



Article
scientifique

Compte rendu de
livre

2007

Published
version

Open
Access

This is the published version of the publication, made available in accordance with the publisher's policy.

[Review of:] The Concept of International Legal Personality, An Inquiry into
the History and Theory of International Law / J. E. Nijman

Kolb, Robert

How to cite

KOLB, Robert. [Review of:] The Concept of International Legal Personality, An Inquiry into the History and Theory of International Law / J. E. Nijman. In: European journal of international law, 2007, vol. 18, p. 775–776. doi: 10.1093/ejil/chm035

This publication URL: <https://archive-ouverte.unige.ch/unige:44809>

Publication DOI: [10.1093/ejil/chm035](https://doi.org/10.1093/ejil/chm035)

Book Reviews

J. E. Nijman. ***The Concept of International Legal Personality, An Inquiry into the History and Theory of International Law***. The Hague: T. M. C. Asser Press, 2004. Pp. 494.

This book offers a solid and detailed inquiry into the doctrinal evolution of the concept of international legal personality (ILP). Its main purpose is to show in what socio-political context and with what legal-political aim a certain understanding of ILP has been advanced by a specific author or group of authors at a specific time. The concept of ILP is not only a theoretical notion, which underlies the construction of international law. It is also a political notion, a locus of change or of conservation. It is a locus of change when new subjects are postulated or admitted to the arena of international law; it is a locus of conservation when international law is shielded from the penetration of new subjects into its body. It is these dynamics which the book seeks, in the first place, to uncover. The keyword for the book as a whole could thus be 'context'.

The author correctly observes that the very concept of 'subject of law' emerges with Leibniz: for the first time in the history of thought, the term *subjectus* is no longer intended to designate a person subjected to a duty, but a person enjoying a legal entitlement.¹ As with the international system, Leibniz's use of the term ILP is, according to Ms. Nijman, predicated upon the idea of reconciling state sovereignty with participation of other actors in international life under the protection of the international legal order. All persons (for instance, princes) and entities (state-like) that are able to employ international power and are therefore obliged to take into account the common

interests of a universal human society and pursue universal justice are covered by the concept of ILP. ILP has here an inclusive function. In later decades, with the consolidation of the sovereign state as sole player in international affairs, international legal doctrine shifted the concept of legal personality towards the idea that only those persons possessing all material (e.g. military) and legal powers (e.g. *jus tractatus*, *jus legationis*) could be considered subjects of international law. International law became a *jus inter potestates*, and mainly a law among states. The concept of ILP thus progressively served an exclusive function. That state-centred concept was challenged in the troubled world of the 1920s and 1930s, when more than one theorist reverted to a critique of legal conceptualism. Many great authors of that period, tainted by the generous ideology of a world society under the lead of the League of Nations, attempted a return to the old idea of a *jus gentium*, sometimes going as far as to claim that the sole true subject of international law is the individual.

The individual is the final *Zurechnungspunkt* of legal duties; and is thus the true subject of all law. The liberal, democratic anti-sovereignist (and even 'human rights') taint of this theory is unmistakable. During the Cold War, after the failure of international law to maintain peace, there was some return to a more state-centred vision, a vision of the excellence of power to maintain certain goal values. The concept of ILP became once more, at least partially, a *locus of status quo*.

Finally, during the last decade, the term and its very substance were progressively neglected in international legal writing. Authors often prefer to speak of actors (non-state actors, NGOs, groups and persons sanctioned by the Security Council, etc.) in order to describe a certain participation in the international system, and eventually also a legitimization of

¹ See G. Tarello, *Storia della cultura giuridica moderna*, Bologna, 1976, p. 139.

that participation. The time-honoured and theoretically connoted concept of ILP is often avoided. However, one may say that it continues to have some ordering function, albeit more functional than in the past:

[I]n international law theory, the traditional conception of ILP defined primarily as the quality of a sovereign state and secondly as a derived quality of international actors has stopped being the subject of (heated) debate. ILP has found its purpose where it is used as a rather pragmatic concept or tool which indicates that an entity exists ‘in the eyes of international law’ [...]. By the attribution of international legal rights and duties, (new) acts come ‘into sight’, become ‘visible’, as international legal persons and are being included in the international (legal) community. In this functional role, ILP continues to be a fundamental concept of international law...².

Thus, the essence of the concept of ILP is ‘legitimate participation’. It is for this reason that Nijman links ILP to democratic participation of the individual – whose voice may thus be heard – as the final bearer of dignity and rights. Hence her conclusion:

[T]he individual is the legal personality *par excellence* of international law, i.e., the law of mankind. Yes, states are international legal persons, but they are secondary persons; individual human beings are the primary legal persons in international law. The individual is both the source and the final destination of the law of nations. ILP forms the *cords* between the individual human being and the universal human society, and because of it, the international community and international law must guarantee the right to have rights, the right to political participation, i.e., the right to speak out and raise one’s *voice*. This could be the new function of ILP.³

The theory of ILP thus comes down to a theory of human rights. One will notice the complete reversion of the traditional understanding of legal personality, limited to the state. Traditionally, the state was the principal legal subject, due to the power it held, and the individual was a derived subject, possessing the rights that states chose to grant; here, the individual is the primary subject of law, due to democratic participation and ultimate human dignity, and the state is the secondary subject, burdened to guarantee these rights of the individual.

This book offers an interesting and meticulous sketch of international socio-political history through one of the key constructive concepts of modern international law. It deliberately refrains from offering a conceptual analysis of the notion of ILP itself. Thus, now that the historical, political and cultural background of ILP has brilliantly been laid bare by this deeply interesting book, the work of legal-technical construction (or deconstruction) of the concept of ILP needs to be undertaken. Who will try to write the accompanying volume to the present study, erecting *intra muros* of the positive law and of legal theory an inquiry into the state of ILP as a legal concept and as a tool for marshalling the legal reality of today?

Email: robert.kolb@unine.ch Robert Kolb
doi: 10.1093/ejil/chm035

² Nijman, *op. cit.*, p. 455–456.

³ *Ibid.*, p. 473, italics in the original.