

Book Reviews

Anne Peters, ***Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht [Beyond Human Rights: The Legal Status of the Individual in Public International Law]***. Tübingen: Mohr Siebeck, 2014. Pp. xxiv + 535. €104. ISBN: 9783161527494.

Anne Peters' most recent book is an equally important and topical contribution to the international law discourse. At the core of her voluminous *œuvre* lies, as the subtitle indicates, the question of the 'legal status of the individual in public international law'. At the same time, the title *Beyond Human Rights* conveys the idea that the co-director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and former president of the European Society of International Law does not cover the subject matter in its entirety but, rather, has opted to leave aside, or rather to presuppose, the very area of international law where one would be inclined to look first for insight and inspiration, namely international human rights law. As the author acknowledges herself, international human rights are 'the pivotal and completely undisputed element of the international legal status of the individual' (at 27).¹ In contrast, Peters' own study sets out for the more open and uncharted territory of so-called 'simple' rights and duties. It is with this peculiar perspective that the book seeks to tackle its guiding question – that is, how the phenomenon of a strongly increasing number of individual rights and duties that may be observed in contemporary international law 'can be described, systematised, and evaluated in a legally sound manner' (at 2).

What initially might look like a hardly justifiable self-restriction, on closer inspection constitutes one of the great virtues of the book. It is avowedly not a human rights treatise but, first and foremost, a contribution to the understanding and development of public international law in general. This also explains the structure given to, and the approach taken by, the book, which is divided into 17 chapters. These can be grouped in three major parts.² In the first part (chapters 1–3; at 1–51), the study provides an overview of the history, both in theory and in practice, of the international legal status of the individual (at 7 ff) and then turns to 'the doctrine of the international legal personality of the human being' (at 29 ff). The concept of international legal personality underlying the book is a broad and broadly accepted one and firmly rooted in positive international law, namely 'the capacity to be a holder of international rights and duties' (at 2, 32, 50). It is with this wide definition in mind that Peters addresses a number of distinctions commonly drawn in this field, namely that (the individual's) international legal personality has a positive and a negative side – that is, rights and duties – that it encompasses substantive and procedural rights and that it does not only include passive entitlements but also the power to create law. The author insists, however, that none of these aspects is in itself decisive for the individual's recognition as an international legal person (at 32, 37 ff, 43 ff). In addition, as international legal personality consists as a mere capacity, it does not automatically give rise to specific, concrete rights (at 50). These must be substantiated from case to case bearing in mind the accepted sources of international law.

¹ Numbers without further indication refer to the page numbers in the book; the translation from German is mine.

² As to the tripartite structure of the book, see also Chapter 1 on the 'Definition of the Problem' (at 2–3).

Hence, in order to know more about the actual legal position of the individual in the international legal universe, it is indispensable to engage with the pertinent provisions of positive international law. The second and largest part of the book is devoted to this enterprise (chapters 4–12; at 53–360). The survey covers an impressively wide range of fields, including not only international humanitarian law, international criminal law as well as diplomatic protection and international investment law³ but also consular law, environmental law, natural disasters and international refugee and labour law. Apart from its breadth, several aspects of the analysis deserve mention. First, while a study focusing on human rights might well have laid particular emphasis on the positive – the ‘rights side’ – Peters extensively delves into the ‘negative’ analysis of the obligations of individuals under international law, both at the primary (chapter 4; at 53 ff) and secondary levels – that is, individual international responsibility (chapter 5; at 103 ff).

Second, these two chapters also testify to a further merit of the study. Here and in the rest of her analysis, Peters does an impressive job in carving out not only the primary but also the secondary claims (that is, relating to the law of international responsibility) available to, or against, the individual in various fields of international law. Third, throughout her analysis, the author makes a considerable effort to distinguish the *lex lata* and *lex ferenda* arguments in relation to the strengthening of the position of the individual in international law, an effort that is direly needed in an area often fraught with wishful thinking. In sum, this part provides a remarkable *panopticum* of the numerous instances and the manifold ways in which contemporary international law makes individuals the holders of rights and bearers of duties *vis-à-vis* other subjects of international law as well as (rather exceptionally) among themselves.

In the third part of the book, comprising the last five chapters (chapters 13–17; at 361–485), Peters seeks to distil a series of conclusions from the material reviewed. In the following, only three issues shall be addressed. First of all, given the scrutiny of the positive law provisions in the second part, Peters feels safe to claim that, from the perspective of contemporary international law, the individual has an international legal personality that is independent from the state. While conceding that it is hard, but nonetheless possible, to draw on treaty provisions in this regard (at 366), the author argues above all that the rule that individuals have legal personality in international law is both part of customary international law and a general principle of law within the meaning of Article 38(1) lit. c of the ICJ Statute (at 371 ff).⁴ In addition, to this effect, she relies on the human right to be recognized everywhere as a person before the law, which is enshrined, for instance, in Article 6 of the Universal Declaration of Human Rights and Article 16(2) of the International Covenant on Civil and Political Rights.⁵ For Peters, ‘everywhere’ actually means everywhere – that is, in every legal order, including public international law. She thus expressly acknowledges the existence of a ‘human right to international legal personality’ (at 382, 480).

If one adheres to a ‘bundle theory’ of legal personality,⁶ the recognition of the international legal personality of the individual is by no means extraordinary, as it is deemed a subject of international law to the extent that it bears rights and duties under positive international law. That this is the case to a considerable degree in contemporary international law has been sufficiently established in the second part of the book. However, Peters’ claim reaches further

³ These are the fields also addressed in the recent study by K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (2011), at 85 ff.

⁴ Statute of the International Court of Justice 1945, 1 UNTS 993.

⁵ Universal Declaration of Human Rights 1948, UN Doc. A/810, 1948; International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

⁶ See, e.g., H. Kelsen, *Pure Theory of Law* (1967), at 172–173: “‘To be a person’ or ‘to have legal personality’ is identical with having legal obligations and subjective rights. The person as a holder of obligations and rights is not something different from the obligations and rights. ... ‘Person’ is merely the personification of this totality.”

than that. For her, the rule that individuals have international legal personality is something separate from, and foundational to, the single instances of right-holding and duty-holding. It embodies the elementary capacity that makes the individual able to acquire and have rights and duties under international law.⁷ Yet Peters does not refer to a transcendental and, in this sense, trans-legal concept. To the contrary, she insists that this capacity represents a veritable rule under international law as notably becomes manifest in the recognition of a right to individual international legal personality in international human rights law, as mentioned earlier. At the same time, in a brief section entitled ‘natural law’ (at 379–381), Peters approvingly ponders over the idea of grounding the individual’s international legal personality in natural law-style reasoning⁸ and appears to endorse ‘a kind of positive natural law of the original legal personality of the human person’ (at 381).⁹ Eventually, however, what is decisive in her mind is that the international legal personality of the individual constitutes ‘a part of the human right. As human right the human person is endowed with the right to legal personality by virtue of being human. The justification for this on the level of legal philosophy can be left open’ (at 382).

Alas, it is one thing to submit that the individual enjoys international legal personality independently from and beyond the state and another thing to suggest that it is now ‘the natural person of international law’ (at 382).¹⁰ This second claim, which is not neatly distinguished from the first one, takes the reasoning yet another step further. While the international legal personality of the individual – its role as *habitué* of international law – is now accepted from most quarters of the international legal community, the claim of its *primacy* as a subject of international law clearly goes beyond the common wisdom in the discipline. For the author, this claim finds its basis in the insight that ‘the carpet of individual entitlements which is tied partly on a treaty, partly on a customary basis becomes denser and denser. Thus, the underlying recognition of individual legal personality becomes more and more the standard situation’ (at 382). Moreover, the massive increase in individual entitlements and obligations ‘is not only relevant in terms of quantity, but is the indicator of a *qualitative leap*’ (at 480).¹¹ This conclusion, which seems to be based on an Engels-style ‘transformation from quantity to quality’ argument,¹² begs further explanation, however.

Peters’ comprehensive and well-balanced analysis of the pertinent international provisions certainly justifies the recognition of a meanwhile far-reaching personality of the individual under international law, which also includes the individual’s (partial) recognition as international lawmaker.¹³ She is also right to underscore that in the *Kosovo* Advisory Opinion, the International Court of Justice (ICJ) has – apparently so far hardly noticed, let alone commented

⁷ In regard to this ‘separation thesis’, see in particular at 50, 382.

⁸ She notably cites P. Daillier and A. Pellet, *Droit international public* (7th edn, 2002), at 650, in this regard who conclude from the existence of a number of *jus cogens* provisions in human rights law and international humanitarian law: ‘[E]lles constituent un fondement suffisant à la reconnaissance d’un droit “naturel” des individus, personnes physiques, à la personnalité juridique internationale.’

⁹ Similarly: ‘A neo-natural law paradigm is best suited to justify a non-state dependent “original” international legal personality of the human person. However, it hardly satisfies the contemporary scholarly standards of intersubjective comprehensibility. It must therefore be supplemented with doctrinal considerations on the basis of positive law’ (at 19). See in the same vein: ‘[A] “legalised” natural law of the legal personality of the human person’ (at 383, 385).

¹⁰ See also: ‘Not states, but individuals are the “natural” persons of international law’ (at 480); see further (at 173).

¹¹ Emphasis in original.

¹² See F. Engels, *Marx and Engels Collected Works*, Vol. 25 *Dialectics of Nature* (1987), at 356 ff.

¹³ With respect to this aspect, see in more detail 474 ff.

upon by scholars – openly recognized that the UN Security Council has the power to bind individuals via its resolutions (at least those under Chapter VII of the UN Charter).¹⁴

Quite obviously, the status of the individual in international law is in a state of flux, and much more in terms of rights and obligations is expected to accrue to it in the foreseeable future. The dynamic of the positive law is actually, and in certain fields rather rapidly, moving towards a further strengthening of the position of the individual. In addition, the recognition of the individual's legal personality in international law is a far cry from being an outlandish position, as aptly shown by Peters in the survey on individualistic international legal theories at the beginning of her study (at 11 ff). Not even the rather bold thesis that the individual constitutes the primary subject of international law is new, but it has numerous forerunners coming from very different corners of the discipline.¹⁵

Nonetheless, there remains a tension. The fact that individuals take precedence over states as subjects of international law cannot be justified on the basis of international law as it currently exists – that is, the *lex lata*. For most intents and purposes, states are still the 'normal case' (at 35), the 'prototype of the international legal subject' (at 50) as well as the 'overlords' in international law, although these attributes are challenged by Peters (at 361 ff) and partly for good reason. In addition, it is a reasonable – and in many respects desirable and laudable – claim that the contemporary system of international law should be transformed in light of the normative option for the individual as the basic legitimatory unit of the international legal order.¹⁶ However, this is a question of the *lex ferenda* and would require elaborating more on the premises and implications of such a normative option from the point of view of legal philosophy. The earlier-mentioned 'natural law' section is not capable of bearing the whole legitimatory load on its rather narrow shoulders.

Based on the material reviewed, Peters is furthermore right in diagnosing, and criticizing, an inflation regarding human rights in the universe of international law (chapter 14; at 387 ff). It has become common to find 'human rights' in all kinds of fields (including a purported human right to, for instance, globalization [at 396]), which bears the risk of 'trivialization' and 'banalization' of the concept (at 393). Human rights are often used as a panacea in the international legal discourse to an extent that it is forgotten that there also exist other 'simple' individual rights in addition to human rights in the proper sense (at 387).

¹⁴ See 87–89. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, ICJ Reports (2010) 403. See in this regard Müller, 'Sovereignty 2010: The Necessity of Circling the Square', 4 *Vienna Journal on International Constitutional Law* (2010) 624, at 629; 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) 358, at 374 ff; Müller, 'Book Review Kate Parlett: The Individual in the International Legal System', 23 *European Journal of International Law* (2012) 294, at 298 ff). As to the situation before the *Kosovo* Advisory Opinion, see Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 529, at 609 ff; M. Herdegen, *Die Befugnisse des UN-Sicherheitsrates* (1998), at 32.

¹⁵ See, e.g., H. Lauterpacht, *International Law and Human Rights* (1950), at 69; G. Scelle, *Précis de droit des gens: Principes et systématique*, Vol. 1, Introduction: Le milieu intersocial (1932), at 42; Cançado Trindade, 'International Law for Humankind: Towards a New *Jus Gentium*', 316 *Recueil des Cours* (2005) 9, at 34, 58, 252; J.E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004), at 473; R. Domingo, *The New Global Law* (2010), at 124 ff.

¹⁶ See, in particular, regarding the theory of 'normative individualism' (at 481); see also in this context the maxim of the Roman lawyer *Hermogenianus*: '*hominum causa omne jus constitutum est*' – that is, 'all law is created for the benefit of human beings', which has been cited with approval by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). See Judgment, *Prosecutor v. Duško Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, 35 ILM (1996), at 50, para. 97.

This distinction is familiar to international lawyers as a result of the *LaGrand* and *Avena* sagas, in which the ICJ eventually refused to deal with the submission that Article 36(1) of the Vienna Convention on Consular Relations constitutes a '(fundamental) human right', even though it expressly recognized that this provision 'creates individual rights'.¹⁷ Much ink has been spilled on the question where the precise line is to be drawn between these two concepts (at 389 ff). Peters' own distinction follows a constitutional model according to which human rights are treated as an element of 'the layer of constitution-type rules', whereas simple individual rights pertain to the lower sphere of simple or standard international law (at 388). The author is aware that these two layers of norms are 'only rudimentarily established' (at 388) in international law as it currently stands, but she sees her own work as 'making a contribution to a so far rudimentary differentiation of international law in view of a hierarchy of norms' (at 3). While she finds it hard to identify special law-making procedures that would privilege the so-called 'constitutional international law' *vis-à-vis* simple international provisions in the sense of the former being harder to create or to change (with the notable exception of norms of *jus cogens* within the meaning of Article 53 of the Vienna Convention on the Law of Treaties or perhaps Article 103 in conjunction with Articles 108, 109 of the UN Charter), Peters nonetheless deems it preferable to construe, for instance, the guarantees contained in Article 36 of the Vienna Convention on Consular Relations as simple international rights.¹⁸ These are linked to, and concretize, human rights such as the right to a fair trial and due process, but, as such, they constitute separate rights that do not enjoy constitutional status in the international legal order (at 341).

This approach secures non-human rights-type individual rights with a certain autonomy and independence *vis-à-vis* the still booming and somewhat 'overheated' concept of human rights. Against this background, it can only be re-emphasized that the author's decision to write a book on the position of the individual in international law with a particular focus on individual rights 'beyond human rights' must be wholeheartedly welcomed. At times, one gets the impression that the human rights discourse runs the risk of taking the whole project of international law hostage for the purpose of promoting its agenda, a phenomenon commonly, and deprecatorily, referred to as '*droit de l'hommeisme*' or 'human rightism'.¹⁹ As a contribution to safeguard the unity and integrity of international law against the dangers arising from its fragmentation, the development of a concept of international individual rights that is not co-extensive with, and entirely subject to, human rights is a commendable endeavour indeed. At the same time, this makes it an all the more challenging task for future reflection and scholarly effort to figure out how this distinction is to be drawn. To conceive of it in hierarchical terms, as the constitutional model suggests, has certain merits, but, as conceded by the author herself, it still has a rather weak normative basis in international law as it stands.

A third issue that deserves to be addressed is Peters' submission in the last and culminating chapter (chapter 17; at 469 ff) that international law doctrine would strongly benefit in its attempts to conceptualize the position of the individual in international law by endorsing the 'international individual right' as a generic concept, encompassing both human rights and simple individual rights. The international individual right stands as 'a label' (at 28) or 'as a code for the individual's primacy as an international legal subject in an ethical and doctrinal sense' (at 469). In the author's view, the concept can profit from, and build upon, the emancipatory potential of 'individual rights as a paradigm of modernity' (at 470). She draws on various

¹⁷ *LaGrand (Germany v. USA)*, Judgment, ICJ Reports (2001) 466, paras 77 ff; see also *Avena and Other Mexican Nationals (Mexico v. USA)*, Judgment, ICJ Reports (2004) 12, para. 124. Vienna Convention on Consular Relations 1963, 596 UNTS 261.

¹⁸ Vienna Convention on the Law of Treaties [1969] 1155 UNTS 331.

¹⁹ See, e.g., Pellet, 'Human Rightism and International Law', 10 *Italian Yearbook of International Law* (2000) 1, at 2 ff.

sources from different traditions and schools in order to establish that the focus of modern legal systems has generally shifted towards a rights-based perspective and, thus, the individual.

There can be no doubt, however, that the major source of inspiration for the concept of the international individual right ('*subjektives internationales Recht*'²⁰) is that of '*subjektives öffentliches Recht*', as it was developed by the German Staatslehre a century ago.²¹ Peters is far from denying this link but, rather, actively embraces it. For her, the construction of the '*subjektives öffentliches Recht*' constituted 'a key factor in the rolling back of the (German) authoritarian state and the creation of a modern, liberal state' (at 481). Since the author observes a certain analogy between the German constitutional law discourse of the late 19th century and the situation of contemporary international law, she is eager to infuse international law with the emancipatory and empowering potential of this concept (at 473, 480 *et seq.*): 'The protection of the human person by objective international law represents a paternalistic model of international law in which the state is conceived of as the trustee of the welfare of the human beings. It is time to overcome this anachronism also in international law' (at 484).

The goal is no doubt a noble one. Yet 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. As far as European Union (EU) law is concerned, the Court of Justice of the European Union (CJEU) has never endorsed the concept of '*subjektives öffentliches Recht*' even though it has a decades-old and elaborate case law on the central place of the individual in the EU's legal order and 'the direct effect of a whole series of [its] provisions'.²² This is not the least due to the fact that the French and Anglo-Saxon legal traditions have devised different concepts to address the individual's role within the legal system, which has prompted the CJEU to opt for a 'syncretistic' approach, as it were, in order not to make one tradition triumph over the other. It would not come as a surprise if similar reservations would be mounted, explicitly or implicitly, against the claim of the international individual right being 'systemically relevant for international law as a whole' (at 482), all the more so in a world that is much more diverse in terms of legal traditions than the European continent, not to mention the fundamental difficulties some traditions have with attributing to 'the individual' the primordial normative status in the first place.

All of these queries do not lessen, but rather underscore, the importance of Anne Peters' book. It provides both an in-depth analysis of the rights and obligations of the individual under contemporary international law and a great deal of food for thought regarding what to make of this analysis from the point of view of international law doctrine. Both in its effort of stock-taking and of providing a vision where the development is heading, *Jenseits der Menschenrechte* marks a significant step in the growing scholarship on the legal status of the individual in international law and, thus, truly deserves to be called a milestone book for the discipline. It is to be strongly hoped that it will soon also be available in English.

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²⁰ See also Peters, 'Das subjektive internationale Recht', 59 *Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge* (2011) 411.

²¹ See, in particular, G. Jellinek, *System der subjektiven öffentlichen Rechte* (1905).

²² See only recently CJEU, *Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties*, Opinion 2/13 Doc. EU:C:2014:2454, para. 166, referring to the CJEU's *jurisprudence constante* on the matter.