

# **Participants in the International Legal System**

Multiple perspectives on non-state actors  
in international law

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First published 2011  
by Routledge  
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada  
by Routledge  
711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

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*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*

Participants in the international legal system: multiple perspectives on non-state actors in international law/edited by Jean d'Aspremont.

p. cm.

1. Non-state actors (International relations) 2. Non-governmental organizations. 3. Persons (International law) 4. International law.

I. Aspremont, Jean d'.

KZ3925.P37 2011

341.2-dc22

2010051270

ISBN: 978-0-415-56514-1 (hbk)

ISBN: 978-0-203-81683-7 (ebk)

Typeset in Baskerville  
by Wearset Ltd, Boldon, Tyne and Wear



Printed and bound in Great Britain by  
CPI Antony Rowe, Chippenham, Wiltshire

## 6 Non-state actors in French legal scholarship

### International legal personality in question

*Nicolas Leroux*

There is no definition of non-state actors in French doctrine; the very term 'non-state actors' is seldom used by French authors, if at all.<sup>1</sup> The concept of non-state actors will thus be understood widely in this contribution, covering all entities which are active on the international stage but do not qualify as states under international law. Thus, the concept will cover individuals and multinational corporations, non-governmental organizations and the Holy See. Because it is virtually impossible to cover the entire body of relevant French literature, this contribution will endeavour to give only a brief account of the historical evolution (Section 1) and current state (Section 2) of French legal doctrine on the issue of non-state actors. It will then try to identify the main problems associated with the current French approach (Section 3) and to outline the ways in which the French tradition of positivism could be reconciled with the emergence of non-state actors on the international stage (Section 4).

A caveat as to what 'French' doctrine means might be in order. International law may be the last branch of human knowledge in which the French language retains the unique role it once had in the glorious days of French dominance, when Napoléon could easily dismiss English as the language of 'une nation de boutiquiers'. The days of universal French conversation are long gone in most areas of science, both human and natural, but a fair command, or at least understanding, of French is arguably still required to be considered a good international lawyer.

This may warm the heart of native speakers but it does not make the task of discussing the French perspective on non-state actors an easy one. A fair, although dwindling, number of doctrinal writings on international law has been and continues to be produced in French by authors hailing from various regions of the world and legal traditions.<sup>2</sup> Studying the perspective of such a diverse group of authors would not make much sense. Rather than looking at the French-language perspective on non-state actors, this contribution will focus on the French tradition of international law – and it is not without a sense of guilt that such a French tradition will be extended to French-speaking Belgian, Swiss and African authors, to whom 'French' will refer throughout this contribution.<sup>3</sup>

The internal consistency of the 'French' tradition thus defined should not be overstated; nor should the differences between the French and other traditions be exaggerated. The 'French', 'German' and 'Italian' traditions of international law offer very similar insights on the status and role of non-state actors on the international scene.<sup>4</sup> Even the views of authors from the British and North American traditions started diverging from those of continental European lawyers only recently.<sup>5</sup> Yet it is interesting to focus specifically on writings and findings of the French tradition, if only because the large body of relevant doctrine available provides an interesting and compelling narrative on how, and to what extent, a positivist and legalistic approach to international law can address (or sometimes fail to address) the emergence of non-state actors on the international stage.

## **1 Historical evolution of non-state actors in French literature**

The current approach of French international lawyers can hardly be understood without taking a brief look at how and when their predecessors addressed the issue of non-state actors, when various entities started to gain access to the international stage and interfere with the business of international relations. Somewhat surprisingly, the first identifiable French authors did not believe that international law was a matter for states only. A variety of individual sovereigns or quasi-sovereigns were generally considered by eighteenth-century lawyers to form part and parcel of the community to which international law applied, that is, to have international personality. Subtle discussions were conducted between competing authors as to whether the spouses and relatives of sovereigns also qualified as 'international persons', the general consensus being that only individual sovereigns did qualify. Remnants of such conceptions can be found late into the twentieth century in connection with the Pope, who was still considered an 'international person' *in personam* by leading writer Paul Fauchille as late as 1923.<sup>6</sup>

Yet, while the distinction may not have been apparent to some authors at the time, the international personality of individual sovereigns – with the possible exception of the Pope – was a function of their sovereignty over a state rather than a dignity bestowed upon them by virtue of their personal character or virtues. When the kings and queens of Europe lost effective power during the course of the nineteenth century, save in a few small principalities, international lawyers increasingly realized that such individuals, whether monarchs or presidents, only participated in international relations as agents of the states concerned.<sup>7</sup> They started to focus on the underlying reality of states, which were rapidly viewed as the sole actors and 'persons' worthy of study for international lawyers.

The turn of the twentieth century saw a fixation with the state in French international legal doctrine. Such fixation with the state went both ways.

While many French international lawyers hailed the state as the one and only subject of international law, equally extremist views about the individual as the only subject of international law were being developed by a minority of scholars of the so-called 'Realist' school of thought (*école réaliste*). Advocates of such theories, including Georges Scelle and Nicolas Politis, focused on the individual as the only entity (*intelligence*) capable of understanding, and complying with, legal norms.<sup>8</sup> In this conception, individuals were, therefore, the only recipients of international rules and the only actors and subjects of international law.

In the meantime, other French scholars, along with Italian and German authors such as Anzilotti and Triepel, focused on the state and effectively hailed it as the only entity worthy of study by international lawyers.<sup>9</sup> Mainstream treaties and writings of the period often did not reflect any developments on non-state actors, with the exception of the Church and, sometimes, the Order of Malta.<sup>10</sup> When non-state actors were included in treaties and writings, they were usually presented as sub- or deficient state forms and the purpose of studying them was essentially to assess how and to what extent they differed from states as these remained the only valid international entities. Only if the non-state actor concerned was deemed sufficiently similar to a state, could it be anointed a 'subject of international law'.<sup>11</sup> The only exception made was to accommodate the status of individuals, although not all scholars agreed. The fact that individuals could derive rights and obligations from international treaties, as stated by the Permanent Court of International Justice in its opinion in the *Danzig* case,<sup>12</sup> was often met with disbelief by scholars used to the absolute pre-eminence of states in international law,<sup>13</sup> even though most of them eventually admitted that individuals could be subjects of international law, at least 'exceptionally'.<sup>14</sup>

The emergence of international commissions and international organizations posed a fresh challenge to the traditionalist views of French scholars. While international organizations were first addressed as mere sub- or super-states, French literature could not help but start discussing in earnest the status of these new bodies between the two World Wars.<sup>15</sup> The 1949 Advisory Opinion by the International Court of Justice in the *Reparation* case settled the issue and forced international lawyers to accept that international organizations enjoyed at least a 'measure' of 'international personality' alongside states,<sup>16</sup> thereby ending the long-running confusion between statehood and international personality.<sup>17</sup> The admission of international organizations also boosted the distinction between original and derivative international persons ('*sujet originel*' and '*sujet dérivé*' or 'primary' and 'secondary' subjects) in French literature – a distinction that arguably is a significant obstacle to a proper understanding of the role of non-state actors by French scholars today.<sup>18</sup>

It is thus difficult to identify many trends within this disorderly collection of thoughts, definitions and sometimes prejudices, that forms the

historical reflections of French international legal doctrine on the role and status of non-state actors. Different authors used various definitions of the same concepts, resulting, unsurprisingly, in diverging views of the status of non-state actors in international law. Yet most French scholars seemed to at least agree on the methodology.<sup>19</sup> If non-state actors were studied by international lawyers, the sole purpose of such a study was to establish whether those entities were *sujets de droit international*, i.e. whether they enjoyed international personality, whatever that meant to each particular author.<sup>20</sup> And, by the end of the 1960s, all French scholars seemed to agree that states, international organizations and individuals had ‘some measure’ of international personality, although what this meant in practice remained elusive.<sup>21</sup>

## **2 Non-state actors in current French literature: the quest for international personality**

The emergence of multinational corporations and non-governmental organizations on the international stage did not affect the prevailing views in French international legal literature about how to deal with non-state actors. French scholars viewed, and mostly continue to view, newcomers through the prism of international personality, as they had done in the past for individuals and international organizations.<sup>22</sup>

This has immediate consequences for anyone attempting to study the current French perspective on non-state actors. Save for a few brave attempts at deviating from the general view,<sup>23</sup> *the so-called French perspective on non-state actors is basically the French perspective on international personality.*<sup>24</sup> As recently as 2003, when the *Société française pour le droit international* decided to address the status of non-state actors in international law, the title of the conference was ‘le sujet en droit international’ (‘subjects of international law’).<sup>25</sup>

There is nothing inherently wrong with addressing the issue of non-state actors in international law through the prism of international personality, although it makes it difficult for lawyers to study ‘less’ legal realities such as the normative influence of non-state actors.<sup>26</sup> Individual personality may indeed be the only way to address the issue of non-state actors from the perspective of legal positivism, which is currently prevalent among French international lawyers.<sup>27</sup> The problem with current French scholarship on non-state actors lies not with the idea of international personality itself but rather, it is submitted, with how the idea of international personality is currently understood by French scholars. Using the concept of international personality is difficult because it has no accepted definition in international law. International lawyers approach it on the basis of assumptions and prejudices which vary according to their basic views of international law, including the symbolic weight they attach to states in the international legal order.<sup>28</sup>

The very definition of international personality used in French literature varies depending on each lawyer's personal inclination towards the 'sanctity' of states in international law. Under the so-called 'restrictive' conception of international personality, international persons are those who can sign treaties, establish diplomatic relations with states and participate in the mechanism of international responsibility *de plano*.<sup>29</sup> That restrictive definition of international personality is modelled on the state and can be traced back to ancient notions described in Section 1 above, by which an entity could be described as 'international' (and thus become worthy of study by international lawyers) if and when it began to look or act like a state.<sup>30</sup>

Recent French literature tends to reject the restrictive definition of international personality as outdated and to favour a so-called 'extensive' definition.<sup>31</sup> Under the extensive definition, international persons are those who derive rights and obligations from international law.<sup>32</sup> Most scholars find such a definition problematic, however, because it is so extensive that it includes virtually every single legal entity known to man. Individuals, and by extension other domestic legal entities, were found to derive rights and obligations from some international instruments by the Permanent Court of International Justice as early as 1928.<sup>33</sup> Under the extensive definition of international personality *stricto sensu*, states, international organizations, individuals, corporations and non-governmental organizations can thus be viewed as international persons. In other words, all entities recognized as 'persons' by either international law (states, international organizations) or domestic law (individuals, corporations, NGOs) qualify as international persons.

This expansive definition does not sound quite right to most French scholars, maybe in part because 'international' dignity can hardly be bestowed so easily to entities as crude as domestic corporations and associations.<sup>34</sup> French literature contains many additional criteria used to restrict the scope of international personality further, based on the extensive definition.<sup>35</sup> The most common criterion is whether an entity can submit claims to international courts and tribunals on the basis of the rights it derives from international law or even simply to address such claims directly to states ('*capacité active*').<sup>36</sup> Some scholars disagree; they believe that *capacité active* is only meant to distinguish between otherwise existing international persons.<sup>37</sup> Others yet submit that international persons are those who have rights and obligations under international law *and* can create binding norms of international law, i.e. mostly treaties, and/or that the existence of their personality depends on the 'function' assigned to them by international law.<sup>38</sup> Irrespective of the definition and criteria they use, many authors also seem to agree that entities such as the Holy See and the International Committee of the Red Cross (ICRC), and sometimes the Order of Malta, are international persons, whether or not they conform with the criteria set out in each author's definition of international personality.<sup>39</sup>

It is agonizingly difficult to make sense of such a diverse and often conflicting collection of definitions, assumptions and sometimes prejudices (as in the case of the ICRC). Yet present-day French scholars seem to at least agree on the methodology used to identify international persons, irrespective of the particular criteria they use. Identifying an international person is an a posteriori construction.<sup>40</sup> French scholars first assess whether the entity concerned meets predefined criteria corresponding to the definition of international personality, e.g. whether it derives rights and obligations from international law and has the capacity to file claims under international law and, if yes, they declare it an international person. However, under that universal notion of international personality in French literature, no conclusion whatsoever can be derived from the fact that ‘international persons’ are international persons.

### **3 Problems associated with the traditional French approach to international personality**

The French view on international personality thus tends to be rather circular.<sup>41</sup> In practice it works as follows: (i) international persons are those who can derive rights and obligations from international law; (ii) individuals can derive rights and obligations from international law; (iii) thus, individuals are international persons; (iv) because individuals are international persons ... they can derive rights and obligations from international law. It is unclear how such a circular and ultimately purely doctrinal reasoning can be useful to international lawyers.<sup>42</sup> A few scholars have identified this circularity but they hold the view that the concept of international personality is still useful at least as a phenomenological tool – i.e. to describe the reality of international law.<sup>43</sup> As such, the notion of international personality used in French literature should be innocuous.

We submit it is not. The words ‘international personality’ carry significant symbolic weight.<sup>44</sup> Bestowing such dignity upon certain domestic entities, especially corporate bodies, effectively conveys the idea that such entities are somehow intrinsically different from garden-variety entities, which are merely the subjects of domestic law, such as common corporations and charities.<sup>45</sup> It follows that the use of international personality in French literature often brings about more confusion than coherence in describing the reality of international relations.

An example of this confusion is the case of the ICRC, which is often classified as an ‘international person’, because it derives certain rights from the 1949 Geneva Convention and/or from its ‘headquarters’ agreement with Switzerland.<sup>46</sup> Yet individuals and other corporate bodies also derive myriad rights from innumerable international treaties and conventions and are not classified as international persons by the same authors. What is more, a number of domestic organizations such as the International Federation of Red Cross and Red Crescent Societies or the Global

Fund to Fight AIDS, Tuberculosis and Malaria derive similar or even more extraordinary rights from agreements with Switzerland and are still not classified as international persons.<sup>47</sup> One cannot help but think that the insistence on the ICRC's international personality derives less from the nature of the rights it enjoys under the Geneva Conventions and more from the actual importance and aura surrounding the ICRC on the international stage.

The other problem associated with the traditional French approach to international personality is that it usually ignores the fact that corporations, associations and, arguably, individuals initially derive their legal existence from a domestic legal order. According to the majority of French literature, international personality can only be either 'original' or 'derivative' (*'originelle'* or *'dérivée'*).<sup>48</sup> The distinction between original and derivative international legal personality can be traced back to discussions on the emergence of international organizations.<sup>49</sup> As will be explained below, the fixation on derivative international personality has prevented French scholars from considering the fact that legal personality was already bestowed upon certain entities by other legal orders – and the legal consequences that could be drawn from the pre-existence of such legal personality.

#### 4 The way forward: understanding 'international' personality?

Circular reasoning, random, or at least inconsistent, criteria and a fixation with 'derivative' personality, the three ills of French scholarship on international personality and non-state actors, have proven frustrating or even depressing to some authors.<sup>50</sup> This need not be the case. A coherent theory of international personality and of the status of non-state actors in international law can be developed in line with the positivist views generally held by French scholars, drawing in part on insights of private international law and legal pluralism theory.

The historical evolution of the French approach to non-state actors and the historical fixation with the role of the state, largely explain the difficulties faced by French scholars in identifying the real nature of international personality. French scholars were first confronted by non-state actors in the form of international commissions and international organizations.<sup>51</sup> Together with the International Court of Justice, they rightly concluded that such bizarre entities could only derive their legal personality from the collective will of their member states – hence the conclusion that international organizations, and by extension all non-state actors, were 'derivative' subjects of international law. It was left unclear, however, whether such personality derived from the will of *all* states, acting collectively as international law-makers, or rather *their* member states, acting as participants in the international legal order by creating a new corporate

body. Confusion set in, because the rule of international law that made it possible for states to create new international persons was of course set out by states collectively, in their capacity as international law-makers. Confusion was thus created between (i) the fact that states accepted that international organizations could be created and granted legal personality and (ii) the fact that individual states actually created and granted legal personality to certain organizations. It is the submission of the present contribution that the 'derivative' character of the legal personality of international organizations refers not to the former but rather to the latter. In other words, where states group to form new entities, the legal personality of such entities derives from that of their member states. International organizations are 'derivative' international persons because they are made up of states, not because they obtain legal personality under a rule of international law established by states generally.

Other non-state actors are not 'derivative' international persons because they are not made up of states: individuals exist as a matter of domestic or natural law, and domestic corporate bodies such as NGOs and corporations derive their personality from that of their members, which are usually domestic entities. In other words, domestic corporate bodies derive their legal personality, it is submitted, not from the collective will of states, but rather from the collective will of the private participants which created the entity under the rules of a domestic legal order. The personality of domestic non-state actors need not be recreated under international law – rather, we submit it needs to be *recognized* by international law.

In other words, where two or more states sign a treaty granting rights to certain corporations or NGOs, they do not create new corporate bodies. They allocate rights to entities already deriving legal personality from another legal order, i.e. a domestic legal order. It is submitted that states can allocate rights to such entities because there is a rule of international law which provides for the recognition of the legal personality of entities created under domestic laws. Under such a rule, international law (i) acknowledges that legal entities exist as a matter of domestic law (or arguably as a matter of natural law, as far as individuals are concerned), (ii) decides to let such personality produce effects in the international legal order and (iii) leaves it to states (acting as law-makers, through treaties, or participants, through contracts with domestic entities) to arbitrarily allocate rights and obligations under international law to such entities. This could be, or at least so it is proposed, the correct interpretation of the Permanent Court of International Justice's findings in the 1928 *Jurisdiction of the Courts of Danzig* case.<sup>52</sup>

It follows that NGOs, corporations and individuals are neither original nor 'derivative' subjects of international law. They are effectively 'foreigners' in international law, in the sense that they were created in the framework of another legal order. Just like French law recognizes the legal personality of entities created under Italian or Mexican law, international

law recognizes the legal personality of entities created under French, Italian or Mexican law. Conversely, international organizations are created within the framework of the international legal order – like states, they are ‘nationals’ of international law, in the sense that they derive legal personality from international law. Such a legal personality can then be recognized by domestic legal orders, which allow the entities concerned to hold rights and obligations under domestic law.<sup>53</sup> A distinction can thus be made between ‘international’ persons, being states and other entities whose legal personality was granted by international law, and domestic persons, being individuals and other entities deriving their legal personality from domestic law.

The conception described in this section may help to address a number of the difficulties associated with traditional French scholarship on international personality and non-state actors. Standard categories of international persons in French literature are states, international organizations, individuals and, sometimes, NGOs and transnational corporations.<sup>54</sup> It is submitted that relevant categories of subjects of international law may rather be described, from a positivist perspective, as (i) states, (ii) international organizations and (iii) ‘external’ subjects whose personality has been recognized by international law. The latter can be granted rights and obligations under international law not because they are international persons, but because they are domestic persons. In fact, in order to be granted rights under international law, non-state actors other than international organizations must first enjoy legal personality under a domestic legal order.<sup>55</sup>

Such conceptions may also help in clarifying the very concept of international personality. Individuals and domestic corporate entities are probably not ‘international’ persons, in the sense that they are not created under international law. They can have rights and obligations under international law simply because their personality is recognized by the international legal order. Yet, irrespective of which rights these domestic entities are granted under international law, and irrespective of whether they have the procedural means to claim such rights under international law, they never become original ‘international’ persons because they are never ‘recreated’ under international law. Specifically, the notion of (international) legal personality may not be dependent upon whether entities have certain procedural rights – what some French scholars call ‘*capacité active*’.<sup>56</sup> Non-state actors, other than international organizations, are simply domestic persons which enjoy rights under international law. Some enjoy ‘*capacité active*’ in connection with such rights, but others do not; this is unlikely to affect the existence of their legal personality, which they derive from the legal order under which they were created, i.e. domestic law.

The fact that non-state actors, except international organizations, are not indigenous legal persons in international law may also account for the

lack of clear sets of rights and obligations associated with their so-called international ‘personality’. International law does not provide for predefined sets of rights and obligations to be granted to whole categories of non-state actors (e.g. individuals and corporations), although it does allocate rights and obligations to sub-categories of non-state actors (e.g. individual investors under a bilateral investment treaty or corporations incorporated in certain jurisdictions under regional human rights treaties) and sometimes even to individual non-state actors (e.g. the ICRC under the 1949 Geneva Convention or the International Olympic Committee under the 1981 Nairobi Convention on the Protection of the Olympic Symbol).

The approach described in this section does not necessarily reflect current French scholarship on non-state actors and international legal personality. It needs further discussion, if only because it draws heavily on the tradition of legal pluralism, although this dimension cannot be addressed in detail in the context of this contribution.<sup>57</sup> It is submitted, however, that it can provide a basis for taking a fresh look at the issue of non-state actors while keeping in line with the mainstream tradition of positivism in French international legal literature and allowing French scholars to delve into other issues associated with non-state actors and international law, including for example their role in international judicial decision-making or the emergence of global public–private partnerships between states and civil society – issues that are rarely, if ever, touched upon in contemporary French literature.<sup>58</sup>

## Notes

- 1 The expression ‘actor’ (‘acteur’) or ‘non-state actor’ (‘acteur non-étatique’) is nowhere to be found in the reference dictionary of international legal terms edited by Jean Salmon: J. Salmon, *Dictionnaire de droit international public*, Brussels: Bruylant, 2001. See, however, R. Ben Achour and Slim Laghmani (eds), *Acteurs non étatiques et droit international. Actes de la VII<sup>e</sup> Rencontre internationale de la Faculté des sciences juridiques, politiques et sociales de Tunis*, Paris: Pédone, 2007.
- 2 On non-state actors generally, see e.g. M. Siotto Pinor, ‘Les sujets du droit international autres que les Etats’, *Recueil des cours* (1932) vol. 41, p. 251 and D.P. O’Connell, ‘La personnalité en droit international’, *Revue générale de droit international public* (1963), vol. 65, p. 5.
- 3 French-Canadian authors usually tend to be closer to the wider North American tradition, at least on the issue of non-state actors – see e.g. the views expressed by F. Crépeau, ‘Acteur de la mondialisation, l’Etat en transition’, in F. Crépeau (ed.), *Mondialisation des échanges et fonction de l’Etat*, Brussels: Bruylant, 1997, p. 1.
- 4 See e.g. R. Portmann, ‘Legal Personality in International Law’, Doctoral Dissertation, University of St-Gallen, 2009; M. Hempel, *Die Völkerrechtssubjektivität internationaler nichtstaatlicher Organisationen*, Berlin: Duncker & Humboldt, 1999; W. Hummer, ‘Internationale nichtstaatliche Organisationen im Zeitalter der Globalisierung: Abgrenzung Handlungsbefugnisse, Rechtsnatur’, in K. Dicke (ed.), *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internation-*

*alen System*, Heidelberg: Müller, 2000, p. 45; J.J. Lador-Lederer, 'Nichtstaatliche Organisationen und die Frage der Erweiterung des Kreises der Völkerrechtssubjekte', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1963), vol. 23, 657. See also A. Cassese and P. Gaeta, *Diritto internazionale*, Bologna, il Mulino, 2006, pp. 177–95.

- 5 See e.g. P.K. Menon, 'The Subjects of Modern International Law', *Hague Yearbook of International Law*, vol. 3, The Hague: Martinus Nijhoff, 1990, p. 30 and D.P. O'Connell, 'La personnalité en droit international', *Revue générale de droit international public* (1963), vol. 65, p. 5.
- 6 Fauchille provides for three sub-headings in his section on 'international persons' – States, Man and Pope – although he admits that the latter category is somewhat illogical. See P. Fauchille, *Traité de droit international public*, Paris: Rousseau, 1923, pp. VIII and 209–10: 'Solution illogique, peut-être, mais solution commandée par l'état actuel du monde chrétien'. On the international personality of the Holy See, see below at Section 2.
- 7 See Fauchille, *ibid.*, p. 210 :

les monarques et les présidents de la République, les ambassadeurs et les ministres plénipotentiaires ne sont que des représentants des Etats; s'ils sont soumis à certains règles du droit international, c'est parce qu'ils constituent les organes des Etats, qui, eux, ont une personnalité du droit des gens.

See also the comment by Prodir-Fodéré in E. Vattel, *Le droit des gens ou principes de la loi naturelle*, Nouvelle édition par P. Prodir-Fodéré, Paris: Guillaumin, 1863, p. 4: 'le bon sens des peuples a fait prévaloir cette vérité proclamée par [Vattel] que le rang attribué aux souverains appartient en réalité à la nation qu'ils représentent'.

- 8 See G. Scelle, *Précis de droit des gens: Premier fascicule*, Paris: Sirey, 1932, new edition Paris: CNRS, 1984, pp. 1–69. See also the summary explanation and rebuke provided by C. Rousseau, *Droit international public*, Paris: Sirey, 1974, pp. 9–10.
- 9 See e.g. R. Redslob, *Les principes du droit des gens moderne*, Paris, Rousseau, 1937, pp. 208–10 and M. Cosnard, 'Rapport introductif', in *Le sujet en droit international: Colloque du Mans de la Société française pour le droit international*, Paris: Pédone, 2003, p. 19.
- 10 See e.g. C. Dupuis, 'Règles du droit de la paix', *Recueil des cours* (1930), vol. 52, p. 5. On the so-called exception of the Church, see e.g. A. Chrétien, *Principes de droit international public*, Paris: Chevalier-Marescq, 1893, para. 77.
- 11 See Cosnard (2003), *supra* Note 9, pp. 32–5: speaking of '[I]a référence obligée à l'Etat, et la recherche d'éléments qui se rapprochent de son statut pour justifier la qualité de sujet d'autres entités'. See e.g. the discussion of nomadic tribes in Fauchille (1923), *supra* Note 6, pp. 212–13.
- 12 *Jurisdiction of the Courts of Danzig*, P.C.I.J. Series B, No. 15, Advisory Opinion of 3 March 1928, pp. 17–18.
- 13 See in particular H. Rolin, 'Les principes du droit international public', *Recueil des cours* (1950), vol. 77, p. 322 and Redslob (1937), *supra* Note 9, p. 209: 'on a beau chercher des ajustements dans le sens d'une connexion entre l'individu avec le droit des gens, on n'aboutit qu'à des abstractions fuyantes'.
- 14 See e.g. M. Bourquin, 'Règles générales du droit de la paix', *Recueil des cours* (1931), vol. 35, pp. 40–7.
- 15 Fauchille denied that international commissions were international persons but admitted that they had 'their own life' ('leur vie propre') – Fauchille (1923), *supra* Note 6, p. 214.

- 16 *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, p. 174. See P. Weil, 'Le droit international en quête de son identité. Cours général de droit international public', *Recueil des cours* (1992), vol. 237, pp. 101–4: 'comment ne pas se souvenir de l'ardeur des controverses des années quarante et cinquante et du coup de tonnerre qu'a représenté l'avis de la Cour ...?'
- 17 See P.-M. Dupuy, 'L'unité de l'ordre juridique international: Cours général de droit international public', *Recueil des Cours* (2002), vol. 297, pp. 107–8. See also the remarks by Fauchille (1923), *supra* Note 6, p. 209.
- 18 See below at Sections 3 and 4.
- 19 With the exception of Georges Scelle and his followers – see above.
- 20 Most authors followed the concepts of international subjectivity ('subjectivité internationale') and international personality ('personnalité internationale').
- 21 See H. Ruiz-Fabri, 'Les catégories de sujets du droit international', in Société française pour le droit international (ed.), *Le sujet en droit international: Colloque du Mans de la Société française pour le droit international*, Paris: Pédone, 2003, p. 55. For examples of standard approaches of the issue, see e.g. the structure of Rousseau's 1974 treatise in Rousseau (1974), *supra* Note 8, p. 10.
- 22 See e.g. N. Quoc Dinh, P. Dailler and A. Pellet, *Droit international public*, Paris, LGDJ, 2009, pp. 716–19. See also P. Vellas, 'Les entreprises multinationales et les organisations non gouvernementales, sujets de droit international', in *Mélanges offerts à Paul Couzinet*, Toulouse: Université de Toulouse, 1974, p. 749 and G. Fedida, *Les ONG humanitaires d'urgence, nouveaux sujets du droit international?* Paris: Thèse Université de Paris X, 1998.
- 23 See e.g. discussions on the influence of non-governmental organizations on international decision-making in M. Bettati and P.-M. Dupuy (eds), *Les ONG et le droit international*, Paris: Economica, 1986 and G. Breton-Le Goff, *L'influence des organisations non gouvernementales sur la négociation de quelques instruments internationaux*, Brussels: Bruylant, and Montreal: Yvon Blais, 2001, although the intellectual foundations of the latter book may be traced back to the French-speaking North American tradition mentioned above at Note 3. See also the various topics addressed in H. Gherari and S. Szurek (eds), *L'émergence de la société civile internationale: Vers la privatisation du droit international?* Paris: Pédone, 2003, including consultative status with international organizations and non-state actors' participation in international courts and tribunals. On these and other topics, see also N. Leroux, *La condition juridique des organisations non gouvernementales internationales*, Brussels: Bruylant, and Montreal: Yvon Blais, 2009.
- 24 See P.-M. Dupuy, *Droit international public*, Paris: Dalloz, 2008, p. 29, making a distinction between
- la façon technique dont se pose la question de la dévolution de la qualité de sujet du droit international [et] la façon dont on parle des acteurs des relations internationales, dans un contexte à la fois politique et sociologique beaucoup plus large.
- 25 Société française pour le droit international (ed.), *Le sujet en droit international: Colloque du Mans de la Société française pour le droit international*, Paris: Pédone, 2003.
- 26 See Cosnard (2003), *supra* Note 9.
- 27 See, however, the contribution of Jean d'Aspremont on international legal positivism in this volume which does not put the emphasis on international legal personality but on the role of non-state actors in connection to the meaning and content of secondary rules of recognition.

- 28 See M. Cosnard, 'Avant-Propos', in Société française pour le droit international (ed.), *Le sujet en droit international: Colloque du Mans de la Société française pour le droit international*, Paris: Pédone, 2003, p. 4, noting that speakers at the Conference on the issue of international personality were faced with 'les présupposés inévitables dont est victime quiconque se propose de construire une présentation raisonnée du sujet en droit international'. See also below, Note 49.
- 29 See e.g. C. Dominicé, 'La personnalité juridique dans le système du droit des gens', in Jerzy Makarczyk (ed.), *Essays in Honour of Krzysztof Skubiszewski*, The Hague, Kluwer Law International, 1996, p. 147, and G. Distefano, 'Observations éparses sur les caractères de la subjectivité juridique internationale', *Annuaire français de droit international* (2007), vol. 53, p. 117.
- 30 See above at Note 16.
- 31 See Distefano (2007), *supra* Note 29, p. 106.
- 32 See *ibid.* and Salmon (2001), *supra* Note 1, p. 820, defining international personality as 'aptitude à être titulaire de droit et tenu d'obligations selon le droit international'. See also P. Reuter, *Droit international public*, Paris: Presses universitaires de France, 1983, p. 175.
- 33 See above at Note 12 and Note 12 itself.
- 34 See Ruiz-Fabri (2003), *supra* Note 21, p. 70.
- 35 See the lists established by Dupuy (2002), *supra* Note 17, pp. 109–10 and Ruiz-Fabri (2003), *supra* Note 21, p. 63. See also A.-L. Vaurs-Chaumette, *Les sujets du droit international pénal: vers une nouvelle définition de la personnalité juridique internationale?* Paris: Pédone, 2009, pp. 2–3.
- 36 See e.g. Vaurs-Chaumette, *ibid.*, pp. 480–3, although the author's conclusions are limited to the area of international criminal law. See also P. Daillier and A. Pellet, *Droit international public*, Paris: LGDJ (2008) p. 718 and Cosnard (2003), *supra* Note 9, pp. 41–50.
- 37 See e.g. J. Combacau and S. Sur, *Droit international public*, Paris: Montchrestien, 2001, pp. 311–17.
- 38 See Cosnard (2003), *supra* Note 9, pp. 50–3 and Weil (1992), *supra* Note 16, p. 122. See also the germane notion of 'service public international' in C. Chaumont, 'Perspectives d'une théorie du Service public à l'usage du droit international contemporain', in *La technique et les principes du droit public: Etudes en l'honneur de Georges Scelle*, vol. 1, Paris: LDGJ, 1950, p. 124, which was used by some as a criteria for international personality: F. Latty, *Le Comité international olympique et le droit international*, Paris: Montchrestien, 2001.
- 39 See below at Note 51.
- 40 See Cosnard (2003), *supra* Note 9, p. 14.
- 41 See Cosnard (2003), *supra* Note 9, generally and in particular pp. 14, 39, 40 and 50.
- 42 See the blunt and enlightening comments by P.M. Eisemann, 'Débats' in Société française pour le droit international (ed.), *Le sujet en droit international: Colloque du Mans de la Société française pour le droit international*, Paris: Pédone, 2003, pp. 73–4: 'à quoi cela sert-il d'être qualifié de sujet de droit international?'
- 43 See *ibid.*, and Ruiz-Fabri (2003), *supra* Note 21, pp. 56–9 and 64.
- 44 *Ibid.*, pp. 74–5.
- 45 This dimension is particularly striking in some of the so-called 'agreements' between Switzerland and some NGOs. See e.g. the Agreement between Switzerland and the International Olympic Committee (a Swiss *association*)

considérant que le rôle universel du Comité International Olympique dans un domaine important des relations internationales, la notoriété qui est la sienne de par le monde et les accords de coopération qu'il a conclus avec

des organisations intergouvernementales font apparaître des éléments de la personnalité juridique internationale.

(Preamble, para. 3)

- 46 See e.g. C. Dominicé, 'La personnalité juridique internationale du CICR', in C. Swinarski (ed.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, Geneva: ICRC, and The Hague: Martinus Nijhoff, 1984, p. 663.
- 47 See Leroux (2009), *supra* Note 23, pp. 193–231. See also P. Gautier, 'ONG et personnalité internationale: à propos de l'accord conclu le 29 novembre 1996 entre la Suisse et la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge', *Revue belge de droit international* (1997), vol. 30, p. 172.
- 48 See Salmon (2001), *supra* Note 1, pp. 821 and 1062, and Distefano (2007), *supra* Note 29, pp. 108–9.
- 49 See above at Note 18.
- 50 See e.g. Distefano (2007), *supra* Note 29, p. 105 and, to a lesser extent, Dupuy (2002), *supra* Note 17, p. 106.
- 51 See above Section 1.
- 52 See above Note 12.
- 53 Although the difference or identity between such recognition and the public international law 'recognition' of the organization by the state concerned remains unclear – see e.g. J. Verhoeven, 'Considérations sur ce qui est commun: Cours général de droit international public', *Recueil des cours* (2008), vol. 234, p. 63:
- tout opposable que soit sa personnalité internationale, l'organisation internationale n'est une personne 'interne' pour le droit d'un Etat tiers que si celui-ci l'a reconnue comme il est libre – en l'absence de convention contraire – de (ne pas) reconnaître toute autre personne morale.
- 54 See above Sections 1 and 2.
- 55 The rule is not an absolute one. International law sometimes treats entities deprived of legal personality under domestic law 'as if' they had such personality. The European Court of Human Rights thus mentioned the possibility that 'the identity of a non-governmental organization may extend beyond its own legal personality so as to comprise several legal persons' for the purpose of assessing the Court's jurisdiction – Case of *Vatan v. Russian Federation*, Judgment of 7 October 2004, Application No. 47978/99, para. 41.
- 56 See Cosnard (2003), *supra* Note 9, p. 28, noting that, under domestic law, some entities, e.g. infants, lack legal capacity but certainly not legal personality.
- 57 As exemplified by S. Romano or, more recently, the work of authors such as M. de Kerchove and F. Ost – see e.g. M. de Kerchove and F. Ost, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Brussels: Presses universitaires Saint-Louis, 2002.
- 58 See, however, on the former, O. de Schrevel, 'Sur l'émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l'homme', *European Journal of International Law* (1996), vol. 7, p. 372. On these and other related issues, see generally Leroux (2009), *supra* Note 23.