PART I

The Framework

1 Structures of the international legal system

1.1 Introduction

At least by the nineteenth century, international law was generally conceived as a body of rules and forms of conduct applicable to states in their relations with each other.[1] During the twentieth century, a more multifaceted and cosmopolitan view of legal relations in international law emerged. It is widely thought that individuals now have a certain status in international law as the beneficiaries of rights and the bearers of obligations, although they are not subjects of international law of the same kind or to the same extent as states. There has thus been a significant shift in attitudes towards the individual and individual rights over the period since Vattel.[2] But while in some fields of international law it is uncontroversial to treat individuals as holding rights (for example, in international human rights law) and bearing obligations (in international criminal law), in other fields there is uncertainty about the status of the individual. Moreover, although it is now accepted that individuals are 'subjects' in some sense, there is little consensus about what that means for the extent to which individuals *engage* in the international legal system and are engaged by it.

In the relatively open and flexible international system of the twenty-first century, the formal status of entities may seem to have little significance. Whether an individual is a direct right-bearer or an indirect beneficiary of an inter-state obligation may seem to be a distinction

[1] See H. Grotius, *The Rights of War and Peace* (1625, R. Tuck (ed.), Indianapolis, Liberty Fund, 2005), bk I, ch. I, XIV (p. 162).

[2] E. de Vattel, *The Law of Nations or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758, B. Kapossy and R. Whatmore (eds.), Indianapolis, Liberty Fund, 2008), Introduction, para. 3 (p. 67).

without a difference for the operation of the primary rules of international law: either way, the individual benefits from some substantive right, held either directly or through its state of nationality. But when it comes to the operation of secondary rules, the distinction assumes practical significance. If a bilateral investment treaty (BIT) is terminated while an individual investor has a pending claim for breach of a standard of treatment required by the BIT, the question whether the individual investor holds direct substantive rights of protection under the BIT may well be relevant in determining whether the termination of the BIT entails termination of the claim. Again in the context of investment protection, if a state claims a right to non-forcible countermeasures concerning its obligations to accord certain treatment to investments under a treaty, the position of the individual investor will be relevant to the question whether a defence of countermeasures against another state precludes wrongfulness of the breach of treaty.[3] These issues are not limited to investment protection regimes; they may arise in any circumstance in which individuals have capacity to bring international claims.

Moreover, an inquiry into the position of the individual in the international legal system can provide insight into structural change in the international legal system. Accounts of the development of the international legal order commonly present international law as historically confined to the activities of sovereign states, but as tending, more or less inevitably, towards a more inclusive system which takes account of a multiplicity of actors, including individuals.[4] By undertaking a thorough examination of the way in which the international legal system developed to take account of individuals and individuals' interests, this book examines the extent to which this common account is reflected in the historical record. As will be explained, this book adopts a 'rules-based' approach to the engagement of individuals in the international system; focussing on the question of the law as it is rather than normative arguments as to what the law should be.

For the purpose of this book, individuals are defined as natural human persons. The discussion and analysis are focussed on

[3] For an example, see *Corn Products International, Inc.* v. *United Mexican States*, (ICSID Case no. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *United Mexican States* (ICSID Case no. ARB (AF)/04/05), Award, 21 November 2007; see discussion in 2.4(c) below.

[4] See e.g., C. Grossman and D. D. Bradlow, 'Are We Being Propelled Towards a People-Centred Transnational Legal Order?' (1993–4) 9 *Am. U J Int'l L and Pol'y* 1; C. Ochoa, 'The Individual and Customary International Law Formation' (2007) 48 *Virginia JIL* 119.

individuals, rather than groups, corporations, intergovernmental organisations or non-governmental organisations. The tendency to class together all non-state entities as 'non-state actors' has been severely criticised in the literature, and rightly so.[5] To divide the world into opposed categories of states and 'non-states' is an oversimplification and risks overlooking significant differences between the rules applicable to specific categories of non-state actors. Even if it were possible to generalise aspects of the analysis to a broader range of non-state entities, it is beyond the scope of this book to examine the position of other non-state entities. While some of the material covered in Part II of the book may be applicable to certain other entities, and it may draw upon treatment of other entities for purposes of drawing analogies or examining general aspects of procedure,[6] the analysis is focussed on the question of the position of human persons in the international legal system.

The book is structured in three parts. Part I examines the framework of the international legal system. This Chapter 1 makes a general overview of the framework over three specified periods: these are, roughly speaking, the period beginning in the nineteenth century and ending in 1914; the inter-war period; and the period from 1945 to the present. In each of these periods, the orthodox account of the position of the individual in the international legal system is summarised. Chapter 1 then examines the concept of international legal personality, as the principal traditional measure of engagement of entities in the international legal system. Chapter 1 concludes with an examination of the challenges to state-centrism in international law presented by some of the relevant alternative theoretical approaches. As explained in the section on methodology below, this book takes an approach consistent with a 'rules-based' approach to international law and does not necessarily take a position on one or other theoretical approaches to international law. But to the extent that particular theoretical approaches

[5] See e.g., P. Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford, Oxford University Press, 2005), pp. 3–36.

[6] For example, international investment treaties may confer a right to arbitrate on an 'investor' which is either a natural or legal entity. Moreover, some of the practice examined relates to tribunals and commissions with jurisdiction *ratione personae* which includes both natural and legal persons. Where decisions relating to claims brought by legal persons are referred to in this context, these are cited for generalised points reliant to procedure which are also revealing with respect to the treatment of natural persons.

claim that structural change in the international legal system is motivated by or results in an increased role for individuals, it is possible that the material under examination in this book could be informed by and directly address such claims. To this end the final section of this chapter sets out some critiques of state-centrism which will be examined in Part III of the book, in light of the material examined in Part II.

Having set out the structural elements in Chapter 1, Part II (Chapters 2–5) surveys developments relating to individuals in four areas of international law, roughly organised to correspond to the three historical periods surveyed in Chapter 1. In each of the areas, the intention is to explore (a) whether and to what extent the developments in doctrine and practice correspond to the orthodox accounts of the framework of the international legal system outlined in Part I; and (b) whether and to what extent the current framework reflects existing doctrine and practice. Chapter 2 covers international claims: it examines the development of diplomatic protection claims in doctrine and practice, and the practice of 'mixed' or 'international' claims, defined as claims brought by individuals against a state. Chapter 3 examines international humanitarian law. It is divided to reflect the two strands of humanitarian law: international and internal armed conflict. Chapter 4 explores international criminal law, focussing on the criminal responsibility of individuals directly under international law. Chapter 5 deals with international human rights law, considering both doctrine and practice, including capacity to bring individual claims.

These four areas have been selected because they are the areas of international law which have the clearest potential to engage individuals, whether as beneficiaries or as right-holders. Other areas of international law could have been chosen – refugee law, environmental law and aspects of international institutional law. These have been excluded for practical reasons, but also because they do not contain new or different structural elements which are not already covered by the areas under examination. For example, refugee law is largely defined by the 1951 Refugees Convention, which confers rights on categories of individuals using the same structural devices as those used to confer rights on minorities in the League period or by human rights treaties in the UN period, both canvassed in Chapter 5. Other inter-state obligations which might have the effect of benefiting or punishing individuals operate through the same techniques as the rules applicable in international armed conflict which are designed to protect individuals from the effects of warfare, through limitations on either methods or means of

warfare. Since the excluded areas do not evidence any different treatment of individuals in the international legal system, the areas examined in Part II may be taken as representative.

In Part III of the book, the material examined in Part II is used to reassess the framework of the international legal system. In Chapter 6, the analysis in each of these four areas is drawn together to reach conclusions about the individual in the international legal system as a whole. Chapter 6 also critiques the use of the doctrine of international legal personality and suggests that analysing the relations of particular entities to the international legal system requires a more nuanced approach than the binary categories of 'subjects' and 'objects' permit. It reflects on ideas of flexibility and openness in the international legal system, and seeks to dispel certain myths about the structural development of the international legal system. Chapter 6 also examines challenges to state-centrism in the international legal system and reflects on the extent to which the case of the individual supports claims that the international legal system is turning away from a state-centric model towards a more cosmopolitan ideal.

1.2 Methodology: a rules-based approach

The approach to the international legal system articulated in this chapter, and which forms the basis of the examination of law and practice in Part II of the book, is consistent with a 'rules-based' approach to international law and possibly also with positivism as a legal theory (depending on the definition one adopts of positivism). Something should be said about each of these.

Traditionally positivism has been associated with an emphasis on state will: in the absence of central authority, law can only be based on the consent of states.[7] As a legal theory positivism emphasises the distinction between the law in force, according to the recognised, consent-based sources of law, from non-legal factors including morality and 'natural law'.[8]

[7] For example, see G. Jellinek, *Die Rechtliche Natur der Staatenvertrage* (Vienna, Alfred Hölder, 1880), pp. 2, 42–9, 56–8; S. R. Ratner and A.-M. Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *AJIL* 291, 293.

[8] B. Simma and A. L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *AJIL* 302, 304; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *RdC* 9, 26–7.

A 'rules-based' approach finds resonance in positivism because it is focussed on discerning the existence of legal rules on the basis of the sources of international law. In this sense, a rules-based approach also distinguishes between the law as it is (*lege lata*) and normative arguments as to what the law should be (*lege ferenda*).[9] However, a rules-based approach does not necessarily indicate that law emanates exclusively from state consent. It may take account of a broader range of law-makers but it still emphasises the idea of law as a system of rules.[10]

This book is concerned with the development of law and practice *de lege lata* and with explaining that development; in doing so it takes a rules-based approach. The starting point for determining those sources is Article 38(1) of the Statute of the International Court of Justice, but there may be other sources of international law which are recognised as binding by the international community. In this way a rules-based approach is not necessarily wedded to state consent as the only basis for generating rules of international law. Neither does it exclude the possibility that individuals and other non-state entities may have a role or participate in the international legal system, provided that role or participation is supported by rules generated according to the recognised sources of law. Since the aim of the book is to explain the development of law (in the sense of the generally accepted rules), it is justifiable to take a rules-based approach while remaining open to the possibility that there may be rules which emanate from sources other than the traditional source of state-based consent.

As such, it is not necessary to take a position on theoretical approaches to international law, including positivism. Other theoretical approaches can generally be characterised as more focussed on normative arguments than with the existing state of the law.[11] Some (e.g., the New Haven School) emphasise process rather than content; some (e.g., feminist theories) are concerned to critique 'the law as it is' from the perspective of groups or persons disempowered by it; others (including critical legal studies) take a more or less rule-sceptical approach.

[9] Simma and Paulus, 'The Responsibility of Individuals', 304; P. Weil, 'Towards a Relative Normativity in International Law' (1983) 77 *AJIL* 415, 416–17.

[10] For a discussion of the rules-based approach, see M. Koskenniemi, 'International Legal Theory and Doctrine' in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2008, online edition, www.mpepil.com), para. 29.

[11] Koskenniemi, 'International Legal Theory and Doctrine', para. 21.

To the extent that these alternative theoretical approaches make arguments *de lege ferenda*, in support of their normative claims, they are of little assistance in achieving the objective of this book, which is to examine the development of law and practice in concrete terms. However, these theoretical approaches might assist in two ways. First, they may suggest an adjustment of the traditional view of the sources of international law or the accepted categories of participants or subjects in the international legal system (see 1.5 below). For example, the claim of the process approach that a multiplicity of actors other than states influence the development of the law, may lead to an adjustment of the recognised sources of international law. In this respect, the examination of law and practice in Part II will be undertaken with a view open to the claims presented by proponents of these different theoretical approaches, bearing in mind the focus here is on *de lege lata*. Secondly, and more generally, they may challenge the traditional state-centric view of the international legal system reflected in orthodox doctrine, which is discussed further in section 5 of this chapter.

It is beyond the scope of this book to examine more generally the normative claims of alternative theoretical approaches to the law as it should be. This is in part for practical reasons: an examination of normative claims would require examination of political and sociological factors which are difficult to assess in the absence of a more generalised study. But since the primary goal of the book is to shed light on the position of the individual in the international legal system *in its own terms*, and on the basis of that examination to discuss structural change in the international legal system, the claims of the differing theoretical approaches are of limited relevance. A focus on the development of the rules according to generally recognised sources of international law (which falls within a general understanding of the rules-based approach) can shed light on the question identified for study, without preferring one or other theoretical approach. It is enough to posit that international law exists as a more or less determinate system, that its processes are, in some meaningful way, rule-based, and that changes in rules and processes can be identified with sufficient certainty. No doubt each of these positions would require to be established at a more basic level, but the assumptions identified here seem reasonable and workable. The enterprise of international law may be flawed, even radically flawed, but that it is an enterprise in its own terms does not seem open to doubt.

1.3 The engagement of individuals in the international legal system: structural issues

This section sketches the structural aspects of the international legal system which will be the focus of further reflection in Part II. The emphasis is on the way in which the international legal system takes account of individuals, rather than substantive rights and duties of individuals, or any specific procedural capacities. The dominant doctrine in each of the relevant periods is examined, together with relevant developments in practice and doctrine which later came to be conceived as effecting structural change in the international legal system.

(a) Prelude: differing legal structures in the early period

It was with the work of Emer de Vattel in the mid-eighteenth century that 'the law of nations' came to be seen as a law between states. Before Vattel, writers on the law of nations had a broader conception of the *jus gentium*. Hugo Grotius (1583–1645) in *De jure belli ac pacis libri tres* referred to the 'law of nations' or *jus gentium*; he did not envisage a law exclusively concerned with relations between states, but rather a law between the rulers of nations – those exercising public power – and between groups of citizens or private individuals not in a domestic relation to each other.[12] Grotius did not see the state as a separate juridical entity, but as a 'body of free Persons, associated together'[13] under the personal leadership of the ruler.[14] Grotius' law of nations was not an inter-state law, but an inter-individual law, applicable on a

[12] P. Haggenmacher, *Grotius et la doctrine de le guerre juste* (Paris, Presses Universitaires de France, 1983), pp. 541–3; E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris, Pedone, 1998), pp. 263, 361; J. Crawford, *International Law as an Open System* (London, Cameron May, 2002), p. 19. Hugo Grotius is often said to be the founder of modern international law: see L. Oppenheim, *International Law: A Treatise* (London, Longmans, Green & Co, 1905), p. 77; H. Lauterpacht (ed.), *International Law: A Treatise, by L. Oppenheim* (8th edn, London, Longmans, 1955), p. 91; H. Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *BYIL* 1, 51. But more recently this has been subject to criticism and dismissed as an exaggeration: see R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, London, Longmans, 1992), p. 4; H. Waldock (ed.), *J L Brierly, The Law of Nations: An Introduction to the International Law of Peace* (6th edn, Oxford, Clarendon Press, 1963), p. 28; Crawford, *International Law as an Open System*, p. 19; D. Kennedy, 'Primitive Legal Scholarship' (1986) *Harvard International Law Journal* 1, 77.

[13] Grotius, *The Rights of War and Peace*, bk I, ch. I, XIV (p. 162).

[14] Haggenmacher, *Grotius et la doctrine de le guerre juste*, pp. 541–3; Jouannet, *Emer de Vattel*, pp. 261–4.

universal basis.[15] In this respect his work followed a leading tradition of medieval scholastic thought. Medieval natural law was seen to be all-embracing; it regulated the natural and social life of all, applying between rulers as well as between private individuals.[16] Similarly, Vitoria's idea of an international society was based on the concept of a universal community which encompassed all mankind, an organised community of peoples which were themselves constituted politically as states.[17] Suárez conceived of a rational basis of the law of nations as the moral and political unity of the human race.[18] The sources of this law of nations were believed to be natural law principles, which were merely supplemented by tacit or express agreements between sovereign princes, which bound them in a personal capacity.[19] The law of nations as conceived by these early writers was all-embracing in character.[20]

In his widely circulated treatise *Le droit des gens, ou principes de la loi naturelle appliqués à conduite aux affaires des nations et des souverains* of 1758, Vattel defined the law of nations as 'the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights'.[21] His separation of the law of nature, which was applicable to individuals, from the law of nations, which was applicable to states, resulted in a conception of the law of nations as inter-state law, rather than as a law for individuals or for a society of humankind.[22] Vattel regarded the state as a separate person with its own will,

[15] M. Koskenniemi, *From Apology to Utopia* (Cambridge, Cambridge University Press, 2005), p. 98.
[16] S. C. Neff, 'A Short History of International Law' in M. Evans (ed.), *International Law* (2nd edn, Oxford, Oxford University Press, 2006), pp. 29, 32.
[17] W. G. Grewe, *The Epochs of International Law* (M. Byers (trans.), Berlin, Walter de Gruyter, 2000), pp. 145–6.
[18] F. Suárez, *On Laws and God the Lawgiver* (1612, G. L. Williams (trans.), Oxford, Clarendon Press, 1944), bk II, ch. 19.9 (pp. 348–9).
[19] F. de Vitoria, *Political Writings* (A. Pagden and L. Jeremy (eds.), Cambridge, Cambridge University Press, 1991), Relectio De Indis Question 3 Article 1, para. 4 (pp. 280–1), Relectio De Potestate Civili Question 3 Article 1 paras. 15–17 (pp. 32–6); Grotius, *The Rights of War and Peace*, bk I, ch. I, XIV (p. 162). See also R. Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law' (2002) 73 *BYIL* 103, 123–4.
[20] Kennedy, 'Primitive Legal Scholarship', 16–17, 42–5, 62–5 and 81–3; see also Koskenniemi, *From Apology to Utopia*, pp. 98–9; A. Nussbaum, *A Concise History of the Law of Nations* (New York, Macmillan, 1964), pp. 86–7 and 108–9.
[21] Vattel, *The Law of Nations*, Introduction, para. 3 (p. 67).
[22] See generally, P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel* (The Hague, Martinus Nijhoff, 1960), p. 199.