in their scholarly texts and how by using it they gave it (historical) meaning? What can we learn from that?

It will teach us that the question of how to deal with 'new' actors, the question of inclusion and exclusion, has been central in the history of international law (scholarship). We will learn that the contemporary concern over non-state actors, which seems post-modern in nature, was actually also a concern of Leibniz', as he, too, needed to tackle the problem of how to accommodate new participants in established political structures without jeopardising stability or risking the complete breakdown of the established order. And he tackled it inspiringly, as at the same time he also pursued universal justice. It is arguable that the Pure Theory of Law is less useful for dealing with today's questions of mass society, but Kelsen's use of legal personality in his defence of democracy does help us to develop our own response to the enduring problem of how to serve democracy through (international) law. We will learn that the appeal for universality, the appeal for and of a global or universal legal system, belongs to the framework of international legal thinking itself, and is not merely the product of pre-modern or post-modern conceptions. We may arrive at the realisation that ILP does not by

definition have its source in sovereignty; we may come to realise that it may well have an independent (meta-)legal source, completely distinct from sovereignty. Hopefully, a belief will be instilled that with our minds, through international legal thinking, alternative conceptions can be found and that by the re-conception of the identity of international law we can also re-conceive who is recognised 'in the eyes of international law' as an international legal person.⁵ We could be reminded that with the emancipation of international law from (natural) theology and the concept of the universal human society, which has come to represent its modern identity as law created by sovereign states, international law was not merely given an independent identity, but was also cut off from its other source of origin, universal justice. Becoming aware of this unfortunate side effect may stir us to recover what we have lost. Reconnecting international law with justice may be helpful when we need to ponder the question of promoting the development of our global community and its legal and institutional structures. And such progress is not just a cosmopolitan fantasy, but is actually occurring, and traces of this development may be found in positive international law today. It is positive international law that indicates the relevance of 'the principles of justice' and the pursuit of justice for the development and interpretation of international law and institutions. It is this function that is so particular to the identity of international law, i.e., acting as an intermediary between morality and power politics. International law has always fulfilled this function and will be able to do so in the future if we keep wanting it enough, if we really set our minds to it.

How we conceive of international legal personality depends on how we conceive of and what we aspire for international law. The significance of this study therefore lies in the analysis of the conceptions of international law and international legal personality and in the enhancement of our understanding of these conceptions and how they were used to deal with contemporary (theoretical) problems.

Naturally, this study also took place in context. In the first place, thanks are due to the institutional context of the T.M.C. Asser Institute in The Hague, where I entered the Asser Dissertation Program in December 1996, and which I would like to acknowledge gratefully for its support and for giving me the opportunity each year to visit yet another 'non-state actors' conference. To my colleagues there, many thanks. Secondly, as part of the international context, I am grateful to the participants of the 1998 ACUNS/ASIL Summer Workshop 'Globalization and Global Governance: Changing Roles for State and Non-State Actors,' at Yale University, for their stimulating comments on methodology and the research on Chapter 3. In its final stage, Chapter 2 benefited from my stay as a Global Law Fellow and Visiting Fellow of the History and Theory of International Law Program of the Institute of International Law and Justice at NYU School of Law

⁵ Art. 2, Montevideo Convention, i.e., Convention on Rights and Duties (Inter-American), 26 December 1933.

and from the discussion with participants of the History and Theory of International Law Seminar, Fall Term 2003. As a constant in the background, I must mention the reassuring presence of the Leiden University International Law Department, where Elsbeth de Vos in particular always made me feel that I was not working without an academic home.

I drew on this research and in particular on Chapter 4 for my article 'Sovereignty and Personality: A Process of Inclusion,' as published in *State, Sovereignty, and International Governance* (OUP, 2002). Similarly, Chapter 2 was the basis for the paper 'Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire' as published in the Working Paper Series of the History and Theory of International Law Program of the Institute for International Law and Justice (NYU Law School).

I would like to thank T.M.C. Asser Press, Marjolijn Bastiaans and Philip van Tongeren, for their expertise and kind cooperation on this book and Mieke Eijdenberg for her patient and persistent editing skills.

I am extremely grateful to Corinne van den Berg-de Keuning of Alfatext who has corrected my less than perfect use of the English language so very skilfully and professionally.

I also wish to express my gratitude to all my friends for having been so supportive throughout these years. My heartfelt thanks for respecting as well as disrespecting regularly my frequently self-imposed isolation. I hope to make it up to you.

My greatest debt is to my parents for their loving support at all stages of the project. This book is dedicated to them, thank you for listening to my stories, for sharing my excitement, and for encouraging me to think critically. This research could not have been done without the support of my brother and our wonderful coffee breaks during which we managed to mix debating serious issues with relaxing laughter. I also wish to mention my grandfather who was at the same time my 'first' teacher, passionate and patient enough to arrest the attention of a little girl with his historical narratives. This book is also dedicated to the memory of my grandmother who, with wisdom and exceptional wittiness, taught me that conventions are there to be scrutinised and that from this creative action arises. In a mysterious way, this wisdom stirred this study at multiple levels.

Responsibility for the views expressed herein, and for all errors and omissions, is fully my own.

Leiden, July 2004

Janneke NIJMAN

LIST OF ABBREVIATIONS

Acad. Ed.	G.W. Leibniz, Sämtliche Schriften und Briefe, edition of the German (formerly Prussian) Academy of Sciences at Berlin, Darmstadt and Leipzig, 1923-.
AJIL	American Journal of International Law
Am.Pol.Science Review	American Political Science Review
ASIL	American Society of International Law
BYIL	British Yearbook of International Law
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CEO	Chief Executive Officer
CPI	Corruption Perception Index
CSCE	Conference on Security and Co-operation in Europe
ECOSOC	Economic and Social Council
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
EU	European Union
FTSE	Financial Times Stock Exchange
GA	(United Nations) General Assembly
HILJ	Harvard International Law Journal
ICAO	International Civil Aviation Organisation
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILO	International Labour Organisation
ILP	International Legal Personality
IMF	International Monetary Fund
Indian JIL	Indian Journal of International Law
IO	International Organisation
ITA	International Transitional Administration
IVR	Internationale Vereinigung für Rechts- und Sozialphilosophie
JNG	De Jure Naturae et Gentium

k.u.k.	Kaiserlich und königlich
LPW	Leibniz Political Writing
LQR	Law Quarterly Review
MAD	Mutual Assured Destruction
MNC	Multinational corporation
Modern LR	Modern Law Review
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NILR	Netherlands International Law Review
Nordic JIL	Nordic Journal of International Law
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
RCADI	Recueil des cours de l'Académie de droit international
RDI et Législation Comparée	Revue de droit international et Législation Comparée
RGDIP	Revue générale de droit international public
RIAA	United Nations Reports of International Arbitral Awards
SG	Secretary-General
TI	Transparency International
TNCs	Transnational corporations
UN	United Nations
UNTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
Univ. of Col. Law R	University of Colorado Law Review
UNO	United Nations Organisation
Vanderbilt J. of Tr.L.	Vanderbilt Journal of Transnational Law
Virg.JIL	Virginia Journal of International Law
WB	World Bank
WEF	World Economic Forum
Wisconsin ILJ	Wisconsin International Law Journal
WTO	World Trade Organisation
WW	World War

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Chapter 1

GENERAL INTRODUCTION

1.1. INTRODUCTION

The winter of 1996-1997, when I embarked on this research, was a time still characterised by an upbeat sense of change. Communism had collapsed only a few years earlier and as a consequence the dynamics of the international society had changed completely, creating a sense of hope. Hope that, for example, the United Nations would rise in authority and that the Security Council would at last be able to function properly now that it was no longer paralysed by Cold War antagonism. In many countries, the redistribution of world power also had quite an impact on domestic politics, especially in those formerly used as a battleground by the two super powers. However, the world was not only changing rapidly because of these events and in terms of international politics alone. The process we have come to identify as 'globalisation' challenges traditional (technological, economic, financial, environmental, criminal, political and social) structures worldwide and the challenge was initially applauded. New participants ascended to the international stage or were at least promoted from a silent to a speaking part and this resulted in a tendency to conclude that the state was in retreat. Governments and international organisations all reflected on the challenges which had to be met and the responses which had to be given. In the Netherlands, for example, foreign policy was reviewed to take account of the fact that states were under significant pressure, both from within and without.¹ In July 1997, a member of parliament officially asked the Dutch Minister of Foreign Affairs whether the nation state was indeed withering away. The Minister confirmed the erosion of certain state functions due to certain developments, such as globalisation, liberalisation and privatisation, which were gathering strength.² Notions such as good governance and democracy or political participation quickly came to the forefront of foreign policies and the United Nations launched a call for action through its Commission on Global Governance to reform the UN system, thereby implementing the shift from states to the people and linking the intergovernmental system and the international civil society in a renewed global network.³ UN Secretary-General Kofi Annan stressed the importance of non-state actors to contemporary international life and officially called upon the UN

¹ Nota Herijking van het Buitenlands Beleid, Tweede Kamer der Staten-Generaal, Vergaderjaar 1994-1995, 24337, nr. 2 (1995).

² Handelingen van de Tweede Kamer, Vergaderjaar 1996-1997, aanhangsel, 1607, Vragen van Weisglas d.d. 1 juli 1997.

³ UN Commission on Global Governance, *Our Global Neighbourhood* (1995). This report concludes that the multitude of non-state global actors which has emerged, and their force and impact,