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978-0-521-19666-6 - The Individual in the International Legal System: Continuity and Change in International Law

Kate Parlett

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The Individual in the International Legal System

Kate Parlett's study of the individual in the international legal system examines the way in which individuals have come to have a certain status in international law, from the first treaties conferring rights and capacities on individuals through to the present day. The analysis cuts across fields including human rights law, international investment law, international claims processes, humanitarian law and international criminal law in order to draw conclusions about structural change in the international legal system. By engaging with much new literature on non-state actors in international law, the author seeks to dispel myths about state-centrism and the direction in which the international legal system continues to evolve.

KATE PARLETT is an Associate in the public international law and arbitration groups of the Paris office of Freshfields Bruckhaus Deringer LLP. She was previously a research fellow of the Lauterpacht Centre for International Law at the University of Cambridge.

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Foreword

The reach of the international legal system beyond traditional interstate relations has been the subject of much writing in recent times. Work lamenting the inability of the international legal system to address the challenges of non-state actors obscures, in large part, the reality that the system has come a long way in a short time. Sir Hersch Lauterpacht, one of the first and most fervent advocates for recognition of individuals as subjects of international law,¹ wrote in 1947 that '[a]s a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively'.² Only a few years later, the International Court of Justice recognised that the United Nations was an international legal person;³ within a decade one could hardly doubt that the individual had a certain standing in international law, albeit in a specialised way. The international legal system, although principally controlled by states, now encompasses a broad range of actors, including with increasing regularity, individuals.

Kate Parlett's study examines afresh one of the classical topics of public international law: the position of the individual in the international legal system. This is – remarkably – the first general work on the individual's standing in international law since the 1960s, and the first study which addresses the topic in a systematic and comprehensive way, explaining how the individual engages and is engaged by international law across a number of fields, covering those areas of international law which are the most significant for individuals.

¹ See, e.g., H. Lauterpacht, *An International Bill of the Rights of Man* (New York, Columbia University Press, 1945).

² H. Lauterpacht (ed.), *International Law: A Treatise*, by L. Oppenheim (6th edn, London, Longmans, 1947), 19 (§13).

³ *Reparations for Injuries Suffered in the Services of the United Nations*, ICJ Reports 1949, p. 174.

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The book quite properly takes a historical approach to the subject. Indeed it is hard to imagine not doing so, given the rather fortuitous and episodic character of the various developments. A highlight in that regard is Dr Parlett's account of the PCIJ's famous dictum in *Danzig Railway Officials* – a dictum which not only challenged the received wisdom in general, but specifically appeared to contradict the strongly dualist views of President Anzilotti. Willy-nilly, the system changed from one seen as limited to inter-state relations in the nineteenth century through to the present day where things are much more variegated, not to say confused (confused in that states retain many of their monopolies despite the variegation).

Dr Parlett illustrates the changing scene by focusing on four areas of international law which have the clearest potential to engage individuals, whether as beneficiaries or rights-holders. These are:

- *international claims*, covering diplomatic protection and claims brought directly to an international forum by individuals;
- *international humanitarian law*, covering both international and internal armed conflict;
- *international criminal law*, focusing on the responsibility of individuals directly under international law; and
- *international human rights law*, covering both doctrine and practice and international claims in human rights courts and supervisory bodies.

The book thus reflects on issues relating to structural change and development in the international legal system, building on historical research to dispel certain generally accepted myths. It is a valuable addition to the literature on the doctrine of subjects in international law. In particular it suggests that analysing the relation of particular entities to the international legal system requires a more nuanced and sophisticated approach than the binary – and hoary – categories of 'subjects' and 'objects' permit.

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Lauterpacht Centre for International Law
University of Cambridge
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This book began with a quizzical inquiry, after the English High Court had held that a bilateral investment treaty which had not been incorporated into English law could nevertheless form the basis of a domestic law claim. This decision stood in contrast to the treatment of human rights treaties: a solid line of authority held that prior to the incorporation of the European Convention on Human Rights by the Human Rights Act 1998, that Convention created no justiciable rights for individuals. This differential treatment may have been explicable on technical bases under domestic law, but it indicated an inherent and more general uncertainty about the relationship of individuals to international law. In an effort to bring clarity to this question, this book explores how the international legal system has changed from the exclusive inter-state Vattelien construct to a system in which individuals have a certain status, and aims to identify more clearly what that status is.

This book is based on my doctoral thesis completed at the University of Cambridge, under the supervision of Professor James Crawford SC. The experience of a doctoral thesis is an inherently solitary one, but the difficulty of embarking on such a project was considerably eased by the supportive and vibrant research community in international law in Cambridge, fostered by the Lauterpacht Centre. It is a testament to Sir Elihu Lauterpacht and a fitting tribute to him and his father, the late Sir Hersch Lauterpacht, that the Centre provides such a welcoming environment for Cambridge students and visitors, and that it fosters academic community in international law. I am grateful to the fellows of the Centre for allowing me to participate in and contribute to the life of the Centre over my five years of residence in Cambridge. My research benefitted from discussions with many of its resident and visiting members and my well-being benefitted from the many friendships formed

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It is to my supervisor, James Crawford, that I am most indebted. He patiently encouraged the project from its inception to its conclusion; he permitted me to indulge my interest in history and discovery and has guided that interest into a coherent work; and he provided comments and guidance in an extraordinarily timely fashion. He combined interest with a scepticism which challenged me to paradigmatically adjust my uncertain optimism for the (possible) futures of the international legal system – at least a little! The book is much better for his input, and I hope it goes some way to meet his expectation.

A number of friends from Cambridge and elsewhere provided comments and advice for which I am grateful: Anita Coles, Anthony Cullen, Kate Gibson, Tom Grant, Megan Hirst, Sarah Joseph, Daniel Joyce, Jonathan Ketcheson, Marcelo Kohén, Conor McCarthy, Sarah Nouwen, Melissa Perry, Anthea Roberts, Sandy Sivakumaran and Kylie Weston-Scheuber. Arnaldo Brenes, Siobhan McKeering, Federica Paddeu and Natalie Vasey kindly assisted with translations. Jonathan Ketcheson also provided technical and helpful assistance with the production of the Appendices to Chapter 2. At Jesus College, Andrew Johnston and Zachary Douglas both provided guidance and welcome advice. Anthony and Nicky Cassimatis, Megan Hirst, Conor McCarthy, Stacy Burgess, Lee Schab and Justice Margaret White provided support and encouragement for the completion of the thesis as well as the book, and I am indebted to them. I am also grateful to Caroline Gill and Charlie Detmold, who warmly welcomed me to Paris as this book was nearing completion and encouraged me to the finish.

My research in Cambridge was supported by the Cambridge Commonwealth Trust, the Gates Trust, Jesus College, the Yorke Fund and the Robbie Jennings Fund. Part of the research was conducted from the University of Melbourne Law School, in the (antipodean) summers of 2008 and 2010, kindly hosted by Associate Professor Andrew Mitchell and Dr Margaret Young. Sharon Burchell, Lucy Kirwan, Verity Quinn and Penny Gleeson provided hospitality in Melbourne and assistance across the miles. My colleagues at the Lauterpacht Centre, in the Costa Rican Foreign Ministry and at Freshfields in Paris were accommodating and encouraging.

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My thesis examiners, Professor Christine Gray and Professor Robert McCorquodale, challenged me to make this a better work and I am grateful to them for their very useful feedback. I am also grateful to the anonymous reviewers of my book proposal for their insightful comments. I am indebted to both Finola O'Sullivan and Nienke van Schaverbeke of Cambridge University Press, for supporting the publication of this book and for their efficiency. Richard Woodham, Elizabeth Davison and Rosina Di Marzo were helpful and accommodating through the production process and I am grateful to them.

I am blessed with a wonderful and supportive family, led by my father Peter Parlett, who together with my late mother, Ruth, instilled in me the value of education and that of hard work. Both values have been indispensable to the completion of this book. Natalie, Peter, Holly, Russell, James, Julie, Neil, Marnie and Tamara all provided invaluable support and expressed welcome interest.

I dedicate any good parts in this work to the memory of my mother, Ruth Parlett, who was interested in life, in learning and above all in people.

Kate Parlett
Paris 1 May 2010

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Select list of abbreviations

ACHPR	African [Banjul] Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
Additional Protocol I	Protocol I Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts
Additional Protocol II	Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts
BIT	bilateral investment treaty
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CROC	Convention on the Rights of the Child
CTS	Consolidated Treaty Series
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	United Nations Economic and Social Council
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
GA	UN General Assembly
Geneva Convention I	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

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Geneva Convention II	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Commission for the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
LNTS	League of Nations Treaty Series
NGO	non-governmental organisation
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SC	UN Security Council
UDHR	Universal Declaration of Human Rights
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission

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