
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 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.

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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).

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

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