

Book Review *Anne Peters, Jenseits der Menschenrechte. Die Rechtsstellung des Individuums im Völkerrecht, Verlag: Mohr Siebeck 2014, XXIV + 535 S, 104,00 €, ISBN 978-3-16-152749-4*

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Introduction

Anne Peters' book is thoroughly researched, logically composed, beautifully executed, and a pleasure to read. True to the German tradition of legal research and writing, neither effort nor space is spared to convey a full, and indeed thoughtful picture of a topic that is truly at the core of a much needed discussion of where public international law (PIL) as a functioning normative framework for the behavior of a variety of actors and agents is, and should be headed. So, in short, every scholar and practitioner of any sub-discipline of PIL would be well advised to take *Anne Peters'* tome in to material consideration.

This review will not duplicate the obviously well-deserved praise others have meted out. Instead, let us take a cursory look at some of the issues raised from a somewhat unsophisticated, if not mundane, perspective, namely: Are the examples discussed creating a solid and sustainable basis for emancipating the individual from his or her alleged status as the object of protection by the paternalistic state? Does this transformation away from human rights, which conceptualizes the individual as an equal participant in the PIL discourse by virtue of a 'subjective public right' that needs not be fundamental or human rights-based, boost the recognition of said individual in relation to the traditional subjects of PIL?

The humanization of Public International Law

Judge *Cançado Trindade* famously said in his concurring opinion in the Inter-American Court of Human Rights' advisory opinion on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* that

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“we have the privilege to witness the process of humanization of international law.”¹ The central question is whether that ‘humanization’ has progressed sufficiently so that we can take the ‘human’ out of the equation and replace him or her with a concept of a ‘subject individual’ that needs no human right to flourish as a full participant in the PIL discourse? *Cançado Trindade* provides a presumptive answer, speaking specifically about the right to consular assistance: “[S]uch individual right, *inserted into the conceptual universe of human rights*, is nowadays supported by conventional international law as well as by customary international law.”² This seems to suggest not the opposite of the above-mentioned emancipation, but something rather different nevertheless: The Court interprets a non-human rights provision, such as Art 36 of the Vienna Convention on Consular Relations,³ by inserting a human rights component – found in the due process rules of the American Convention – into the by and large state-centered regulatory framework of the Vienna Convention and thus empowers individuals by broadening the scope of individual rights and, consequently, their standing to assert such rights in domestic and international fora.

Anne Peters makes many thoughtful general and programmatic suggestions, placed throughout the book and intertwined with discussions of substantive examples of when and where it is asserted that PIL has already advanced towards a more general recognition of the individual as a, or ‘the’ primary subject (“als das primäre Subjekt des Völkerrechts anzuerkennen”⁴). The discussion turns first to individual responsibilities under international law and, consequently, international criminal law, but also individual civil liability. The reader then finds chapters on individual claims against states, rights and duties in times of armed conflict, R2P, the status of victims of crime under international law, international investment law, and consular and diplomatic protection. While broad, this selection of examples is tailor-made to advance the central claim of *Jenseits der Menschenrechte*. As we shall see, there is more (and, purposefully, less) to the topic.

Legal personality of the individual beyond, or without human rights?

The essential proposal of *Jenseits der Menschenrechte* appears to be that the legal personality and status of individuals *en par* with states and other subjects of PIL has already been elevated to a principle *de lege lata*. It is suggested that there exist two types of subjective individual rights under PIL: human rights, and “simple” (“einfache”⁵) rights. These are coordinate, rather than hierarchical in nature. Human rights

¹ I-ACtHR, *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999), para 35.

² I-ACtHR, *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999), para 35.

³ Adopted on April 24, 1963, 596 U.N.T.S. 261.

⁴ *Peters Anne*, *Jenseits der Menschenrechte. Die Rechtsstellung des Individuums im Völkerrecht* (2014) at 173.

⁵ *Peters* (Fn 4) at 387.

remain important, of course, but no longer enjoy primacy in conferring such status to individuals.

In the field of human rights and fundamental freedoms, some 75 years of extensive treaty-making, customary law development, international jurisprudence in coordination, and frequently in confrontation with national judiciaries, etc have indeed succeeded in establishing an understanding – partial, if not piecemeal, as it may be – that within certain jurisdictions, or regions of the world, individuals can indeed challenge states in front of international courts and tribunals as if they were enjoying equal status. Caveats still abound, even in the human rights realm: Individuals must first subject themselves to any and all remedies deemed effective on the domestic plane, unless they can make a claim to fall in an ‘exempt’ category either by virtue of their status, or the flaws and resulting structural inefficiency of the remedy at issue. States still claim and are granted the right not to be subjected to international judicial scrutiny by virtue of the principle of subsidiarity – coincidentally, that very principle has been at the core of the discussions relating to the reform of the European Court of Human Rights’ procedures, and has understandably led to some pushback from that Court, most recently in the preparatory exchange of observations for the April 2018 Copenhagen summit.⁶ States are still partly immune from judicial or quasi-judicial review and liability under human rights law for acts of state agents beyond the physical boundaries. Most pertinently, though, the actual enforcement of the ‘universal’ principles of human rights law takes place only in a few regions made up of states that uniformly (as in Europe), predominantly (as in the Americas, at least the south, or partly Africa) have subscribed to binding human rights treaty obligations that also allow for a full, judicial, and legally enforceable implementation to occur.

Vast swaths of the Earth’s surface lack binding and effective human rights enforcement on the international plane. Billions of individuals cannot approach an international human rights court, even if such a tribunal would indeed be their first, real ‘remedy’ in the absence of an independent and impartial judiciary at home. Human rights law today, as imperfect as it is, is under attack. To be sure, *Anne Peters* does not attack human rights law. Human and ‘simple’ rights under PIL remain coordinate, as we have seen before. Human rights remain embedded, *Anne Peters* argues, in the quasi-constitutional realm of PIL.⁷ Rather than challenge human rights, she super-interprets the findings of international courts and tribunals together with other practice in the non-rights field to arrive at her conclusions. It is important to note that *Jenseits der Menschenrechte* maintains that the distinction between the two spheres of rights is and should be substantive (“materiell”⁸). Now, *Anne Peters* argues that a specific distinction between fundamental and simple individual rights in PIL would serve as a cor-

⁶ Opinion on the draft Copenhagen Declaration, adopted by the Bureau in light of the discussion in the Plenary Court on 19 February 2018, available at <https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhagen%20ENG.pdf> (25.04.2018), at para 13: “[T]he significance of subsidiarity in any given case will depend on factors including the Convention provisions involved, the exact nature of the complaints raised, the particular facts of the case and its procedural background. It is therefore a matter for the Court to assess each time as it performs its function.” See also *ibid*, para 10.

⁷ *Peters* (Fn 4) at 387, compares human rights in the international sphere with ‘Grundrechten’, or fundamental rights, in national constitutional arrangements.

⁸ *Peters* (Fn 4) at 390.

rective against a possible trivialization (“Banalisierung”⁹) of human rights. The examples provided as evidence for a developing field of non-fundamental subjective individual rights under PIL are plentiful, and cannot all be discussed in detail here. However, in the following we shall attempt to explore some of the topics to see whether they indeed support the central narrative.

Environmental (procedural) rights – merely subjective, or human?

Anne Peters refers to the Protocol of San Salvador to the ACHR,¹⁰ which in Art 11(1) indeed stipulates that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.” Of course a right to a healthy environment as such is purely programmatic – albeit certainly of a morally persuasive nature. However, para (2) of Art 11 adds that “[t]he States Parties shall promote the protection, preservation, and improvement of the environment.” The promotion of protection, specifically, means that states shall secure the right by guaranteeing to individuals that they may utilize procedures aimed at giving practical effect to it. According to Art 2, this starts with states parties’ obligations “to adopt, [...] such legislative or other measures as may be necessary for making those rights a reality.” Restrictions in national law, Art 5 says, are permissible “only to the extent that they are not incompatible with the purpose and reason underlying those rights.” This already provides a solid basis for a claim that procedural rights are *not* merely subjective rights, but essential elements of the core *human* right to a healthy environment. Even if we do not follow *Ruiz-Chiriboga*’s suggestion all the way, namely that “[t]he American Convention and the Protocol of San Salvador are to be considered as together forming the text of one single treaty,”¹¹ the Inter-American Commission’s view that procedural rights *including a judicial remedy* to secure one’s right to environmental conditions that do not pose a threat to human health should be noted.¹² Read together with the consistent jurisprudence of the Inter-American Court on the rights of indigenous communities to have their collective property rights safeguarded against development that disregards environmental protection¹³ and on access to government-held information, including in environmental matters as in *Claude Reyes v. Chile*,¹⁴ it is prudent to conclude that if not all, at least a preponderance of the ‘procedural’ rights associated with Art 11 of the Protocol of San Salvador enjoy the status of fundamental, or human rights.

⁹ *Peters* (Fn 4) at 393.

¹⁰ *Peters* (Fn 4) at 397.

¹¹ *Ruiz-Chiriboga Oswaldo R.*, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties*, *Netherlands Quarterly of Human Rights* 31/2 (2013) 159, 185.

¹² Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997), at 92 et seq.

¹³ I-ACtHR, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79, at para 149: “For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.” See also *Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs*, Judgment of November 28, 2007 (Ser. C) No. 172.

¹⁴ I-ACtHR, *Claude Reyes et al. v. Chile, Merits, Reparations, and Costs*, Judgment of September 19, 2006, Inter-Am. Ct. H.R. (Ser. C) No. 151.

The right to consular assistance – merely subjective, or human?

The chapter on the individual right to consular assistance¹⁵ provides a very in depth discussion of the meaning and scope of Art 36 of the Vienna Convention on Consular Relations. Several international tribunals, as well as national courts, have interpreted this provision in the context of the defense rights of alleged or convicted criminals. The ICJ in *Germany v. the United States (LaGrand)*¹⁶ left the question whether the right to access to a consular officer was a fundamental, or human right, open. The Inter-American Court of Human Rights was much less hesitant. It clearly stated that “Article 36 of the Vienna Convention on Consular Relations concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law.” The Costa Rica court identified a criminal defendant’s right to obtain consular assistance as an essential element of due process, and thus a state obligation that could, if not observed, result in the finding of a human rights violation.¹⁷

The dogmatic problem of whether consular assistance is, as such, a human right per se, or might be an accessory right attached to due process guarantees, is interesting, albeit primarily as a matter of PIL theory. In practice, the ICJ and Inter-American courts, as well as a number of their peers and national courts, recognize that it is a state’s obligation to secure – affirmative – access to a consular officer *because* without it, due process may be jeopardized. That right is individual, not merely an interstate obligation that has beneficial effects on the particular criminal defendant; is attached immediately and directly to the fundamental right to an effective defense; and as such is not merely a personal and subjective right, but a human right. The facts in *LeGrand* demonstrate quite clearly that its application does not depend on whether the particular death row inmates would in fact have benefitted from consular assistance – or had, or were aware of, any substantive linkage other than mere nationality. Instead, the failure to secure access to consular assistance in itself was the breach of PIL obligations that triggered the ICJ’s findings of US responsibility.

The Inter-American Court’s reasoning reflects that same rationale:

“[I]t is obvious that notification of one’s right to contact the consular agent of one’s country will considerably enhance one’s chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.”¹⁸

¹⁵ Peters (Fn 4) 307–342.

¹⁶ *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p 466.

¹⁷ I-ACtHR, *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999), at para 122, holding that the right to consular assistance was “recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.”

¹⁸ I-ACtHR, *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999), at para 121.

Similarly, some US state courts, such as the Supreme Court of Nevada in *Gutierrez v. State*¹⁹ in 2012 (referring to the ICJ's *Avena*²⁰ opinion) while saying that "without an implementing mandate from Congress, state procedural default rules do not have to yield to *Avena*, they may yield, if actual prejudice can be shown,"²¹ and "without an evidentiary hearing, it is not possible to say what assistance the consulate might have provided,"²² did not hesitate to classify the mere possibility of a procedural disadvantage as actionable under state constitutional due process guarantees.²³

Such objectivized, non-situational procedural guarantees are archetypically human rights in nature. They remind us of, for instance, the objective test of the independence and/or impartiality of a tribunal which, similarly, does not question whether a judge or adjudicator who had improper linkages to a party, for instance, was indeed biased when doing his or her job, or in fact disadvantaged the aggrieved party to an extent that can be measured and proven. Only when assessing adequate remedies does the 'grievance' as such become a factor, and could for instance lead to the conclusion that a finding of a breach of, here, a human rights treaty, would in itself be sufficient.

PIL claims to a right to diplomatic protection: – merely subjective, or human?

Another core aspect of the protection of individuals in transnational relations is the possible right to diplomatic protection – a right exercised against one's home state, not a host state. *Jenseits der Menschenrechte* here recognizes from the outset that claims of lacking diplomatic protection usually concern human rights matters ("weil diesem Begehren meist Menschenrechtsverletzungen zugrunde liegen"²⁴); yet, it speaks of a soft ("weich"²⁵) entitlement. The proposals of a standard securing the subjective individual right incorporate classical human rights terminology: states should be obliged to take 'reasonable steps' that need to be assessed based on a balancing of individual and state interests, and at a bare minimum individuals are to be informed about the reasons if the home state decides not to take diplomatic steps on his or her behalf. In the absence of a PIL norm requiring states to exercise effective diplomatic protection, which has so far been rejected even in the context of violations of peremptory norms of international law, national jurisdictions have only fundamental rights standards to rely on when discussing narrow and specific state obligations in this context.

Let us turn to the other question of interest in the present context, namely whether there are areas where, despite the fact that an international legal regime has for an

¹⁹ Case 53506, unpublished order, September 19, 2012.

²⁰ ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of March 31, 2004, ICJ Reports 2004, p 12.

²¹ *Gutierrez v. State*, at 3.

²² *Gutierrez v. State*, at 8.

²³ See also: Supreme Court of Massachusetts, *Commonwealth v. Amaury Gautreaux*, 458 Mass. 741, 751 (2011): "We acknowledge and accept the conclusion of the ICJ regarding the obligation that art. 36 creates when clear violations of its notice protocols have been established, that is, to provide some process by which the soundness of a subsequent conviction can be reviewed in light of the violation."

²⁴ *Peters* (Fn 4) at 359.

²⁵ *Peters* (Fn 4) at 360.

extended period of time recognized that it governs matters that are in the public interest, involve core values, and affect individuals and groups that are rights-bearers, it has still failed to grant these rights-bearers procedural standing. Could it be said that this failure was due to a deficiency in qualifying these entitlements as human rights? And, consequently, could the absence of a definitive human rights-based recognition of subjective public rights be the cause for the diminished level of standing? Again, one example must suffice.

Legal regimes minus the ‘human’ element: Cultural heritage protection and the lack of standing of individuals and groups prior to 2015

The UNESCO world cultural and natural heritage regime is a major example of a complex international mechanism based primarily on the World Heritage Convention (WHC)²⁶ that seeks to protect collective (global, if you will) entitlements to preserve values of the highest order. These values are often at risk; rank supreme as entitlements that humanity as a whole, and require states to adopt and implement an effective domestic system of implementation supervised by an international body.²⁷ World heritage designations have direct and immediate effects on the rights of people and communities within their reach, notably property, the disposition over natural resources, participation in decision-making, cultural and economic rights, and due process. Any yet, astonishingly, until 2015 the WHC processes were neither authorized nor mandated to, and thus did not undertake any meaningful assessment of the human rights of individuals or communities affected by a site designation, be it as beneficiaries, or as those who would be restricted or curtailed by the effects of a designation. It took findings of human rights tribunals to usher in a change, notably the African Commission’s *Endorois Welfare Council* decision in 2009, recognizing *eg* the property and religious/spiritual rights of an indigenous community evicted from its ancestral homes and holding *inter alia* that “the contested land is the site of a conservation area, and the Endorois – as the ancestral guardians of that land – are best equipped to maintain its delicate ecosystems.”²⁸

In 2015, the World Heritage Committee took the historical step of recognizing that “[t]he human rights embedded in the UN Charter and the range of broadly ratified human rights instruments reflect fundamental values that underpin the very possibility for dignity, peace and sustainable development. In implementing the World Heritage Convention, it is therefore essential to respect, protect and promote these social, economic and cultural rights.”²⁹

²⁶ Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in Paris from 17 October to 21 November 1972, 1037 U.N.T.S. 151, No. 15511.

²⁷ Cf *Morawa Alexander H. E./Zalazar Gabriel*, The Inter-Relationship of the World Heritage Convention and Human Rights Law, in Bille Larsen Peter (ed), *World Heritage and Human Rights* (2018) 193–216 (194).

²⁸ AfriCommHR, Communication No. 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, decision of November 25, 2009.

²⁹ *World Heritage Committee*, World Heritage and Sustainable Development, World Heritage Convention, Bonn: WHC-15/39.COM/5D (2015), at para 7(i).

Consequently, the Policy adopted in 2015 implemented a number of rules that we can properly qualify as ‘giving adequate standing to the affected individuals and groups.’ For instance, para 17(iii) of the Policy requires the Committee and bodies to “recognize, respect, and include the values as well as cultural and environmental place-knowledge of local communities.” Para 19(i) demands “that the full cycle of World Heritage processes from nomination to management is compatible with and supportive of human rights;” that engages the WHC bodies as well as the member states. The Policy culminates in a finding that states – and it has been argued that this would equally apply to UNESCO as the sponsoring international agency – “adopt a rights-based approach, which promotes World Heritage properties as exemplary places for the application of the highest standards for the respect and realisation of human rights.”³⁰

Thus, while the WHC processes were designed to safeguard rights of the highest order, they failed – persistently, one may say – to afford proper standing to the individuals and groups affected and concerned prior to the realization, as late as in 2015, that the processes did indeed affect human or fundamental rights. Only that realization prompted a reconsideration of what procedural standing the WHC bodies should guarantee to the rights-bearers. The WHC Operational Guidelines, as amended in 2015, thus include as “partners in the protection and conservation of World Heritage [...] those individuals and other stakeholders, especially local communities, indigenous peoples, governmental, non-governmental and private organizations and owners who have an interest and involvement in the conservation and management of a World Heritage property.”³¹ These actors in the process consequently now not only benefit from “an assessment of the vulnerabilities of the property to social, economic, and other pressures and changes,”³² but have standing in the domestic processes of nominating World Heritage sites, where the Operational Guidelines “encourage [...] [states] to prepare nominations with the widest possible participation,” and more: states are nudged on to demonstrate that their “free, prior and informed consent [FPIC] has been obtained, through, inter alia making the nominations publicly available in appropriate languages and public consultations and hearings.”³³ One may well call this: full legal personality and procedural standing.

Subjektives öffentliches Recht, or still human rights?

The concept of ‘subjektives öffentliches Recht’ was coined by German *Staatslehre* scholars more than a century ago. That period of history witnessed the collapse of a world order defined by princes and sovereigns, republics lacking modern democratic governance structures, and elites content, it seems, with legal protections safeguarding their property and status. The new *Lehre* undoubtedly did contribute a legal framework for the emancipation and, one might say, liberation of the educated citizenry in

³⁰ *World Heritage Committee* (Fn 29) para 19(ii).

³¹ *World Heritage Centre*, Operational Guidelines for the Implementation of the World Heritage Convention, WHC.15/01 (2015), Chapter I.I, para 40.

³² *World Heritage Centre* (Fn 31) para 111(c).

³³ *World Heritage Centre* (Fn 31) para 123.

Germany and, possibly, elsewhere in Europe; as well as the development of thought systems that embraced, gradually, individual justice and certain elements of social justice. And yet, as another reviewer has said, “it remains to be seen whether the exhortatio inscribed into the very last sentence of the book (‘The time has come for the international individual right’ [at 485]) will fall on fertile ground in the international law discourse.”³⁴

Maybe one might add the – cautious – question whether the undoubtedly enlightened thought processes of central European scholars at the time when the great empires came to a crushing end should be used as the foundation for a new doctrine of individualizing public international law in the second decade of the 21st century, or beyond? The bourgeoisie back then had accumulated much political clout, but had no statutory entitlement to rights-based guarantees to rely on. It took another 40+ years and two global wars to infuse the world order with an understanding that international organizations – particularly when safeguarding the rights of individuals – and ultimately individuals themselves via their inherent and inalienable human rights could claim the substantive and procedural status that they today enjoy. It is human rights that contribute to an expansion of duties to traditional non-subjects of PIL, such as transnational corporations. It is human rights courts and tribunals, and definitively neither PIL courts nor international criminal tribunals that have elevated individuals to independent rights-claimants with full standing, including the right to seek and receive compensation and other remedies.

This does not mean that we should not look beyond human rights and further expand the status of individuals in PIL generally. However, *human rights* have been and still are the driving force in this area of the law. It is merely suggested that the discourse be pursued without de-humanizing the process of advancing this important field of international law.

³⁴ Müller Andreas Th., Book review, *European Journal of International Law* 26 (2015) 295–300.