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LEGAL PERSONALITY AS A FUNDAMENTAL CONCEPT FOR INTERNATIONAL LAW

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Legal personality as a fundamental concept of international law

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1. Introduction

Legal personality is generally understood as the capability to be - in traditional anthropomorphic terms - 'the bearer of legal rights and obligations'. The concept is often linked to the philosophy of the *persona*, and comprises the element of 'juridical will'. Legal personality is a structuring tool in legal systems, not least that of international law, as it indicates which actors or entities participate (have the capacity to engage in legal relations). From a systemic perspective, the prime interests are protection and accountability of actors and, at a more abstract level, stability of the legal system.[1] Used mostly (as in this chapter) interchangeably with 'subject of law', 'legal personality' is the plate-mark that accords legal existence. Hence it is a site for political struggle in both thought and practice: '[t]he concept is the foundation […] of all legal ideology.'[2] To have 'personality' in international law (ILP) means inclusion in the international legal system as an actor, it means being subject to the law and having the right to use it. To be denied ILP means to be excluded, with ensuing deprivation of instruments such as rightsholdership, capacity to conclude treaties, *ius standi,* and legal responsibility - but it may also mean freedom from normative constraints. As history demonstrates, inclusion in the law may bring emancipation as well as domination.

[1] Fleur Johns points out how "…doctrines of personality function to ensure the durability and stability of international legal obligations over time" (Introduction in: Fleur Johns (ed), *International Legal Personality*, Ashgate, 2010), at xxiii)

[2] Roger Cotterrell, *Sociology of Law* (1992), at 123.

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Personality developed into a fundamental concept of international law only during the *Sattelzeit*.[3] As such, the idea of international legal personality became the locus of political claims and counter-claims during the twentieth century, of for example colonies, mandate territories and individuals. Today, the struggle of inclusion and exclusion focuses on non-state entities ranging from IOs and NGOs to different self-identified groups, to multinational corporations (MNCs), cities, robots, animals and ecosystems.

This chapter considers 'legal personality' in two different roles, which are mutually constitutive. The concept works as an epistemic tool in theoretical reflections on the workings of international law, while at the same time it denotes a doctrinal category within the system of international law. We take into account both functions, with a concomitant shifting between levels of analysis, looking also at the actual candidates for international legal personality which over time have emerged in different political contexts. The chapter discusses a sequence of moments in the development of the form and use of the concept that we consider especially significant. These are, with a loose indication of time periods: legal personality as a sign for legal existence (17th century) (part 2); the external aspect of legal personality and its structuring effect (18th century) (part 3); legal personality as the flipside of the reified state (19th century) (part 4); contestation of anthropomorphic conceptualisation of legal personality, and challenge of the closed doctrinal category of international legal persons (Interbellum) (part 5); legal personality turning from a constitutive to a declaratory legal statement (UN era) (part 6); and the potential impact on the legal personality concept of post-subject and post-human lines of thought (from the 1990s) (part 7). While the following sections thus give a diachronical account of the concept of ILP, the identified moments in its development are also continuing and co-existing *aspects* of the concept. For example, while it is true that an intense concern for the state as the sole legal person in international law came to the fore in the second half of the 19th century, the central position of the state is also an important element in the contemporary discourse on international legal personality.

[3] See Introductory chapter in *Concepts for International Law - Contributions to Disciplinary Thought* (London, E Elgar, 2017)

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2. Personality as presence in the law of nations

In the early 17th century Grotius had worked with an idea of 'international' legal personhood in relation to both rulers and states, even if he did not use the term as such.[4] Hobbes on the other hand had famously defined the state as a 'person' constituted by contract, but as he negated the existence of a 'law of nature and nations', there had been no room for a concept of *international* legal personality.[5] Thus it was for Leibniz's universal (natural law) jurisprudence to introduce the concept into international law.

Gottfried Wilhelm Leibniz (1646-1716) first used the notion of *persona iuris gentium* in the *Praefatio* to his *Codex Iuris Gentium Diplomaticus* (1693).[6] The concept of legal personality at once framed and addressed an urgent political issue: the emergence of new and powerful political actors.[7] While the European political and legal order of the Holy Roman Empire was breaking up into a post-Reformation Europe of sovereign states, Leibniz for a long time was defending the old legal structures, headed by 'Emperor and legitimate Pope.' These, in his view, 'constrain[ed], by a greater authority, those turbulent men who … are disposed to sacrifice the blood of the innocent to their particular ambition'.[8] However, once Leibniz had realised the irrevocability of the new political constellation of states sufficiently free and powerful to exercise influence in international affairs, he showed what may be understood as a lawyer's rule of law sensibility, and brought in the concept of 'international' legal personality. To don the emerging states with legal personhood would ensure that all European powers - old and new, major and minor – be bound by the law of nations and nature (*ius naturae et gentium*) and would thus be obliged to use their (military) power with 'wise charity'.[9]

[4] Cf *De Jure Belli ac Pacis* (1625); see for State as 'perfect association' Book I, Ch. III, vii; see for People as a *corpora artificialia*, Book II, ch IX, iii;
[5] Cf Thomas Hobbes, *Leviathan*, Ch. XVI and XVII for a definition of the concept of person.
[6] See Patrick Riley, *Leibniz Political Writings* (CUP 2nd ed. 1988) 165-176, at 175 (hereinafter LPW).
[7] Janne Nijman, *The Concept of International Legal Personality. An inquiry into the history and theory of international law* (TMC Asser Press, 2004), Ch 2; see also, Heinhard Steiger, Supremat – Außenpolitik und Völkerrecht bei Leibniz, F Beiderbeck, I Dingel and W Li (eds), *Umwelt Und Weltgestaltung: Leibniz' Politisches Denken in Seiner Zeit* (Vandenhoeck & Ruprecht 2015) 135-206.
[8] In *De Suprematu Principum Germaniae* or *Caesarinus Fürstenerius* ('Prince-as-Emperor') (1677), LPW 112.
[9] See for Leibniz' concept of justice as wise charity eg *Praefatio* to the *Codex*, LPW 171.

Recognising early on the legal and political implications of a constellation of independent sovereign states (the so-called Westphalian order), Leibniz essentially sought to mitigate the legal and political crisis of his time and to construe all exercise of power as constrained and guided by (natural) law and justice.

3. Personality as a structuring tool in international legal relations

To be sure, legal personality upon its introduction was not instantly a fundamental concept – or an 'inescapable, irreplaceable part of the [legal] vocabulary' – in international legal thought and practice.[10] It is only during the transition towards modernity, a period Koselleck has termed the *Sattelzeit* (c.1750-c.1850), that the concept became firmly connected to the modern state and as such became fundamental to international law.

Emer de Vattel's *Le Droit des Gens* (1758) presented the sovereign State as 'a moral person having an understanding and a will peculiar to itself, and [capable] of obligations and of rights.' The state now became the prime bearer of rights and duties in international law and the defining *person* of the international legal system.[11] De Vattel supplemented the legal (or 'moral') personality of the state with an international legal dimension. His writing marks the development of the law of nations from a 'law […] established among all men by natural reason, and […] equally observed by every people,' [12] to a law specifically geared to the relations between sovereign states.

With this development international law was firmly set on a liberal course.[13] Such all the more because Vattel broke explicitly with the individual-state analogy: in his view norms, rights and duties dictated by natural law were different when addressed to individuals or when addressed to states: while sociability and solidarity were more

[10] Reinhart Koselleck, 'A Response to Comments on the *Geschichtliche Grundbegriffe*', in Hartmut Lehmann and Melvin Richter (Eds), The Meaning of Historical Terms and Concepts, New Studies on *Begriffsgeschichte,* 1996 at 64.
[11] Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, applique´s à la Conduite aux Affaires des Nations et des Souverains*, 'The Classics of International Law' (James Brown Scott, ed) (The Carnegie Institute of Washington, 1916) (originally published 1758), at 3 and 21.
[12]De Vattel, n 8, Preface 3a-4a.
[13] De Vattel, n 8, at 3 and 6.

prominent among individuals, states first of all sought liberty and autonomy to secure self-preservation and self-perfection.[14] With the egoistic understanding of the state's nature, the international legal order in which states were set to function, could only be understood as a rather thin one. The state would bear 'right[s] to whatever is necessary' to preserve and perfect itself.[15] Vattel's monumental work, which was to shape international legal thought and practice for a century to come, shifted focus to the external effect of state sovereignty and international legal personality.[16] This went to consolidate the idea of state equality[17], and to strengthen the view of international law as an order of coordinated, equal legal persons.

4. Exaltation of the state person

Hobsbawm's 'long nineteenth century' is a fitting periodisation also when it comes to international law. The period between 1789 to 1914 provided a multifaceted context for the development of the concept of international legal personality. Natural law thinking largely made way for a positivist perspective on law.[18] Meanwhile, concern with the state's corporate character and with the contractual basis of its personality faded into the background. The state came to be personified and reified as a natural 'organism' rather than a constructed entity. Already in 1821 Hegel referred to states as 'completely autonomous totalities in themselves' and as 'the absolute power on earth (in which the world spirit unfolds itself)'.[19] Hegelian state theory and its impact on international legal scholarship contributed to the perceived '*fehlender Rechtskarakter*'[20] of international law as an international system constraining states; rather, what governed inter-state relations was conceptualised as 'external constitutional law'. The focus of the

[14] De Vattel, n 8, eg Preface, at 5a-7a, 10a, 12a; Introduction, at 4.
[15] De Vattel, n 8, Chapter II, at 14.
[16] Stéphane Beaulac, Emer de Vattel and the Externalization of Sovereignty, 2003 *Journal of the History of International Law* 5: 237–292; also Catherine Brölmann, *The Institutional Veil in Public International Law* (Hart Oxford 2007), chapter 3.
[17] Francis Ruddy, *International Law in the Enlightenment* (Oceana, New York, 1975), at 55-57
[18] Antonio Truyol y Serra, *Histoire du droit international public* (Économica, 1995), at 115-127
[19] Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (1821 - Knox translation of 1952, Suhrkamp 1986), §§ 260-269, 330 and 331, respectively.
[20] Adolf Lasson, *System der Rechtsphilosophie* (1882).

international legal personality concept thus moved back to the actors' legal existence as such, away from their interrelation.

Generally only states were considered persons or subjects of international law - influential scholars such as Jellinek *a priori* dismissed the idea of personality for other entities-[21] and the theorisation of 'legal personality' was impacted accordingly. The two main theoretical approaches to legal personality both proceeded from Hegel's understanding of the state as an actual, historically developed social reality.[22] Yet the first, marked by Hegel's *organic* thinking of the state, understood the concept of legal personality in organic or in (as, famously, Von Gierke in relation to the state) biological terms.[23] The second approach recognised as such the social reality of the entity to which legal personality was attributed, but conceived of 'legal personality' in fictional terms.

Influenced by Hegelian state theory and the voluntarist conception of international law, 19th century German thought and practice saw individuals and social groups as absorbed by the state collective, to the loss of their identity and liberty. This line of thought, befitting the states only-view of international legal personality, later would be considered to have paved the way for 'corporative' and fascist states.[24]

The concept of international legal personality had initially developed within European international law, in relation to Western modern statehood and sovereignty. During the 19th century, 'civilization' became 'the universal standard of evaluation and with the force of apparent natural necessity called for European expansion.'[25] European colonial practices of domination and subordination came to shape the doctrine of international legal personality through the fact that personality was discriminatorily bestowed upon

[21] Georg Jellinek, *Die Lehre von den Staatenverbindungen* (1882), at 49.
[22] Also for other scholars working with this conception, Roland Portmann, *Legal Personality in International Law* (CUP 2010), at 56; Janne Nijman, Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality, in Matt Noortmann and Cedric Ryngaert, *Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers* (Ashgate 2010), 91.
[23] Nijman n 7, at 113.
[24] Wolfgang Friedmann, *Legal Theory* (London: Stevens&Sons, 1967, 5th ed), at 248 and 559.
[25] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2004), at 102; Nijman n 7, at 115 and 117 fn 156.

(and denied to) nations and territories on the basis of the quality of 'civilization'.[26] Anghie has pointed out how 'colonial territories had no pre-colonial personality cognizable by international law [with] as a consequence, their resources […] unprotected by international law', and how later attribution of legal personality to the non-European world often appeared to serve the purpose of facilitating the transfer of title or the granting of concessions to the European world.[27]

5. Contestation of the concept and expansion of the doctrinal category

Immediately after the Great War, international law scholarship was dominated by a sense of crisis. The concepts of sovereignty and personality, shaped by their sole wielder, the state, became a key site of political struggle. Many turned against the nineteenth century exaltation of the state and its 'absolute and uncontrolled'[28] sovereignty, for having contributed to the failure of the old international legal order. As the notion of legal personality became detached from the metaphysical identity of the state, the concept as such moved to the heart of the debate. Meanwhile, in doctrine the independence of the sovereign state – key element in its distinction from the manifold non-independent territorial arrangements in international law - came to be specifically associated with personality, as reflected in a provision such as article 1 of the 1933 Montevideo Convention ("The state as a person of international law should possess the following qualifications […]").

As part of the project to transform international life and to rehabilitate and renew international law, a number of legal scholars during the interbellum, from markedly different schools of thought,[29] articulated a critique of the anthropomorphic personality

[26] James Crawford's Foreword to Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) at xii.
[27] Anghie, n 26, at 219 and 105; also, Anthony Carty, *Philosophy of International Law* (2007), at 79 et seq.
[28] Nicolas Politis, The status of the individual in international law, in *The New Aspects of International Law* (1928), at 19 ("an iron cage for its citizens").
[29] See Nijman, n 7, Ch 3: Sociological approach - Politis and Scelle; Natural law - Brierly and Lauterpacht, Le Fur, Verdross; positivist or pure theory of law - Hans Kelsen; also Alvarez and Krabbe; see also Koskenniemi n 22.

concept.[30] Other common threads in the renewal project were a rejection of state sovereignty, as well as a quest for a non-voluntarist source of international obligation with a view to replacing sovereignty with the supremacy of international law, and thus potentially opening up of the closed doctrinal category of international legal persons. While some scholars argued for reinforcement of the old voluntarist order and clung to the doctrine of states as the sole subjects of international law,[31] several others posited the individual as the 'first', 'proper' or 'original' person in the international legal order. This was the real dawn of international human rights - tied in with a concern for democratic values and for the emancipation of the individual-, even if at the time not yet reflected in positive international law.

The sociological school, seeing international law as a product of social fact (Scelle's 'social solidarity'), understood ILP as a notion that translates the reality of the international life of individuals and communities into a legal reality of *individuals* (not states) as the subjects of international law.[32] Individual legal personality in international law thus meant to facilitate individual responsibility in international law and the possibility for the *gouvernés* to stand up against their *gouvernants* and call them to account. For the sociological school, a growing variety of legal persons came naturally with the advancement of the global society. It was one of the members of the sociological school who was the driving force behind the 1923 draft convention 'adopted unanimously' by the *Institut de Droit International* granting legal personality to international non-governmental organisations. This would have given to NGOs 'the direct protection of international law and […] the right to refer to the Permanent Court of International Justice any decisions adopted by Governments against them in violation of the rules of international law'.[33]

[30] Most famously in that period Hans Kelsen's *Reine Rechtslehre*, translated as *Introduction to the Problems of Legal Theory* (1934 transl. B Litschewski Paulson and S Paulson, Clarendon, 1996), at 46-47, and *General Theory of Law and State* (transl. Anders Wedberg, Harvard University Press, 1945), at 93, 108, 181-188 (the state is not an organic nor even a social reality).
[31] Anzilotti, Cavaglieri, Heilborn, Oppenheim, Triepel, among others.
[32] George Scelle, *Précis de Droit des Gens, Principes et Systématique, Vol I, Introduction, le milieu intersocial* (1932), at vii-49.
[33] Politis, n 28, at 23.

The Pure Theory of Law aimed to do away with the identification of the legal person with a real or substantive entity, the *bearer* of rights and duties, and argued it should be understood merely as a heuristic concept that expressed 'the unity of a bundle of legal obligations and legal rights.'[34] Having dismantled the 'personifying fiction' Kelsen reduced legal personality to a formal legal concept, a 'point of imputation' or 'point of attribution'.[35] This was crucial also as a normative construction point in the hierarchy of a universal, whence monist, legal system that ultimately would address individuals directly.

The strong anti-Hegelian critique on the part of inter-war natural law scholarship (eg Brierly, Lauterpacht, and Le Fur) was accompanied by an advocacy for the individual as the 'true legal person' in international law. Thus the interbellum version of the 'real personality' theory (Le Fur) linked international legal personality to individuals.[36] At a time in which nationalism was one of the powerful collective creeds, a turn to the individual – endowed with moral intelligence and free will – for natural law scholars, too, meant renewal and seeking a 'saner international order'.[37]

These theoretical approaches had international law address individuals directly, thus bypassing the authority and legal identity of the states that up until then would have had exclusive authority over individuals through a link of nationality or territoriality. Legal personality was essentially employed as a conceptual crowbar to reach through the opaque veil of state sovereignty, and to make the individual visible in the eyes of international law. In an applied legal context this trend may be gleaned from the 1928 *Jurisdiction of the Courts of Danzig* Opinion.[38] According to Lauterpacht it was "difficult to exaggerate the bearing" of the Opinion,[39] which showed that "no considerations of

[34] *Introduction to the Problems of Legal Theory*, n 30, at 46-47.
[35] *Introduction to the Problems of Legal Theory*, n 30, at 39-51 and 99-101.
[36] Louis Le Fur, La Théorie du Droit Naturel Dupuis le XVIIe Siècle et la Doctrine Moderne, 18 *RCADI* (1927/III), at 404.
[37] James L Brierly, *The Law of Nations: An Introduction to the International Law of peace* (1928), Preface, at v.
[38] *Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration*) (Advisory Opinion), [1928] PCIJ Ser B No 15.
[39] Hersch Lauterpacht, 'The Subjects of the Law of Nations [Part II]' (1948) 64 LQR 97, 98; contra Anzilotti (*Cours de droit International* (Librairie de Recueil Sirey, Paris 1929), at 175.

theory can prevent the individual from becoming the subject of international rights if States so wish."[40] A recent textual and contextual analysis of the *Danzig* Opinion traces the ambiguities in its wording, and convincingly argues how the conclusion must be that the Court said a possibility existed for individuals to obtain rights directly from international law.[41]

Discussion about actual candidates for the doctrinal category of international legal persons was not limited to the human individual, even apart from the longtime class of 'sui generis' legal persons such as the Holy See. A number of politically relevant non-state actors came to the fore at that time, notably (in current terminology) international organisations (IOs) such as the ILO and the League of Nations, and minorities. Their aptitude for legal personality was hotly debated in theorist circles. This did have a bearing on the development the concept, for one in that several scholars came to propose an open category of international legal persons,[42] to be identified ex post on the basis of apparently present rights, duties and capacities.

The question of legal personality for the League of Nations was addressed in more technical terms than that of individuals, arguably because the League as an actor was a concrete competitor of the state (it did for example boast a 'treaty-making practice' of sorts, including a 1921 *modus vivendi* with host state Switzerland - noteworthy also in that Switzerland explicitly recognised the (international) legal personality of the League).[43]

That the League had a separate identity at an institutional level was undisputed. However, the organisation's pervasive role in international politics also raised the thorny question of its position and status in general international law. Oppenheim in his last piece of writing (1919) attributed a degree of legal personality to the League,

[40] Lauterpacht, n 39, at 407.
[41] Kate Parlett, 'The PCIJ's Opinion in *Jurisdiction of the Courts of Danzig*. Individual Rights under Treaties' (2008) 10 J of the History of Intl L 119.
[42] Portmann, n 22, at 174; eg Kelsen, *General Theory of Law and State*, n 30, at 99 and 342, and Kelsen, *Reine Rechtslehre*, n 30, at 52.
[43] United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No. 61.V.3), at 127.

apparently inferring such from rights and obligations *de facto* present in the Organization,[44] not unlike the reasoning of the International Court of Justice (ICJ) in the *Reparation* Opinion thirty years later. Attribution of legal personality however remained highly controversial, even if the political climate for international institutions was increasingly favourable. Percy Corbett, writing in 1924, noted that continental lawyers showed great interest in the matter, but displayed "an extraordinary diversity of views on the subject." Anglo-Saxon scholars, on the other hand, "practically ignored" the debate.[45]

Otherwise these were the years in which international concern for 'national minorities' was institutionalized, notably through the efforts of the League of Nations which set up a 'minorities protection system'[46] made up of commitments comprised in the various types of 'minorities treaties'. Minority groups did gain access to the protection mechanism via the petition system developed by the League in the early 1920s.[47] Whether in that period international 'rights' or only 'benefits' for minorities were at issue, is a matter of debate.[48] A broadly shared view is that minorities enjoyed some sort of 'protected status' but no 'legal personality'. Either way it is fair to say that in a broad sense the League has been a catalyst in the conceptualisation of legal personality for non-state entities, in particular minorities.[49]

The League of Nations Mandate system brought former colonies of the defeated powers under the administration of mandatory powers such as the UK, France, and South Africa. While the mandates were (implicitly) attributed a degree of international legal personality,[50] they were in many respects treated as colonies. The system of the

[44] Lassa Oppenheim, "Le caractère essentiel de la société des nations", 26 *RGDIP* 1919, 234-244, eg at 239.
[45] Percy Corbett ('What is the League of Nations?', 5 *British YIL* 1924, 119148), who mentions the 'invariably repudiated 'super-State'', at 120; Brölmann, n 16, at 54-64.
[46] See Jennifer Jackson Preece, *National Minorities and the European Nation-States System* (Clarendon, Oxford 1998), at 67-94
[47] Jacob Robinson et al, *Were the Minorities Treaties a Failure?* (Antin Press, New York 1943).
[48] Budislav Vukas, 'States, peoples and minorities as subjects of international law' *RCADI* 1991 (Martinus Nijhoff) 231, at 499-501; André Mandelstam, *'La Protection des Minorités'* in *RCADI* 1923/I (Martinus Nijhoff) 362, 475-477 and 511.
[49] Catherine Brölmann, 'The PCIJ and International Rights of Groups and Individuals', in Chr Tams & M Fitzmaurice, Legacies of the Permanent Court of International Justice (Martinus Nijhoff, 2013), 123-143.
[50] James Crawford, *The Creation of States in International Law* (OUP 2005), at 574.

mandates (as 'a sacred trust of civilisation' - art 22 League Covenant) can be said to have continued the 19th century's attitude (see part 4) to personality for non-European territories.[51]

6. From a constitutive to a declaratory predicate

The discourse on legal personality after the Second World War, while conceptually building on interbellum scholarship, is shaped first of all by features of positive international law and developments in international practice. The individual gained political prominence in the international sphere. The independent legal status and possible 'legal personality' of individuals in international law, which had been intensely discussed before, now found their way into positive international law through legal provisions stipulating rights (such as in UN's flagship Universal Declaration in 1948 and the many human rights treaties in its wake) and obligations (such as in the new field of international criminal law, applied first by the 1945 war crime tribunals).

This is also the period in which international organisations entered the international arena, their number rapidly growing in the years following the creation of the United Nations. The political struggle of IOs was different from that of individuals. Organisations had an ambiguous role, in that they served as vehicles for state activity (a major factor in their success to begin with), and at the same time constituted a separate source of authority, increasingly competing with state actors.

The question of how to express this in formal-legal terms, which had been largely avoided for the League, now inescapably presented itself for the UN soon after the creation of the Organisation. The 1949 *Reparation* Advisory Opinion is a true hallmark, as the ICJ, partly inspired by political necessity, made several far-reaching statements on the international legal identity of the UN, which in a definitive way re-shaped the concept of legal personality.

[51] Antony Anghie 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34 NYU J Intl L & Pol 513.

With the *Reparation* Opinion the Court in one go positioned the UN as an international legal person; a status that would never be seriously challenged for the UN, or any other international organization in its wake. Political complexities can be gleaned from the Court's well-known statement that the UN is not a 'super-state',[52] the echo of a concern voiced during the San Francisco conference,[53] and of a comment made already in relation to the League.[54] Apart from including a new actor in the system, the newly affirmed status of the UN changed the concept of legal personality in a fundamental way.

Legal personality had been traditionally used to raise an *a priori* barrier to participation in the legal system. In the *Reparation* Opinion the Court famously employed the concept of legal personality in an inductive (even if somewhat circular) manner, when it reasoned that the Organisation had "functions and rights which can only be explained on the basis of possession of a large measure of international personality."[55] A line of reasoning explored in inter-war scholarship (see above), was now reconfirmed in judicial practice. The Opinion reshaped the concept of 'legal personality' as an epistemic tool in theory and doctrine in at least two ways: first it radically turned around the mode for construing personality, which was now *a posteriori* inferred from apparently present legal rights, duties, and capacities, rather than attributed *a priori* to specific actors (states). Second and related, the Court carefully steered a middle way between the traditional meaning of the term 'legal personality', molded on the 'full personality' of states, and on the other hand a new, pragmatic application of the concept: "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."[56] Doctrine quickly picked up on this and textbooks would now list, next to the state as an 'original subject', a number of actors with 'derived' or 'relative' personality without specific legal capacities automatically flowing from that predicate.

[52] *ICJ Reports* 1949, at 179.
[53] 12 UNCIO 703, at 710.
[54] Cf Corbett, n 45, who mentions the 'invariably repudiated 'super-State'' at 142
[55] *ICJ Reports* 1949, at 179.
[56] *ICJ Reports* 1949, at 178.

International legal personality as an epistemic tool lost some of its strength when it stopped having precise legal implications. Still, the conceptual alteration had an important emancipatory effect on the growing variety of international actors in that they could more easily be construed as *legal persons*. What has been called the 'liberating effect' of the severance of the link between legal personality and lawmaking in the *Reparation* case, can count as a specific facet of this.[57]

Similar to the participation of organisations, the position of individuals as addressees of international legal norms would in most textbooks now be described in terms of 'legal personality'. The opening up of the category of legal persons was otherwise visible in the narratives on newly prominent international actors such as *peoples* (with a key role in the decolonisation period as the *Normadressat* of the right to self-determination enshrined in common article 1 of the 1966 Covenants), *indigenous peoples* (with several special rights – such as regarding land – partly enshrined in 'soft law' statements), and *minorities* who (among others on the basis of the (arguably) collective right in Article 27 ICCPR) assumed new legal élan compared to minorities in the interbellum. In line with the new function of the legal personality concept, these categories were said to possess ILP 'to the extent that they carry rights and duties under international law'.

As a structuring concept 'legal personality' thus assumed a new role. Inferred from the apparent presence of concrete legal capacities, rights or duties which then serve as indicia, the concept has become an *a posteriori* predicate that helps us make sense of international law by mapping out who are - in one way or another - participants. Generally speaking, the concept of 'legal personality' no longer works as a doctrinal barrier through a pre-set catalogue of legal persons, established on the basis of moral imperatives or political expediency.[58]

That is to say - except when it comes to Non-Governmental Organisations. As yet the international community seems unanimously to adopt the barrier approach vis-à-vis

[57] Jean d'Aspremont, 'Subjects and actors in international lawmaking' in C Brölmann and Y Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishers, 2016), 32-55, at 42.
[58] Brölmann, n 16, at 68-71.

NGOs, whatever signs of international-legal participation these may show.[59] For other actors, whether it be linked to the objective of protection or to that of accountability, the concept of legal personality is frequently invoked and doctrine tested: de facto regimes, armed ('opposition') groups, 'terrorists'. Likewise, several commentators have taken a pragmatic, inductive approach to multinational corporations, which are described as international legal persons to the degree they perform legally relevant acts in international practice; especially since the Ruggie reports the label of legal personality for MNCs has assumed a more abstract, mature dimension through the idea of their being bound by a catalogue of customary human rights.

Once international legal personality has been accorded to a (particular category of) actor, doctrinal reification occurs. Where the international legal personality of states, organisations, minorities and peoples is a given, social reality becomes the locus of contestation: is the entity *really* a state, is the group *really* a people, or a minority, or an indigenous people?

The fixed link between social and legal reality makes for complex identity politics, as when states do not recognise self-identified ethnic minorities within their borders; or when an entity presents itself as an 'international organisation', but claims *not* to have legal personality (the EU in its early years); or when an entity contrary to all appearances asserts it is *not* an international organisation and as a consequence does not have legal personality (this is, for now, the narrative of the OSCE). Conversely it is possible to start out with an (implicit) assertion of legal personality – for example by repeatedly performing legal acts, such as accession to a treaty – and therefrom proceed to claim the existence of a social fact; this appears to be the (effective) strategy of the emerging state of Palestine.

[59] Note that prominent NGOs such as Greenpace conclude agreements that are generally situated outside the spheres of both national law and international law, such as the understandings concluded with FAO (accessible at the FAO archive), which are "governed by general principles of law".

7. Post-subjectivity and the international legal person

From an immanent perspective, or 'in doctrine', the role of international legal personality as a declaratory predicate remains prevalent. At the level of theory, however, the concept is in motion. In recent years, postmodern philosophy of the subject has significantly impacted legal thought. One influential strand is the Foucauldian critique, which envisions the 'death' of the modern subject - that is the autonomous agent who knows herself and is distinct from power to the extent that she is able to confront it sovereignly.[60] Legal thinking is thus confronted with a move away from the *creating* subject (that is, the willful and acting subject generally taken as a starting point in legal thought on personality) to the postmodern *constructed* subject or self. For a lawyer the conception of the individual subject as *a result of* knowledge and power relations rather than as the wielder of power raises urgent questions, for one about accountability and responsibility.

The philosophical debate on (post)subjectivity has moreover triggered a renewed interest in the underpinning of legal personality, and ensuing attention for inter-subjectivity and ethics in (international) legal thought.[61] The 'post-anthropocentric' perspective then has opened the *legal* imagination to the possibility of international legal personality for animals,[62] rivers[63] and ecosystems with a view to providing protection; and the 'posthuman' perspective has sensitized lawyers to the possibility of determining a point of attribution in networks,[64] and in cases of "autonomous machines'

[60] Eg Michel Foucault, *The Order of Things* (1994); Michel Foucault, 'The Subject and Power', 8(4) *Critical Inquiry* 1982, 777.
[61] Jean-Luc Nancy, *Being Singular Plural* (Stanford University Press 2000); Janne Nijman, "Paul Ricoeur and International Law: Beyond 'The End of the Subject' - Towards a reconceptualisation of international legal personality" , 20 *Leiden Journal of International Law* 2007, 25.
[62] An early plea for the right to life of whales is Anthony D'Amato and Sudhir K Chopra, 'Whales: their emerging right to life' (1991) 85 AJIL 21, 25, included in Johns, n 1, 339.
[63] Eg New zeeland law has recognised the (domestic) legal personality of the Whanganui river; two citizens function as guardians and speak and decide on behalf of the river (Abigail Hutchison, 'The Whanganui river as a legal person' in 39 *Alternative Law Journal* 2016, 3).
[64] Lorenzo Casini, 'Domestic Public Authorities Within Global Networks' in Joost Pauwelyn, Ramses Wessel, and Jan Wouters, *Informal International Lawmaking* (OUP 2012), 385, at 391; and, via the angle of responsibility for network(ed) action, André Nollkaemper, 'Diffusion of Responsibility in International Law', IILJ Colloquium 2015 (iilj.org/courses/documents/NYUPaperDiffusionofResponsibility.pdf), at 5, 6.

decision making"[65] (such as armed robots), for the purpose of establishing legal accountability. How subjectivity critique may redefine legal personality in international law, will be an exciting question in legal scholarship in the coming years.

In positive international law, with the international legal system redefined over the past decades by international human rights law and international criminal law, the argument of the individual as the *primary* international legal person seemingly takes hold ever more firmly.[66] That said, the counter-position is consistently defended as well, drawing on profound doubt as to whether attribution of ILP at the expense of the state can be truly emancipatory.[67] If not the state, who or what will govern the individual? Global power structures of markets and corporations?

Legal personality is a structuring tool in international law, but its effects are complex. Does an actor *with* ILP gain or loose independence? Is an actor *without* ILP disenfranchised or, rather, free from constraints? As for effectiveness, in the debate on multinational corporations it is frequently pointed out that (in its quality of a flexible predicate) legal personality for MNCs does not per se lead to more accountability. Some commentators see no use for the formal concept and look to concrete rights and obligations; others focus their attention on *participants* in international law rather than 'legal persons' (Higgins, Alvarez).[68]

Questions of applied value aside, *personality* is the conceptual linchpin between the social and the legal, and as such cannot but be a central tool in claims of authority and autonomy among the participants in international life.

[65] Rosi Braidotti (*The Posthuman* (Wiley & Sons, 2013)), at 44, also 139.
[66] Eg Anne Peters, *Beyond Human Rights – The Legal Status of the Individual in International Law* (CUP 2016).
[67] Nijman n 7, Ch 6.
[68] Jan Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors', in Jarna Petman & Jan Klabbers (eds), *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi* (Brill 2003).