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Definition of the Question

1.1 Individualization of International Law?

The starting point for this study is the observation that with increasing frequency international legal norms directly address and engage individuals. For instance, individual rights under international law appear to arise from extradition treaties, treaties of friendship and establishment, double taxation agreements, transport treaties, intellectual property treaties, investment protection treaties, treaties on the legal status of foreigners, and the Vienna Convention on Consular Relations. On the side of duties, the criminal responsibility of individuals under international law has in recent decades been fleshed out by the work of the ad hoc criminal tribunals and the International Criminal Court.[1]

Accordingly, scholars of international law have around the turn of the millennium noted a transformation of the international system. The inclusion of individuals under international law was claimed to have become a "fundamental axiom" of the international legal order.[2] A "paradigm shift" consisting in the increasing significance of the individual in international law,[3] a shift "from international law to world law",[4] "from international law to global law",[5] to the "new *jus*

[1] See Chapter 5.
[2] See Oliver Dörr, Privatisierung des Völkerrechts, *JuristenZeitung* 60 (2005), 905–916 (905); see also P. K. Menon, The Legal Personality of Individuals, *Sri Lanka Journal of International Law* 6 (1994), 127–156 (148).
[3] Wolfgang Benedek, Das Individuum als Völkerrechtsubjekt, in: August Reinisch (ed.), *Österreichisches Handbuch des Völkerrechts*, Band I: Textteil (5th ed., Wien: Manzsche Verlags- und Universitätsbuchhandlung 2013), 291, paragraph 1238.
[4] Angelika Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Berlin: Duncker & Humblot 2007).
[5] Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press 2010), 133.

gentium of humanity"[6] and to "humanity's law"[7] has been proclaimed, and a "humanization of international law" has been diagnosed.[8]

These views have not gone unchallenged. In a fairly recent Hague course entitled "The Emancipation of the Individual from the State under International Law", Gerhard Hafner reached the conclusion that this "emancipation" is incomplete and that "the status of individuals in international law is restricted".[9] Others have warned against an overstretched individualization of international law: In a case note on a German Constitutional Court decision rejecting an international-law-based individual right on compensation for violations of international humanitarian law (IHL), a scholar held that

> "the increasing recognition of the individual . . . is limited to certain, rather narrow, fields of law, which are still based on (and therefore tightly circumscribed by) state consent; their embrace of individual rights *does not erode the general structure of international law,* where, in principle, the individual remains an object of protection . . . The Court's decision might even be a useful portent that *the overstretched concept of the individualization of international law has reached its useful limits*."[10]

The controversy about any potential "individualization" of international law is at the same time a debate about the basic structure of the system and must be seen in that context. The diagnosis of the German scholar Christian Tomuschat, lecturer of the 1999 General Course on Public International Law at the Hague Academy of International Law, was that the international community had been "progressively moving from a sovereignty-centred to a . . . individual-oriented system. . . . The international legal order cannot be understood any more as being

[6] Antônio Augusto Cançado Trindade, International Law for Humankind: Towards a New Jus Gentium, *Recueil des Cours* 316 (2005), 9–444.

[7] Ruti Teitel, *Humanity's Law* (Oxford: Oxford University Press 2011). *Ibid.*, 31: "Humanity offers a distinctive subjectivity: the status of the human is a basis for new and diverse claims, on the part of diverse voices that are new to international law and politics."

[8] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff 2006). See also Antonio Cassese, *The Human Dimension of International Law: Selected Papers*, ed. Paola Gaeta and Salvator Zappalà (Oxford: Oxford University Press 2008).

[9] Gerhard Hafner, The Emancipation of the Individual from the State under International Law, *Recueil des Cours* 358 (2011), 263–453 (437). Hafner sought to apply "an anthropocentric approach to international law instead of a State-centric approach, without, however, losing sight to the present dynamic and contradictory structure of international law" (*Ibid.*, 287), and reached quite different conclusions from this study.

[10] Klaus Ferdinand Gärditz, Bridge of Varvarin, *American Journal of International Law* 108 (2014), 86–93 (91; italics mine).

based exclusively on State sovereignty. ... States are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights. At the present time, it is by no means clear which one of the two rivalling Grundnorms will or should prevail in case of conflict. Over the last decades, a crawling process has taken place through which human rights have steadily increased their weight, gaining momentum in comparison with State sovereignty as a somewhat formal principle". Importantly, Tomuschat continued that "*[t]he transformation from international law as a State-centred system to an individual-centred system has not yet found a definitive new equilibrium*".[11]

1.2 Backlash in the Age of BRICSs?

In the new millennium, the global political and economic constellation has changed with the rise of the BRICS States (Brazil, Russia, India, China, and South Africa) and a concomitant decline of the United States and Europe. The question is whether and how this power shift affects the international legal system, and with this, the status of the individual in it. Was the phenomenon of "humanization" or "individualization" of international law only "a hallmark of the period of U. S. leadership"[12] which spread an ostensibly typically US-American "narcissistic rights culture"?[13] If this were the case, a reversal of the "individualization" of international law would seem likely, because the voices of non-Western States which have traditionally been more sceptical of the purported "individualization" have gained more salience.

In post-Soviet Russian international law scholarship, the "debate between the statist and the pro-individual school" had been initially spearheaded by pro-individualists.[14] In 1990, then President Yeltsin

[11] Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law, *Recueil des Cours* 281 (1999), 11–438 (237 and 161–62; italics mine). See for the view that the current international legal order is based on *three* pillars, namely peace, development, and human rights, Emmanuelle Tourme-Jouannet, *Le droit international* (Paris: PUF Que sais-je 2013), 70–122.

[12] William W. Burke-White, Power Shifts in International Law: Structural Realignment and Substantive Pluralism, *Harvard International Law Journal* 56 (2015), 1–80 (77).

[13] Georg Nolte/Helmut Philipp Aust, European Exceptionalism?, *Global Constitutionalism* 2 (2013), 407–436 (424).

[14] Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press 2015), 98.

had declared at the first assembly of national deputies of the Russian Federation "that from then onwards the 'first sovereignty in Russia will be the human being'".[15] But since then, the pro-individual school has not gained ground in Russia. On the contrary, the Russian Statist school seems to be dominant in the intellectual centres, and this fits to the political climate under President Putin.[16]

Also the Chinese scholar and judge at the International Court of Justice (ICJ), Hanquin Xue, insists on the centrality of the State for the protection of human rights: "There are increasing communal interests shared by all states, such as … human rights promotion and protection …, but to realize these goals, States are the crucial actors at both national and international level … Any weakening of the status and role of the State, as demonstrated in many a case, could only mean more misery and sufferings for individuals."[17] She also explains Chinese insistence on non-intervention as a reaction to double standards applied by the West.[18]

The insistence of China and Russia on State sovereignty, even at the expense of human security, was manifest in the two States' representatives' statements in the Security Council when vetoing, at two occasions, draft resolutions which sought robust action against Syria, in 2011 and 2012. The proposals tabled in the Security Council reacted to documented war crimes and crimes against humanity committed by Syrian armed forces and the State's manifest failure to protect its population.[19] Although the draft resolutions did not foresee a military

[15] *Ibid.*, quoting the Russian author M.V.Ill'in. [16] *Ibid.*, 99.

[17] Hanquin Xue, Comments on Hurrell, in: James Crawford/Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* 3 (Oxford: Hart 2012), 27–29 (28).

[18] Hanquin Xue, Chinese Contemporary Perspectives on International Law: History, Culture and International Law, *Recueil des Cours* 355 (2011), 41–233 (153), speaking of "China-bashing": "[E]ven Western scholars admit that China has been subjected to double standards in the assessment of its human rights performance. Such bias became even more evident when human rights issues were driven by strategic interests and economic benefits against China. Under such circumstances, it is not surprising that China would invoke the principles of sovereignty and non-interference to defend its socio-political system and reject double-standards in the human rights dialogue."

[19] See Francis Deng and Edward Luck, Special advisers of the UN Secretary General on the Prevention of Genocide and on R2P. On the situation in Syria, Press Release 21 July 2011. See on human rights violations, war crimes, crimes against humanity committed by government forces notably the various reports of the Independent International Commission of Inquiry on the Syrian Arab Republic, inter alia, UN Documents A/HRC/19/69 of 22 February 2012, paragraph 126; A/HRC/21/50 of 16 August 2012, paragraph 145; A/HRC/30/48 of 13 August 2015, paragraphs 165–167.

intervention but only demanded, inter alia, that the Syrian government immediately put an end to all human rights violations and attacks against persons exercising their rights to freedom of expression, peaceful assembly, and association,[20] they were vetoed by China and Russia with the argument that such measures would interfere unduly with Syrian sovereignty.[21]

Against the background of the current "power shifts in international law", William Burke-White has recently found that the "reassertion of the centrality of the State conflicts with the individualization of international law" and has predicted that "[f]or legal rules and regimes that seek to advance this individualization or draw their effectiveness from it ... the return of the state will likely have pronounced negative consequences. Over time these regimes may be ratcheted back as international law returns closer to its Westphalian origins as a system of sovereignty, among sovereigns".[22]

The re-insistence on the legitimate role of the State in the entire system, and the potential "re-Vattelisation" of international law going with it, has a number of reasons and motivations which are only in part linked to the ongoing power shift. Steven Ratner has usefully summarized the three main moral justifications for the position that "the interests and claims of states ... deserve serious consideration alongside with the interests and claims of individuals":[23] First, States have (some) "moral standing" *when* they express the interests of their population (in a Kantian paradigm

[20] Draft resolutions of 4 October 2011 (UN SCOR 66th sess., UN Doc. S/2011/612) and 4 February 2012 (UN Doc. S/2012/77). The draft texts also called for access for humanitarian aid, and the 2011 draft resolution in addition called for "vigilance and restraint" over the transfer of arms (paragraph 9).

[21] In 2011, the Russian delegate insisted on a "logic of respect for the national sovereignty and territorial integrity of Syria as well as the principle of non-intervention, including military, in its affairs" (UN Doc. S/PV.6627, 6627th meeting of 4 October 2011, 6 p.m., p. 3). The Chinese delegate asked that any Security Council resolution "should fully respect Syria's sovereignty, independence and territorial integrity. Most important, it should depend upon whether it complies with the Charter of the United Nations and the principle of non-interference in the internal affairs of States" (*Ibid.*). In 2012, the Russian delegate deplored that the draft on humanitarian assistance was in reality "calling for regime change" (UN Doc. S/PV.6711, 6711th meeting of 4 February 2014, 10 a.m., at p. 9). The Chinese delegate vetoed the resolution because "the sovereignty, independence and territorial integrity of Syria should be fully respected" (*Ibid.*).

[22] Burke-White, Power Shifts, 2015, 77.

[23] Steven Ratner, *The Thin Justice of International Law* (Oxford: Oxford University Press 2015), 85–87.

which is valid only for some States); second, States are vessels for the creation of individual identity (in the communitarian paradigm). Third – in my view most importantly – from a consequentalist perspective, the State system "is in fact the best available structure to advance individual welfare".[24] This claim has recently, not the least due to political experience and empirical research, gained more salience. We have come to realize that consolidated and well-functioning States are an important factor for complying with human rights norms.[25] My own view is distinct from the three views just mentioned; I would say that State sovereignty is being recognized by positive international law as instrumental for securing the well-being of humans.[26] But whatever view on the State's moral standing one takes, we must pragmatically acknowledge that "[t]he state system appears to be a fixed attribute of the international order . . . as a practical matter, states remain the primary and indispensable agents of individuals".[27]

The ongoing re-emphasis on the importance of States, accompanied by a certain backlash against "over-individualization", might have been triggered by the recognition that basic "Westphalian" principles such as territorial integrity and the prohibition on the use of force have been violated by leading powers (e.g., in 2003 by the United States with the intervention in Iraq, and in 2014 by Russia with the annexation of Crimea). Concomitantly, it is often perceived that these principles deserve re-emphasis. Related reflections are that the so-called humanitarian intervention in Kosovo in 1999 is widely seen to have overstretched international law and that the application of the doctrine of the responsibility to protect in Libya in 2011 has not improved the situation of the population.

[24] *Ibid.*, 86.
[25] Constructivist authors have identified the degree of Statehood as the most important condition influencing the ability of States to comply, but the authors also encourage the search for alternatives (Thomas Risse/Kathryn Sikkink, Conclusions, in: Thomas Risse/Stephen C. Ropp/Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press 2013), 275–295 (291–292)). Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Viking 2011) identifies as the single most important factor for the improvement of human security the emergence of stable States (see *ibid.*, 822, also 63, 66, and *passim*).
[26] Anne Peters, Humanity as the A and Ω of Sovereignty, *European Journal of International Law* 20 (2009), 513–544.
[27] Ratner, *The Thin Justice*, 86.

1.3 *The Legal* Acquis Individuel*: Structure of the Book*

However, political disappointment about the "failure" or "abuse" of Western interventions in the Middle East and mere assertions of a novel Statism are not able as such to destroy the global legal *acquis individuel*. That acquis is the topic of this book. My overarching question is how the phenomenon of the growth of individual rights and duties under international law can be described, systematized, and evaluated in a legally meaningful way.

To answer this question, the study will draw three lines. Firstly, I will briefly 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). This international legal personality – provisionally understood here as the ability to have international rights and duties[28] – depends on the ideational background understanding, on the observer's doctrinal conceptualization, and of course on the state of positive international law. For these reasons, the historical paradigms, the varying terminology, and the legal practice will be traced briefly (Chapter 2), so that I can subsequently (in Chapter 3) propose a definition of international legal personality I believe to be useful.

Secondly, the study will take up a comment by the International Law Commission: "Individual rights under international law may also arise *outside the framework of human rights*."[29] Even just a few decades ago, the Federal Constitutional Court of Germany found this to be unusual: "*Outside the domain of the minimum standard for human rights*, current general international law only rarely contains norms establishing (individual) 'subjective' rights or duties of private individuals directly at the level of international law; its scope essentially covers the sovereign international relations between States and associations of States; individual rights or duties of private individuals are, as a general rule, established or affected only indirectly via domestic law."[30] My survey of current legal practice aims to show the extent to which international legal rights (and duties) of individuals not relating to human rights actually exist in current law – deviating from the legal situation

[28] On the terms "international legal person/personality" and "international legal subject/subjectivity" (used synonymously here), see Chapter 3.

[29] ILC Commentary on Article 33 of the ILC Draft Articles on State Responsibility (*Yearbook of the International Law Commission* (2001) Vol. II, Part 2, 94–95 (95, paragraph 3; referring to PCIJ, *Danzig*, and ICJ, *LaGrand*; italics mine).

[30] BVerfGE 46, 342 et seq., 362, Ruling of 13 December 1977 – *philippinische Botschaftskonten* (italics mine).

determined by the German Constitutional Court thirty-five years ago. Individual rights under international law that are not human rights – as well as individual duties under international law – will be clearly identified and named.[31] By bracketing human rights, the survey aims to show how rich and differentiated the legal status beyond human rights is (Chapters 4–12). We shall see that international-law-based rights and obligations of individuals are widespread and refined – which suggests, I submit, that they would be difficult to dismantle. Incidentally, by analysing in detail the legal position of the individual in international law as it stands, this study also suggests that the two-pillar image of the international legal order (resting on States and individuals), as evoked above, is somewhat simplistic.

Thirdly, a sound concept of international legal personality and the empirical survey of the accumulated individual rights and duties under international law will be used as a basis to work out a key factor: the independence of this new international legal status of the individual from the State. The individual has become a primary subject (person) of international law.[32] Individuals not only have numerous "subjective" international rights (in the plural) but also are further entitled to international legal subjectivity (international legal personality) in virtue of their personhood on the basis of customary international law and general principles of law and as an aspect of their human right to legal personality. Put differently, the international legal personality of human beings is rooted in Art. 16 ICCPR and already forms a general principle of law (Chapter 13).

The crystallization of this primary international legal personality of the individual will be encapsulated by introducing the term of the international individual right. This legal institution will be explained in terms of legal doctrine and theory and also justified ethically in Chapter 17.

Overall, this legal development (the crystallization of "simple" rights and duties and the underlying institution of the subjective international right) is compatible with the structures and fundamental values of

[31] For the parallel, already more advanced crystallization of subjective rights protected by European law, see fundamentally Johannes Saurer, *Der Einzelne im europäischen Verwaltungsrecht: Die institutionelle Ausdifferenzierung der Verwaltungsorganisation der Europäischen Union in individueller Perspektive* (Tübingen: Mohr Siebeck 2013). See already Stefan Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss* (Tübingen: Mohr Siebeck 1996), 410–441.

[32] I use the term "subject of international law" as a synonym with "international legal person"; and "(legal) subjectivity" synonymously with "(legal) personality". See in detail Chapter 3.

international law. The distinction between simple rights and duties of individuals (in contrast to human rights; see Chapter 14) suggests that different legal layers of law may exist *within* international law. Such a distinction would fit to the theory of global constitutionalism. Global constitutionalists believe that within the international legal order a body of especially important rules, principles, and structures exists which deserves the label of international constitutional law. In principle, only human rights would appear to form part of this body of international constitutional law, while the simple individual rights and duties would rank below the constitutional level.

1.4 Scope of Investigation: "The Individual"

The term "individual" ("individu") is not a technical term usually found in international treaties or other hard or soft legal texts.[33] It is common in international legal literature, however. First and foremost, individuals in this study are natural persons.

Especially in the chapter on investment protection (Chapter 10), I also include legal persons under national private law engaged in *business* (undertakings). Their status under international law is independent of their national legal form. From the perspective of international law, it is irrelevant whether these collective business actors are constituted under national law as legal persons or as entities without legal personality.

Whether and when a group of individuals forms an entity to which legal responsibility can be attributed is determined by the legal order whose rights and duties are at stake. So, for the purposes of imposing duties under international law, it is international law that determines which groups will constitute persons under international law (international legal subjects). Put differently, international law governs the preconditions under which collectives other than States, for example international organizations, armed groups, NGOs, and business

[33] In international legal texts, especially relating to counterterrorism, individuals are sometimes distinguished from "entities". For instance, UN Security Council resolution 1989 (2011) to combat al-Qaida refers throughout to "individuals, groups, undertakings and entities". Article 53, paragraph 1 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field (First Geneva Convention) of 12 August 1949 refers to "individuals, . . . firms or companies either public or private". In principle, the various actors are subject to identical legal consequences in the aforementioned texts.

enterprises, are able as such to be bearers of international legal rights and duties.

Human rights are considered in this study only at two places: First, for carving out a distinct category of individual rights that are *not* human rights (Chapter 14). Second, human rights may generate duties of individuals or business actors (Chapter 4). Such potential obligations of political, economic, and private actors to respect the human rights of others are an important manifestation of their so-called passive status as subjects bound by international law, beyond the requirement to refrain from international criminal acts.

What is bracketed in this study is the legal status of ethnically, linguistically, culturally, or politically defined groups that – as a collective or through coordination of their members – assert the right of self-determination under international law or rights as minorities. Finally, transnationally active organizations of civil society (NGOs) are not considered. These can be distinguished at least as a matter of degree from private economic actors due to their pursuit of the common good. This goal might potentially justify the conferral of specific international legal positions (e.g., rights to participate in international law-making processes) that are not granted to natural, so-called private persons, irrespective of their formal legal status under national law. The specific status of NGOs under international law is a separate topic.