

Beyond Human Rights

– The Legal Status of the Individual in International Law

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Abstract Book

The argument of this book is that a paradigm change is occurring in the course of which human beings are becoming the primary international legal persons. This argument is unfolded against the background of historical concepts and doctrines about the status of the individual under international law. It is notably based on the practice in numerous areas of public international law, ranging from the law of international responsibility over the law of armed conflict, the law of humanitarian assistance, international criminal law, international environmental law, the law of consular relations and the law of diplomatic protection, international labour law, and refugee law, up to international investment law. In these fields, substantive rights and obligations of individuals arguably flow directly from international law, and in some instances procedural mechanisms for enforcing them exist. All this manifests an international legal personality of individuals which is based on customary law, which constitutes a general principle and which can be derived from the human right to legal personality. The emergence of “ordinary” international rights as opposed to human rights shapes the novel legal status of humans in international law which differs from international law protecting persons.

Abstract Chapters

§ 1 Definition of the question

This chapter defines the scholarly question, clarifies the key concepts, notably the concept of the individual, and gives an overview of the structure of the book. The starting point of the study is the observation that with increasing frequency, international legal norms directly address and engage individuals. Although the transformation from international law as a State-centred system to an individual-centred system is incomplete, and is currently under challenge, a global legal *acquis* individual exists.

Against this background, the book will recapitulate the history of ideas and the doctrine of the status of individuals under international law, i.e., their international legal personality (international legal subjectivity). It then surveys the current legal practice to show the extent to which international legal rights (and duties) of individuals not relating to human rights actually exist in current law. Importantly, the distinction between “simple” rights and duties of individuals suggests that different legal layers of law may exist *within* international law. The book will also examine a key factor: the independence of this new international legal status of the individual from the State.

§ 2 Historical theory and practice of the international legal status of the individual

This chapter traces the history of ideas on the international legal status of the individual. In the era of natural and international law, the individual was deemed part of that order. The individual was displaced by statism and legal positivism in the 19th century, while only a minority of scholars considered the individual to be an international legal person, with differing justifications. The contemporary paradigms of international legal scholarship, ranging from policy oriented jurisprudence to neo-naturalism have different views on the status of the individual.

Historical legal practice strengthening the international legal status peaked in the interwar period, with the PCIJ Danzig opinion as a milestone. After the Second World War, the Nuremberg trials and the adoption of international human rights covenants are key factors. But so far, the international legal status of the individual has not been explained bottom-up with a view to the rapidly changing body of positive international law since the 1990s. A possible original, objective international legal personality of the individual would still need to be justified in more detail.

§ 3 The doctrine of the international legal personality of the human being

The legal doctrine of the international legal subjectivity reflects and perpetuates the distinction between States and all other entities.

International legal subjectivity (or personality) is international legal *capacity* in the sense of the entitlement to be a holder of international rights and duties. International legal subjectivity does not require that an actor be able to generate international law himself or herself, and it does not require that the actor himself or herself be able to assert his or her rights before international monitoring bodies. International legal capacity precedes the ownership of rights. It is filled by specific rights and/or duties but is not constituted by them. Instead, the attribution of a concrete right or obligation to an actor implies as a condition precedent that the actor has legal capacity in the first place. The recognition of legal capacity does not automatically imply specific, concrete rights or entitlements. Legal capacity can in theory be entirely empty or without function if no specific rights are granted. International legal capacity thus does not say anything about the real legal position of a concrete entity.

§ 4 International individual obligations

Current international law imposes obligations on individuals in numerous sub-domains (the “regulatory turn”). Because of the practical and normative difficulties associated with these obligations, the development of further individual obligations directly under international law should be recognized only under two conditions: There must in fact be a need for global regulation in that regard, and the principle of legality must be respected. In situations where these conditions are properly met, individual obligations may be established through treaties, customary international law, general principles of law, case law, and secondary international law, especially resolutions of the Security Council. According to current international law, economic actors are not subject to any hard legal obligation to observe international human rights, but they do bear a political responsibility (driven by international law). Individuals do not have fundamental duties as a corollary to human rights, and the recognition of such duties is not advisable.

§ 5 The international responsibility of the individual

Individuals may be subject to secondary obligations in accordance with the law of international responsibility. In addition to the firmly established direct international criminal responsibility of individuals, the non-criminal responsibility of individuals can also be established as well.

The existing “civil” liability conventions might, as shown, be interpreted as a basis for the direct international responsibility of individuals with regard to the environmental damage covered by the conventions. However, neither the proposals by the ILC nor the much more differentiated law of the EU has taken it this far.

The legal possibility of imposing secondary international legal obligations on individuals as well as primary obligations should be welcomed from an abstract perspective in principle. The concrete and practical utility of such a development is questionable, however.

A direct imposition of international obligations on the operators and the assumption of a secondary relationship of responsibility under international law between the injured party and the (private) injuring party would only make sense if doing so would improve the possibilities of liquidation- which is doubtful. Attention must be paid that the international responsibility of individuals does not leave States of the hook – they would remain responsible in parallel to individuals.

§ 6 Individual rights arising from international responsibility

Current general international law permits individual secondary rights held by individuals arising from State responsibility. This possibility results from the interplay between the international law of international responsibility on the one side and human rights protection and the law of armed conflict on the other.

The content of this secondary claim is directed at procedural remedies that must be provided primarily by national bodies. The State obligation to provide remedies can be seen as a correlate of the local remedies principle.

It is currently an open question whether beyond this, a claim for compensation under customary international law exists in the event of gross violations of human rights and international humanitarian norms.

There is (still) no international individual right to compensation in the event of violations of other norms of international humanitarian law that protect and entitle individuals, but such claims would be advisable *de lege ferenda*.

§ 7 Individual rights and duties in the law of armed conflict

Firstly, individual claims for compliance with some of the precepts and prohibitions of international humanitarian law (level of primary law) exist, as the non-renunciation-clauses and savings clauses testify.

Secondly, – and this is in practical terms most relevant – claims may arise from the relationship of responsibility at the secondary level in the event of a breach of a primary norm. The traditional reading preferred by the courts is that individuals have neither any general treaty claim nor a customary-law based claim to compensation. *De lege ferenda*, a strong current in the literature is favourable to recognizing individual compensation claims.

However, no international mechanisms for an individualized enforcement of such claims exist. Also, international humanitarian law does not require contracting parties to make a national legal process available. Most domestic courts have so far shied away from enforcing any individual rights arising from IHL.

Finally, every individual combatant and every civilian is a direct addressee of the norms of international humanitarian law *relevant to his or her situation*, where permitted by the wording of the norms and if the imposition of obligations is sufficiently foreseeable for the person concerned. The legal situation differs in international and non-international armed conflict.

§ 8 Protection against acts of violence and forces of nature

This chapter discusses possible “trans-boundary” international legal claims of the individual, notably against third states, to protection and assistance in acute emergencies that threaten the elementary legal goods of human beings such as life and physical integrity, food, and shelter. Even if an *obligation* to protect – not only of the territorial State but also of (certain) *third* States and/or international organizations – appears to be emerging to some extent under *objective law*, this does not mean that an international individual right to transnational humanitarian protection (i.e., to active protective intervention by third States and other subjects of international law) is being recognized.

It is questionable whether the codification or recognition of a direct international individual right to protection and assistance in acute emergencies vis-à-vis third-party subjects of international law would be wise in terms of legal policy, since such a right could easily be abused as an excuse for interventions and could in practice hardly or only selectively be enforced.

§ 9 The international legal status of victims of crime

All human rights bodies have formulated a positive legal duty to criminally prosecute, try, and in the extreme case, to punish. The IACtHR and the UN Human Rights Committee go farther than the ECtHR and appear to postulate a human right to prosecution and punishment.

In the context of criminal investigation and potential punishment, these are only obligations of conduct, and they are solely “objective”, not mirrored by corresponding individual rights of the victims of violence.

The Rome Statute and ICC case law has created real international rights for victims of international crimes (rights to participation, rights to introduce and examine evidence, rights to protection, and a right to reparation). Their implementation must be balanced against rights of the defendant such as a fair and speedy trial.

It is controversial whether the entitlement to punish ultimately belongs to the individual victim, or whether it is incumbent to the public power (the State or the “international community”). Even if the public power is viewed as the victim’s trustee, victims should not be deployed as replacement prosecutors. Any privatization of criminal prosecution would not do justice to the modern rationale of criminal punishment.

§ 10 Rights and duties in investment protection law

Investors may own procedural and substantive primary and secondary rights in investment protection law. The procedural power to bring claims is an international legal position of the investor. The secondary claims belong almost indisputably to the investors, and the international legal responsibility of the host States is toward those investors. The primary rights accruing from the contract to the investor may, depending on the design of that contract, be internationalized and accordingly have an international legal nature. Moreover, investment treaties, notably BITs, may generate rights of investors (“direct rights”) which normally co-exist with the rights of the State party.

The acknowledgment or reinforcement of procedural and substantive rights of investors under international law underscores the market-economic component of investment arbitration's hybrid quality. The danger of one-sided preferential treatment of investors can be minimized by recognizing and expanding investor obligations, under due respect for the principle of legality. The enforceability of investor responsibility appears limited at first sight, because host States can rarely institute investment proceedings themselves. However, the host State's active use of corruption as a defence may lead to inadmissibility and thus foreclose scrutiny of the substance of investors' claims.

§ 11 Individual rights in consular law

In *LaGrand*, the ICJ recognized an international individual right to consular access and an associated right to information. These rights are best conceived as "ordinary" international individual rights. They are an element of the fair trial guarantee for foreigners, they are not human rights per se.

Effective implementation of the treaty guarantees by providing domestic remedies for breaches has not yet been sorted out conclusively in various domestic legal orders. The conceivable solutions range from annulment of the conviction to consideration in clemency proceedings, exclusion of evidence, monetary compensation, subsequent correction of the error, mitigation of the sentence, and compensation through the length of sentences served. It is submitted that the routine rejection of the exclusionary rule hardly satisfy the effectiveness requirements of international law.

§ 12 Individual rights in diplomatic protection

In the law of diplomatic protection, individual international rights are conceivable vis-à-vis the injuring State and the home State. First, the *lex lata* is open in regard to who holds the substantive international legal positions underlying a request for protection against an injuring State. The attribution (or fiction) of rights belonging solely to the individual's home State no longer fits into contemporary international law and should be rejected. The acknowledgment of underlying substantive international rights of the individual has practical consequences for the inclusion of the individual in the proceedings and the permissibility of waiver.

Second, the home State's international obligation to properly consider the possibility of exercising diplomatic protection should be recognized. The State's discretion is limited (in virtue of international law) by the rights of the individual. This principle can be derived from the domestic constitutional law in an increasing number of states, and has been recognized by courts.

Another question is whether this duty is mirrored by an international individual right to proper exercise of discretion. Assuming such a right, it would encompass a procedural right of the person concerned to be informed of the reasons of the home State if it decides not to grant protection.

§ 13 The legal basis for the international legal personality of the individual – and the question of its independence from the state

The question is whether the legal status of the individual was emancipated from States. The answer depends crucially on the legal basis from which that international legal personality is derived. All three traditional sources of law referred to in Article 38(1) of the ICJ Statute may serve as a legal foundation for international legal personality. Importantly, the human right to legal personality (Article 6 UDHR; Article 16 ICCPR), according to which everyone has "the right to recognition *everywhere* as a person before the law", forms an additional legal basis.

International legal personality rooted in customary law, general principles of law, and human rights is not merely selective (relating to selective treaty provisions), but rather is a potential that is unlimited *a priori*. It is a separate question as to which rights will fulfil that potential. Ultimately a basis for the international legal personality of the individual independent of States is only conceivable if international law not created by States is deemed possible in the first place. It is submitted that at least some fundamental legal principles precede the existence of states as international persons, and that individual international legal personality is one of them.

§ 14 Human rights and other rights

The umbrella term of international individual rights includes two groups of rights: human rights and “ordinary” rights. These two groups can be distinguished on the basis of the substantive criterion of importance for human interests, and only in the second place on the basis of formal criteria such as general recognition.

The ordinary rights serve non-fundamental human interests. It is appropriate that some of them are laid down at the international level, because global regulation is not only needed for “important” subject matters, but due to the transnational nature of many problems.

The distinction between human rights and “ordinary” international individual rights counteracts the risk of trivializing and overstraining international human rights. The distinction has practical legal consequences for the weight of the rights in question, legal protection, and their design and revocability.

Refugee law is an example for the superposition of human rights and other rights onto a regime which originally enshrined only intergovernmental obligations. Labour rights are also best conceptualized as a distinct category of international rights, besides human rights, while acknowledging a considerable area of overlap. The key conceptual difference is that international labour rights direct material claims against employers, which are predominantly private actors in market economies.

§ 15 The individualized enforcement of international law

The recognition of primary international legal personality strengthens the role of the individual as a functionary, trustee, or *gardien vigilant* of (objective) international legality

A key question is that of the addressees bound by international individual rights (i.e., the obligors). In line with the decentralized structure of international law, international individual rights are directed against a multitude of actors. States are the primary obligors. Besides, it is not clear that these rights have received an additional new “direction of obligation”, to bind also international organizations as obligors.

International individual rights are and should be primarily enforced through domestic institutions. International individual rights include a right to a local remedy (effective review by an independent body). But practical objections against individual enforcement of international rights before domestic courts must be taken seriously. The possibilities for the affected persons themselves to enforce international individual rights against international organizations are only rudimentary.

§ 16 Direct effect of norms establishing individual rights and duties

The decision of a domestic institution (especially of a court) to apply a provision of international law directly or not may, from the perspective of international law, be guided by domestic law, but international legal requirements must be met. The interests of the individual

should – according to the view advocated here – be incorporated into the decision-making process. The normative considerations of separation of powers and democratic legitimacy, which (also) motivate this decision ultimately also serve the freedom of the individual. Moreover, regular application of international law in turn strengthens its output legitimacy. The routine rejection of direct effect would lead to a vicious circle of delegitimation of international law.

Provisions of international treaties should normally be qualified as directly applicable as long as the norms *prima facie* meet minimum requirements of specificity and unconditionality (i.e., the usual preconditions for justiciability, no different from domestic legal provisions). International legal norms imposing obligations on the individual should be applied directly only to the extent that doing so respects the principle of legality.

§ 17 The international individual right

The term “international individual right” encapsulates the legal status of the individual in international law, where that legal status is not based purely on the consensus of States. The term “international individual right” encodes the primary international legal personality of the individual.

Four strands of critique of rights (the “critical”, the communitarian, the democrat, and welfarist objections) are discussed and refuted. Legal rights offer a stronger protection than the concrete and selective obligations to accord humans a specific treatment under international law.

In the international legal system, because of the ever-present threat of a backlash, the normative demands on the States should not be overstretched by overlegalizing the international rights of individuals.

While individuals are currently not global citizens (hardly co-creators of international law), they are surely global bourgeois. Individuals, not States, have become the “natural” persons under international law. Making explicit – through scholarly analysis – the existence of the so-far hidden and implicit overarching concept of an international individual right in positive international law shows that pure statism would be an exaggeration, just like the human-rightism of the 1990s.