Introduction

Legal personality is a concept present in international law. It is principally employed to distinguish between those social entities relevant to the international legal system and those excluded from it. There is almost universal agreement that states are international persons. But it is unresolved whether and according to what criteria entities other than states – individuals, international and non-governmental organizations, private corporations – can become international persons and what consequences such international legal status entails. In this sense, it still holds true that, as the International Court of Justice put it in *Reparation for Injuries*, international personality is a concept 'giv[ing] rise to controversy'.[1]

Despite (or perhaps because of) its controversial nature, there is little comprehensive literature on legal personality in international law, at least in recent times. Certainly, most textbooks contain chapters on international personality or on the subjects of international law, the two expressions mostly used as synonyms.[2] And equally true, there is a large number of scholarly contributions focusing on one particular aspect of international personality, for example on the international legal status of individuals or on the international capacities of international and non-governmental organizations. But there are very few general treatments of the topic and, to the extent they exist, they tend to be brief and observational in nature[3] or more

[1] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 1949 ICJ Reports 174, at 178.

[2] The latter holds true throughout this work. Likewise, the terms 'personality', 'legal personality' and 'international personality' will be used interchangeably.

[3] Important examples include Barberis, Julio A., 'Nouvelles Questions Conçernant la Personnalité Juridique Internationale', RCADI, 179 (1983–I), 145–304; Menon, P. K., 'The Subjects of Modern International Law', *Hague Yearbook of International Law*, 3 (1990), 30–86; Kolb, Robert, 'Une observation sur la détermination de la subjectivité internationale', ZöR, 52 (1997), 115–25; Kolb, Robert, 'Nouvelle observation sur la

concerned with historical and biographical rather than with legal analysis.[4]

This book aims to offer a comprehensive analysis of legal personality in international law. Deliberately, it combines theoretical and practical aspects of the concept. Starting from the observation that different positions on personality (here called conceptions) are present in contemporary international legal argument, these conceptions are organized and examined with regard to their intellectual origins as well as their manifestations in legal practice. Such engagement with the existing body of international legal argument allows examination of the basic assumptions on which the different conceptions of international personality rest and scrutinization of their application as well as substantiation – in the form of presumptions for and consequences of legal personality – in the case law. It is then possible to determine which assumptions underlying the different conceptions are still to be considered legally sound and which ones have been discarded in international law over time. Correspondingly, it can be established whether presumptions for certain entities being international persons and whether certain consequences attached to this legal status conform with the basic premises of the contemporary international legal order.

Five different conceptions on international personality are identified as being present in international legal argument: the 'states-only conception', the 'recognition conception', the 'individualistic conception', the 'formal conception' and the 'actor conception'. These conceptions consider different entities to be international persons, contain different mechanisms in order to become one and attach different consequences to being one. The main argument of this book is that it is not tenable anymore to consider states the only natural persons of international

détermination de la personnalité juridique internationale', ZöR, 57 (2002), 229–41; Klabbers, Jan, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' in Jarna Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden: Brill, 2003), 351–69; and Cosnard, Michel, 'Rapport Introductif' in Société Française pour le Droit International (ed.), *Colloque du Mans: Le Sujet en Droit International* (Paris: Éditions A. Pedone, 2005), 13–53, all of them not intending to represent a comprehensive treatment. A more general work is Arangio-Ruiz, Gaetano, *Diritto Internazionale e Personalità Giuridica* (Bologna: Cooperativa Libraria Universitaria, 1972), which is, however, very different in general outlook from the present study and somewhat outdated.

[4] See Nijman, Janne Elisabeth, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (The Hague: T. M. C. Asser Press, 2004), which is a very useful study in terms of the historical and biographical context in which the concept has developed, but which mostly refrains from actual legal analysis.

law possessing free discretion to allocate personality to other entities; moreover, it cannot be a question of effective actor-quality in international relations that allows one to acquire international legal status. The assumptions underlying these conceptions have been progressively discarded in international law. It is submitted that international personality has to be administered according to a set of legal principles informed by the formal and individualistic conceptions. Accordingly, with the exception of individuals in certain situations, there are no a priori international persons: personality is acquired in international law whenever an international norm is addressed at a particular entity, without there being a presumption for or against certain units. The sole consequence of being an international person in this framework is to be able to invoke international responsibility and to be held internationally responsible as far as applicable secondary rules exist. In particular, it is argued that it is not a direct consequence of international personality to have the capacity to create international law.

Two aspects related to the relevance of the concept of international personality have to be addressed at once. First, the term 'international personality' has often been avoided in legal doctrine in recent years. A group of scholars, most notably perhaps Rosalyn Higgins, prefers to speak of 'actors' or 'participants' rather than international persons.[5] As the categorization into the five conceptions suggests, in this book the actor approach is understood as representing an additional conception of international personality. For it concerns the same function of determining the entities relevant for the international legal system. Of course, this is not to deny that the actor conception contains certain innovative aspects distinguishing it from more traditional approaches; but such aspects will be considered as part of the general investigation into the conceptions of international personality. Second, it has to be admitted that the concept of international personality is only rarely directly addressed in international practice. However, this does not mean that it is irrelevant for determining legal issues. This book makes the case that predispositions about international personality influence legal outcomes in several areas, namely the direct application of treaties to individuals, the capacities of international organizations, the rights and duties of non-state actors under customary international law, and the legal nature of state contracts. More specifically, it is demonstrated – by relating the

[5] Higgins, Rosalyn, *Problems and Process: International Law and How we Use it* (Oxford: Clarendon Press, 1994), esp. 50.

legal reasoning in practical instances to the assumptions underlying different conceptions – which conception of personality was manifested in particular authoritative statements on these topics. In this way, the practical relevance and the consequences of applying a particular view of personality become more tangible.

The structure of this book is as follows. Part I seeks to demonstrate that the concept and the conceptions of international personality are present in international legal argument and that the choice of a particular conception is significant to specific international legal issues. Part II sketches the broader history of the concept before investigating, as the main contribution of the book, the intellectual origins and the practical manifestations of the five conceptions present in international law today. Part III finally evaluates the legal constructions elucidated in the preceding part and formulates a viable legal framework for personality in international law.

PART I

The concept of personality in international law

In analogy to municipal law, the notion of personality is used in international law to distinguish between those social actors the international legal system takes account of and those being excluded from it. But owing to the peculiarities of the international legal system, there is no clearly established international law of persons. As a result, there are different positions on exactly which entities count as persons in international law, under what criteria personality is acquired and what specific consequences this status entails. This lack of clarity is disconcerting in itself. But it also influences the outcome in particular legal situations. In order to substantiate these claims, Part I of this book will first outline the presence and function of personality in international legal argument (1). It will then identify the different substantive positions on the concept and how one has to deal with them (2). Finally, the case will be made for the significance of the concept in legal practice even when personality is not directly addressed (3).

1

Notion

Legal personality is a controversial concept of international law. But it is, of course, not a concept confined to the international legal system. It represents one of the pillars of municipal law as well. In order to approach the meaning of the notion, it is therefore convenient to review the function of personality in municipal private law. A private law analogy might help to develop an understanding of the role of the concept in international law. Yet, at the same time, it is important to note the peculiarities of international personality. It is because of them that the concept poses much more difficult legal issues in international law than in municipal law. These differences are also the reason why a private law analogy can only help to demonstrate the problem, but not to find a solution for the controversial concept of personality in international law.

A legal system has to determine whom it endows with the rights and duties contained in it and whose actions it takes account of by attaching legal consequences to them. To this effect, municipal law usually includes a law of persons. Historically, this law of persons was concerned with marking several distinctions in the legal personality of individuals. It comprised classes like nobles, clerics, serfs or slaves to which it allocated different degrees of personality in law.[1] Most of these distinctions vanished from the private law of persons in the nineteenth century. Yet, it did not become obsolete. As an effect of the emerging right to form groups and associations in most countries, new categories of legal personality, in this case of corporate nature, were introduced into the private law of persons. For the purposes of law, these recognized groups and associations were regarded as distinct entities from the individuals composing them. One could then not only have legal relationships with other human beings under municipal private law, but also with such groups

[1] See also Maitland, Frederic William, 'Moral Personality and Legal Personality (Sidgwick Lecture)', *Journal of the Society of Comparative Legislation*, 6 (1905), 192–200, at 198.

and associations being acknowledged persons of the legal system. As a result of this process, individuals (distinguished only according to age and mental condition) and various forms of corporations are today considered legal persons of most municipal private laws. In general, these entities are clearly specified, either through provisions in civil codes or through other authoritative statements of the private law of persons. As legal persons, these entities have rights and duties and can act in a legally relevant way, that is, can enter into contracts or commit torts, the consequences of both acts being determined by the legal system. The private law of persons therefore establishes which entities are legally relevant for a specific municipal legal system.

In international law, it also has to be determined which entities have rights and duties and act in legally relevant ways. The notion of legal personality is traditionally employed to this end, and accordingly called international personality. In principle, international law makes use of the concept of legal personality in the way municipal law does and text-books[2] or General Courses[3] on international law failing to address the concept are very rare. However, two peculiarities distinguish personality in international law from that in municipal law.

The first peculiarity often stated is that international personality not only denotes the quality of having rights and duties as well as certain capacities under the law, but that it also includes the *competence to create the law*.[4] This association of international personality with law-creation is an effect of there being no centralized legislator in the international legal system as opposed to municipal private law where the creation of

[2] A selection of contemporary textbooks dealing with the concept of international personality includes: Brownlie, Ian, *Principles of Public International Law*, 6th edition (Oxford University Press, 2003), 57–67; Ipsen, Knut, *Völkerrecht*, 5th edition (Munich: C. H. Beck, 2004), 55–111; Shaw, Malcolm N., *International Law*, 6th edition (Cambridge University Press, 2008), 195–264; Verhoeven, Joe, *Droit International Public* (Brussels: Larcier, 2000), 47–316; Jennings, Robert Y. and Arthur Watts, *Oppenheim's International Law Volume I: Peace*, 9th edition (London: Longman, 1992), 117–329; Müller, Jörg Paul and Luzius Wildhaber, *Praxis des Völkerrechts*, 3rd edition (Berne: Stämpfli, 2001), 209–315; Rousseau, Charles, *Droit International Public (Tome II): Les sujets de droit* (Paris: Edition Sirey, 1974), (whole volume); Cassese, Antonio, *International Law* (Oxford University Press, 2001), 46–85; Daillier, Patrick and Alain Pellet, *Droit International Public*, 5th edition (Paris: L. G. D. J., 1994), 547–684; Doehring, Karl, *Völkerrecht*, 2nd edition (Heidelberg: C. F. Müller, 2004), 24–120.

[3] See the overview provided by Kolb, Robert, *Les Cours Généraux de Droit International Public de l'Académie de La Haye* (Brussels: Bruylant, 2003), which shows that most General Courses since 1929 have addressed the concept of international personality.

[4] See e.g. Brownlie, *Principles*, 57.

law lies in the competence of centralized state power (and consequently is not exercised by the legal persons of private law). International law, on the contrary, is thought to emanate from the will of states in the first place: the states composing the international system enact international law themselves through different modes of explicit and implicit coordination.[5] As states are considered the quintessential international persons – indeed at times statehood and international personality were regarded as synonymous – it is not disputed that at least international personality of states includes the capacity to create law apart from being subject to this very law. What is disputed is whether this is a necessary attribute of an international person more generally or whether there also can be international persons lacking the competence to create law. The merits of these differing views will be considered more closely in the remainder of this book.

The second peculiarity is that there is *no centralized law of persons* in the international legal system. There is neither a pertinent treaty nor are there established rules of customary international law that comprehensively determine matters of personality.[6] In contrast to the law of treaties or international responsibility, the law of persons has also never been selected for codification by the International Law Commission, although this was suggested in 1949.[7] The closest international law gets to an authoritative statement on international personality is the well-known definition articulated by the ICJ in the *Reparation for Injuries* opinion:

> an international person ... is ... capable of possessing international rights and duties, and ... has capacity to maintain its rights by bringing international claims.[8]

[5] This view is reflected in Article 38 ICJ Statute. This well-known provision, though technically only stating the law to be applied by the ICJ, is generally considered to represent the authoritative statement on the sources of international law. However, it has to be admitted that the existence of Article 38 ICJ Statute has not solved the issue of sources of international law completely and there are still ongoing doctrinal discussions, especially on the nature of international custom and the general principles of law.

[6] It is widely agreed that Article 34(1) of the ICJ Statute giving standing only to states does not reflect a statement on international personality more broadly. This is in contrast to the importance Article 38 of the same Statute enjoys in determining the sources of international law.

[7] *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission*, Memorandum submitted by the Secretary-General, UN Doc. A/CN.4/1/Rev.1, at 19–22.

[8] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 1949 ICJ Reports 174, 179.

In the absence of other authoritative statements, these lines are often referred to when dealing with international personality.[9] Unfortunately, the definition is not very illuminating for it neither addresses which entities actually are international persons nor does it state comprehensive criteria according to which personality is attributed. The latter aspect is further obscured by the somewhat tautological nature of the definition.[10] In the absence of an established international law of persons, it is mostly from general considerations of the nature of the international legal system that guidelines on personality in international law are inferred: theoretical positions on the function of law in international affairs, the role of the state and the place of the individual play an important part in international legal argument where the concept of international personality is concerned. Personality in international law therefore tends to be a relatively philosophical and at times abstract topic. It is a concept closely related to the nature and purpose of international law in general.

Developments in international practice (both state practice and practice of international tribunals) are, however, taken into account when dealing with the concept. The problem is that these developments can be interpreted in different ways depending from what theoretical positions one starts.[11] For example, the fact that private investors regularly claim rights contained in bilateral investment treaties on the international scene, as in the context of ICSID arbitrations,[12] can be understood either

[9] See e.g. Daillier and Pellet, *Droit International* (5th edition), 393; Herdegen, Matthias, *Völkerrecht*, 3rd edition (Munich: C. H. Beck, 2004), 62; Ipsen, *Völkerrecht*, 55; Menon, 'Subjects', at 31; Rousseau, *Droit International Public*, 8; Schwarzenberger, Georg, *A Manual of International Law*, 6th edition (London: Professional Books, 1976), 42; Brownlie, *Principles*, 57.

[10] Critical examinations of the definition, particularly of its circularity, can be found in Brownlie, *Principles*, 57; Bowett, Derek William, *The Law of International Institutions*, 4th edition (London: Stevens, 1982), 336–7; Clapham, Andrew, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), 64; Cosnard, 'Rapport', at 16 and 30; Crawford, James R., *The Creation of States in International Law*, 2nd edition (Oxford University Press, 2006), 28 (by implication); Currie, John, *Public International Law* (Toronto: Irwin Law, 2001), 19; Klabbers, 'Subjects Doctrine', at 367–8; Klabbers, Jan, 'The Concept of Legal Personality', *Ius Gentium*, 11 (2005), 35–66, at 39–41; Kolb, 'Observation', at 117; Tomuschat, Christian, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law', RCADI, 281 (1999), at 127.

[11] A similar point is made by Verzijl, Jan Hendrik Willem, *International Law in Historical Perspective Volume 2: International Persons* (Leyden: A. Sijthoff, 1969), 1.

[12] The International Centre for Settlement of Investment Disputes (ICSID) was established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 160.