

Paul Ricoeur and International Law: Beyond ‘The End of the Subject’. Towards a Reconceptualization of International Legal Personality

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Abstract

The enquiry into international legal personality in the following article is both descriptive and prescriptive in nature. On the one hand, the phenomenon of the (legal) subject is described and explained, in order to offer a better reflection on, and analysis of, its existence. This holds for both the individual and the (so central to international law) collective subject. On the other hand, our attempt at reconceptualization has a clear normative aspect. Reconstructing (international) legal personality on the basis of anthropology and ethics as an inextricable part of the identity of a person results in a conception of (international) law as justice. And this means that international legal personality reconceptualized along the lines suggested in this paper functions to develop just international institutions and just international law.

Key words

cosmopolis; ethics; hermeneutics; Hobbes; international institutions; international legal personality; justice; legal theory; natural law; phenomenology; postmodernism; recognition

I. INTRODUCTION

‘If modern law is law without God, then postmodern law is law without Man.’¹ But can law do without Man? It cannot, and yet this is the situation we face here. It is among the urgent challenges of today: is man indeed nothing more than a scattered *locus* where contingency rules, an *atopos* subjected to all kinds of forces which determine who he is, rather than that man constitutes himself and the world he lives in?

The philosophical attack on man – best known as ‘la fin de l’homme’ in the version of Foucault – cannot remain without response, including from the discipline of international law. The problematic of the subject underlies legal personality as well as legal (and ethical) responsibility. Traditionally, the legal subject presupposes

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1. A. Carty, *Post-Modern Law: Enlightenment, Revolution, and the Death of Man* (1990).

the *human* subject in the modernist conception – that is a single, coherent, unitary and autonomous entity, which does not really change with time so that its promises have validity in the future, which can thus be the addressee of law and which can be held responsible for its actions.²

With this subject being so fundamental to law, it is impossible not to respond to the proclamation of ‘la fin de l’homme’ and to the replacement of the modern identity of the subject by the notion of the fragmented Self without essence. How can such an unstable Self act? How can it change the world through actions? Where does it leave (the bearer of) responsibility? If these are pertinent questions with regard to the individual human subject, they are even more so with regard to collective entities such as, notably, the sovereign subject we call state.

The attacks on both the individual and the collective (e.g. the state) Self are (philosophically) intertwined. This is self-evident as the individualist, subjectivist perspective has marked the deep structure of international law. Moreover, this individualist and subjectivist understanding of international law draws on one particular conception of the modern subject. It is the Hobbesian perception of man that has been transferred to the international level, and with that transfer factors of ethics and morality have been excluded from the international society and its legal order.³ With the transposition of the Hobbesian understanding of man as an egoistic being and of ‘the state of nature’ as a situation of war of all against all, the conception of the international society as anarchy due to self-interested state conduct has come to ground our discipline’s thought. The Hobbesian vision of the amorality of the state and of international anarchy has pushed alternative perspectives that sought for representation of morality and justice at the international level to the margin or beyond.

To be sure, Foucault’s announcement of the ‘End of the Subject’ includes an attack of precisely the idea of the state person and its identity as the sovereign and amorally operating Leviathan. But this has affected our discipline perhaps even more. Foucault’s rejection of the traditional theory of power and his (related) attack on Leviathan does not end the Hobbesian state of war but, on the contrary, moves it to an even more fundamental level: namely at the basis of society, between its members, and even to the *inside* of the fragmented Self. Foucault’s resentment towards Leviathan is understandable, yet the means he proposes to eliminate the Sovereign monster and to reconceive power without a wielder is not acceptable

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2. The human subject may act individually as well as collectively. When it acts collectively a separate autonomous subject may be formed which can be an addressee of law in its own right. Again, the existence or constitution of this (new) subject is understood as quite unproblematic, merely an issue of how the will of the new subject is formed by the collective of human subjects.
 3. This is not to say that Hobbes’s comprehensive philosophy does not include both political and moral philosophy, but merely that his concept of the natural condition of mankind – the state of nature in which men live in war as no absolute authority exists – became the model for thinking about the international society, i.e. a society which has not entered into a social contract and which lacks a supreme power to enforce moral–juridical action. In other words, according to Hobbes, for moral action to exist, man must have escaped from the state of nature and have given up his natural right of self-preservation. Otherwise, the fear of a violent death – without a government or sovereign power to protect him and to enforce order – justifies the right to self-defence. For morality and law to exist, a sovereign power is required. In the state of nature a moral action may be too high a risk since it may be abused rather than met in a mutual way.

either. As much as I agree with the rejection of the Hobbesian conception of the state in its 'state of nature', I do not accept the consequences of Foucault's theory of power either. In the following, I shall instead draw on Hegelian-inspired thought in order to reintroduce morality as part of the 'state of nature' and – proceeding from this model – as part of the international society and its legal order.

Just as law cannot do without justice it also cannot do without man. Both propositions will be defended here. Clearly the postmodern critique of the modern subject has substance and value. It seems fair that the fiction of the legal person as a subject (both individual and collective) coherent and monadic, and thus capable of acting upon one unitary will with univocal (speech) acts, is under siege. But if, as in the postmodernist view, the (human) subject loses its existence, the legal subject, too, loses its significance. The rejoinder in this paper aims to find a way out of the deadlock which the 'end of the subject' creates for international law.

In particular, it means to offer a first attempt for reconstruction of the notion of the (legal) subject. Such a reconstruction is necessary because, it is submitted, (i) (international) law ultimately requires a connection between the legal subject and the (human) subject, who is capable of acting and can be held responsible, and who is also capable of participating in the creation of law, as without this capacity democracy and the *Rechtsstaat* cannot exist. (ii) While taking account of the insights offered by postmodernist critique, this paper thus makes an attempt to transcend the deconstructive philosophies of the subject and to save the viable subject. The reconstruction of 'subjectivity' or 'personality' in the way suggested here reflects the subject's deep and inherent relationship with others and allows for ethics to ground law. (iii) The current inquiry into international legal personality is both descriptive and prescriptive in nature. On the one hand, the phenomenon of the (legal) subject is described and explained, so as to offer a better reflection on, and analysis of, its existence. This holds for both the individual and the (so central to international law) collective subject. On the other hand, our attempt at reconceptualization has a clear normative aspect. Reconstructing (international) legal personality on the basis of anthropology and ethics as an inextricable part of the identity of a person results in a conception of (international) law as justice. And this means that international legal personality reconceptualized along the lines suggested in this paper functions to develop *just* international institutions and *just* international law.

First, the critique of the subject will be summarized in the variant of Foucault. Subsequently, I shall introduce the philosophical defence of the human subject as formulated by the recently deceased French philosopher Paul Ricoeur. Coming from phenomenology and hermeneutics, Ricoeur is able to save the capable and responsible subject and to defend it against its total fragmentation.⁴ His project – the 'hermeneutics of the Self' – is about the understanding and explanation of the human

4. Paul Ricoeur is hard to pin down in terms of philosophical traditions or schools. He moved in areas such as psychoanalysis, political theory, theology, existential phenomenology, philosophy of language, moral philosophy, and ethics. His ideas on the human subject as explored in this paper draw on philosophy of language (semantics and pragmatics), analytical philosophy, hermeneutics, and ethics.

subject or Self, and in this process of inquiry the Self makes its (re)appearance.⁵ It is a worthy response to Foucault's proposition that man is merely a construction of impersonal forces, as it recognizes that man is constituted in relation *to* the world outside but not fully *by* this outside world. The 'hermeneutics of the Self' captures how the Self constitutes itself by narration and interpretation in pursuit of the Good Life. From the premise of the 'hermeneutics of the Self' we instantly discern the ethical–moral dimension of this philosophical defence of the subject: 'the selfhood of oneself implies otherness to such an intimate degree that one cannot be thought of without the other, that instead one passes into the other, as we might say in Hegelian terms'.⁶ Man constitutes itself in relation to others. Ricoeur places the Other, not only (i) in the face of the other person, the otherness inherent in intersubjective relations, but (ii) also in the experience of one's own body as an encounter with Otherness. Finally, (iii) otherness is implied in 'the most deeply hidden' relation of the Self to itself – which is conscience. Conscience is conceptualized as an Other voice in one's mind which manifests itself as 'attestation' – the key word of *Oneself as Another* and a central concept of the 'hermeneutics of the Self' as developed in that book. In brief, the self appears in *optima forma* when it *attests* to its convictions. It then answers ethical questions, and its appearance provides a new kind of certainty – 'here I am'; as such, it has epistemic and ontological value as well. Ultimately, this is also the Self which constitutes itself by recognizing its responsibility and by seeking recognition by others. Ricoeur thus moves towards a Hegelian understanding of reciprocity as the constitution of selfhood and transcends the original asymmetry that characterizes the relation to others. With this move he also adopts Hegel's response to Hobbes's conception of man and the state of nature and facilitates the reappearance of morality in the state of nature and the order built upon it. Law is one of the *institutional* orders which mediate and organize this struggle for recognition at the impersonal level. Law mediates the self's impersonal relations – that is, the relations between the Self and 'distant others'. In these relations the Self also attests to its convictions by acting upon its desire to live in '*just* institutions'.⁷ In Ricoeur's own words, the just 'is first an object of desire, of a lack, of a wish. It begins as a wish before it is an imperative'.⁸ In other words, man's quest for happiness marks his relations with others both at a face-to-face and at an impersonal level. Part of the purpose of human life is to aim at living well *also* with, and for, *impersonal* others, hence, to live well even at a global level. Thus justice is not the virtue of the intersubjective relation (that would be friendship) but the virtue of the impersonal or institutional relation with faceless others. Institutions facilitate the transition

5. P. Ricoeur, *Oneself as Another* (1992), translation of *Soi-même comme un autre* (1990). References hereinafter are to *Oneself as Another*.

6. Ricoeur, *supra* note 5, 3.

7. With the notion of institution, Ricoeur refers to structures which mediate the relation of distance from the other, the other of impersonal relations. This is 'the other for justice'; institutions should mediate the virtue of justice in relation to the distant other – the other for justice is 'anyone' or 'each'. Among these orders of institutional mediation, these social institutions, is the juridical form of institutional otherness or the legal order; law as an order structures interaction and binds the agent to others. But the institutional condition is not a merely legal one; without social institutions and the political institution we would not associate with distant otherness. The juridical system mediates association with others; without it we cannot aim for the good life. Our sense of justice makes us aim for just institutions, i.e. distributing to each his due.

8. P. Ricoeur, *The Just*, trans. David Pellauer (2000), xv.

from the interpersonal to the societal plane (from the virtue of friendship to the virtue of justice) and so the ethical aim arrives at its fullest scope: *à chacun son droit*. Thanks to international institutions – including international law – I live in relations with faceless other members of humanity. Justice as an imperative is aimed at peace; justice so conceived thus demands that international institutions and law serve peace and not war or revenge. For instance, the beginning of justice done to victims of human rights violations is recognition of the facts; and thanks to the many truth and reconciliation commissions this is also now part of the institutional structure of the international community.⁹ This perspective of just institutions may thus also serve to contain criticisms of current institutional realities, which are predominantly power structures and which fail to recognize that justice should rule also in relation to the less powerful entities. Justice has an ethical content: the requirement of equality. Justice is distributive to the extent that it demands that social institutions promote the good of those who are part of them (the members of society); this includes the poorest and those who suffer most, even on a distant continent. Justice is served when institutions are transformed such as to create just situations – that is, situations in which the capabilities that people choose and value – such as those of being fed, of bodily health, of being educated, of exercising practical reason, of taking part in the life of the community, or of expressing oneself freely – are fully *recognized*. Justice thus is a substantive notion, it is an intrinsic part of ethical intentionality. The demand for justice includes a demand for institutions which recognize and organize human responsibility, for ourselves as well as for others. In international law, the right to (internal and external) self-determination of (indigenous) peoples or ethnic minorities is one example of a concept that accommodates difference or otherness in the international legal system. Cultural (collective) rights or the recognition of self-determination often have to be fought for, since access to justice and its institutional structures is often difficult. Reflection on state sovereignty from the perspective suggested here includes the responsibility of states; after all, the inherent purpose of power is the *good* of the whole community (national and global), which includes both bodily and moral well-being. The doctrine of the responsibility to protect as it emerged within the United Nations concurs with this perspective.¹⁰ Justice as

9. However, Ricoeur does not argue in favour of amnesty, which does not ‘proceed from the juridical realm’. If not part of the realm of justice, yet created as a political solution, amnesty creates a situation in which ‘to the prevention of any pursuit of criminals, is added a prohibition even to refer to the facts themselves in terms of their criminal aspects. Therefore it is a question of veritable institutional amnesia that invites us to act as though something never happened’. Traumatic events have to be recognized by the perpetrators, victims have to be recognized, and a state should not allow misrecognition of this kind to be part of its history and identity. Amnesty denies memory, ‘pardon gives memory a future’. Pardon can only be carried out by the victim; it is not aimed at forgetting but at ‘the end of mourning’. Amnesty is ‘the pseudo-judicial attempt to wipe out the facts’. Pardon comes within the realm of justice. Ricoeur, *supra* note 8, at 143–4. Justice demands institutions – including such institutions as truth and reconciliation commissions – to take account of memories and the actual healing of the victims in order for genuine reconciliation and peace to be possible.

10. States, like other institutions, have to act responsibly too, which may come down to an obligation to protect with force the humanity of human beings threatened by gross human rights violations outside the state’s own territory. Such humanitarian intervention, however, requires careful consideration of *la souffrance des victimes* on the one hand and *la violence de l’intervention* on the other. There is *un impératif catégorique, le devoir d’assistance*, but a *déchaînement de la violence* is prohibited too.

a virtue of institutional relations, including cosmopolitan relations, facilitates a critique of international law and institutions for their shortcomings with respect to justice: just institutions further the recognition of each actor by the other as a participant of the same international community.¹¹ The recognition of otherness as an inclusion in the international (legal) order is given legal significance as a struggle for self-determination. Justice as a virtue of global institutions challenges the international community to recognize humanity's universality as well as plurality and to confront misrecognition and misrepresentation of human plurality within institutional structures (as in the composition of the UN Security Council). Justice includes distributive justice and demands that the world take responsibility for its poorest members. The idea of a right to basic capabilities is formulated (below) with a view to implementing the standard of social justice. This conception of justice may come to serve as a basis for a critique of current international institutions – international law and organizations – aimed at directing international institutions towards justice – that is, for the good of human beings and the distribution of certain basic capabilities, to be employed individually as well as collectively. Considering the current state of international society and the problems it faces, it is no luxury to reflect on a new ethos to contribute to our political imagination, to inspire global institutional reform, and to support and sustain the development of international law.¹² The onset of the reconceptualization of the international legal personality

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11. 'C'est dans cette juste distance entre les partenaires affrontés, trop près dans le conflit et trop éloignés l'un de l'autre dans l'ignorance, la haine ou le mépris, qui résume assez bien, je crois, les deux aspects de l'acte de juger: d'un côté trancher, mettre fin à l'incertitude, séparer les parties; de l'autre, faire reconnaître par chacun la part que l'autre prend à la même société que lui, en vertu de quoi, le gagnant et le perdant du procès seraient réputés avoir chacun leur juste part à ce schème de coopération qu'est la société.' P. Ricoeur, *Le Juste* (1995), at 192.
12. Ricoeur was asked in an interview, 'Est-ce que cela veut dire qu'il faut constituer un gouvernement international, ce qui pourrait aider à résoudre beaucoup de problèmes?' Paul Ricoeur explained: 'Non, je ne pense pas. Notre problème est sans précédent, car nous n'avons comme des sujets de droit et de force que de pays nationaux. Notre tâche n'est donc pas de créer une entité internationale qui serait l'Etat-Nation de la force "X". Maintenant nous avons une réalité tout à fait nouvelle qui devrait former quelque chose comme un "concert des nations".' Question: 'C'est ce que j'ai voulu dire en pensant à la fédération envisagée par Camus.' Ricoeur: 'Moi, je pense que de ce point de vue c'est Kant qui a vu les choses au plus clair dans son projet de la paix éternelle comme conséquence du *ius gentium*, des droits humains. Je pense qu'il nous faut aller par ce chemin, car il est beaucoup plus difficile d'arriver à un concert des nations qu'au pouvoir d'une nation. Maintenant nous sommes mis en danger aussi bien par le morcellement des nations que par la suprématie d'une seule force, c'est à dire par le chaos mondial et la monocratie américaine. D'ailleurs les américains eux-mêmes ont difficulté à se situer, car les autres pays les obligent à jouer les gendarmes du monde, souvent même contre leur propre volonté. . . . Ce que je veux dire, c'est que nous disposons de l'expérience historique du compromis et des négociations. Dans les activités publiques on se heurte tout le temps aux négociations entre chefs et conseils administratifs etc. Les démocraties qui fonctionnent aujourd'hui plus ou moins bien, sont établies sur des compromis comme les droits des minorités, le contrôle constitutionnel de la majorité dirigeante etc. C'est précisément cette expérience historique du compromis qu'il faut élargir. Magnifier le différend, c'est voir la réalité telle qu'elle est, mais cela ne veut pas dire du tout qu'il a une existence obligatoire, c'est juste un fait. Dire qu'il ait le mot dernier, ça serait une capitulation. Au fait le différend n'est qu'une partie du problème.' Diplomacy, as the opportunity for dialogue and compromise and the further development of international law, has to aim for the transformation of the international order into an order of respect and mutual recognition. Interview by Yvaka B. Raynova, 'Quo Vadis?', (2000) 2 (winter) *Labyrinth*, also available at http://phaidon.philo.at/~iaf/Labyrinth/2000/ricoeur.html#_ftn1. See also A. Carty, 'New Philosophical Foundations for International Law: From an Order of Fear to One of Respect', (2006) 19(2) *Cambridge Review of International Affairs* 311. See for a plea for diplomacy *ibid.*, at 314: 'The process of critique reveals a new dimension of the person, that of understanding another world than one's own, comparable to learning another language or understanding one's own language as one among others. Translation and the

developed here is normative or evaluative as well as descriptive – descriptive in the sense that as a reconceptualization leaning on phenomenology it is better suited to the (human and institutional) reality.

This ethical–moral dimension of the ‘hermeneutics of the Self’ is not only decisive for Ricoeur’s project to save the human subject, it is also suited to be the philosophical basis on which a new theory of international legal personality can be grounded. In the final part of this article, I shall argue that (international) legal personality should be conceived of as part of the ethical–juridical identity of the Self (individual and collective) in impersonal relations on a cosmopolitan scale. As such, the contours of a reconceptualization will centre on an anthropological grounding: legal personality is a mode of identity (i.e. the ethical–moral identity of the self) at a particular scale: in relations with a third person or Other mediated by cosmopolitan institutions. The (international) legal identity of the individual or collective Self is conceived as part of a broader concept of personal or collective identity. Both the identity of, for example, a historic community (people, nation) as organized in a state and also a personal identity are part of this quest for legal personality, while both the individual and the collective self have the power to act (the power-in-common is the capacity of the members of the historical community) and the desire to live together in just institutions. (International) legal personality, then, is no longer a formal fiction which shields the internal reality from the external international plane and whose meaning is construed by international law, as best symbolized by the mask; it is a *concept* which links law to justice.

The reconceptualization of legal personality proposed here is thus inextricably linked to a theory of law as justice. It recognizes that law has its origins in the moral and ethical realm and that in the pursuit of happiness, man seeks (social) justice – which means that at community level, he desires to live with *just* institutions. Hence the following will also confront the denial of the (philosophical) possibility of a *just* international order. The aim of this paper – to build philosophical foundations for international legal personality – therefore does not sit easily with contemporary international law scholarship: it needs to defy mainstream positivist critique as well as postmodernist theorists.

The early twentieth-century breach with nineteenth-century reified and sanctified conceptions of personality in international law has surely been a significant and valuable one. It aimed at the liberation of international law from natural law and at its separation from morality. This is a controversial yet cherished separation. We only have to remember Kelsen’s redefinition of legal personality. He replaced the contemporary substantive concept – a ‘hypostatization of ethico-political postulates’ – with a functional and formal concept: legal personality as a point of attribution of the legal order and as a heuristic tool. He did so, however, for

capacity for compromise, as a mutual recognition of situations of conflict, are always liable to be denounced as appeasement, particularly in the Hobbesian context where the person is not considered to have any moral dimension. However, for Ricoeur a capacity for *compromise* is part of the capacity of the person to recognize himself as a figure of passage from one regime to another, without accusations of relativist disillusionment or superficiality (Ricoeur 2004 [*La recourse de reconnaissance*], 307).

substantive and, I would submit, even moral–political reasons.¹³ Kelsen renounced any natural law or sociological grounding of international legal personality or international law for their potential threat to peace and stability. After all, such grounding would bring foreign (social, political, moral, etc.) elements to law and legal science and with these elements include uncertainty. Law and morality cannot be linked; any natural law approach would bring along ideology and metaphysics. *Sein* or Being has to remain fully separate from *Sollen* or Ought. This is also at the root of Kelsen’s critique of legal fictions; he valued fictions as long as they were not falsifying the world by claiming to be ‘natural’ reflections – like, indeed, the reified state of his days. Kelsen rejected the ontological distinction between law and the state; in his view, there could not be a state person as a meta-judicial reality since it would be a political and moral threat to democracy and peace.¹⁴ This rejection of reified personifying notions was a response to the nineteenth-century substantiation of the state person as a divine entity above the law. In order to bring the state under the (international) law again, Kelsen redefined the state person as the legal order to which the international legal order is superior and all-comprising. Ontological dualism (law and state) is replaced by a monistic – purely formal – legal construction within which international law is the juncture between the international and national legal order. The (state) person is the legal order, not an entity separate from its order. The legal order grounded in the *Grundnorm* was fully detached from morality or social reality. Legal personality was purified from moral, mythical, or glorifying interpretations and reduced to a fiction helpful in understanding the legal system.¹⁵ But this fiction and its formalist definition depend fully on a conscious, wilful, and capable subject. Law presupposes the existence of the subject – individual as well as collective – as capable of deliberation and decision-making. Action is *human* action, not action of power or language practices. Law and legal personality (as ‘bearing’ rights and duties) rest on the idea of subject as ‘centre of agency’. Man is the only ‘place’ where a shift from the factual to the normative can take place: we wonder what to do, come to some conclusion, and act. This shift may occur within the individual as well as the collective. It is a prerequisite for legal notions such as attribution and responsibility. Even though Kelsen’s redefinition of legal personality as the starting point of relationships is detached from the physical being of man – the legal person is not the human individual, merely the personification of (part of) a legal order which configures at the point of attribution – it is not detached from will, intention, and human action.¹⁶

But we must bear in mind that behind Kelsen’s formalist approach to (international) law was the modernist drive to establish a universal and objective identity of international law. At the time, his formalism was indeed ethically motivated.

13. See for an extensive account of Kelsen’s theory of legal personality, J. E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004), ch. 3. It is argued there that in redefining law and legal personality Kelsen also defended democracy and fought to liberate individual freedom and responsibility.

14. See, for a substantiation of this claim, *ibid.*

15. See, for Kelsen’s critique of legal fictions, *ibid.*, ch. 3.

16. After all, the essence of the exercising of a legal right is the expression of a will, and, in the case of political rights, this means ‘the power to influence the formation of the will of the state’. *Ibid.*, at 187.

Kelsen's definition of (international) legal personality as the subject or point of attribution for legal relationships involving rights and duties prescribed by positive law became a classic one. Many variations have since been formulated, but within mainstream positive international law the established concept of international legal personality is indeed the formal description of 'subject of rights and duties under international law', that is, positive law purified from moral grounding. International legal personality can only be granted by sovereign states (i.e. the full international legal persons of international law) that create positive international law. In common legal use international legal personality is a formal concept which distinguishes the legal from the political and the moral, thus sustaining the circular – because not anthropologically grounded – identity of positive international law.

The contours of a new theory of international legal personality suggested here may indeed be placed in a natural-law tradition, as it conceives of law as justice. However, contrary to premodern and modern perspectives it does not conceive of natural law as a set of divine or universalistic dictates.

Instead, grounded on the 'hermeneutics of the Self', this post-postmodern perspective on international legal personality and international law recognizes law as justice and builds on the idea of law as an order of recognition. Law is a social system which organizes our relations with others (part of which is the recognition of each other's *otherness*) and so mediates institutionally our pursuit of the good life at the impersonal level. International legal personality is conceived as the ethical–moral identity of the Self, with at its core the relation of Self and Otherness, on a global scale which thus links ethics to (international) law and incorporates the recognition of human plurality.

On a global scale as well, the claims of respect for the dignity and *identity* both of individual human beings and of (cultural) collectivities challenge us to find a way – ethical and juridical – to deal with plurality, to deal with *otherness*. Within the realm of international law, this requires a theory of personality that facilitates recognition in multiple ways: recognition of one's own responsibility, mutual recognition of each other's differences, both individually and collectively, on multiple scales (domestic as well as global). In this globalized world we do share a common universal destiny. To confront the problems which threaten the future of humanity, we need a global order which facilitates and stimulates the recognition of responsibilities.

Like all other disciplines, international law scholarship did not escape the (post-modern) influence of ideas such as the marginalization of universal modern values; the disqualification of the general, universal approach; and the negative conception of law and legal language.¹⁷ Even if it has indeed become less obvious that power

17. I note elsewhere that Foucault's influence on the intellectual conventions of our time can hardly be over-estimated considering how it has moulded contemporary international law scholarship in general, notably regarding (partly related) concepts of state sovereignty and international legal personality in particular. The identification of law as the repressive and therefore negative form of power is largely to blame for that. Of course, there is this defining dimension of international law that law springs from sovereign power, but it has always coexisted with this other international law (historic) imprint, i.e., international law as a (morally driven) critique and limit of power. Foucault's reduction of law and legal concepts to the negative language of power only may have prompted many international studies to turn away from the general and universal. *Ibid.*, at 351.

is countered with universal values, and even if it is true that *plurality* is the human condition, it remains our discipline's intellectual task and responsibility to continue reflecting on how to contain power through international law.

One way to do this is through conceptual rethinking. International legal personality is a crucial concept of international law. Here I shall draw on, and expand my quest for leads for, a new theory of international legal personality which was started elsewhere.¹⁸ Such a theory cannot leave aside a response to the critical perspective, as Anthony Carty has pointed out.¹⁹ I will take up that challenge and develop my argument on Ricoeur and international law – thus responding to what to my mind is often a sceptical if not nihilistic view on international law. Alongside the 'death of the subject' theme, classical notions such as sovereignty and personality have been deconstructed and the indeterminacy of international law has been laid bare. However, reconstruction still has to begin. The Foucauldian suspicion of subjectivity in general and the critique of the modern subject by critical legal scholarship in particular is extremely important, in that we have been forced to be more realistic about the world, to experience it more fully and recognize its darker sides. Now we have to come back with an answer which prevents us from tumbling into nihilism. Critical international law scholars such as Carty and Koskenniemi indeed agree that after a stage of deconstructive scholarship we now need to search modestly for seeds for a new theory of international legal personality.²⁰

2. THE END OF THE SUBJECT: THE POSTMODERNIST CHALLENGE

The idea of the human subject is at the heart of modernity, it is the point of departure for both epistemological and moral modern thought. It has its origins in the Cartesian subject: the conscious Self exists because it thinks; man is defined by its *ratio*. In the Grotian version, 'man is rational and social by nature'. The modern subject is solid, stable, and coherent; it is rational, independent, and cognizable. Man is able to know and understand himself and the world, to judge it, and thus to act rationally and reasonably within this world. The modernist Self creates and re-creates itself, the world, and the meaning of both. Through this accumulated knowledge, he has found universal truths. Generally, thanks to human reason, his actions are (perceived as) teleologically driven towards order and justice. This is a not unattractive line of thought, and yet it is attacked forcefully.

The 'end of the (human) subject' or 'death of man' theme is indeed one – if not the only – core theme of postmodernism.²¹ Although by now a much quoted and popular

18. Ibid.

19. A. Carty, 'International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law', (2005) 6 *Melbourne Journal of International Law* 534.

20. See, e.g., A. Carty, 'Critical International Law: Recent Trends in the Theory of International Law', (1991) 2 *EJIL* 66, at 81–2; M. Koskenniemi, *From Apology to Utopia* (2005), 500.

21. Postmodernism completely rejects the alleged 'terror of reason' (in the sense of the absolute and timeless certainty that modernism (supposedly) conceived reason to be), because reason taken to extremes excludes everything that is different. Consequently, a certain hostility vis-à-vis the Enlightenment ideals of social progress, the emancipation and liberation of the individual, the existence of universal values, the possibility of absolute knowledge, and the supremacy of pure logical rationality (which were also all key principles

statement, it refers to a complicated body of thought often misunderstood. Obviously the counterintuitive label of this debate is partly to blame. Most scholars, especially those within the international law discipline focused on improving human rights situations around the world, intuitively repudiate it either for its factual inaccuracy or for its relativist and nihilist connotations. Apart from the simple *reality* that man is living all over the globe and in many instances is suffering and in need of protection, there is also a legal motive. Without the (legal) existence of the human subject there is no entity to which to tie human rights – something which would cause an entire legal field to implode – or, there would be no entity to which to impute an action to or to hold accountable. But ‘the end of the subject’ debate is referring of course to a philosophical debate which has found its way into our discipline. The image of ‘the death of the subject’ symbolizes a shift from the *creating*-subject (of language, power, or culture) to the idea of the *constructed*-subject (by language, power, or culture).²² As such, it is pivotal to contemporary debate in epistemology, ethics, and social and political philosophy, and in legal theory. We will meet the critique of the subject in the version of Foucault, who based his attack on an analysis of power operating discursively in society.²³

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- of modernism) can be felt in every discipline that has come under postmodern influences. It is in its revolt against modern reason that postmodernism is both an epistemological and a political movement. Its criticism of liberal political theory is a distinct feature of the postmodern view which we will also touch upon below.
22. The ‘death of the subject/author’ challenged Foucault also to respond to the question of the end of the subject in relation to language. In ‘What is an Author?’ (1969) he argues that the author came into being and to the forefront of the discourse only as part of the juridification of the appearance of texts (who should be prosecuted for this insult?). M. Foucault, ‘What is an Author?’, in Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews*, ed. and introd. D. F. Bouchard, trans. D. F. Bouchard and S. Simon (1977). Foucault’s question is not ‘*who* is the author?’ but ‘*what* is the author?’ His concept of the ‘author function’ does not refer to the individual who wrote the text, but rather to the author as a function of discourse. The author having come into being only recently in human history, Foucault joined in now that the author is dead. Here, too, Foucault’s argument on the disappearance of the subject raises questions in relation to notions of intention and attribution of and responsibility for (literary or linguistic) actions. Rather than an identification of a ‘who’ Foucault’s author is indeed again a locus of discursive practices. The author as a function of discourse, what we make out to be the author of a text, cannot fully be identified with the actual person of the writer. The actually identity of the author is not what matters, only the narrator that emerges as part of or as a result of discourse. As we shall see below, Ricoeur uses the notion of narrator too. The narrator who tells his life’s story is, however, a ‘who’. Ricoeur agreed to the methodological considerations of the death of the author in relation to reading and understanding texts in literary theory. Fragmented (incomplete) knowledge of the author may distort our understanding of a text, and in that respect it is better not to know anything. But he did not extend the death of the author to the philosophical realm and the subject of humanism. Reading is a different kind of communication from speaking with someone; the later model of communication is the basis of Ricoeur’s dialogical ethics. Ricoeur meets Foucault when he agrees to the image of the subject or the self as a locus of practices or forces, but it is not a full agreement. While Foucault gives up the question of ‘who?’, Ricoeur does not stop at the conclusion of the self as a void where forces rule: the self as narrator – the narrative self – exists only in relation to the other who gives him the opportunity to address and unify both its permanent identity and its responsive and dynamic identity. The dialectic relation between the permanent and the changing self, accommodated by the narrator, enables Ricoeur to save the human subject even though man has fallen from its throne. Ricoeur’s response to Foucault’s understanding of the author is implicitly addressed in this article. The subject may be ruled by discursive forces, forces of power or knowledge, but the self is capable of taking control and is not merely a product of language. The human subject may not be sovereign – i.e. independent and autonomous – but it is not a fiction either.
 23. For the purpose of this article, two of Foucault’s works in particular have been taken into consideration – *Power/Knowledge: Selected Interviews & Other Writings 1972–1977* (1980), and *The Order of Things: An Archaeology of the Human Sciences* (1970), translation of *Les Mots et Les Choses* (1966). At a later stage, this project, on the problematic of the (legal) subject, will develop an analysis of both Ricoeur and Foucault which also takes into account Foucault’s later work *Histoire de la Sexualité* (which includes ‘Le souci de soi’). However, the present article focuses directly on Foucault’s work on power. Therefore some of the most profoundly philosophical

'La fin de l'homme' should first and foremost be understood epistemologically in relation to the human sciences.²⁴ Foucault argued for a change of focus: away from the human subject as the object of study, and towards all processes and mechanisms that *constitute* man. In his view '*man* is a recent invention . . . [whose] appearance . . . was the *effect* of a change in the fundamental arrangements of *knowledge*'.²⁵ These fundamental arrangements of knowledge were formed by modern thought at the end of the eighteenth century.²⁶ However, man's being and actions are actually largely (perhaps fully) determined by language and power. Therefore, 'Ought we not to admit that man will return to that serene *non-existence* in which he was formerly maintained by the imperious *unity* of Discourse?' This is the epistemological critique in a nutshell; Foucault poetically described the possibility of man 'erased, like a face drawn in sand at the edge of the sea'.²⁷ Consequently, to many the modern subject is no longer acceptable as the basis for bringing us truth; new – postmodern – methods to gather knowledge, to find the available fragments of truth, and to account for the phenomenon of man are needed. Foucault's redirection has profoundly marked political science and (international) legal theory. His argument that man is constituted by power manifests a rejection of the traditional (legal) conception of power in terms of sovereignty and legitimacy – a conception which he substitutes with a new concept of power couched in terms of knowledge and truth. This is not the place to elaborate on Foucault's theory of power or on the methodology of genealogy suggested to analyse power;²⁸ a few remarks will have to suffice.

Legal and political theory, Foucault argues, have traditionally either advocated or attacked the power of the sovereign. But he rejects in the clearest terms the idea that the juridical edifice of state sovereignty is the correct explanatory model. In his view, power cannot stem from a mythico-juridical event like the social contract. For too long political analysis has been dominated by legal conceptions in general, and has been 'obsessed with' the notion of the sovereign person in particular.

or perhaps religious questions – the meaning of human life, whether and how the self can answer to existential questions of man's contingency, and the incomprehensiveness of human existence – for now are left unaddressed.

24. What Foucault meant to say is that the human subject as the object of modern thought, the subject which is the foundation and source of the human sciences, the cognizable self that has brought us a scaffolding of thought based upon itself, the subject involved in collecting knowledge and making meaning, *that* subject is fading away. His anti-humanist perspective is evidenced in his attempt to explain the existence of the human sciences and the fact that 'they are not sciences at all'; they merely serve the collection of knowledge. Hence Foucault's anti-humanism is anti-subjectivism in the sense that it wishes to account for developments, phenomena, for history – let us say – without reference to the human subject, also in order to account for the constitution of the human subject itself. Foucault, *Order of Things*, *supra* note 23, at 366.
25. *Ibid.*, at 386–7.
26. Thus, viewed from a cultural – historical perspective, at the end of the eighteenth century the emphasis shifted from God (or his representative on earth: the king) to the human subject as the basis of knowledge and truth, and this new man gained the divine perspective of looking at himself as an object of study. Ever since, modern thinking has defined man by his relation with God or king, and for this reason the death of God has to involve 'the disappearance of man'.
27. Foucault, *Order of Things*, *supra* note 23, at 386–7 (emphasis added).
28. See, for more extensive analysis of Foucault's theory of power and his rejection of the traditional liberal or juridical theory of power, Nijman, *supra* note 13, at 370 et seq.

What we need, however, is a political philosophy that isn't erected around the problem of sovereignty nor therefore around the problems of law and prohibition. We need to cut off the King's head [i.e. the locus of sovereignty]: in political theory that has still to be done.²⁹

Having thus beheaded the king in order to 'escape from the limited field of juridical sovereignty and state institutions',³⁰ Foucault consequently turns his investigation to power outside the juridical schema of sovereignty and on to the micro-level of society, where the effects of power are most noticeable. By the beheading of the king (or the killing of the unifying sovereign spirit that constitutes Leviathan) Foucault deprives political and legal theory of its unifying concept, the possibility of singularity. In his view, 'rather than worry about the problem of the central spirit, . . . we must attempt to study the myriad of bodies which are constituted as peripheral subjects as a result of the effects of power'.³¹ In other words, Foucault renounces sovereignty and personality as adequate concepts, and he refutes our preoccupation with the transformation of the individual will into the will of the state person and with oppressive (sovereign) power as an attribute of the state personality. He thereby intends to liberate power (and the study of power) from its modernist legal box and to lay bare that the human subject is constituted by power/knowledge regimes.

The human subject, then, does not pre-exist in relation to these power/knowledge regimes. Rather, it is through power mechanisms within discourses of truth and knowledge that the subject emerges. Mechanisms of power function through 'the production of effective instruments for the formation and accumulation of knowledge, . . . *power*, when it is exercised through these subtle mechanisms, cannot but evolve, organize and put into circulation a *knowledge*, or rather apparatus of knowledge'.³² In brief, power is a relational phenomenon of domination and subjugation that operates on the most local and concrete level of society, and within knowledge or truth discourses. Truth legitimizes power or, put differently, power is in the hands of those who define truth. Texts and discursive practices are thus powerful tools. Politics has become a discourse of truth in which numerous opinions operate, rather than just those of the few appointed members of the legislature. Who among the participants in this discourse are marginalized? or, whom does the discourse serve? In other words, 'the *political* question . . . is not error, illusion, alienated consciousness or ideology; *it is truth itself*'.³³ It is the question of how power works at the most local and concrete level; not so much at the legal level, but there

29. Foucault, *Power/Knowledge*, *supra* note 23, at 121.

30. *Ibid.*, at 102, 187.

31. *Ibid.*, at 97–8: '[It] would be the exact opposite of Hobbes' project in Leviathan, and of that, I believe, of all jurists for whom the problem is the distillation of a single will – or rather, the constitution of a unitary, singular body animated by the spirit of sovereignty – from the particular wills of a multiplicity of individuals. Think of the schema of Leviathan: insofar as he is a fabricated man, Leviathan is no other than the amalgamation of a certain number of separate individualities, who find themselves reunited by the complex of elements that go to compose the State, but at the heart of the State, or rather, at its head, there exists something which constitutes it as such, and this is sovereignty, which Hobbes says is precisely the spirit of Leviathan.'

32. *Ibid.*, at 101–2 (emphasis added).

33. *Ibid.*, at 133 (emphasis added).

where the state connects with the existing cluster of relations, where power is also 'productive' and 'hold[s] good'.

Thanks to this productive nature of power, Foucault is able to explain how man comes about, how power/knowledge regimes constitute subjects through subjection at the most concrete and actual level: '*how it is that subjects are* gradually, progressively, really and materially *constituted* through a multiplicity of organisms, forces, energies, materials, desires, thoughts etc.'³⁴ With the proposition that the human subject is a product of power, Foucault identifies the individual subject as the locus of a fragmentary, incoherent self, constituted by the forces of power. The individual is no longer the prime mover: the constructed self has replaced the constituted subject.

Evidently, this paradigm shift has radical implications. It means the 'end of the subject' in its modern identity of creator (of meaning and the finder of truth). In rejecting the subject-dependent concept of power, Foucault envisions politics without an identifiable subject to direct the political process: between action and reaction, politics develops discursively and the only direction it takes is from the objective it is intended to serve.

However, faced with the practical political side of his end-of-the-subject argument, Foucault recognized that '[h]ere you can't escape the question of the subject, or rather the *subjects*, certainly, and this is what is preoccupying me'.³⁵ Foucault shaped a hypothesis starting from the following question: if power is not sovereign power, who then participates in the struggle for it? He suggested that the struggle for power was a struggle of 'all against all'. In his view, there are no 'immediately given subjects of the struggle', for example the proletariat on the one hand and the bourgeoisie on the other. 'We all fight each other. And there is always *within* each of us something that fights something else.'³⁶ Ultimately, the individual is a fragmented unit composed of 'sub-individuals', which is radically different from the coherent subject envisaged by modernism. In short, Foucault considered the human body to be 'the locus of a dissociated Self', which 'adopts the illusion of a substantial unity'.³⁷ In addition, we are all destined to fight each other and ourselves. And so, without the constituent subject, the world is ready to come apart.

As such, the loss of human subjectivity is indeed the *end of humanism*, both epistemologically and morally – politically.³⁸ It is the loss of the self as a stable and coherent entity. Man's *incoherence* is applauded, rather than responded to by a philosophy that would enable man to re-establish a sense of wholeness by determining or finding 'meaning'. Contrary to the modernist project, which aimed to allay (but not deny) human anxiety, postmodernism celebrates the uncertainties and contingencies of life.

34. Ibid., at 97–8 (emphasis added).

35. Ibid., at 207 (emphasis added).

36. Ibid., at 208 (emphasis added).

37. Foucault, *Order of Things*, *supra* note 23, at 366.

38. It opposes, for example, the subject idea of existentialism, which considered the individual human subject the only entity capable of willing, of bearing responsibility, and creating meaning. It also considered it to be the only possible foundation in our quest for knowledge and in the moulding of history and building of progress. However, it is also true that Sartre through his brand of humanism ended up supporting Stalin and defending the Gulags.

But serious questions naturally emerge: if an individual is an effect of power, does this mean that we are never powerful and able to act? There is debate among scholars as to whether Foucault's rejection of subject was indeed a rejection of agency. The two are related, but not identical, concepts. However, if the subject is merely a function of relational structures of power/knowledge, as a general consequence it must be that all agency is determined by its context, and no autonomous subject and agency can exist. For those concerned with ethical and legal questions, this is inconceivable. But how can we retain the human subject as an agent capable of evaluation and of ethical and legitimate choices, notwithstanding this influential theoretical context? Who or what should bear responsibility in the postmodern world where man has ceased to exist – power relations or linguistic structures? Or, put differently, if we live in an age without a human subject, what implications does this have for individual and collective responsibility? It is with the questions of capacity and responsibility that we turn to Ricoeur's alternative.³⁹

3. MEETING THE POSTMODERNIST CHALLENGE: PAUL RICOEUR'S 'HERMENEUTICS OF THE SELF'

With his 'hermeneutics of the Self', Paul Ricoeur engages with Foucault's critique of the subject and in particular with his attack on man's coherent identity. Ricoeur's objective – to defend and save the subject as the self-constituting Self – is ambitious. That the individual is at least partly constructed by society, or social structures (language and power regimes), seems undeniable. And yet, even though man cannot constitute her- or himself independently from social regimes, according to Ricoeur there are moments or events in which man manifests his or her autonomy and coherence as a subject with agency. Ricoeur meets Foucault's contention concerning the subject with a combination of epistemological respect and normative disagreement.⁴⁰ For some time, it was fashionable to consider Ricoeur as 'just another' philosophy professor, but today scholars increasingly value his work differently.⁴¹ Nonetheless, the writings of Paul Ricoeur are unknown territory for

39. See, for another significant defence of the notion of the subject in response to Foucault's theory of power and the end of man, J. Habermas, 'An Alternative Way out of the Philosophy of the Subject: Communicative versus Subject-Centred Reason' (1987), in L. Cahoon (ed.), *From Modernism to Postmodernism* (2003), at 589–616.

40. Ricoeur clearly distinguishes between structuralism as a method of text analysis and structuralism as a philosophy. Structuralism in the first sense perceives text autonomously: the text is taken as an objective thing, '[it] escapes its author and signifies for itself'. Ricoeur accepts the structural analysis as a 'stage' in his reasoning, but rejects the philosophical conclusion subsequently drawn on the basis of this practice, i.e. that 'the subject is eliminated from its position as the author of discourse'. Foucault's 'idea that man is a recent invention seems to [Ricoeur] sheer invention'. P. Ricoeur, *Critique and Conviction* (1998), 77–9.

41. His has indeed been a 'reconnaissance tardive', since recognition of his theory took well into the 1980s to become firmly established. F. Martel, 'Le voyage philosophique de Paul Ricoeur', (1997) 357 *Magazine littéraire*. The philosopher Charles Taylor has confirmed the importance of Ricoeur's contribution to the debate. C. Taylor, 'Une philosophie sans frontières', (2000) 390 *Magazine Littéraire*, Dossier: Paul Ricoeur, morale, histoire, religion: une philosophie de l'existence, at 30–1. Ricoeur acknowledges the strong influence Taylor has had on his own work on ethics. Ricoeur, *supra* note 8, at xiv. It is suggested that Ricoeur's Protestantism is partly to blame for the fact that recognition came to him relatively late, although he has always 'insisted on a strict separation between philosophy and faith'. 'There is no doubt that this religious orientation is a significant part of the explanation for the long period of neglect of his work in France'. G. Gutting, *French Philosophy in the Twentieth Century* (2001), 364–5.

most international law scholars. Meanwhile, his phenomenology of the capable self offers us a much needed way of engaging with the critique of the subject and, ultimately, of saving the (individual and collective) Self as an agent – as a capable and responsible subject. As such it may serve as an anthropological grounding for the new theory of the legal subject proposed below.

Ricoeur's 'hermeneutics of the Self' offers an alternative – and intuitively it seems a more accurate – understanding of the subject. He distinguishes two basic attitudes towards the problematic of the Self: one of 'overevaluation' and one of 'under-evaluation' of the Self. He refers to the first as 'the exalted cogito' as first presented by Descartes and to the second as 'the shattered cogito' of Nietzsche⁴² – or, in the version of Foucault: the fragmented, contingent Self. Ricoeur's 'hermeneutics of the Self' is a philosophy of the subject that neither 'exalts' nor 'humiliates' the subject, but which discerns the 'acting and suffering' subject and trusts the reliability of its 'attestation' beyond suspicion.⁴³ It is true that man's inner world is as much an interpretation as the outer world, yet rather than seeing Nietzsche's anti-cogito as the inverse of the Cartesian cogito, and accepting its prevalence, Ricoeur regarded the anti-cogito as a sign of 'the destruction of the very question to which the cogito was held to give an absolute answer.'⁴⁴ The real question which the Self is held to answer is the question of the good life, and not the question of the ultimate foundation of knowledge. Indeed, it is in living a good life that the Self constitutes itself in relations with others.

In *Oneself as Another*, the Self is posited indirectly as it appears in four modes or dimensions of identity, as (i) a speaker who uttered a remark; as (ii) the agent on whom an action depends and who thus manifests his power-to-do; as (iii) the narrator who recounts his life; and as (iv) the self who is imputable and responsible. This manifestation occurs through self-identification when the Self is called on to answer to the question of 'who?' which Ricoeur poses in four different ways; in answering, the Self attests to its capacities and recognizes itself reflexively. Let me be more concrete. Ricoeur recognizes that the Self is dependent on its social context and grounds the capable subject on reflexivity and otherness. He demonstrates that 'The *self* is implied reflexively in the operations (e.g. speaking or acting), the analysis of which precedes the return towards this self.'⁴⁵ In other words, the Self manifests itself when speaking and acting, because the act of speech and the act of acting refer to the Self reflexively as the speaker or actor. To make this self-identification apparent, Ricoeur uses the 'detour' of four questions of 'who?': who is speaking? who is acting? who is

42. The first Cartesian cogito refers to the modern tradition in philosophy that tries to find in the subject an absolute foundation of knowledge. With the image of the shattered cogito, Ricoeur characterized the tradition which turned against this positioning of the 'I' as a valid foundation for knowledge, because this view ignored the fact that in order to be able to doubt, think, and self-reflect the cogito needs the mediation of language. Since the use of language is not something literal, non-figurative, neutral, or truthful in itself, there is no language that is completely free of deceit, no language that is not somehow suspect, and therefore any foundational claim of the cogito to certainty has to be rejected. Ricoeur, *supra* note 5, at 4 et seq.

43. *Ibid.*, at 18–22.

44. *Ibid.*, at 14. '[T]he three major features of the hermeneutics of the Self [are] . . . the detour of reflection by way of analysis, the dialectic of selfhood and sameness, and finally the dialectic of selfhood and otherness'. *Ibid.*, at 16.

45. *Ibid.*, at 18 (emphasis added).

narrating her or his life story? and, finally, who takes responsibility for these actions or events?⁴⁶ Each question asks for identification. With every answer – ‘I am’ – self-identification and self-assertion occur. Every assertion, ‘I am speaking’, ‘I can make something happen (intentionally)’, ‘I am narrating myself’, ‘I am holding myself accountable’, constitutes a true foundation through identification by self-designation, always in relation to others. I speak to someone, someone ascribes an action to me as an agent,⁴⁷ I talk narratively about myself with someone. By answering these questions, not only do we identify ourselves, we also attest to our capacities – we *can* speak, act, narrate, hold ourselves responsible for a bad or prohibited action, and in other words we can determine action as good and obligatory. I will come later to the social form of human capacities (i.e. the capacities as claimed by collectivities and submitted to public evaluation and approval – action in common, or agency), in particular to the capacity of narrating and taking responsibility, and concentrate here on human capacities in their individual form. In answer to the first two questions – who is speaking? and who is acting? – the Self identifies itself and attests to its capacity to speak and its power to act. ‘I am’ thus confirms the human subject as capable of speaking and acting. The self designates himself as agent by actions and speech acts. The subject is thus posited in an indirect manner through detours of analysis (by way of analytic philosophy and philosophy of action and of language) which bring out the way in which the Self is implied reflexively in these operations. Here, we concentrate on the stage beyond self-identification (as self-designation) when our personal identity appears. Ricoeur describes our personal identity as an identity which may be constituted from contingent elements (remember Foucault), yet these elements are united or ‘emplotted’ in the narrative of our lives.

The narrative identity of the Self then becomes manifest in the capacity to narrate one’s life story or to recount events experienced in relation to the world.⁴⁸ Ricoeur explains how we attest to this capacity when we answer to the third of the questions identified above: ‘who is narrating?’ The subsequent identification of the Self by self-designation attests to the human capacity to recount and interpret life – its events, encounters, and its coherence which exist in spite of its contingency. It clearly brings to light the hermeneutic character of the Self. In the narrative identity of the Self, Ricoeur reconciles our identity-*idem* (our sameness of body and character, our stability illustrated by our genetic code) and our identity-*ipse* (selfhood, the adjustable part of our personality).⁴⁹ Through our narrative identity our personal identity, ‘which

46. In the nine studies in *Oneself as Another*, Ricoeur examines all four questions extensively. The first two studies are exercises in the philosophy of language (semantics and pragmatics) and deal with the question, ‘who is speaking?’ As speaking is actually the performance of the act of speech, the subsequent two studies in action theory on the question ‘who is acting?’ are also closely related: ‘by implication speakers are themselves actors’. *Ibid.*, at 17.

47. Ascription or attribution to a person is part of the meaning of intentional action. See P. Ricoeur, *The Course of Recognition*, trans. D. Pellauer (2005), at 98.

48. Ricoeur, *supra* note 5, at 147–8.

49. Identity-*idem* and identity-*ipse* accord with one another dialectically. The first cannot be thought through without considering the second, but they may overlap. Ricoeur introduces the notion of ‘*acquired identifications*’ by which the other enters into the composition of the same. To a large extent, in fact, the identity of a person or a community is made up of these identifications with values, norms, ideals, models, and heroes, *in* which the person or the community recognizes itself. Recognizing oneself *in* contributes to recognizing oneself *by*.

can be articulated only in the temporal dimension of human existence',⁵⁰ endures throughout our lives; it accommodates both the permanence and the change of personal identity. It 'mediates' between selfhood as sameness in time and space (as 'uninterrupted continuity' or 'permanence in time') and selfhood as 'discontinuity and instability' enables the Self to discover something new and to change. In other words, the Self of our narrative is not the same as the character of the identity-*idem*, but it emerges from the interaction of the identity-*idem* with the world, and from the way in which we recount that interaction. Personal identity is lost if selfhood is no longer upheld by sameness – that is, if selfhood loses its 'corporeal anchoring in the world'. The narrative identity gives a locus to both the permanent and the changing identity in this dialectic of the Self (ipseity). The character of these narratives,⁵¹ the narrative Self, evaluates its life and reflects on those events and actions that invite a favourable or unfavourable judgement. Narrating counts on a listening ear. It occurs mostly in dialogue with others as well as with oneself as another. The narrative identity of the Self attests to the capacity to describe and evaluate one's actions and life events and account for them to others. In other words, it implies in its structure mediation between description and prescription: 'there is no ethically neutral narrative'.⁵² Ethical and moral reflection leads us naturally to the next mode of the identity of the subject.

This fourth mode of identity – the ethical and moral identity of the Self – thus has narrative identity as a prerequisite. Like our other identities, our ethical–moral identity manifests itself in relations with ourselves, with the more intimate Other (the 'you' of the interpersonal), and with the third person or distant Other. This last relation, of the Self with the distant Other, requires mediation by institutions and occurs on different scales, for example, nationally but also internationally.⁵³ The fourth question in the quest for the capable human subject – 'who takes responsibility for these actions and accepts moral imputation?' – enables the Self to identify itself as an ethical and moral being. It has the capacity to take responsibility for its past actions, to repair a bad or illegal act, and to take responsibility for action which is needed in

The identification with heroic figures clearly displays this otherness as one's own, but this is already latent in the identification with values which make us place a "cause" above our own survival'. *Ibid.*, at 121 (emphasis in original).

50. Ricoeur, *supra* note 5, at 114.

51. The character of a narrative or life story is the character of what Ricoeur terms 'emplotment'. With this notion, he engages with the (postmodern) theme of the total contingency of life and the Self, the absence of any kind of unity and the resulting loss of meaning. In Ricoeur's view, the discontinuity and instability of selfhood does not mean that contingency is all there is. By the notion of emplotment he offers a narrative conception of the connectedness of life. By the Self's emplotment, i.e. by the configuration of events into a narrative, an event is transformed into a meaningful part of the narrative. The actions in the plot and its characters are necessarily related in the narrative, as predicates and actions are attributed to persons and 'the contingency of an event contributes to the necessity, retroactive so to speak, of the history of a life, to which is equated the identity of the character'. *Ibid.*, at 142–7.

52. *Ibid.*, at 115.

53. See *supra* note 7. An 'institution' is the structure that mediates living together associated with others in a (historical) community, such as a people or a nation or a region even, and which constitutes the social bond. We mentioned law as such a mediating structure and the political institution which constitutes the social bond of the *polis* is the most encompassing of social institutions as it creates the space in which all other institutions (such as economic, religious, and juridical institutions) can operate. Through the political institution called state citizens exercise their capacities in concert as 'power-in-common'. Ricoeur, *supra* note 5, at 196–7.

the future. Hence the identification of the subject as the ‘Self of responsibility’ is the constitution of the subject capable of pursuing good (ethics) and respecting obligation (morality). The identification of the subject of imputation and responsibility by stating ‘Here I am!’ in a testimony attests most clearly to the Self. This is the Self that springs into action from a position of befuddlement over the multiplicity of practical possibilities induced by the modern anxiety of ‘everything is possible, but what am I to do?’ into self-attestation: ‘here is where I stand.’ It is in *response* to the Other who counts on the Self, that the Self becomes one. In responding, ethically or morally, to the world one *attests to oneself*. Often this response holds a promise to be there or to act when necessary in the future. By its capacity to make and keep promises the Self (ipseity) distinguishes itself from its identity as sameness (*idem*). In other words, promise-making lays bare ‘self-constancy’:⁵⁴ I promised you, you can count on me, ‘well, here I am’. Promising to be there for someone is paradigmatic of being oneself even when time has passed, it is a paradigmatic example of ipseity, and the other is essential for this event.

The capacity to recognize one’s responsibility as discerned in *Oneself as Another* gets a more explicit role in *The Course of Recognition*, in which Ricoeur develops the shift from imputability to responsibility. Here, the relationship with otherness evolves from a negative to positive one. In the scheme of Ricoeur, imputability refers to a negative relationship with the Other – that is, one has wronged the other and can be imputed in terms of this misrecognition of the other. Responsibility, on the other hand, refers to a positive relationship – that is, one feels responsible for the well-being of others. As such, this phenomenological shift from imputability to responsibility ‘opens new horizons’ beyond the reduction in the sphere of otherness to include responsibilities beyond the knowable or foreseeable effects of an action towards a more ethical and moral notion of recognizing one’s responsibility for other persons:⁵⁵

As a result of this change in emphasis, the idea of vulnerable others tends to replace that of damage done as the object of responsibility. . . . It is for the other who is in my charge that I am responsible. This expansion makes what is vulnerable or fragile, as an entity assigned to the agent’s care, the ultimate object of his responsibility.⁵⁶

Of course, our responsibility is not unlimited – if only because that would lead to indifference. Logically, the scope of our responsibility is determined by the extent of our power to do good and right. Likewise our capacity to do harm (and thus

54. For the attestation of the ethical identity of the Self, the notion of ‘self-constancy’ is important. It gives permanence in time, independent of sameness and in spite of diversity and change. How can other people depend on us if we are not stable, coherent subjects? How can we trust the value of a contract if the subject changes? Ricoeur did not see the sameness of the body and character as the only expression of the continued self. He also identified ‘keeping one’s word’ as an expression of this permanence in time, and yet this does not overlap with the self’s sameness. Keeping one’s word challenges time and as such it has permanence in time, even though it is independent of the permanence of character. It involves the selfhood of the Self as a ‘polar opposite’ to the permanence of character, since it is not inscribed in the Self as sameness, but simply relates to the ‘who?’ who has given his word. ‘To keep one’s word’ expresses ‘self-constancy’ by ‘the faithfulness to a word’ and indicates the ethical attitude of being accountable to the Other to whom the promise was given; it signifies honouring the trust that the Other has placed in your faithfulness.

55. Ricoeur, *supra* note 45, at 108.

56. *Ibid.*

our responsibility) is limited by spatial and temporal proximity.⁵⁷ In brief, being there for someone, as well as taking a stand on an issue in the face of multiple ethical alternatives, is the answer to the problem of the Self: the personal testimony (*témoignage*) of justice,⁵⁸ of aiming for the good life (part of which is the will to live with just institutions, as will be argued below).

In answer to Foucault's fragmented, contingent Self, Ricoeur posits the Self as an *atopos* where nonetheless unity becomes evident once it is confronted with the Other – especially in situations of uncertainty, danger, or conflict which challenge the Self, who then acts upon his desire to do good. The expressions of the good and the just present a coherent and firm image of the Self: 'this is me' – 'here I am'. The Self which posits ethical and moral identity transcends the narrated (or constructed) Self. It is here that the self-identification of the capable subject finds its strongest case, according to Ricoeur: "The *autonomy* of the self will appear then to be tightly bound up with *solicitude* for one's neighbor and with *justice* for each individual."⁵⁹ Justice is to the life of the subject in social and political institutions what friendship or solicitude is to the subject's relations at the interpersonal level; they both represent the desire for the good life.

The Self that is attested to in this way is not an ultimate foundation. But neither is it in a state of disintegration to the extent that no trace of certainty or unity remains. The unity that emerges from Ricoeur's studies is the thematic unity of human action – thus the certainty offered by the 'hermeneutics of the Self' is not absolute.⁶⁰ However, unlike the perspective of the anti-cogito, the prism/starting point of attestation or 'testimony' at least provides the 'certainty' of trust. It saves the Self by placing 'trust' in the 'reliabi[lity]' of the attestation to the Self. Ricoeur thus arrives at a definition of attestation as 'the *assurance of being oneself acting and suffering*'.⁶¹ By the notion of attestation Ricoeur offers an alternative to the contemporary negation of man's future by pointing to the power of trust, or 'trust in the power to say [and] do', and hence in the power to act well and justly.⁶² We may say that the hermeneutic certainty of attestation is the 'ultimate recourse' in the face of announcements on the disappearing Self.

While Foucault depicts the human subject as a product of historical and social influences and as the mere locus of these inter- and counteracting (power) forces, Ricoeur defends a subject that may, true to say, at times be divided and oscillating dialectically or lacking a centre, but that nevertheless attests to its coherence by narrating its own life story and, above all, by acting ethically, morally, and politically. Unfolding the modes or levels of identity of the subject, Ricoeur locates the

57. Ibid., at 109.

58. Which is – according to Ricoeur – the answer to the real question of the Self. See *supra*, text subsequent to note 43.

59. Ricoeur, *supra* note 5, at 18 (emphasis in original).

60. *Oneself as Another* is set up as a series of studies of the problematic of the Self which make different analytical philosophical detours; the unity of these studies is their focus on human action: the ability to act is defining of man's humanity, and human action is treated as 'a fundamental mode of being'. When we ask, what sort of being is the Self? Ricoeur answers in terms of being as act and potentiality.

61. Ricoeur, *supra* note 5, at 22 (emphasis in original).

62. Ibid., at 22–3.

ethical–moral dimension of the self and – as we shall see below – offers us a point of departure for the contours of a reconceptualization of (international) legal personality.

4. FROM THE ‘HERMENEUTICS OF THE SELF’ TO THE SUBJECT OF JUSTICE OR LEGAL PERSONALITY

Contrary to our discipline’s customary approach, in this paper reflection on international legal personality does not take as a starting point the visibility of the actor in the eyes of the law – that is, where the law designates entities as legal subjects. In contrast, it starts at the base (as Foucault in a way suggested) in order to understand and explain how (international) legal personality emerges at a specific level of identity construction in the dialogical relation between the Self and the distant Other mediated by social institutions such as law. In other words, (international) legal personality can be reconceptualized as man’s ethical – moral identity in relation to institutional otherness on a national as well as cosmopolitan scale.

By taking ethical–moral account of one’s actions in relation to third persons, one recognizes life in a political society and its legal system. We constitute our legal personality when we constitute our ethical–moral identity specifically in relation to ‘distant’ third persons (i.e. not in relation to ourselves or in inter-person relations) through one of the mediating social institutions – *in casu* law. It follows that legal personality or subjectivity is a continuation of, and inseparable from, the Self’s ethical and moral identity. Hence the concept of the subject of ethico-juridical imputation and responsibility builds on the idea or reality of the capable human being.⁶³

But what does it mean to act ethically and morally – hence, in conformity with what is ‘good’ and ‘obligatory’ – in relation to people outside one’s personal sphere? Evidently, what this means depends on the relationship in which the Self is involved: with oneself (as another), with the near Other, or with the distant Other, that is one’s fellow citizens.⁶⁴ Each of these relations has a teleological and a deontological aspect.⁶⁵ Ricoeur defines the desire to live a ‘good’ life for all three relationships:

63. ‘[T]here is a bond of mutual implication between self-esteem and the ethical evaluation of those of our actions that aim at the “good life” (in Aristotle’s sense), just as there is a bond between self-respect and the moral evaluation of these actions, submitted to the test of the universalization of our maxims of action (in the Kantian sense). Taken together, self-esteem and self-respect define the ethical and moral dimension of selfhood, to the extent that they characterize human beings as subjects of ethico-juridical imputation.’ Ricoeur, *supra* note 8, at 4.

64. The following chart emerges: from left to right we have oneself, near other, and distant other, and from bottom to top the good, the obligatory and the practically wise. At the lowest level of the chart, ethics have primacy over morality; from this Ricoeur derives ‘the necessity for the ethical aim to pass through the sieve of the norm’, and ‘the legitimacy of recourse by the norm to the aim whenever the norm leads to impasses in practice’.

65. Ricoeur distinguishes between ethics – which is teleologically oriented (actions which aim for the good life) – and morality – which is deontologically oriented, i.e. the realm of moral norms which are more universal and which may restrain human action. Ethics and morality are distinguished – human action as aiming for the good life or as focused on conforming to moral obligations. Like Aristotle, Ricoeur holds that human action is always aimed at something good and ultimately at the Good (*Telos*). But aiming for the good is not enough; human action should be submitted to morality – to norms which claim universality. Ricoeur proposes to establish ‘(1) the primacy of ethics over morality, (2) the necessity for the ethical aim to pass through the sieve of the norm, and (3) the legitimacy of recourse by the norm to the aim whenever the norm

for the first the desire is for personal fulfilment; for the relationship with the ‘near Other’ the desire is for reciprocity in friendship; and with the ‘distant Other’ the desire is a fulfilled life in and with others in *just* institutions. We should not ‘forget’, Ricoeur underscores, that all in all the desire ‘*to live well with and for others in just institutions*’ is the foundation of moral and legal duties, rather than the fiction of the social contract.⁶⁶ In other words, just like the appearance of subjectivity in a general sense, the emergence of legal subjectivity requires otherness, that is ‘institutional otherness’. The transition from the capable subject to the legal subject (or the ‘subject of real rights’) requires the relation to the third person:

Only the relation to the third, situated in the background of the relation to the you, gives us a basis for the institutional mediation required by the constitution of a real subject of rights – in other words, of a citizen. This double necessity – that of the mediation by otherness in general and that of the distinction between the other as a ‘you’ and the other as a third party – can be established on the plane of fundamental anthropology to which we appealed in order to elaborate the notion of capable subject.⁶⁷

Thus it is in its relationship with ‘the institutional other’ that the Self appears as a legal person. Institutional otherness contributes to the construction of legal personality, and legal personality, in turn, preserves the relationship between ‘what is good’ and ‘what is just’. The good is prevented from being cut off from the legal; a purely procedural foundation for justice is forestalled as the teleological roots of justice are secured.

The political order encompasses all other institutions of society. Citizenship as conceived here – the subject of law – is thus (re)constituted by the social bond by which the subject has rights but also ‘the intrinsic obligation to participate in the burdens related to perfecting the social bond’.⁶⁸ Citizenship – being a subject of law as justice – is the mode of belonging to the political body. The citizen issues from the institutional mediation of the political body. Social institutions, and the political institution in particular, are ‘orders of recognition’. The relationship of the subject with his fellow citizens is the constitution and recognition of the capable subject as the ethico-juridical subject.

The social bond instituted by contracts, by agreements of every sort, which give a juridical structure to the giving of one’s word as an exchange, is intercalated within the structure of trust. The principle that agreements should be kept constitutes a rule of recognition that surpasses the face-to-face relation of the promise made between two people. This rule encompasses anyone who lives under the same laws, and, if we invoke international or humanitarian law, humanity as a whole. The other is no longer ‘you’, but the third party designated in a noteworthy way by the pronoun ‘everyone’ [*chacun*], an impersonal but not anonymous pronoun.⁶⁹

leads to impasses in practice’. ‘Morality is held to constitute only a limited, although legitimate and even indispensable, actualization of the ethical aim, and ethics in this sense would then encompass morality.’ Ricoeur, *supra* note 5, at 170.

66. Ricoeur, *supra* note 5, at 239 (emphasis in original).

67. Ricoeur, *supra* note 8, at 5.

68. Ricoeur, *supra* note 5, at 181.

69. Ricoeur, *supra* note 8, at 7–8.

As Ricoeur indicates here with his reference to international law, we also live under rules common to us as members of humanity's universal society. Our responsibility may decrease with the distance between ourselves and other people – since it is based on our ability to act – but it does not disappear. It is in this relation to 'each' that justice must be done. The subject of justice conjoins the political and the juridical. Just political institutions thus provide the required 'institutional mediation' for the subject to exist as a legal person, national and international.

As members of humanity who constitute their ethical–moral personal identity we have rights and responsibilities. These rights have no source in a social contract, but are 'rights of *humanity* in the precise sense of this term – that is, as rights attached to human beings as human beings and not as members of some political community conceived of as the source of positive rights'.⁷⁰ Rights and responsibilities require institutional structures. Without just institutions, 'individuals are only the initial drafts of human persons':

Their belonging to a political body is necessary to their flourishing as human beings, and in this sense, this mediation cannot be revoked. On the contrary, the citizens who issue from this institutional mediation can only wish that every human being should, like them, enjoy such political mediation, which when added to the *necessary* conditions stemming from a philosophical anthropology becomes a sufficient condition for the transition from the capable human being to the real citizen.⁷¹

From this phenomenological trajectory, the subject of rights – or legal subjectivity – emerges here as 'citizenship'.

The definition of the legal person as citizen makes it clear how much the question of justice and the question of politics are intertwined. The question of politics entails the question of the organizing structures of society and its political and legal institutions, which have to be just.

Elsewhere, I point out more extensively how Ricoeur is indebted to Hannah Arendt's republican conception of individual freedom (i.e. freedom as political participation) for his concept of citizenship and the Aristotelian idea of man and politics.⁷² As Klabbers has shown, plurality is at the core of Arendt's political philosophy. Political participation is an existential condition of human life. The appearance of the Self is only possible in a life with others; it requires 'sheer human togetherness'. The human condition is both equality and diversity. Plurality is the basic condition of all sociopolitical life. Ricoeur continues Arendt's line of thought about citizenship or political identity as defining of man's humanity.

The next step is to reconceive international legal personality as the legal identity of the individual which emerges in the relation of the ethical–moral self with others at a cosmopolitan scale. This transition from a capable subject to a legal subject happens at the impersonal level; the ethical–moral self is in a social or institutional relation with the Other. The transition to an international legal person then takes place in the subject's pursuit of happiness – the good life – at a cosmopolitan scale.

70. *Ibid.*, at 9 (emphasis in original).

71. *Ibid.*, at 9–10 (emphasis in original).

72. Nijman, *supra* note 13, ch. 6.

This may be through institutional mediation of the state or perhaps other global actors such as civil society organizations.

It is the Self's ethical–moral identity which seeks to live a good life in relation to the distant Other and so desires just institutions, also at a global scale. Here, international law provides the required institutional mediation. Thus, while 'institutional otherness'⁷³ is a prerequisite for legal personality, it is also – since the Self seeks to constitute itself ethically and politically at the impersonal level – constructed by the Self. In this dialectic process between the Self and otherness, aimed at happiness as the common good, just institutions are thus further developed. From this phenomenological perspective, individuals are primary and original international legal persons just like collectivities or historical communities such as nations or (indigenous) peoples. Before continuing this line of thought on the individual human subject in the final section below, I will first briefly address the collective Self, such as the historical community organized into the state.

5. THE COLLECTIVE SELF: THE IDENTITY OF COLLECTIVE AGENTS OF SOCIAL CHANGE

The shift from the individual to the collective is a challenge in every discipline, from philosophy and sociopsychology to politics and law. Ricoeur's phenomenological approach enables this shift by a change of focus: from the individual form of human capacities to the social form of human capacities. As such, the anthropological basis is the same: whether exercised individually or in common, man's humanity is defined by the power to act, by agency. Ricoeur uses the term 'power-in-common' for the social form of the capacity of an agent to constitute itself as the author of an action. It is the 'capacity of the members of a historical community to exercise in an indivisible manner their desire to live together', which he carefully distinguishes 'from the relation of domination in which political violence resides'.⁷⁴ Historical communities are, for example, nations, peoples, minorities, and indigenous peoples.

The phenomenology of the collective Self as a capable and responsible subject, and eventually as a legal subject, develops in a way largely similar to that of individual subjectivity. In the same way as the individual Self, the collective Self attests to its capacities, and like the individual Self, the collective Self constitutes its own identity. Ricoeur points at the way in which the same four questions of 'who' facilitate the appearance of the collective agent: the collective Self attests to its capacities by answering these questions; it designates itself as author of an action or of the story of its (national) history. Indeed, in response to the question 'who takes responsibility for these actions and accepts moral imputation?' at the social level, the collective Self attests to its power to act and to its (capacity for) accountability and responsibility for its actions. In this way, it identifies itself (in

73. See *supra*, text at note 64.

74. Ricoeur, *supra* note 5, at 220.

the world), recognizes its responsibilities, and attests to being a capable subject. A social agent's recognition of its agency constitutes 'a cultural constant'; it gives permanence to its capacity for social change, that is, to introduce changes in the world through action. What is true for the individual human subject is true for the collective subject: narrative identity is not ethically neutral, it carries the seeds of the ethical–moral identity of the collective. Likewise, the capacity to take responsibility is part of the ethical–moral identity of the collective Self. In doing so (e.g. historical and/or political) communities identify themselves as social agents and recognize their narrative as well as ethical–moral identity.

The narrative component of collective identity is indeed important to social life, both nationally and internationally, because it accommodates the dialectic process of permanence and change in the community's identity and facilitates the manifestation of self-constancy. The narrative self of national history continues to develop as the (historical and/or political) community continues to recount and evaluate its history, traditions, and national myths. This offers a conception of, for example, the political community called state as an alternative to the formal legal definition. The narrative collective identity (like personal identity) recognizes the dialectic social reality of the community and as such reconciles identity and otherness. This is not altered by the fact that the mode of recognition of social capacities may be different in the sense that it is an even more public affair.

The collective self's primary means of self-constitution is through the narrative process of public appearance (public representation and participation) and submission to peer and public scrutiny, followed by either recognition or misrecognition. The self-identification and self-recognition of collective agents occurs when these agents participate by narration in public debates, nationally as well as internationally, but also when they interact by other means, for example, in the case of states, in the negative situation of diplomacy having failed and interaction becoming military.

The ethical–moral identity of social agents develops similarly to the ethical–moral stage of personal identity through two dialectical processes, (i) of selfhood/*ipse* and sameness/*idem*; and (ii) of the Self and others (between *ipse*/selfhood and otherness). The first dialectic finds expression in self-recognition and the second in the desire to be recognized. At the global level, peoples seek recognition in legal terms when they claim their right to self-determination or claim statehood. Through the dialogue and interaction with others, the collective Self seeks recognition and does so through argumentation. Social agents submit their actions to public evaluation and approval and, in doing so, they argue for and justify their actions in ethical, moral, and juridical terms. In other words, through participation and interaction, the collective self attests to its capacities and develops its narrative identity further, into an ethical–moral identity, by evaluating its actions and justifying them. Argumentation is then an activity through which the social agent also continuously reconstructs itself and testifies to the agent's ethical collective identity. Being subjected to ethical–juridical evaluation, whether by participation in a national debate or at an international forum, the social agent will argue in dialogue with other social agents that its actions are good and permitted. Here, too, narrative identity

allows for change. Historical events may be disapproved of in hindsight perhaps only after decades, national history may recount it differently and gradually the narrative identity of the historical community changes and adapts (and moral blindness may be corrected). Collective narrative identity has immutable traits (sameness) as well as mutable traits which separate the identity of the collective Self from this sameness of character.⁷⁵ On the other hand, collective narrative identity may also be an obstacle in conflict resolution, when changing positions is prevented because sameness dominates in the dialectic of the collective Self and suffocates otherness, that is selfhood/*ipse*. In such situations, openness to plurality may fail to develop. The state's community is exemplary:

This notion of narrative identity is of the greatest importance in inquiry into the identity of peoples and nations, for it bears the same dramatic and narrative character we all too often confuse with the identity of a substance or a structure. At the level of the history of different peoples, as that of individuals, the contingency of turning points in the story contributes to the overall significance of the story that is told as well as of the protagonists. To recognize this is to free ourselves of a prejudice concerning the identity claimed by different peoples under the heading of arrogance, fear, or hate.⁷⁶

Hence to free national history and collective identities from prejudice and hate that may be part of their self-constitution in relation to the Other, Ricoeur suggests a therapy of sorts for collective entities – an idea which is not that foreign to states in a process of leaving the racist or totalitarian element in their identity behind, and of dealing with collective traumas and collectively felt aggression. ‘We may thus consider nations, peoples, classes, communities of every sort as institutions that recognize themselves as well as others through narrative identity.’⁷⁷

These historical communities have structures which facilitate living together beyond the interpersonal sphere; these structures of living together are the institutions which are subjects of justice when Ricoeur defines the institution as ‘the point of application of justice’.⁷⁸ Being a subject of justice attests or testifies to the power to act (in common) because justice is a teleological notion; it extends the goal of the good life to impersonal relations (to institutions) and so the field of action is extended.

Not all collective phenomena can be qualified as collective agents of social change, but the state, or rather its historical–political community, is indeed such a collective, which constitutes and develops itself as a subject narratively and institutionally in relation to others. The state is the organization of the historical community, and due to this organization it is capable of making decisions and of taking action. At a global level, the state is constituted in relation to other states and increasingly to other (non-state) actors. The development and realization of its collective identity requires others who participate in a state's narrative and who count on a state; ethico-juridical responsibility to others is constitutive of self-constancy of the state. Internally, the community realizes its desire to live together though purposeful

75. *Ibid.*, at 123.

76. Ricoeur, *supra* note 8, at 3–4.

77. *Ibid.*, at 7.

78. Ricoeur, *supra* note 5, at 194.

social and political institutions. The state, then, is the political institution that unites people as citizens and enables them to preserve the community and aim concertedly for the good. The state, then, is the embodiment of the citizens' power-in-common, power which unites individual human capacities into a collective form. Conceived of as a collective Self that constitutes itself and recognizes its agency, the state is the collective representation which mediates symbolically the (re)institution of the social bond that the collective produces through social practices. Judicial practices are such social practices; they may be identified with the juridical structure of society, that is, the structure and organization aimed at the distribution of goods as well as rights and obligations among citizens. These juridical practices institutionalize justice as one of society's communicational activities and constitute the state as institution and legal order.

Ricoeur's focus is on how we 'ascribe to social practices, as components of action in common, the sphere of those representations which human beings make of themselves and their place in society'.⁷⁹ These collective representations enable us to perceive the collective phenomena or social practices to which they refer:

This connection between representations and social practices is expressed through the role of symbolic mediation these representations exercise when there is something specific at stake with regard to the social practices, namely, instituting the social bond and the modes of identity attached to it. Representations are not therefore abstract ideas floating in some autonomous space, but, as said, symbolic mediation contributing to the instituting of the social bond. What they symbolize is identities that confer a particular configuration on these social bonds as they are formed.⁸⁰

The state as the (purposeful) organization of a political community is indeed such a representation. This role of the state would be incomprehensible without the 'symbolic mediation' of a signifying system such as democracy or (domestic and international) law and, at the international level, the standardized game of diplomacy. International law and diplomacy are shared symbolic mediators which serve the state and the international community, through which the state lives an international life and can act in the world. But domestically also the legal system is a mediating symbolic context which facilitates the interpretation of state actions and as such structures our evaluation and judgement of these actions. The legal system is indeed essential to the instituting of the social bond and the identity of the state that arises from it. The constitution of the self has thus expanded on to the next scale. Both on a national and international scale, situations of uncertainty invite the state's community as well as other social agents to shape their identity by acting and taking responsibility collectively.

Collective or social (capacity to recognize) responsibility demonstrates a social agent's power to act. It is also part of the constitution of the agent's ethico-juridical identity. And this is a central concept in the shift, at the political level, from the individual to the collective. Ricoeur conceptualizes collective responsibility in relation

79. Ricoeur, *supra* note 45, at 135.

80. *Ibid.*, at 135.

to individual freedom and social justice. It is the responsibility of the community as a whole to ‘transform abstract [rights and] freedoms into real opportunities’. Ricoeur follows Isaiah Berlin in the distinction between freedom as a positive and as a negative notion. Positive liberty is about what a person can accomplish, in other words is about ‘capabilities’. It is about ‘the capacity of a person to lead the life he or she chooses’.⁸¹ Individual liberty understood as a life choice then becomes a social responsibility – collectively we have to guarantee that the individual members of society have the basic capacities actually to build a life as they judge it to be good. If we reason analogously to the self-constitution of personal identity: society as a collective Self constitutes itself ethically and morally by mediating this desire through just institutions. The concerted desire to live in just institutions constructs an organization of the collective Self with power-in-common, hence a social agent which recognizes its responsibility, constitutes its ethico-juridical identity, and mediates the dialectic of society between sameness and otherness. Ricoeur employs the notion used by Amartya Sen of ‘rights to certain capabilities’.⁸² Sen reconciles this idea with a Rawlsian concept of justice, that everyone has the right to similar individual liberty. In other words, justice demands that everyone has ‘a right to capacities’ in order for every person to be able to choose their life. Within such a theory of justice, individual liberty may be an individual objective but its pursuit is to be conceived of as a collective endeavour – it is a social responsibility.⁸³ Justice conceived of in terms of equality – we all have the right to certain capacities which enable us to choose our lives – is then a distributive notion of justice which demands our national as well as international institutions to organize our collective desire to life together in such a way as to accommodate the pursuit of justice – to fight exclusion (rightlessness, poverty, etc.) and enlarge the scale of mutual recognition (all the way to the global level).

In other words, as the (self-)recognition of the (social) agent involves the evaluation of the agent’s actions in ethical and moral terms, it presupposes standards of justice; a theory of justice centred on this idea of ‘rights to certain capacities’ shows the extent to which political, moral, and juridical dimensions are intertwined. The minimal capacity to act – that is, the capacity to exist – and the real capacity to choose one’s actions ‘tur[n] out to be inseparable from those liberties ensured by political and juridical structures’.⁸⁴ Without these structures, freedoms and rights are vain. Just institutions shape our ethical life with others (we are born in an existing context of institutions yet we also shape them during our lives as we constitute ourselves in relation to others through institutional mediation), the virtue of justice demands our recognition of others, that is, of their otherness as well as their right

81. *Ibid.*, at 143.

82. *Ibid.*, at 144. It is within this ‘evaluative’ framework that the actual exercise of the freedom to choose calls on collective responsibility. It is up to such collective responsibility to ensure individual liberty in both its positive and negative forms, as well as the integrity of reciprocal relations between these two forms of liberty.

Ibid., at 144.

83. *Ibid.*, at 145.

84. *Ibid.*, at 146.

to capacities to choose a different life. The human condition of plurality is substantiated by the idea that every person has the right to capacities which enable her or him to choose her or his life – and since life is always life with others, this must be institutionally mediated by just social systems which organize collective responsibility. The recognition of collective responsibility is part of a process of collective self-constitution.

The collective, like the individual, is always in a process of self-constitution, which includes a dialectic process between selfhood and otherness. The (hi)story of the development of historical–political communities indeed goes to show how the Self is constituted in relation with the other or the foreign, either within the Self or outside in the world. The Self develops self-respect and self-esteem and self-confidence if these relations conform to the standards of justice, which include recognition of otherness. The collective Self may evaluate itself in ethical and moral terms in response to the Other, yet this inter-subjective process is not the only way in which ethical–moral identity is constituted. The Self may also attest to its collective identity in the relation with itself, in the encounter with the Self as another. Such can be seen, for example, in a national public debate over the nation's history and perhaps (international) crimes involved. Another example of otherness in relation to identity can be found in the position of the Kurds, who as a historical community have their own collective identity internationally recognized as such (in northern Iraq), yet whose collective identity within Turkey is unrecognized. Its otherness has not yet been adopted into the dialogical structure of the political community organized as the Turkish state. The *ipse* identity of the Turkish political community is failing in testing its attitude, its norms, and its normative model of behaviour, and so fails in adjusting its national identity and in establishing itself as the international (ethical and legal) subject that recognizes otherness and internalizes international legal norms which demand the recognition of (internal) self-determination of collective selves such as the historical communities of peoples. The example shows how at the collective level the two dialectics of identity operate (or *in casu* fail to operate purposefully towards justice) as well: internally, the dialectic of sameness and selfhood/*ipseity* (the identity that absorbs and accommodates new initiatives, developments, and normative models and ideals) and, externally, the dialectic of the Self and the other-than-Self.

Otherness and selfhood may be in dialogue and perhaps eventually reconciled, but history shows how often exclusion and misrecognition occurs. The recognition of otherness, both outside and within oneself, facilitates ethical and moral – legal conduct. This involves also a third relation with otherness: the otherness of conscience, our other voice within. Our conscience commands us to act well and justly, to take responsibility; it attests to the Self and to the dialectic relationship of Self as *idem*-identity and self as *ipse*-identity. The collective identity is marked by a similar narrative and ethical constitutive process in which the otherness of conscience may be represented and operate by stimulating the development of the *ipseity* or the ethical – moral collective self. Political communities organized as states (re)constitute their identity continuously by the dialectic of universality and plurality, sameness

and alterity. Ultimately, through these dialectic processes of Self with otherness,⁸⁵ mutual recognition emerges.

At this point it should be underscored that the constitution of the collective Self may also be characterized by the failure to take responsibility or by turning a deaf ear to the demands of justice. This goes, of course, to the heart of postmodernist critique: collective entities such as states construct themselves not merely in relation to but actually against one another, or against the Other within the Self. With regard to the state as *the* collective Self of international law, the dialectic movement between sameness and otherness may go dramatically wrong (for a long time). Today, the European Union demands that Turkey face its trauma of the Armenian genocide and revisit its narrative identity in order to evaluate its actions of the past and thus confirm its ethics and morality for the future. South Africa has institutionalized the reconstitution of its national identity in the Truth and Reconciliation Commission. But also at global level, foreign relations are marked by self-constitution notably against otherness. World affairs after 9/11 are particularly illustrative. International life is predominantly characterized by opposition and marked by a tendency of the collective identity to construct itself in opposition to otherness (Dutch identity after the First and Second World Wars, European identity versus US identity, or Western identity versus Islamic identity are cases in point).

It is the purpose of just international law and institutions to mediate relations between states as well as other organized communities (peoples, minorities, indigenous groups) represented on the international plane so as to serve recognition, reconciliation, co-operation, and social justice. The self-constitution of political communities organized as states involves other political and historical communities. These relations take place in the context of international institutions and international law. Together with the individual members who compose the community that constitutes its collective identity in relation with others, the collective Self has the same ethico-moral desire – to live together in just institutions. At the final stage of its self-constitution, international legal personality emerges as the (wounded) ethical-moral identity of the collective Self expressed on a global scale, that is, in relation to global others. As such, international legal personality is again the final stage in the development of identity: legal subjectivity is firmly grounded on the power to act and the desire to live well together.

However, the (international) reality of collectivities which constitute themselves in opposition to each other may suggest that international law and institutions frequently fail in their task. This is a reality we have to face in order to correct the shortcomings of international law in this respect. Ricoeur serves this self-scrutiny by addressing the Hobbesian view on international law and society. He offers an alternative which can liberate us from the perception that collectivities such as states necessarily act amorally and out of egoism for the reason that this is the way in which they are constituted. Currently the international legal order is construed as a

85. The other as the locus of God's self-revelation.

predominantly voluntarist order. It is characterized by power politics and frequently ignores the rights as subjects of justice of other collectivities such as indigenous peoples or minorities, since these represent the elements of otherness within the sovereign state. International law should not ignore this issue, or rather the international community should not prevent international law from dealing with these issues; Ricoeur's hermeneutics of the individual and collective Self describes and explains why, and suggests the direction for international law and international institutions to take: organize the international community as an order of mutual recognition, facilitating the recognition of otherness and international co-operation in just institutions and in accordance with international law as justice.

In other words, the Hobbesian state of anarchy is guaranteed as long as we do not reconceive international law as a social system mediating between the Self and the Other seeking mutual recognition. To be able to move from anarchy to an order of recognition and justice, Ricoeur points us to Hegel and to the struggle for recognition elaborated by him.⁸⁶ Because self-recognition and seeking recognition of others is part of the construction of the Self (individual as well as collective), it cannot be ignored in this attempt to find seeds for a new grounding of international legal personality. As mentioned before, I draw on Ricoeur's Hegelian-inspired thinking for its powerful and convincing thought that men living in a natural state will secure their lives, yet not without seeking recognition, since man cannot live with what he terms as contempt. This negative feeling is fought against – the struggle for recognition takes place, on the level of emotion, as well as on the juridical and social level. It is the dialectic of contempt or misrecognition and recognition which leads to *Anerkennung* in the state of nature.⁸⁷ As such, the model of the state of nature is changed and enriched with the idea of the possibility of mutual recognition between Self and otherness as equal partners capable of respect and co-operation. This model of the state of nature as an order of recognition may serve as a descriptive and prescriptive example for the international order.

6. TOWARDS A NEW THEORY OF INTERNATIONAL PERSONALITY AND INTERNATIONAL LAW AS JUSTICE

In the preceding paragraphs, (international) legal personality appeared as an aspect of the phenomenology of the subject. The Self constitutes itself in relation to itself, to the immediate Other, and ultimately to the distant Other. The four stages of identity take shape in these three types of relations. The international legal personality of both the individual and collective Self is an aspect of the Self's ethical–moral identity, which arises in relation to the distant (individual or collective) Other at a cosmopolitan scale (see the table).

86. Master/slave struggle as model for dialectic relation of Self and Otherness; from asymmetry between master and slave to interdependency and the symmetry of mutual dependency and recognition.

87. 'With contempt, the incorporation of the negative into the winning of recognition is complete.' Ricoeur, *supra* note 45, at 259.

	in relation to		Distant other or institutional otherness
	Self as another	Near other	
Self-constitution			
Ethical–moral identity of the Self in living to fulfil the aim of ‘the good life’. (Selfhood in dialectic relation with otherness, actions are judged in terms of the good (ethical) and obligatory or duties (moral–juridical). By judging one’s actions as good and permitted or obligatory in relation to otherness, self-respect and self-esteem arise.)	Personal fulfilment.	Friendship.	Justice: a. national scale: subject of justice <i>or</i> legal personality; b. at cosmopolitan scale: international legal personality.
Narrative identity of the Self.			
Identity of the Self as acting subject.			
Identity of the Self as speaking subject.			

International legal personality as reconceptualized here refers to the identity of the Self in relation to otherness institutionally mediated by law (as justice). As such, international legal personality emerges with law as an order of recognition.

In the introduction I mentioned that the deep structure of classic (voluntarist) international law is Hobbesian, based on the Hobbesian understanding of the state of nature that has been the model for thinking about the international society and international law.

International legal personality first emerged in the work of Gottfried Wilhelm Leibniz, as a concept within his universal jurisprudence with which he responded to Hobbes. Leibniz rejects Hobbes’s (as well as Pufendorf’s) position that justice is that which is done by a supreme power, as this implies that justice is based on will and power.⁸⁸ According to Leibniz, justice is love as charity – that is, at the impersonal level living well means to be focused on God, or on perfection, or on the common good. It is inherent in man’s rational and social nature to be directed towards this common good.

88. See, for more on Hobbes’s concept of person and Leibniz’s issues with Hobbes’s and Pufendorf’s views, Nijman, *supra* note 13, ch. 2.

Leibniz used the concept of international legal personality to bring all (old as well as new) powers under the rule of law as justice, that is, the law of nations and nature. He conceived of international legal personality as the concept to legitimize the participation of (relatively) sovereign powers in international life, but not without at the same time establishing their responsibility to conform to the justice-based rules of international law. In Leibniz's universal jurisprudence, international legal persons were thus assigned the legal duty or responsibility of furthering universal justice. International legal personality indicated personal capacity: of the sovereign power to act, as well as the responsibility to advance justice. Law as justice is what we all desire and aim for by human nature, or, in Ricoeur's words, law as justice is what we construct as we construct ourselves in a dialectic relation with otherness out of a (natural) desire to live together. As such, the realignment of the theoretical perspective proposed here with the natural-law tradition cannot be denied.

The origins of international legal personality show how important the first premises are for every reasoning we undertake. Leibniz's and Hobbes's different visions of man and the state of nature lead them in the opposing directions of universal justice and universal anarchy. Hobbes could never have handed us the concept of international legal personality since he denied the existence of international law; after all, the state of nature – which is life without a government, just like international society – is life in anarchy. Leibniz was not the only one to take issue with Hobbes; so did Hegel, many years later. Hegel responds to Hobbes's image of the natural state of war with the struggle for recognition. By introducing the struggle for recognition Hegel brought back the ethical–moral dimension to the state of nature and to the origins, and potential, of (political) society.

International legal personality reconceptualized on the basis of the hermeneutics of the Self relates to a conception of international society and international law which allows for a representation of morality and ethics. It is the responsibility of (world) citizens and their institutions to actualize justice on a cosmopolitan scale. The contours of a reconceptualization of international legal personality proposed here also offer a framework for the description of the identity of collective entities in international law and the position on the international stage claimed by these entities. The state as the political institution of a community is of particular concern in this respect. The reconstruction of the international subject outlined in this paper allows for a conception of the international (largely interstate) order in which the international legal personality of the state ensures the link between justice and law.

We thus need to leave behind the Hobbesian model for the international society – the struggle for survival – and follow Ricoeur when he draws on Hegel's alternative: the struggle for recognition. This enables us to shift from an 'order of fear and conflict' to an 'order of respect and mutual recognition'.⁸⁹

In brief, Hegel's argument is that Hobbes was wrong and morality is present in a 'state of nature'. Ricoeur explains, 'What is at stake is knowing whether an originarily moral motive underlies life together, one that Hegel will identify with the desire to

89. See Carty, *supra* note 12.

be recognized. Thus it is as a theory of misrecognition that the Hobbesian theory of the state of nature [is] revisited.⁹⁰

According to Hobbes, three passions characterize life in a state of nature or a 'war of all against all': competition, distrust, and vanity or glory. In other words, in this conception of human nature, moral conduct is not coming from within but is imposed from outside. Man acts in order to gain either profit, safety, or reputation or fame, but never out of compassion or *caritas*. The situation that arises is one of mutual misrecognition. For Hobbes, the right of nature is the right to use one's power to preserve oneself. In a law of nature fully based on the principle of self-preservation morality or respect for the other is absent. Only the fear of death inclines man to peace. The fear of a violent death incites the conclusion of a political contract. As Ricoeur aptly points out, the dimension of alterity is absent 'in the sequence of concepts culminating in the idea of a covenant'.⁹¹ In the passage from the natural to the fictitious person – by means of the chain of transfer, contract, and covenant – an alterity that co-operates in the ipseity (of the fictitious person) is lacking. How should we come from this state of 'war' to a state of mutual recognition, a state of 'peace'?⁹²

Ricoeur searches for a moral exigency that is as powerful and 'originary' a drive 'as the fear of violent death and the rational calculation that this opposes to vanity'.⁹³ He finds it with Hegel: the struggle for recognition is a similarly fundamental drive of man and as such could be the foundation of political order.

Struggle for recognition is a process which (i) 'ensures the link between self-reflection and orientation toward the other'; (ii) 'proceeds from the negative toward the positive pole, from disregard toward consideration, from injustice [i.e. exclusion] to respect [i.e. mutual recognition]'; and (iii) is systemized by the hierarchization and institutionalization of recognition.⁹⁴

If the desire for recognition is indeed the foundation of a political theory, indignation is the primary, originary motive in the same way as the fear of violent death in Hobbes's theory. Foundation of political order or *civitas* in Hegelian theory is the experience of indignation about injustice – that is, exclusion or misrecognition – and the ensuing demand for recognition of the self. This indignation has a moral dimension or, rather, it is a moral phenomenon. In other words, Hegel is out to establish that man is capable of more than actions arising from rivalry, distrust, and vanity, and that man is more sacred or spiritual than Hobbes portrays him to be. It is Hegel's aim to incorporate morality in this transfer from the state of nature to the state, to find a moral reason that explains in this thought experiment why men move beyond war.

Thus Hobbes's struggle for survival is replaced by the Hegelian struggle for reciprocal recognition. Hegel preserves the 'idea of a living unity between individual and universal freedom', beyond 'the primacy of the *polis* over the isolated individual'. He 'assign[s] to consciousness the capacity to generate the successive stages of

90. Ricoeur, *supra* note 45, at 162–3.

91. *Ibid.*, at 170.

92. *Ibid.*, at 164.

93. *Ibid.*, at 171.

94. *Ibid.*, at 171–2.

self-differentiation that punctuate the struggle for recognition'.⁹⁵ The substitution of the struggle for self-preservation and survival with the struggle for recognition and 'the inclusion of the struggle for survival in the dialectic between self-assertion and intersubjectivity' determine Hegel's theory of natural law.

Like the individual Self, the collective Self – such as a state or a people – desires to be recognized. With this desire for recognition as the foundation of his political philosophy, Hegel ascribes to indignation the same importance and function as Hobbes does to the fear of death. This is the (philosophical) value of the struggle for recognition: it preserves 'the correlation between a relation to oneself and a relation to the other'.⁹⁶ Contrary to the fear of a violent death, which produces violent behaviour to survive in the state of war, the desire to be recognized is a motive which produces moral conduct: recognition and respect can only be received if they are given.

On Hegel's model a normative theory of political society can be based. Once mutual recognition arises from the originally dissymmetric relations, community will emerge. As such, it offers a tool for a better understanding of the Self. Hegel enables us to put 'the resources of the negative [the refusal of recognition e.g. in crime, humiliation, the emergence of indignation] at the service of a process of the actual realization of consciousness or of Spirit'.⁹⁷

The negative feelings become the source of normativity: experiences of injustice generate norms which arrange for correction of misrecognition. Justice is served by uplifting the injured entity to a state of 'being recognized', for example by compensation. Crime in Hegel's perspective is misrecognition of property or personality. Seeking justice is thus an attempt to end misrecognition and succeed in the struggle for recognition. On a global scale, the struggle for recognition is visible in the dynamic of humanity's cultural plurality as well as multiculturalism within domestic societies.

Ricoeur cites with approval Taylor's observation that 'Our identity is partially shaped by recognition or its absence, often by the *misrecognition* of others.' Misrecognition harms the individual human beings who are the members of these collectivities, since they internalize an auto-image in which they deprive themselves of a part of themselves. As self-recognition cannot arise without mutual recognition, partial (or defective) recognition by others harms human dignity and precludes the complete identity comprising otherness. The demand for recognition of one's dignity and individual identity requires – hence assumes – the Other as well as a dialogical structure. Ricoeur: 'It is collectively, one could say, that we demand an individualizing recognition.'⁹⁸ Therefore we should shift away from a politics of universal equality (with all its blind spots for difference and plurality) to what Charles Taylor has called a 'politics of recognition'. This shift then will be due to 'a change in the definition of the meaning of equality implied by the very idea of dignity'. Ricoeur elaborates:

95. *Ibid.*, at 175.

96. *Ibid.*

97. *Ibid.*, at 216.

98. *Ibid.*, at 214.

It is equality itself that calls for a differential treatment, right up to the institutional level of rules and procedures for 'affirmative action'. Abstract universalism is reproached for having remained 'blind to differences' in the name of liberal neutrality. In this way, two policies, equally founded on the notion of equal respect, enter into conflict starting from the same central concept, that of dignity, with its egalitarian implications.⁹⁹

Ricoeur reads Taylor in an attempt to find an alternative to classical liberalism – and its global version of abstract universalism – and its negation of difference, that is difference within the Selves that act on the global plane, as well as differences between or among the collective Selves.

Our identity, as individuals and groups, is partly shaped – or misshaped – by the recognition or misrecognition we receive from others. Taylor rightly observes, 'Due recognition is not just a courtesy we owe people. It is a vital human need.' The recognition of identity is not the same as the recognition of dignity. This is a crucial distinction with regard to the reconceptualization of international legal personality. Rather than using personality as a concept that recognizes dignity, international legal personality (and its recognition) are here part of the self-constitution of identity. The relation between selfhood and otherness within each Self and between Self and Others, individual or collective, exists at all levels up to the international society of states. However, with each step or transposition to a bigger scale, complexity rises and the risk of conflicts over recognition and legitimacy of ethnic and cultural differences may increase. Nonetheless, a liberal society 'singles itself out as such by the way in which it treats minorities, including those who do not share public definitions of the good, and above all by the rights it accords to all of its members'.¹⁰⁰ Minorities as otherness within may be engaged in a struggle for recognition from which mutual recognition emerges and respect comes to substitute contempt.

The new theory of international legal personality outlined in this paper allows for a diversity of social agents to constitute their ethical–juridical identity, including international legal personality, since they aim for living well on a cosmopolitan scale. International law is one of the institutions which mediates this desire for living together with all of humanity recognizing both our universality and plurality. In this view, not only historical–political communities such as states, but also indigenous peoples and minorities, are conceived as international legal persons involved in the struggle for recognition mediated by international law and international institutions. As international legal personality is defined as part of the ethical–moral identity of the subject, the rights and responsibilities that come with international legal personality vary with the capacities of the different subjects. Yet since international legal personality is grounded in the desire to live together in just institutions, the international law system thus conceived develops into an order of respect and mutual recognition that structures interaction and co-operation at the global level.

How would such international law and such international order be possible? It is possible once we understand that the model reflects potentiality (capacities) and that it is the responsibility of (world) citizens as well as of states and other institutions

99. Ibid.

100. Taylor as cited by Ricoeur, in Ricoeur, *supra* note 45, at 216.

to actualize justice, to recognize rights and duties. The current international order is moulded on a model with people who have forgotten the will to live together, nationally as well as internationally. Historical–political communities do not spring from a fiction called ‘social contract’ but from ‘the will to live together which they have *forgotten*’; this will should be recollected; the foundation of historic–political community is ‘*the desire to live well with and for others in just institutions*’.¹⁰¹ If we recollect this desire and recognize that it pre-dates the contractual society, or rather accept that it belongs to the passions of the state of nature – as Grotius and Leibniz have already pointed out – a just international order is possible.

This entails the recognition that justice pre-dates law, that justice as rules and norms is the institutionalization of justice belonging to the ethical with equality at its core.¹⁰² The Self lives in a dialectic relation with Other(nes), individually as well as collectively. This means that it seeks recognition and offers recognition in return. Such is the struggle for recognition which pre-dates contracts or laws, and which is the core of the ethical–moral dimension of the *status naturalis*. The state of nature may be a struggle, but it is not a war. It is not merely determined by the fear of death, but also by the desire to be recognized. From this Hegelian-inspired line of thought, the right concept for the international (legal) order emerges, in which morality is inherent and not imposed from outside after the conclusion of a social contract.

7. CONCLUSION

The subject of law (as justice) thus does not find its source in a social contract, rather it emerges from the relation of the Self with Other(nes)s. ‘Aiming at the good life with and for others in just institutions’ means in relation to distant Others the pursuit of a just political–juridical order which mediates the mutual recognition of human plurality and universal humanity. To recognize each other as capable and suffering human beings and to act as responsible citizens is to advance and defend institutions which make (social) justice effective – domestically but also internationally. Indeed, we are also world citizens, who may pursue the actualization of (social) justice on a cosmopolitan scale. This aim can be pursued through the state as well as through, for example, global civil society organizations which may act as mediators for the subject’s efforts.

International legal personality as an aspect of our ethical–juridical identity, in other words, is not merely having rights; it also includes a responsibility to fight against exclusion and misrecognition on the global scale. Part of this responsibility is also to eliminate those obstacles within our historical–political community¹⁰³ which prevent the political institution (the state) from co-operating effectively at the international level. International legal personality, in short, concerns the life in global institutions.

101. Ricoeur, *supra* note 5, at 239 (emphasis in original).

102. *Ibid.*, at 201 et seq.

103. Ricoeur defines ‘institution’ as ‘the structure of *living together* as this belongs to a historical community – people, nation, region, and so forth – a structure irreducible to interpersonal relations and yet bound up with these [relations]’ and which facilitates justice. Ricoeur, *supra* note 5, at 194 et seq. (emphasis in original).

Indeed, the historical–political community called state – established by the bond of common mores rather than rules – also constructs its collective identity in relation to institutional otherness at an international scale. International legal personality is the ethical–juridical identity of the state as it arises in international relations – how it operates and co-operates according to international standards of justice. We have already seen that citizens of these states have their own responsibility as national and international legal persons, but the state conceived of as a collective self has a separate collective ethical–juridical identity and thus international legal personality too. As a subject of international law (as justice), the state has a responsibility to aim for just institutions and to eliminate all factors which exclude and misrecognize the other members of the community. Plurality also belongs to the international political sphere.

International law is the institutional mediation of (social) justice on a global scale. International legal personality as reconceived here no longer refers to (absolute) sovereignty, but first and foremost to responsibility. Justice is addressed to both individual and collective persons, to individuals as well as states. The human capacity to take responsibility in relation to others and in relation to ‘oneself as another’ connects *Sein* and *Sollen*, it connects the potential for action to actual ethical–moral conduct. This new concept of (international) legal personality may serve as a timely juncture between the ethical and moral realm on the one hand and the legal order on the other.

Similarly to Hannah Arendt,¹⁰⁴ Ricoeur understands citizenship, or the right to have rights, as a requirement of human existence. As man’s humanity is defined by his capacity to act (agency) it is essential that he is recognized in his relation to the institutional Other at the impersonal level. Hence the legal and political order which emerge from, and facilitate the relations of, the Self with the distant or impersonal other, is (intrinsically) aimed at justice – that is, aimed at living the good life collectively also. The ethical–moral identity of the Self demonstrates how the Self relates to justice, or rather – following Aristotle and many after him – the Self is understood as the Self aiming for the good life. Law as justice is knowable to the Self; he submits his actions to the standard of justice when recounting and judging his life. Justice exists as the standard of responsibility for both the individual and the collective. The juridical identity of the collective Self institutionalized in the state is thus the ethical–moral identity of the state community as it arises in relation to others. Justice as the standard for the political and juridical organization of mankind contributes to our political and juridical imagination; it requires the concerted (ethical) action of individuals and collectives in accommodating and recognizing humanity’s identity and alterity. Taking Europe as an example,¹⁰⁵ the challenge to

104. See J. Klabbers, ‘Possible Islands of Predictability: The Legal Thought of Hannah Arendt’, in this issue.

105. See Ricoeur on the institutional future of Europe: ‘[I]ndeed, it would be a mistake to believe that transfers of sovereignty in support of a political entity which is entirely unrealized can be successful at the formal level of political and juridical institutions without the will to implement these transfers deriving its initiative from changes of attitude in the ethos of individuals, groups and peoples’. P. Ricoeur, ‘Reflections on a New Ethos for Europe’, (1995) 21(5) *Philosophy and Social Criticism*, at 3. Here, Ricoeur reflected on possible models for such new ethos and their institutional consequences. Without going into too much detail here, the translation ethos as a model to suit and support the further construction of Europe to Ricoeur would demand, for example, that European students learn at least two living languages, since this would contribute also to their (spiritual)

the international community as a whole to develop its institutions such as to be able to confront global problems is self-evident. The institutional integration of identity and alterity is equally necessary at the global level. The first outline of a reconceptualization of international legal personality and international law developed here proposes the incorporation of the deontological–teleological perspective within the international legal system. It also offers a better understanding of sovereignty – that is, its originally ethical foundations. The imperative of a new ethos of mutual recognition to replace the ethos of self-preservation (which has dominated Europe for a long time and dominates the international arena most of the time) entails an opening of the mind – justice is concerned with the other – and a guidance for institutional (political and judicial) imagination. By rejecting Hobbes’s pessimistic anthropology and adopting a slightly more optimistic or constructive anthropology, an ethos of mutual recognition is allowed to replace the ethos of self-preservation. For such a new (cosmopolitan) ethics to inform and inscribe international relations, the participation of the whole of humanity through different associations and institutions is required. Success is possible, insofar as the desire to be recognized – which underlies social life – is one of the originary passions of human beings. The quest for recognition is a moral motivation which is part of the (continuous) reconstitution of every individual and collective Self in relation to others. As such, it is constitutive of a social order of mutual recognition and respect. The (international) legal system contributes to the realization of the Self, as each recognizes the Other as a legitimate subject of (international) rights and responsibilities.¹⁰⁶

To sum up, the reconceptualization of international legal personality sought here is both descriptive and prescriptive. (i) It adopts Ricoeur’s hermeneutics of the Self as a valid answer to the deconstruction of the subject and – it being a constructive

ability to translate between cultures, to their capacity to attend ‘to this process of transference to the mental universe of the other culture, having taken into account of its customs, fundamental beliefs and deepest convictions; in short, of the totality of its significant features’. The importance of worldwide education has only increased the necessity for members of humanity to be able to translate a foreign culture into linguistic, analytical, and emotional categories peculiar to one’s own, and vice versa, which has become even more urgent. Also, the exchange of memories (as a model for communicating on events which mark national histories) may fruitfully inform our reflection on international institutions as facilitators of exchange and dialogue, and, for example, on ‘founding events’ which may have been violent to others internally and externally. Politics of identity and recognition cannot be excluded from the international level. However, recounting (national) founding events differently may not do the required justice to victims – access to international human rights fora is required for those who suffered violations. Similarly, the Permanent Forum on Indigenous Issues within the UN system is an important institutional development in giving indigenous peoples representation on the international plane. However, it is still to be seen whether the General Assembly will indeed recognize the right to self-determination of indigenous peoples as formulated in the Draft United Nations Declaration on the Rights of Indigenous Peoples as adopted by the Human Rights Council by its decision 7/2 of 29 June 2006. Art. 3 of the Declaration provides that ‘Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ Moreover, Art. 4 stipulates that ‘Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.’

106. See Carty, *supra* note 12, at 313–14: ‘the idea of responsibility, which expresses itself in indignation at the contrast between the equal formal distribution of rights and an unequal material distribution of goods, the humiliation felt where civil rights are denied, and the frustration felt at the absence of participation in the formation of the public will. Responsibility may pass through struggle, from humiliation and indignation into a capacity to express oneself in a rational and autonomous manner on moral questions. Therefore, responsibility covers both the assertion of the self and the recognition of the equal right of the other to contribute to the advance of rights and the law (Ricoeur 2004 [*Parcours de la Reconnaissance*], 292–293)’.

philosophical perspective of the subject – as a solid foundation for the reconceptualization of international legal personality. (ii) In this way, it means to provide a better model for describing and explaining current developments in international law which show that the classic conception of international law and international legal personality prevents us from capturing adequately the rise of non-state actors and their increased visibility and legitimacy in the eyes of international law. (iii) Besides explaining more adequately the quest for recognition and the changing position of collective entities, the reconceptualization of international legal personality as a part of the identity of the individual subject on a cosmopolitan scale allows for a fundamental change of perspective: the individual subject is an originary and primary international legal person. (iv) The contours of a new theory of international legal personality as formulated here accommodate change; such a theory may facilitate the variety of collective entities (such as (indigenous) peoples and minorities) now seeking recognition and claiming inclusion in the international law system. ‘International legal personality’ reconceptualized as a stage in the phenomenology of the subject may serve as an underpinning for such recognition and inclusion – which is timely, since it has been established that exclusion or misrecognition defeats a just international law. (v) Once reconceptualized as a mode or stage of (personal as well as collective) identity, international legal personality revindicates law’s inseparability from ethics, or international law as justice.

In conclusion, we are dealing with an ‘evaluative–descriptive term’,¹⁰⁷ which throughout its conceptual history has been a locus of change in the language of international law. The proposed reconceptualization of international legal personality seeks also the alteration of the moral identity of international law. It means to offer a conception which better describes the reality connected to the notion of the legal subject, and in addition it means, frankly, to influence legal (conceptual) developments. The traditional definition of international legal personality as ‘a bearer of rights and duties under international law’ on the one hand can still seem valid literally. Yet on the other hand its meaning has changed completely: read in isolation, Kelsen’s description of legal personality as the point of attribution or imputation is correct; however, a defining conceptual change occurs as law is not defined by its ultimate *Grundnorm* but by its rootedness in justice. International legal personality is no longer ‘granted by’ positivist international law; it is a stage of ethical–moral identity constituted in the dialectic relation of Self and Other(nes). It thus enriches the modernist conception into an anthropologically grounded and ethically rooted concept. But the anthropology on which (international) law and the (international) legal person rest, is an anthropology that recognizes the (individual and collective) Self as unstable and tainted by the human condition. Yet it also recognizes that the human subject is fully capable of recognition and of respect for the (internal and external) Other.¹⁰⁸

107. Quentin Skinner: ‘It is essentially by manipulating this set of terms that any society succeeds in establishing and altering its moral identity’. Quoted in Nijman, *supra* note 13, ch. 1, text to n. 83.

108. ‘So the dynamic of international legal argument and the normative development of international law are to be found in the embedded historical contexts of the individuals and communities they are both supposed to ground. On their own the legal arguments and norms cannot even be understood and must appear as an endlessly inconclusive circular and self-defeating game’. Carty, *supra* note 12, at 315.