

Kate Parlett. *The Individual in the International Legal System. Continuity and Change in International Law*. Cambridge: Cambridge University Press, 2010. Pp. 462. £70. ISBN: 9780521196666.

Whether and where to locate the individual in the universe of international law has become a standard question for the discipline. While in the 19th and still in the early 20th centuries international legal doctrine could not see in the human person anything other than a mere object of international law,¹ at the beginning of the 21st century, the individual presents itself as *habitué* of international law with major treatises dedicating a substantial number of pages, if not whole chapters to the topic.² The last hundred years have thus witnessed a remarkable development which has shifted the individual's place in international law from the utmost periphery of the discipline to perhaps not its centre, but at least to its inner circles.

Interestingly, a review of the pertinent literature does not reveal a constant increase in the output on the problem of the status of the individual in international law.³ There rather seem to exist 'market cycles' with a first surge of academic interest in the matter rising from the end of the 1920s on, notably in the wake of the famous dictum of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Danzig* case⁴ and lasting until well after World War II. The question seems to have attracted much less attention in the 1970s and 1980s in order to make way for the topic powerfully to resuscitate itself around the turn of the century. Kate Parlett's doctoral thesis on *The Individual in the International Legal System* is characterized by Parlett's supervisor, Professor Crawford, as 'the first general work on the individual's standing in international law since the 1960s' (Foreword, at p. xiii) and thus fits well into this general trend. The book stands out as an equally ambitious and fertile contribution to the ongoing debate⁵ on the status of the individual in international law.

According to the author's own words, her goal was to undertake an 'inquiry into the position of the individual in the international legal system [which] can provide insight into structural change in the international legal system' (at 4). The perspective taken is therefore a diachronic one, i.e., one focused on the development of the topic in time, which also becomes manifest in the book's subtitle: *Continuity and Change in International Law*. In that regard, the book seeks not to fall prey to widespread assumptions in the field. It distances itself from the conventional narrative of a continuous and unidirectional process from the negligence of the individual in 19th century international law towards its emergence, and consolidation, as a legal subject

¹ See, for instance, L. Oppenheim, *International Law. A Treatise* (1905), at 18f, para. 13 with the orthodox account that subjects of international law were states 'solely and exclusively'; see in general Manner, 'The Object Theory of the Individual in International Law', 46 *AJIL* (1952) 428.

² See, e.g., I. Brownlie, *Principles of Public International Law* (7th edn, 2008), chs 25 and 26; A. Cassese, *International Law* (2nd edn, 2004), at 142–150; McCorquodale, 'The Individual and the International Legal System', in M. Evans (ed.), *International Law* (3rd edn, 2010), ch. 10; M. Shaw, *International Law* (6th edn, 2008), at 257–259; Hailbronner and Kau, in W. Graf Vitzthum (ed.), *Völkerrecht* (5th edn, 2010), at 225–270.

³ For an overview of the academic production in the field see Gorski, 'Individuals in International Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, online edition, available at: www.mpepil.com (last visited on 30 Jan. 2012).

⁴ The Court held that while 'according to a well established principle of international law, [a treaty], being an international agreement, cannot, as such, create direct rights and obligations for private individuals . . . the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts'; see *Jurisdiction of the Courts of Danzig*, Advisory Opinion, PCIJ Reports Series B No. 15 (1928), at 3, 17f.

during the 20th century. The book also resists the temptation of simply postulating a 'revolution' or 'paradigmatic shift' in contemporary international law regarding the individual. Such a shift was famously articulated in the *Tadić* Decision of the Appellate Chamber of the International Criminal Tribunal of the Former Yugoslavia: '[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well'.⁶ In contrast, Parlett opts for conceiving of the pertinent developments as a complex, multi-faceted process with variegated and also opposing trends. She thus subscribes to a view which emphasizes, and contrasts, both dynamics of strengthening the individual's position in international law ('change') and the remaining relevance of governing principles of traditional international law which tend to retain the state at the very heart of the international legal order ('continuity').

Consistently with this assessment, Parlett stresses from the outset that, in terms of methodology, her book adopts a 'rules-based' approach to international law (at 7). Accordingly, the book's analysis and evaluation of the status of the individual in the international legal system are presented as an exercise *de lege lata* (at 9) rather than *de lege ferenda*. In spite of all the – in the best sense – positivist ambitions of Parlett's book (at 9) and the justified reluctance to align herself with a particular theory regarding the evolution of international law, the book might have benefitted from engaging more with major contributions of 20th century legal doctrine on the rise of the individual as a subject of international law. We shall come back to this aspect below.

At the outset the author makes it clear that when speaking of 'individuals' she seeks to examine the legal status of 'natural human persons' as opposed to other non-state entities, notably legal persons (at 4 ff). From there, the analysis proceeds in three steps assessing international law's dealing with the individual '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' (at 5). In Part I, the book intends to distill the shifting orthodox accounts of international law on the question of the individual for each of the relevant periods. It departs from the Vattelian state-centrism of the 19th century, with international law regulating the relations between sovereign states as the exclusive subjects of international law, and with the – sharply separated – sphere of municipal law where the individual has its place (at 16). While the international legal doctrine during the *inter-war period* remained essentially unchanged, some developments, notably the recognition that individuals could be granted rights directly under international treaties,⁷ laid the ground for future amendment of the doctrine. The individual was given access, in principle, to international law (at 26). The *post-1945* international legal system adheres to the traditional state-centrism but gives rise, at the same time, to significant changes regarding the place of the individual in international law. This includes the actual conferment upon individuals of both rights and duties under international law and the acceptance of a broader range of subjects of international law, with the individual being a promising candidate among them (at 26–29). It is within the framework of these three periods that the book addresses developments in the concept of international legal personality, with a particular view to the emergence of the individual as a subject of international law and, related to that, challenges to state-centrism in international law (at 29–44).

⁵ See also the documentation of the symposium held on the occasion of the 70th birthday of the late Judge Antonio Cassese in 21 *EJIL* (2010), 7, notably including articles by Gaja, 'The Position of Individuals in International Law: An ILC Perspective', at 11, as well as Clapham, 'The Role of the Individual in International Law', at 25.

⁶ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, 35 *ILM* (1996) 32, at para. 97.

⁷ See the *Jurisdiction of the Courts of Danzig* case, *supra* note 4.

Subsequently and more specifically, the core part of the book (Part II) consists of a detailed account of the evolution of the individual's status in four selected areas of international law, with the analysis in each case running through the three historical periods mentioned above: (1) international claims, including diplomatic protection claims and 'mixed' claims, i.e., claims brought by individuals directly against a state (at 45–175); (2) international humanitarian law in international and non-international armed conflict (at 176–228); (3) international criminal law (at 229–277); and (4) international human rights law (at 278–340). According to the author, '[i]n 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 system outlined in Part I; and (b) whether and to what extent the current framework reflects existing doctrine and practice' (at 6).

What are the major results of tracing the history of international law's engagement with the individual in the aforementioned fields? The picture drawn by the author is multi-faceted, the result is mixed: on the one hand, there are areas where the individual has gained the legal status of 'subject' of international law, in the sense of international law entitling it to hold international rights and duties in its own name, notably in international criminal law (at 274 ff) and individual human rights law (at 338 ff), but also in international investment law (at 119 ff). On the other hand, international humanitarian law and the law of diplomatic protection remain to represent areas of international law where the individual is, to be sure, a concern for international law, but where positive law as it stands has not (yet?) materialized into promoting the individual to being a direct right-holder under international law.

Kate Parlett's analysis is both succinct and comprehensive, inasmuch as it covers 'the areas of international law which have the clearest potential to engage individuals' (at 6). The organization of the reasoning in the three aforementioned historical periods for each of the areas subject to scrutiny gives the book a clear structure and allows the reader to draw parallels and identify differences in the direct comparison between different fields of law. This is certainly a particular merit of Parlett's work since many of the available studies focus on the individual's status in international law from the peculiar angle of a single field, e.g., human rights law or investment law.

The author also deserves support for her conclusion, in Part III, that the traditional subject–object dichotomy cannot give a satisfying explanation in view of the complex status of the individual in contemporary international law, and that such binary reasoning must therefore be overcome (at 353 ff). In the well-known words of Dame Rosalyn Higgins, 'We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.'⁸ Higgins concludes that 'the whole notion of "subjects" and "objects" has no credible reality, and, in my view, no functional purpose'.⁹ The author seems to second this statement (at 355). At the same time, she seems to sympathize rather with what could be called a *state-interest oriented* approach to international law than intense theorizing on the individual's status in international law. This becomes manifest not only in the rather cursory discussion of several theoretical attempts to conceptualize the individual in the international legal order (at 38–44; 355 ff), but in particular in her final 'reflections on structural transition in the international legal system' (at 365 ff): while one will endorse Parlett's observation that '[t]he international legal system does not appear to be developing along a smooth trajectory from a state-centric international law to a more inclusive international legal system' (at 367), this is not equally clear for the heading 'solutions above theories' (at 367). To the author's mind, a view on structural change in international law as 'a result of the need to manage and address practical problems' (at 367) is the preferable way to

⁸ R. Higgins, *Problems and Process. International Law and How We Use It* (1994), at 49.

⁹ *Ibid.*

tackle the intellectual challenge of locating the individual's place in contemporary international law. 'The picture which emerges is rather that states manage practical questions . . . and as a result of those practical solutions the international legal system may be transformed. That transformation does not seem to inhere in any particular theoretical framework' (at 367–368). To be sure, Parlett concedes that '[t]o suggest that the international legal system has developed in the absence of a coherent theoretical framework is not to say that theorising serves no useful purpose or that the international legal system at any particular point in time cannot be explained by reference to theory' (at 369). Nonetheless, Parlett concludes that there are 'a range of possible futures for the international legal system, and . . . the extent to which those futures are realised is highly contingent, and in the end dominated by the interests of states' (at 369).

In view of the differentiated reasoning of the book such rather general conclusion leaves the reader somewhat unsatisfied. This admittedly visceral reaction is reinforced by the fact that the book's last section is devoted not to the individual, but to 'States in the international legal system' (at 369 ff) and further corroborated by the book's very last sentences: 'though the trend towards increased participation of and capacities for individuals seems set to continue, states continue to dominate the international legal system, particularly in respect of international law-making, and access of other entities to the system. And while there is a modern tendency to use "state-centrism" in a pejorative way and to celebrate individualism in all its forms, it seems legitimate to question whether some of these aspects of the structures of international law, which have withstood the test of time, still serve a useful purpose, and should be celebrated rather than condemned' (at 372). Hence, consistently with the state-centred approach identified above, states remain in the driver's seat. Equally, 'continuity' appears eventually to have the last word over 'change'. While this is a legitimate and well-defendable position to take, the argument would have gained in strength had the underlying theoretical assumptions and implications been articulated and discussed more clearly.

While rejecting the subject–object dichotomy, as described above, at the end of her book Parlett heavily relies on the distinction between states as 'autonomous subjects' and individuals as 'passive subjects' of international law (at 357). The distinction becomes manifest on two levels: the first is the extent to which an entity has control over its own receipt of rights, obligations, and capacities. Whereas autonomous subjects receive those only when they consent, in the case of passive subjects rights, obligations, and capacities are imposed upon them without regard for their consent. Secondly, as opposed to their counterparts, autonomous subject have control over the delegation of functions and capacities to other entities and therefore function as 'gatekeepers'. In the author's words, '[e]ntities which have both these capacities have an independent capacity to participate in the international legal system, whereas entities which possess neither may only participate in the international legal system at the instigation of and with the consent of these independent subjects' (at 357).

Although this distinction is offered to the reader as the best available description of the status of the individual in the contemporary international legal order, it should not be taken for granted that the state-centred approach, reserving the gatekeeping and law-making role, i.e., the 'active' role in international law to states is fully in line with existing positive international law. In some respects, the distinction reminds one of the stigmatized binarization of states as subjects and individuals as objects of international, just with the lines drawn differently and, for that matter, as a reappearance of the dichotomy 'in different clothes'. To be sure, Parlett concedes that the individual's role may go beyond that of a mere passive subject,¹⁰ but without looking more deeply into potential concrete manifestations of the phenomenon. It is certainly true that individuals do neither act as 'law-makers' nor control the access to the international legal order in

¹⁰ The author takes note of the potential role of the individual in the formation of customary international law (at 361), referring to McCorquodale, *supra* note 2, at 313 in that regard.

the way states do. But, with all due caution regarding domestic analogies, is this not also the case at the national level? Is the individual, in most cases, not also there restricted to the role of a passive subject which is on the receiving end of the rights and obligations allocation process? And, conversely, are there not certain indications that also in international law the individual or non-state entities composed of individuals are promoted to some degree of autonomy?

To name just a few examples the analysis of which might have enriched the discussion in the book as they challenge a clear-cut distinction between states as independent and individuals as passive subjects as an accurate representation of the current state of international law. First, as holders of rights to initiate and conduct litigation in various international bodies and fora, individuals actively contribute to the formation of international law. Secondly, while the relative independence of European law *vis-à-vis* general international law limits the significance of the example, individuals have certainly acquired a certain status as active subjects in the legal order of the European Union, be it as electors or candidates to the European Parliament or as potential participants in a citizens' initiative as created under the 2009 Lisbon Treaty.¹¹ In this context, one may also refer to the broadly discussed question of the democratic legitimization of international organizations, in regional organizations, but also and in particular in the WTO. Thirdly, the Rome Conference of 1998 leading to the adoption of the Statute of the International Criminal Court stands as a widely noted example of the systematic and effective participation of the organized NGO community in the law-making process of an inter-state treaty, albeit without participating as such in the formal voting acts.

In addition, also regarding the individual's role as 'passive subject', interesting legal developments are taking place beyond the areas of substantive law discussed above, namely in the recent practice of the Security Council. It is striking to see how this body, acting in a rather conservative and state-centred setting, has repeatedly imposed rights and obligations on non-state entities, including individuals. The reference here is not to the phenomenon of so-called targeted or smart sanctions, given that the pertinent resolutions oblige states to create a legal framework at the domestic level which makes travel bans and the freezing of accounts effective against the affected individuals within the realm of national law. They thus follow the traditional pattern of the Security Council creating obligations for UN member states and the latter implementing them in their respective internal legal orders. The relevant resolutions are therefore an exercise in creating individual rights *through* international law rather than creating genuine individual rights *under* international law.

At the same time, the International Court of Justice has for its part recognized that the Security Council can impose international obligations on non-state entities, arguably including individuals.¹² In its 2010 *Kosovo* Advisory Opinion, the Court held 'that it has not been uncommon for the Security Council to make demands on actors other than [UN] Member States and inter-governmental organizations'.¹³ Together with the rule of interpretation that when construing Security Council resolutions 'the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations',¹⁴ the Court has authoritatively accepted the Security Council's capacity to impose

¹¹ Arts 11(4) and 14 of the Treaty on European Union.

¹² See also Schroeder and Müller, 'Elements of Supranationality in the Law of International Organizations', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (2011), at 358, 374f.

¹³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, at para. 116, available at: www.icj-cij.org/docket/files/141/15987.pdf (last visited 30 Jan. 2012).

¹⁴ *Ibid.*, at para. 117.

binding obligations also on individuals. Even though it comes to the opposite conclusion *in casu*, the Court's pertinent reasoning indicates that the Security Council could well have done otherwise if it had actually intended to inflict duties on the authors of the declaration of independence of Kosovo and if that intention had become sufficiently manifest in the pertinent resolution.¹⁵ As a result, 80 years after the *Courts of Danzig* Advisory Opinion, the World Court has timidly, but effectively, extended the scope of its dictum that 'the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations'¹⁶ from international treaties to Security Council resolutions.

An important outcome of the pertinent developments thus seems to be that in the contemporary international legal order one can expect international rights and duties of individuals to arise from very different quarters, in terms both of areas of substantive law and of sources of law, not just including international treaties, but also customary law and Security Council resolutions, arguably even general principles of law. Furthermore, it is correct to point out that to some extent fields of international law evolve according to their own normative logic and pace and that therefore the degree and intensity of the engagement of individuals have developed differently. At the same time, the fact that the individual has, within a number of decades, very much evolved from an illegitimate child to a well-accepted family member of international law testifies to a transformation of the international legal order as a whole which cannot fail to have implications for the categories and concepts at the basis of the science of international law.

A standard tenet of scholastic doctrine was *individuum est ineffabile*: the individual is unfathomable. While this principle related to the classical idea that human cognition and science are based on general concepts which can never fully reach and exhaust the richness of the individual, this may remind us that the venerable concepts of international law are modelled upon and serve an international legal order drawn from states – and for a certain and decisive phase of conceptual formation of classical international law from states exclusively. If contemporary international legal science seeks to give the individual its proper place in the international legal system, if it wants conceptually to incorporate the individual as a hitherto widely alien factor, subject and actor in international law, it must be prepared to look for the reflections of the undisputed rise of the individual on the level of positive law in the mirror of our theorizing on international law. To focus on studying practical solutions will arguably not prevent the individual from flourishing and further upgrading its status in international law, but may restrain the discipline's capability of making this development 'fathomable'. To conclude with the famous final sentence of the *Tractatus logico-philosophicus* of the Austro-Cantabrigian philosopher Ludwig Wittgenstein, 'What we cannot speak about we must pass over in silence.'

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¹⁵ *Ibid.*, at paras 94 and 118.

¹⁶ See *supra* n. 4 (emphasis added).