

## REVIEW ESSAY

*THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW*, BY JANNE ELISABETH NIJMAN (THE HAGUE: T M C ASSER PRESS, 2004) 512 PAGES. PRICE £60.00 (HARDCOVER). ISBN 9067041831.

### INTERNATIONAL LEGAL PERSONALITY AND THE END OF THE SUBJECT: NATURAL LAW AND PHENOMENOLOGICAL RESPONSES TO NEW APPROACHES TO INTERNATIONAL LAW

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#### I INTRODUCTION

Janne Elisabeth Nijman's huge undertaking is a most broadly conceived exploration of an international law topic that, hopefully, will help to redefine what international lawyers take to be their intellectual tasks. She is concerned with placing international legal thinking in the widest possible intellectual context, over a period of about 300 years. The work presents many challenges as well as doubts. Is it useful or necessary to understand the modest intellectual output of international lawyers in the context of developments in the fields of art, music, painting, philosophy and, most of all, the general political and economic climate? Is there any continuity between the work of Leibniz on international legal personality and the post-World War I concerns of James Brierly, Hans Kelsen and Georges Scelle about classical state sovereignty? Why consider extensively the role of personality in the post-World War II Cold War bipolarity

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and ignore the long 19<sup>th</sup> century? Why could Nijman not have written the whole book around the single theme of the concept of personality today and the theme of 'The End of the Subject'?

Nijman has clear enough answers to these questions. Her vast undertaking has a simple enough ambition. She wishes to place the individual person at the centre of international legal thinking and practice. Leibniz provides the framework for posing the question of whether an entity has international legal personality. After this Nijman's concern jumps rapidly to the thesis that post-World War I international law thinkers turned around the 19<sup>th</sup> century obsession with state sovereignty as the centre of legal scholarship, rethinking states as institutional frameworks assigned the task by the international legal order of safeguarding the welfare of individuals. The challenge of the 'End of the Subject' debate is that poststructuralist thought, and particularly critical international legal scholarship, appears either to challenge the possibility of the concept of personality, or to neglect the area around the concept as inherently unfruitful. Nijman wishes to challenge this climate or movement in order to restore the place of the 'individual person' — a place once apparently guaranteed by international legal thinkers of the post-World War I period and by Hersch Lauterpacht, who is seen as providing a bridge to the present by spanning the inter-war and Cold War periods.

How different is this enterprise from the usual international law treatment of legal personality? Why should a theory of personality be necessary? There used to be some controversy about the status of individuals as subjects of international law, but now the focus is upon the wide variety of legal instruments that either give them direct rights or allow them to be sponsored. Issues about the status of non-governmental organisations are resolved into providing them with frameworks to assure them a participatory and consultative role. Transnational corporations are considered under the rubric of globalisation and the end of nation-state sovereignty. Perhaps the most dramatic recent developments concern the so-called new social movements, which challenge the international economic order enshrined in the World Trade Organization, the International Monetary Fund and the World Bank.<sup>1</sup>

I think that such listings show the need for reflection upon the meaning of international law thinking about personality, and the need to understand that concept itself in a wider intellectual context. Although not mentioning it directly, Nijman is undertaking the task of reversing the tide of pragmatism which Martti Koskenniemi says has dominated international law after World War II, especially since the 1950s; a pragmatism which is concerned to make institutions work without asking whether international law has to have fundamental ends and, more specifically, whether its project has to have an overall intellectual coherence or consistency.<sup>2</sup> The difficulty with discussions about transnational corporations and new social movements is that it is not clear whether the

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<sup>1</sup> See generally Jürgen Habermas, 'New Social Movements' (1981) 49 *Telos* 33; Claus Offe, 'New Social Movements: Challenging the Boundaries of Institutional Politics' (1985) 52 *Social Research* 817; Notes from Nowhere (ed), *We Are Everywhere: The Irresistible Rise of Global Anticapitalism* (2003).

<sup>2</sup> See generally Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002).

international legal profession is trying to impose its own terms of reference on the challenges of these possible issues of legal personality. Nijman has precisely such an ambition. Once one realises that this is exactly how far she is willing to push the task of the international lawyer, it becomes clear why context is so important to her, and why pragmatism is not enough. Without an overall vision of its purpose the international legal environment will fragment, undermining isolated and uncoordinated efforts in particular areas. Without an understanding of the intellectual or cultural forces in contemporary society working towards this fragmentation, the international legal thinker will not be up to the task of resisting and overcoming such forces. So Nijman's vast exercise is not an aesthetic journey of curiosity, but a determination to provide solid cultural and intellectual foundations for the place of the individual person in present international legal society.

At the same time one needs to understand Nijman's use of Quentin Skinner's theory of intellectual history and Leibniz's theory of personality to grasp the framework she employs for her inquiry into international legal personality. The crucial argument, difficult for the mainstream international lawyer, is that Nijman defines this process as an intellectual task. Following Skinner, and other theorists of hermeneutics such as Edvard Donald Hirsch Jr, she argues quite simply that there must be *international legal thought* because a

responsible interpretation of historic arguments requires an analysis that situates the argument within the contemporary contexts ... as each historic text is 'an intended act of communication' on things which lie outside the text itself.<sup>3</sup>

Nijman is already committing herself to an anti-postmodernist position — that authors have intentions which there is a moral duty on the part of the interpreter to respect, the basic moral imperative of speech being to respect the author's intentions. Since the context of the author's work and goals is outside him or herself, it follows that the interpreter must pursue the author into that context in order to understand the author. This is the opposite of claiming that the context determines causally what the author produces. Rather, the nature of intellectual history is that not only the answers posed, but also the questions asked, change. This is not to deny historical continuity, but it is to accept that history consists of sequences of contemporary debates.<sup>4</sup>

This approach very categorically opposes postmodernism in at least one of its meanings, although Nijman only develops this opposition in the penultimate chapter, on 'The End of the Subject'. Her intellectual opponents are not just postmodern international lawyers, but also their progenitors, so to speak, such as Michel Foucault. Her central argument is that, according to Foucault, legal concepts are the negative language of power. Foucault rejects the traditional concept of the intellectual as a person who counters power with law as obsolete, because universal truth and justice are not transcendent. Today's intellectual is engaged in very specific, concrete scientific research. This explains why legal

<sup>3</sup> Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004) 18–19 (citation omitted), quoting Quentin Skinner, 'Motives, Intentions and the Interpretation of Texts' in James Tully (ed), *Meaning and Context: Quentin Skinner and His Critics* (1988) 68, 77.

<sup>4</sup> Nijman, above n 3, 18–19.

language and traditionally used concepts of personality are ignored in contemporary international legal theory.<sup>5</sup> The heart of Nijman's method and challenge is in the final sentence of this stage of reasoning: 'Like all other disciplines international law scholarship proved unable to escape from the influence of ideas such as the marginalisation of universal modern values, the disqualification of the general, universal approach'.<sup>6</sup>

The most sympathetic, and at the same time testing, way to approach Nijman's work is to explore whether she has fully understood and met her own challenge. In my view postmodernism can serve as a diagnostic device to understand the extent of social and cultural fragmentation which exists. There are certainly postmodernists who enjoy being capricious and whimsical. The movement is many faceted, but Nijman's philosophical aim for international legal personality will fail if it does not meet the postmodern challenge. After a perusal of some of the main episodes of her work, I propose to undertake this assessment, by focusing primarily upon one of her intellectual supports — Paul Ricœur — and asking whether a phenomenology, open to natural law thinking and sympathetic to ontology, can reground international legal theory. Nijman relies heavily on two of Ricœur's important works: *Oneself as Another* (1992) and *The Just* (2000).<sup>7</sup> This review will also consider some of Ricœur's other published works. However, Ricœur builds on Hegel and this brings me into conflict with some aspects of Nijman's work, particularly her neglect of Hegel and the 19<sup>th</sup> century generally. Nonetheless, this review essay accepts the fundamental thesis and framework of Nijman's book, that international law as a discipline cannot dispense with purely intellectual work, that the work is intellectual precisely in the sense that it is contextual, and finally that, at present, postmodernism presents the main challenge to this necessary intellectual work. While I am, as it were, on the side of Nijman and Ricœur, I do not think that the conflict between hermeneutics and postmodernism can be conclusively resolved.

## II THE THEORY OF INTERNATIONAL LEGAL PERSONALITY

Nijman points to Leibniz as offering the first explicit definition of international legal personality in his *Codex juris gentium diplomaticus*:

He possesses a *personality in international law* who represents the public liberty, such that he is *not subject* to the tutelage or power of anyone else, but has in himself the power of war and of alliances ... If his authority, then, is *sufficiently extensive*, it is agreed to call him a potentate, and he will be called a *sovereign* or a sovereign power ... Those are counted among sovereign powers ... who can count on sufficient freedom and power to exercise some influence in international affairs, with armies or by treaties ...<sup>8</sup>

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<sup>5</sup> Ibid 351.

<sup>6</sup> Ibid.

<sup>7</sup> Paul Ricœur, *Oneself as Another* (Kathleen Blamey trans, 1992 ed) [trans of: *Soi-même comme un autre* (first published 1990)]; Paul Ricœur, *The Just* (David Pellauer trans, 2000 ed) [trans of: *Le Juste* (first published 1995)].

<sup>8</sup> Nijman, above n 3, 58–9, quoting the English edition: Gottfried Wilhelm von Leibniz, *Leibniz: Political Writings* (Patrick Riley trans, 2<sup>nd</sup> ed, 1988) 175 (emphases added by Nijman).

This definition is not understood by Nijman as being positivist or conventional in the sense that ‘such persons’ are actually recognised and do thereby apply, and have applied against them, rules of law. Instead, the context is that Leibniz is arguing or reasoning that ‘such persons’, in fact middle-ranking German princes, must have international legal personality for the sake of European/universal order and justice against those (for example Louis IV or the Holy Roman Emperor) who might deny it. An integral part of Leibniz’s argument is that the goal of a just, harmonious world order is only attainable if it is recognised that the potentates are themselves subject to rules of justice at the universal, distributive and, above all, commutative level. At this latter level, violations of justice merit a coercive response. However, the whole fabric of order is only conceivable if potentates accept subjection to all levels of justice, in individual personal terms. That is, Leibniz is speaking of a *ius gentium*, not a *ius inter gentes*. Underpinning Leibniz’s theory is his system of Monadology. Human beings are the highest form of rational substance, whose place with one another in a rational universe is assured by a supreme Providential being, the primary Monad, whose nature humans reflect and towards whom they strive for perfection.<sup>9</sup>

Without this context, both the content and the rhetorical power of Leibniz’s argument would be lost in a modestly sized argument about positive law, whose significance for international lawyers would remain unknown were Nijman not to insist on it. She appears to present Leibniz uncritically and does not later argue that anyone has actually followed him. Instead, Nijman constructs a series of episodes in international legal history in which she has already given a central and permanent place to the idea of natural law and to the idea that law — that is, in her sense of *Ius* or Justice — can only be addressed to individual persons, that legal capacity is obviously representative, but that collective entities as such cannot have *personality* in the sense of moral or legal personality. Nijman concludes her chapter on Leibniz with a very brief account of the establishment of the moral personality of the state by Emmerich de Vattel. Vattel’s teaching leads to the doctrines of dualism, absolute sovereignty and the perception of *ius gentium* as the voluntary law between sovereign states only: ‘The law of nations is no longer (natural) law that applies to (sovereign) individuals, but consists of the *positive* law that is exclusively applicable between independent sovereign states’.<sup>10</sup> Nijman rightly considers this doctrine to have become dominant in the 19<sup>th</sup> century, and equates it with the triumph of Hegelian and post-Hegelian thinking that has to be resisted by the post-World War I anti-statist liberalism of Brierly, Kelsen and Scelle.<sup>11</sup> She displays an unstated adherence to a continuing tradition of natural law and an indifference to what is arguably the heart of the problematic of international society, recognised clearly by Thomas Hobbes, Hegel and poststructuralism, that collective identities tend — apparently

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<sup>9</sup> Nijman, above n 3, 58–80.

<sup>10</sup> *Ibid* 83 (emphasis in original).

<sup>11</sup> *Ibid* 80–4.

inevitably — to be constructed in opposition to one another, making instability endemic to international society.<sup>12</sup>

### III THE REVOLT AGAINST CLASSICAL STATE SOVEREIGNTY: FOUNDATIONS FOR THE IDEA OF INTERNATIONAL LAW AS A GLOBAL CONSTITUTIONAL ORDER

The heart of Nijman's study is chapter 3, 'Demystifying ILP: Brierly, Kelsen and Scelle'. The chapter constitutes a unity despite significant differences in the theories of Brierly, Kelsen and Scelle. The rest of the book is subordinated to the aims of this chapter.

Nijman is an adherent to a natural law foundation for law, exemplified here by Brierly. She goes on in chapter 4, 'Cold War Bi-Polarity: ILP Hanging in the Balance', to put the main weight on the contribution of the philosopher Emil Brunner to a renaissance of natural law, insisting that Brunner provides the cultural context for Lauterpacht's post-World War II work on the idea of human rights.<sup>13</sup> As will be seen, this downplays the continued significance of power politics in international relations and lays the discipline whose contemporary history she so convincingly constructs open to Foucault-based postmodernist criticism of the idea of law and of international law.

At the risk of appearing overenthusiastic, I would say that I consider chapter 3 an immensely significant contribution to international law scholarship and the most forceful chapter of the book. It puts a dramatically different light on the ground covered by Martti Koskenniemi in *The Gentle Civilizer of Nations* (2002). In an equally exhaustive account of the work of much the same authors, placed in an encyclopedic cultural context, Nijman may be taken to be coming to virtually the opposite conclusion to Koskenniemi. Nijman goes on to conclude her book by arguing that — despite the hiccups caused by globalisation and by postmodernist international lawyers like Koskenniemi and myself — the heritage of the work of Brierly, Kelsen, Scelle and Lauterpacht is firmly in place and perfectly adequate for the future, provided only that the vision these figures developed is clearly remembered. In my judgement, the clearest possible foundations for the present *rationale* of mainstream international law are provided here, precisely because the exhaustive cultural context in which the four writers are shown to function makes absolutely clear the extent to which they can be legitimately described as international legal thinkers — what Nijman wishes her book to be seen to be about. Present debates about democracy, international legal order, humanitarian intervention and human rights may not go beyond apparently positivist, functionalist and instrumentalist efforts to realise basic legal ideals. However, it may be that they do not need to, given that the present mainstream international law profession still adheres quite consciously and passionately to the ideals with which its four predecessors resolved the huge cultural dilemmas of their time. Whether those dilemmas themselves remain the most pressing issues of our time, and whether natural law assumptions about the individual and law are enough to respond to these issues, remains another matter.

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<sup>12</sup> See, eg. James Der Derian, *On Diplomacy: A Genealogy of Western Estrangement* (1987) 178–9, quoting Michael Howard, that '[s]elf-identification as a Nation implies almost by definition alienation from other communities': Michael Howard, *The Causes of War and Other Essays* (1983) 26.

<sup>13</sup> Nijman, above n 3, 268–75.

Against Koskenniemi, I would say that the ideals of the Interbellum did not evaporate in the horrors of World War II and the pragmatic anti-idealism which followed. Rather, we have continued to rely on this legacy and have confidently imagined that the end of bipolarity was an even further confirmation of it.

The contextual approach to international law thinking shows just how penetrating is the rejection of collective identity of state and nation. Brierly and Kelsen were fully aware that they were living in the Age of the Masses and were fully conversant with the works of Sigmund Freud, Gustave Le Bon, Elias Canetti, José Ortega y Gasset and many others who warned that the humanity of the individual faced almost certain disappearance into the abyss of collective hysteria, totalitarianism and irrational violence. The call to individual moral responsibility was the clear response, and the idea of law was to facilitate this. A democratic base was to be provided in participatory citizenship, although it was somehow appreciated that a measure of general political education would be necessary to make this effective. The idea of law as such was a form of morally rational and just standard or guide to behaviour — common to all individual human beings, with a global anchor that allowed one to talk of a common law of mankind, or of an international legal community. The idea of human rights as added by Lauterpacht provided a focal point for the legal order, identifying, also through individual remedies, the teleology of the system. The federative structure of the law as spelled out by Scelle positioned the restraint upon the power of collective groups — already demonised as inherently prone to irrationalist, oppressive behaviour — as the most essential element of the idea of law. The state as an institution is simply a focal point of identifiable governors who have powers limited by the legal order, so that it is always possible to describe in legal terms where power is being abused. The ultimate sanction of the legal order for such behaviour is collective intervention, but it is obvious that if Lauterpacht's belief in the centrality of an international judiciary could be realised, this would make state intervention superfluous.

While the legitimacy of law rests on democratic foundations of participation and consent, the ultimate force of the idea of law being expounded here is one of a rule of reason to which each individual rational human being will submit. The rule of reason, as the rule of law, is a standard of individual responsibility. This is most clearly expressed by Brierly, who does not insist on a distinction between law and morality. It might be thought that Kelsen and Scelle were far removed from natural law thinking. However, the monist view — that all of law is predicated on a series or hierarchy of competences and of obligations (the individual as subject and object of law) — supposes that there is some providence or happy coincidence which assures that such a monist order somehow merrily falls into place (Kelsen),<sup>14</sup> and that the practical task of the lawyer is essentially of an administrative law character (Scelle).<sup>15</sup> This ensures that there does not occur an abuse of function by legal persons, who are by turns legal officials and legal addressees of norms. Such an inherently complete

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<sup>14</sup> See generally Hans Kelsen, *Reine Rechtslehre* (1934).

<sup>15</sup> See generally Georges Scelle, *Précis de droit des gens: Principes et systématique* (1932–34).

(because monist) system of global legal order can be perfectly monitored and developed by an international judiciary (Lauterpacht).<sup>16</sup>

All of this can happen if international law actually exists. Of course the post-Kantian formalist cannot pose such a question directly. What is outlined above is simply the way mainstream international lawyers see 'reality'. Their legal apparatus has to cope with the threats identified in the Interbellum. It has the ontological status Immanuel Kant attached to practical reasoning. If and to the extent that the law, so understood, is put into practice, the threats of collective irrationality will be held at bay. For instance, Muslim fundamentalism should not as such present any 'category' difficulties. To the contrary, it presents the very foundational challenge which can serve to remind us of the values the four international law thinkers wished to uphold and so coherently expounded.

The difficulty for the anti-Kantian is that, as Ricœur and the phenomenological tradition point out, this mainstream international law approach is radically subjective and self-regarding. Postmodernism can see easily, at the same time, that the idea of law is being clearly used as a refuge from the 'other' represented by every conceivable axis of evil, but particularly any form of collectivity, or any cultural world other than that espoused by 'the gang of four'. This is not a fatal criticism to make against Nijman, who has not broken from the universalist, natural law tradition. How the natural law tradition can be seen as a response to our 'age of anxiety' is something she does consider. Following closely the work of Stephen Toulmin, she quotes him connecting the Interbellum with the post-Thirty Years War context:

Between the Wars, serious-minded European intellectuals faced the same task as had faced Leibniz after 1670: to find a neutral basis of communication between former enemies, devise a rational method for comparing ideas from different nations, and build transnational institutions that could prevent a renewal of international war.<sup>17</sup>

Nijman wants to compare each 'scholarly quest for universal harmony'.<sup>18</sup> After World War II she attaches special importance, as already mentioned, to Emil Brunner. The central part of his doctrine is that natural law is knowable to everyone, irrespective of their beliefs, because it is naturally forced on the human consciousness.<sup>19</sup> Brunner may be read, says Nijman, as a representative of those contemporaries who thought that law and justice are in a close relationship; that the state should be reinstated as the protector of law, not as its producer. It should be resubjected to natural law, human rights included.<sup>20</sup> This is not seen as a naïve or reactionary view: 'From Brunner we already learned the connection between modern anxiety and the return to natural law'.<sup>21</sup>

Nijman does not link Brunner directly with Lauterpacht, but treats them as parallel representative thinkers,<sup>22</sup> the former clarifying the background of the

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<sup>16</sup> See generally Hersch Lauterpacht, *International Law and Human Rights* (1950).

<sup>17</sup> Nijman, above n 3, 89–90, quoting Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (1990) 157–8.

<sup>18</sup> Nijman, above n 3, 89.

<sup>19</sup> *Ibid* 271.

<sup>20</sup> *Ibid* 275.

<sup>21</sup> *Ibid* 282.

<sup>22</sup> *Ibid* 275, 312.

latter. Lauterpacht is most explicit in his equation of law with human rights and a justice based on natural law in his article, 'The Grotian Tradition in International Law' (1946),<sup>23</sup> but also in his *International Law and Human Rights* (1950). In one sense there is a 'no nonsense' character to Lauterpacht. Of course people may be irrational and vicious, but there can be no accepting this. People must simply 'get a grip', restrain themselves and follow their better judgement.<sup>24</sup> Indeed Nijman describes Lauterpacht as the Henry Moore of post-World War II international legal scholarship.<sup>25</sup> Commenting extensively on his *Madonna and Child*, she says 'Moore preferred to focus *not* on man's capacity for violence, but, rather more positively, on beauty, the sacredness of the human being and his capacity for "composure, dignity, and profound spiritual strength"'.<sup>26</sup> She concludes that '[u]ltimately, at the end of the 20<sup>th</sup> century, the idealist attempt to reinforce justice by developing international organisation and human rights law has been successful'.<sup>27</sup>

Nijman's extraordinary final assessment of Lauterpacht contrasts with that of Koskenniemi's equally impressive scholarship on the man. For Koskenniemi, Lauterpacht is an inevitably sad leftover of Victorian ideals of liberalism, a forlorn figure in the face of the stand-off of the superpowers, out of place in the company of more modest international law figures based in England and, presumably, not founding a forward-looking school.<sup>28</sup> Lauterpacht represents perhaps a pre-Dickensian or pre-Raphaelite world of justice and harmony, maybe also a 19<sup>th</sup> century Jewish Enlightenment. These forces sought to resuscitate rationalism after World War I, were exhausted in the struggles of the 1930s and 1940s, became caught up in institutionalist pragmatism by the 1950s and had spent whatever creative force they had by the 1960s.<sup>29</sup> However, Koskenniemi has neglected Brunner — for whom ideologically he can have no sympathy — and he does not cast his glance far enough to notice Moore. So, in light of Nijman's research, Koskenniemi is probably mistaken in what he takes to be his 'killer' argument when he says of Lauterpacht's project: 'I see it as a consistent attempt to maintain, through projection, the wholeness of a social world and personal identity when none of the competing projects (of science, politics or economy) had been up to the task'.<sup>30</sup> The extensiveness of Nijman's contextual approach allows her to say of Lauterpacht that he is a 'bridge conjoining positivism and natural law theory, a bridge connecting the Interbellum modernist past with the post-Cold War future'.<sup>31</sup> I think Koskenniemi may underestimate the critical mass, if not the intelligence, that Lauterpacht represents. The difficulty is whether this heritage can last. Nijman too is aware of this, and ends her book with the query about 'The End of the Subject'.

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<sup>23</sup> Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *British Year Book of International Law* 1.

<sup>24</sup> Nijman, above n 3, 308–9.

<sup>25</sup> *Ibid* 302.

<sup>26</sup> *Ibid* 277 (emphasis in original), quoting Peter Fuller, *Henry Moore* (1993) 40.

<sup>27</sup> *Ibid* 287.

<sup>28</sup> Koskenniemi, *The Gentle Civilizer of Nations*, above n 2, 353–412.

<sup>29</sup> *Ibid* 410–12.

<sup>30</sup> *Ibid* 412.

<sup>31</sup> Nijman, above n 3, 297.

IV NATURAL LAW AND PHENOMENOLOGICAL FOUNDATIONS FOR  
INTERNATIONAL LEGAL PERSONALITY: WHETHER AND HOW THEY CAN  
MEET THE POSTMODERN CHALLENGE

The conclusion to a contextual history of international law thinking cannot easily turn itself into a work of legal philosophy; Nijman's work becomes more of a statement of where she stands.<sup>32</sup> This has some value insofar as she indicates just how much company she has. Brunner, Ricœur and now also Hannah Arendt provide support for what is a classical philosophical approach, going back through a Christian natural law philosophy (Brunner), to Arendt's resurrection of classical Aristotelian political philosophy. Nijman argues for a connection between Arendt and Ricœur, to make herself comfortable with a combination of the natural law and the hermeneutic approaches to law. Both Arendt and Ricœur had an admiration for Karl Jaspers, the German existential phenomenologist, whom Nijman considers at length in her chapter on post-World War II.<sup>33</sup>

A *Building Natural Law and Phenomenological Foundations for  
International Legal Personality*

So a new concept of international legal personality must be rooted in a theory of justice, crossing between the moral and ethical realm on the one hand and the legal order on the other, linking the two and insisting that the latter has its origin in the former. The approach will avoid idealism by taking the hermeneutics of the self as a starting point.<sup>34</sup> The approach has to be a natural law one, because, recalling Leibniz, Nijman effectively defines legal personality from the starting point of human capacity, which brings with it responsibility. Following Ricœur's hermeneutic phenomenology, she understands his idea of capacity or capability as responsibility for self in relation to others, and primarily in relation to the self as another. Ricœur is also Aristotelian in going back to the latter's concept of being in terms of potentiality and actuality, marrying phenomenological intentionality with an Aristotelian teleology. Such a framework of analysis for ethics or natural law will marry law to ethics as Thomist theory does. Natural law needs institutionalisation to give it practical application, but positive law always remains subordinate to, and an instrument of the needs of, natural law and the phenomenological understanding of the person in relation.

Ricœur, Brunner and Arendt do not just remain moral philosophers. They have a full-blown theory of law which is defined in terms of the necessity for a person's very identity and existence to be able to act effectively in a wider community beyond the circle of close friends and family, that is, at an impersonal level. The function of the theory of legal personality, and of international legal personality, is to elaborate just institutional relations of individuals to one another which assure an adequate expression of personal capability. The theorist will presumably be called upon to judge whether a particular state so oppresses its citizens as to give the international community a fallback authority to institute a temporary transnational administration. The theory of natural law certainly provides for an individual, and presumably

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<sup>32</sup> See especially *ibid* 447–73.

<sup>33</sup> *Ibid* 105–10. See also François Dosse, *Paul Ricœur: Les sens d'une vie* (2001) 235.

<sup>34</sup> Nijman, above n 3, 445.

collective, right of resistance, but Nijman's lack of sympathy with collective rights means that she does not go on to consider the implications of her theory for a right of self-determination of a people. For instance, where a minority can no longer exercise its political capacity effectively — in the Aristotelian sense — within an existing state, an objective standard of justice might require a readjustment of the state institutions in which the minority exists, a euphemism for a right of secession. Nijman's starting point was the ambiguous status of the German princes following the 1648 Westphalia settlement, and Leibniz's resolution of this in terms of actual capacities and responsibilities. Leibniz's dilemmas face us in innumerable ways today. In Nijman's theory order will always be (as it was for Aristotle, Arendt, and Ricœur) a function of justice, in the sense of a right harmony in human relations — which it is ultimately possible to find because of a positive or benign ontology underlying them.

### B *Meeting the Postmodern Challenge*

There are at least two dimensions of Nijman's undertaking that are obviously insufficiently developed. One is to explain more fully the implications of her theory for systemic thinking about international law in terms of existing legal categories, and the other is simply to take seriously those she identifies as her contemporary opponents, the postmodernists. These weaknesses may well be fatal to an effective reception of her book. Those in the international law profession who may sympathise with her approach will still need her to spell out its implications in detail. Those international law theorists who oppose her are likely to dismiss her as a reactionary who does not understand the implications of the intellectual currents she rejects. Of course, to call for more chapters in a 500 page book is rather demanding, and I believe Nijman has clearly set out the basic framework for the development of a philosophical foundation for international legal personality. It is probably no accident, given her marrying of natural law and existential phenomenology, that she does this in terms of a passionate personal statement, motivated by a disdain for and even exasperation with the apparent futility of critical international legal studies. So Nijman says of herself: 'In the final chapter I will therefore have to take a stand: I will attempt to rethink ILP from a justice perspective'.<sup>35</sup>

This is in opposition to Koskenniemi and Kennedy, against whom she makes the following pointed and very well aimed denunciation:

It would be fair to say that during the 1990s international law scholarship, largely due to the influence of post-modern 'critical' scholars, like Martti Koskenniemi and David Kennedy, rather than approaching problems of international law from a theoretical perspective focuses on discourse analysis to demonstrate the *indeterminacy* of the international law discourse and how it is being held captive in its linguistic prison. In other words, because language determines our thinking (a popular post-modern theme) this language currently seems to prevent international legal scholars from advancing international law.<sup>36</sup>

She is also in opposition to myself, quoting a point in my 1991 *European Journal of International Law* 'Critical Trends' article where I object to the

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid 398 (emphasis in original).

persistent use by states of fictional representations of universality and consensus, as if they were a universally accepted discourse, so as to impose a particularist language on others.<sup>37</sup> I make the additional point that the coercive language used is taken entirely from liberal political theory, masquerading as positive international law.<sup>38</sup> After a long quotation from my article, Nijman comments that, in her view,

the contemporary context is one in which the identification of law as the useless and *negative* language of power is the norm in academic and intellectual circles and traditional (legal) concepts are considered mere fortifications of power. This contributes to the general behaviour of legal scholars which is to *skirt round* the traditionally important legal concept of ILP in their attempts to avoid its true scrutiny from a *legal* theoretical perspective.<sup>39</sup>

These two objections are chosen from among many others that Nijman makes<sup>40</sup> not only for reasons of space, but also because they are sufficiently central to the critical legal agenda for a response to be justified. Nijman's strength as a historian makes her weaker as a philosopher. Her anxiety to expound clearly what people are saying in a wider intellectual context which makes their views intelligible may be what makes her book so long. After a fairly exhaustive and balanced exposition of Foucault's views on everything and the law, Nijman expounds only some of Ricœur's views, states her preference for Ricœur because he is a more positive sort of guy, and then moves on to the next stage of her history. This working method is more effective than my description of it might suggest, simply because the vastness of Nijman's landscape does serve to alter the balance of the overall picture. There are simply more optimists around than 'depressives' might have thought. There is a wonderful quotation from Bertrand Russell which Nijman uses that I think perfectly captures her mood: 'Pessimism is a waste of time'.<sup>41</sup> The question remains whether the good guys have any good arguments!

I do think it is necessary actually to engage with the foundations of the arguments of one's opponents. It is part of the hermeneutic enterprise to understand from where these persons herald. Inevitably the exercise will have a large measure of speculation in it, but — *and here is the real rub of the matter* — can one reasonably expect that they respond to criticism of them? Of course, this is extremely unlikely if the world of critical legal studies is closed to the hermeneutic principle of exploring the intentions of authors, which Nijman begins her book by defining as a central moral responsibility of the quest for knowledge. I am aware of only Peter Goodrich, among critical legal scholars, as one who responds to the criticism of the mainstream in his detailed assessment of

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<sup>37</sup> Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 *European Journal of International Law* 66, 66.

<sup>38</sup> *Ibid.*

<sup>39</sup> Nijman, above n 3, 392 (emphases in original).

<sup>40</sup> *Ibid* 387–402.

<sup>41</sup> *Ibid* 304.

the work of such figures as Anne Barron, Neil Duxbury and Mathew Kramer.<sup>42</sup> Even Goodrich is regarded as personalising academic debate by doing so. The entire profession seems utterly remote from the Socratic tradition. None of us critical international legal scholars are trained philosophers, or for that matter social anthropologists, but I have stumbled upon an article by Ricœur which challenges the very foundation of critical legal postmodernism — that we are prisoners of language — and I think his challenge does require a response from postmodern international lawyers. Following Nijman's style, I will elaborate Ricœur's argument at length.

### C *Escape from the Prison of Language*

In a piece 'Structure and Hermeneutics',<sup>43</sup> Ricœur takes issue with Claude Lévi-Strauss' work on structural anthropology, contrasting it with his own hermeneutic method of explanation. The structuralist belief in the primacy of synchrony over diachrony, of form over content, is founded on an excessively narrow field research base in a geographic area of so-called totemic thought, never having reference to Semitic, pre-Hellenic, or Indo-European thought. Specifically within what Ricœur calls the geographical area of 'totemic illusion', the formal codes are dominant as against a *bricolage* of content, ensuring an order based upon binary oppositions that guarantee meanings are exhaustively supplied through differentiations imposed by the formal system of coding. This meaning structure is entirely ahistorical, logical and marks a primacy of the synchronic.

Married to this is a borrowing of a linguistic model of communication, that linguistic laws designate an unconscious and, in this sense, a non-historical, non-reflective level of mind. Ricœur asks by what means this analogy is universalised onto all human behaviour and experience. It is true that kinship, for instance, is a kind of language — it is not certain 'that the relation between diachrony and synchrony, valid in general linguistics, rules the structure of particular discourses in an equally dominant fashion'.<sup>44</sup> Indeed Ricœur draws attention to the fact that Lévi-Strauss himself accepts that the correlation between culture and language is not sufficiently justified by the universal role of language in culture.

Yet structural anthropology asserts these combinations of linguistic theory and totemic binary codes as 'more a Kantian than a Freudian unconscious, a categorical combinative unconscious'.<sup>45</sup> It is a Kantian unconscious but only as regards its organisation, since it is without a thinking subject, a systemic

<sup>42</sup> See, eg, Peter Goodrich, 'Critical Legal Studies in England: Prospective Histories' (1992) 12 *Oxford Journal of Legal Studies* 195; Peter Goodrich, 'Doctor Duxbury's Cure: Or, A Note on Legal Historiography' (1993–94) 15 *Cardozo Law Review* 1567; Peter Goodrich, 'The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction' (1999) 10 *Law and Critique* 343. See also Peter Goodrich, 'Satirical Legal Studies: From the Legists to the Lizard' (2004–05) 103 *Michigan Law Review* 397 for an extended review of how different streams of legal scholarship fail to take account of one another.

<sup>43</sup> Paul Ricœur, 'Structure and Hermeneutics' (Kathleen McLaughlin trans) in Don Ihde (ed), *The Conflict of Interpretations: Essays in Hermeneutics* (1974 ed) 27 [trans of: *Le Conflit des interprétations: Essais d'herméneutique* (first published 1969)].

<sup>44</sup> *Ibid* 38.

<sup>45</sup> *Ibid* 33.

relationship that is also non-historical. The objective logic of a system of oppositions and correlations has no history because it has no subject in time. Ricœur quotes Lévi-Strauss, saying that linguistics presents us with a ‘dialectical and totalizing entity but one outside consciousness and will. Language, an unreflecting totalization, is human reason which has its reasons and of which man knows nothing’.<sup>46</sup> The ‘order of things’ becomes the only possibility (my borrowing of a title of Foucault), in the sense that for Lévi-Strauss the ultimate goal of the human sciences is to dissolve man, to reintegrate culture in nature, and life into its physicochemical conditions.<sup>47</sup>

Ricœur resists these totalising visions. He never denies a place for a systemic coding as a way of disciplining an excess of meaning. Without structure polysemy is the law. An isolated symbol has too many meanings.<sup>48</sup> The problem is how an objective comprehension which decodes can work with a hermeneutic comprehension which deciphers and which is directed towards a recovery of signifying intention.<sup>49</sup> Unlike totemic worlds, the Hebrew world respects founding events over nomenclatures and classifications, for the historicity of traditions, especially intellectual ones, gives a preference to contingency and event over system.<sup>50</sup> The limitations of the linguistic model and the ethnographic submodel show up in the fact that the synchronic point of view reaches at most the current social function of the myth, merely a skeleton whose abstract character is apparent. Says Ricœur:

An order posited as unconscious can never, to my mind, be more than a stage abstractly separated from an understanding of the self by itself ... If the decoding is not the objective stage of the deciphering and the latter an existential episode of the comprehension of self and of being, structural thought remains a thought which does not think itself ... [I]t is the function of hermeneutics to make the understanding of the other — and of his signs in various cultures — coincide with the understanding of the self and of being. Structural objectivity can then appear as an abstract moment — and validly abstract — of the appropriation and the recognition through which abstract reflection becomes concrete reflection. At the limit, this appropriation and this recognition would consist in a total recapitulation of all the signifying contents in a knowledge of the self and of being, as Hegel attempted — in a logic which would be that of contents, not that of syntaxes. It goes without saying that we can produce only fragments, known to be partial of this exegesis of self and of being. But structural comprehension is not less partial, in the sense that it does not proceed from a recapitulation of the signified but only reaches its ‘logical level by semantic impoverishment’.<sup>51</sup>

Ricœur’s criticism of structural anthropology and of ‘the linguistic turn’ in the humanities strikes at the heart of what concerns Nijman in her objections to postmodernism. In particular she deplores the preference for so-called intertextuality over intersubjectivity, along with such catchphrases (for her) as ‘binary oppositions’, ‘meaning is *relational*’, ‘etc etc’ (as she says) citing

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<sup>46</sup> Ibid 52 (citation omitted), quoting Claude Lévi-Strauss, *The Savage Mind* (1966 ed) 252 [trans of: *La Pensée sauvage* (first published 1962)].

<sup>47</sup> Ibid 54.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid 35, 38.

<sup>50</sup> Ibid 45–8.

<sup>51</sup> Ibid 51–2 (citation omitted), quoting Lévi-Strauss, above n 46, 105.

Kennedy and Koskenniemi.<sup>52</sup> Indeed Ricœur's challenge makes it all the clearer what Kennedy rejects in *International Legal Structures* (1987) in a passage quoted at length by Nijman.<sup>53</sup> The historical, contextual approach espoused by Nijman is the necessary precondition for the posing of questions of serious ethical responsibility within the profession of international lawyers. Kennedy denies the very same dimensions that Ricœur notices are excluded by structural anthropology in favour of an internal systemic exercise in decoding rhetorical devices, treating international law as a totemic system:

I do not analyze the relationship between international legal materials and their political and interpretative milieu. I am not concerned about the context within which arguments are made and doctrines developed. Nor do I concern myself with the meaning and distinctiveness of public international law doctrine. I focus rather upon the relationships among doctrines and arguments and upon their recurring rhetorical structure. I trace the references which one doctrine makes to another and the repetitions which characterize doctrinal materials widely dispersed through the field as a whole. It might be useful to think of this book as a look at public international law from the *inside*.<sup>54</sup>

So, there are legitimate philosophical ways out of the barren field of personal a-responsibility that critical international legal studies imposes upon the profession through its insistence upon a prison house of language. Nijman is implying that such a development as structuralism is the means whereby a generation of New Approaches young scholars gives verbal expression to its refusal to accept personal ethical responsibility as part of their professional task.<sup>55</sup> Whether this is due to the huge personal authority of the founders of critical international law scholarship would require a much more exhaustive contemporary historiography of the international law profession.

#### D *The Utility of Positivism*

Nijman's second criticism is, in broad terms, that critical international legal studies is reductionist in equating the language of international law with power, and in arguing that the law is manipulated for political ends and that it has no restraining normative content. There is a level at which such a claim about international law is purely factual or empirical. Whether state officials or courts use legal concepts for ulterior political (ie in some sense non-legal) ends can be observed, and the huge success of Koskenniemi's *From Apology to Utopia*<sup>56</sup> must rest in part upon the enormous erudition with which he expounds the international legal materials so familiar to the profession. The profession, ie the entire mainstream, must have recognised itself in his description. It is true that his argument is basically totemic; that the structure of international law,

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<sup>52</sup> Nijman, above n 3, 397 (emphasis in original).

<sup>53</sup> *Ibid* (fn 155).

<sup>54</sup> David Kennedy, *International Legal Structures* (1987) 7 (emphasis in original).

<sup>55</sup> New Approaches to International Law is a project founded in 1993 at the European Law Research Center at Harvard Law School. It's aim is to make connections between academics and researchers in international law who are 'rethinking the traditional approaches to their disciplines': David Kennedy and Chris Tennant, 'New Approaches to International Law: A Bibliography' (1994) 25 *Harvard International Law Journal* 417, 417.

<sup>56</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

understood synchronically as a normative framework without foundation, must swing aimlessly between the non-law of state power and the non-law of foundationless normative standards. However, he also describes his argument as a politics of international law; that the very indeterminacy of legal norms means that individual legal officials must accept personal responsibility for the choices they make.<sup>57</sup> Such a position is not far from phenomenological existentialism, and Koskenniemi's later equally successful historical work, already mentioned above, shows that he is not at all unwilling to take very seriously the intentions of international lawyers as authors.<sup>58</sup> He does not share Nijman's faith in the tradition of natural law, but in that respect he is in the same company as virtually the whole of the international law profession.

In contrast, my own critique of the politics of international law is purely diachronic. I am profoundly sympathetic to what I can understand of Foucault because I believe his genealogy of knowledge, following from Nietzsche, is a huge systemic advance in historiography. There is no doubt that for Foucault himself his vision is totalising, but that does not exclude others from treating it as a heuristic device substantially accurate as a description of the diplomatic reality with which all international lawyers have to work. To turn Nijman's moral argument against her, I have been trying for some time to argue that it is irresponsible of international lawyers not to engage with actual practice of states at a level that may be convincing for international historians and political scientists. Invoking a positivist, realist concept of historiography, I stress the need to start from a factual foundation which assures that the legal critic really does know what is happening.<sup>59</sup> This is an essential precondition for judgements about the quality of state conduct and, indeed, even for knowing whether and how far a state is complying with international law.

However, obviously any attempt to sharpen an analysis of state activities still presupposes a definition of the object of research. For instance, the archives are, so far as they are conscientiously preserved, still, at best, the self-reflection of the state, with all of the limitations of its own self-awareness. A hermeneutic of such state materials from any perspective, whether genealogical or other, has to engage the interpreter in an agonistic dialogue with the material. Here I believe the work of some postmodernist international relations specialists is essential foundational material also for the international law theorist of international legal personality. Nijman misses this dimension entirely in her study because of her excessive focus on the status and welfare of the individual, and because she accepts uncritically the vision of the collective life as a potentially hysterical and totalitarian mob, as presented by her Interbellum writers. She thereby overlooks the difficulty, appreciated so clearly by postmodernist theorists, that international disorder and anarchy — the problem for the very existence of international law — has been *constructed*, since the time of the celebrated but irrelevant *Treaty of*

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<sup>57</sup> Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4.

<sup>58</sup> Koskenniemi, *The Gentle Civilizer of Nations*, above n 2.

<sup>59</sup> This is the basis of all of my archival work: see, eg, Anthony Carty and Richard Smith, *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office (1932–1945)* (2000); but more recently and more briefly, Anthony Carty, 'Distance and Contemporaneity in Exploring the Practice of States: The British Archives in relation to the 1957 Oman and Muscat Incident' (2005) 9 *Singapore Year Book of International Law* 75.

*Westphalia*, around the transfer or projection of what James Der Derian has called self-alienation from within the Hobbesian state onto the international plane.<sup>60</sup> This dimension is missed entirely by those who see the primary problem as the oppression of the individual person by a frenzied collective *within which he or she lives*. This is why to give human rights the central focus in international law is to miss completely the very problem international law has to face, viz, how or why collective entities in international society construct themselves against one another. Inquiry into the nature of the *domestic-foreign* binary opposition is the starting point of James Der Derian and Michael Shapiro's *Postmodern Readings of World Politics*.<sup>61</sup>

## V CONCLUSION: ALIENATION AND INTERNATIONAL LAW

Arguably one contribution of Foucault, which has recently been developed by Michael Hardt and Antonio Negri in *Empire*,<sup>62</sup> has been to dissolve the sovereign Hobbesian state, which had projected alienation abroad, into a struggle of 'all against all', a negative globalisation. Nijman follows Foucault's argument that if power is not sovereign power, who then participates in the struggle for it? She presents an extremely lucid exposition of Foucault's answer, taken from *The Order of Things*,<sup>63</sup> only to juxtapose it later against the image of the capable, responsible being of Ricœur. I think she is correct that the battle, to borrow Foucault's metaphor, has to be fought at the level of ontology (not merely ethics) but in this context she offers an incomplete reading of Ricœur, who confronts the same ground as Foucault directly in such work as his commentaries on Edmund Husserl and Freud.<sup>64</sup> To continue, Nijman notes how for Foucault the struggle for power is supposed to be a struggle of all against all. There are no immediately given subjects of the struggle, for example the proletariat on the one hand and the bourgeoisie on the other. She quotes Foucault: 'We all fight each other. And there is always *within* each of us something that fights something else'.<sup>65</sup> So, ultimately the individual itself is a fragmented unit composed of 'sub-individuals', which is radically different from the coherent subject envisaged by modernism. She concludes with a very clear grasp of the

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<sup>60</sup> See generally Der Derian, above n 12.

<sup>61</sup> The subtitle of the volume edited by James Der Derian and Michael Shapiro (eds), *International/Intertextual Relations: Postmodern Readings of World Politics* (1989). See especially the chapters by Richard Ashley, 'Living on Borderlines: Man, Poststructuralism and War' and William Connolly, 'Identity and Difference in Global Politics'.

<sup>62</sup> Michael Hardt and Antonio Negri, *Empire* (2000).

<sup>63</sup> Michel Foucault, *The Order of Things: An Archeology of the Human Sciences* (1970 ed) [trans of: *Les mots et les choses: Une archéologie des sciences humaines* (first published 1966)].

<sup>64</sup> Paul Ricœur, *Husserl: An Analysis of His Phenomenology* (Edward Ballard and Lester Embree trans, 1967 ed) [trans of: *Husserl: Idées directrices pour une phénoménologie* (first published 1950)]; Paul Ricœur, *Freud and Philosophy: An Essay on Interpretation* (Denis Savage trans, 1970 ed) [trans of: *De l'interprétation: Essai sur Freud* (first published 1965)].

<sup>65</sup> Nijman, above n 3, 377 (emphasis added by Nijman).

implications of what Foucault is saying:

The bottom line is thus that Foucault considered the human body, ‘the locus of a dissociated Self,’ which ‘adopts the illusion of a substantial unity.’ And not only this, but we are also ... all destined to fight each other and ourselves and so, without the constituent subject, the world is ready to come apart.<sup>66</sup>

The seminal, if under-appreciated, international relations critique that builds on Foucault’s genealogy of knowledge is Der Derian’s work. After mentioning Nietzsche and Foucault, he continues: ‘Infused by their work, a genealogy of diplomacy is, in short, an interpretation of how the power of diplomacy, in the absence of sovereign power, constituted and was sustained by a discursive practice, the *diplomatic culture*’.<sup>67</sup> Der Derian devotes a whole chapter to the theme of alienation, taking as his starting point Nietzsche’s axiom ‘for us the law “each is furthest from himself” applies to all eternity — we are not “men of knowledge” with respect to ourselves’.<sup>68</sup>

Der Derian sets out a standard psychiatric definition of alienation as ‘disturbance of the whole personality, eg failure of identity formation, adoption of false roles under external pressure, alienation from one’s true self or from one’s personal or cultural background’. At the same point he notes the *Oxford English Dictionary* introduces the interpersonal dimension of alienation, as: ‘To convert into an alien or stranger ... to turn away in feelings or affection, to make averse or hostile, or unwelcome’.<sup>69</sup> Alienation is a word that designates separation, whether from self or from the other, and a phenomenology of the alienation that undoubtedly exists among states is the true and ultimate starting point of a study of international legal personality. The question is whether there is a way to mediate this alienation. Der Derian argues that such has been the function of diplomacy, recognising and leaving unresolved the permanency of alienation as a diffuse human experience. Anti-diplomacy is described by Der Derian as any ideology, whether the French Revolution, fascism or Bolshevism (or, for that matter, contemporary liberal market economy) that claims to be able to put in place a perfect philosophy that will remove, rather than merely mediate, the phenomenon of alienation, not recognising it as an ineradicable feature of the human condition.<sup>70</sup>

It is an anti-diplomatic world in which we find ourselves at present, with the Western self-styled liberal democracies waging an at times violent struggle to impose their vision of the world on the whole of humanity, in the sense that they expect thereby to banish the sense of alienation completely from human experience. Der Derian, although writing in 1987, provides an accurate description of the consequences of the desire to make human rights the ultimate goal of international law and society. The strength and the weakness of Nijman’s work is that she shows so graphically in her Interbellum chapter how the whole contemporary edifice of international law, the trend towards a so-called global constitutionalisation and the primacy of individual human rights, is based upon a

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<sup>66</sup> Ibid 377–8.

<sup>67</sup> Der Derian, above n 12, 4 (emphasis in original).

<sup>68</sup> Ibid 8.

<sup>69</sup> Ibid 13.

<sup>70</sup> Ibid. See especially chs 7 and 8.

demonisation of collective and community life in favour of an absolutisation of the autonomy of the individual person, whose sacral character lies precisely in the fact that it remains completely immune from scrutiny. This is how international law *misunderstands itself and thereby remains alienated from itself* at present.

Nijman does recognise a deficiency here. With reference to Brunner she sees the possibility of an increase in individualism to the point of dissolution of community which, if it persists, will mean ‘only coercion can finally hold the social order together’.<sup>71</sup> Hence there is need for a philosophy, such as Brunner’s doctrine of ‘communal personalism’, that is directly rooted in a Christian tradition and culture.<sup>72</sup> Der Derian tries explicitly to avoid the religious origins of the language of alienation in the idea of man’s separation from God.<sup>73</sup> I think the main strength of his work, as of this second strain of postmodernism, is diagnostic or heuristic. The following remarks accurately describe the present crisis of an international society confronted by an anti-diplomacy of liberal democracy (which I equate with his term ‘revolutionary’ in the quotation which follows) that hopes to remove the phenomenon of alienation from the rest of humanity, without recognising and negotiating its presence within itself:

the systemic hermeneutic of alienation ... might help explain the link between *intra* and *inter*-estrangement, that is, the dynamic of how the conduct of diplomacy under revolutionary regimes shifts from the mediation of estranged states to the mediation of the universal alienation of humanity.<sup>74</sup>

Instead, one needs to recover and guard a measure of, as it were, healthy estrangement to reduce the tension of the present crisis. International legal personality must somehow be reconceived so as to reflect an acceptable level of mutual distance and unknowing. This is where the concept must be systematically related to the contemporary philosophical debates about the nature and consequences of mutual recognition and misrecognition. This is known to have begun with Hegel’s famous *master–slave death struggle* and it has still to find an end.<sup>75</sup> Here it is a story to be continued.

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<sup>71</sup> Nijman, above n 3, 459.

<sup>72</sup> *Ibid* 459–60.

<sup>73</sup> Der Derian, above n 12, 15.

<sup>74</sup> *Ibid* 26.

<sup>75</sup> Paul Ricœur has also expressed himself on this matter in the last work before his death this year: see Paul Ricœur, *Parcours de la reconnaissance* (2004).