

Membership in the Global Constitutional Community

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1. The Constitutional Community

The legal subjects within the framework of the contemporary international legal order are widely conceived as an international community.¹ The international community might be a precondition or, on the contrary, the result of the constitutionalization of the international legal order. The concept might also function as a substitute for a global constitution.

A community can be distinguished from a mere agglomeration on account of the closeness and the common objectives of its component entities. A community is, in short, integrated. It possesses members, and is not made up of only isolated actors. The concept of an international community suggests inclusiveness, and therefore tends to favour rather than to hinder the inclusion of non-state actors. The concept also implies that the mutual relationships are more than bilateral or plurilateral ones. Furthermore, the idea of a *legal* community means that the relationships are governed by law, and not by force. Finally, the concept evokes (rightly or wrongly) some common 'spirit' or identity. The concept of an international community has been criticized as concealing a *de facto* oligarchy. It has been pointed out that there 'is a danger of the implantation in international society of a legislative power enabling certain states—the most powerful or numerous ones—to promulgate norms that will be imposed on the others'. Thus, concepts such as that of the "international community"

¹ See Art 53 VCLT; Art 42 lit. b) and 48 sec. 1 lit. b) ILC-Articles on the Responsibility of States for International Wrongful Acts of 2001 (UN Doc A/CN.4/L.602, Rev.1). In scholarship seminally Hermann Mosler 'The International Society as a Legal Community' (1974/IV) 140 *Recueil des Cours* 1–230, at 11–12: '[I]nternational society is at the same time a legal community which regulates its members' relations with one another and with organized institutions by rules and principles and maxims of conduct.' See for a focus on natural persons as a member of the community René-Jean Dupuy *La Communauté internationale entre le mythe et l'histoire* (Economica Paris 1986), e.g. at 180. See further Christian Tomuschat 'Die internationale Gemeinschaft' (1995) 33 *Archiv des Völkerrechts* 1–20; Andreas Paulus *Die internationale Gemeinschaft im Völkerrecht* (Beck München 2001).

may become code words, lending themselves to all kinds of manipulation, under whose cloak certain states may strive to implant an ideological system of law',² says the critique.

I submit that the constitutionalist paradigm is both a useful extension of the concept of the international community and apt to counter the critique of concealed oligarchy. Stating that the international community is a *constitutional* community evokes the constitutionalist principle of democracy and thus offers a leverage for making visible and arguing against the privileges of some states, such as the permanent members of the Security Council. Moreover, constitutionalism provides both a parsimonious explanation for the existing community-like features of the international legal order, and allows the easy extrapolation of these features.

First, the constitutionalist paradigm explains the existence of *erga omnes* norms.³ Why should certain obligations create rights or at least interests for non-affected actors, and possibly even allow those to apply countermeasures or to raise claims? One answer could be that those actors are members of the constitutional community. A body of (international) constitutional law, even if not codified in one single document, provides some glue to hold actors together, because it sets out common objectives or aspirations, and defines the rules of interaction. This type of integration makes the legal possibility of claims by actors not directly affected much more plausible. On the other hand, the establishment of hierarchical centralized enforcement mechanisms, which would be an important component of an international constitutional order, could also render the concept of *erga omnes* norms superfluous. *Erga omnes* norms seem to be a device to facilitate the protection of community interests in a 'horizontal' manner in the absence of hierarchical enforcement (see on this issue p. 133).

Second, a constitutionalist reading allows overcoming the dichotomy between original, full international legal subjects on the one hand, and derivative and partial legal subjects on the other. This dichotomy was in reality only a reification of the distinction between states as the makers of international law and all other, newer, subjects, such as international organizations or individuals. In opposition to this view, the constitutionalist approach decentres the state. If the international system is conceived as possessing constitutional law, the following argument can be raised: once a constitutional order has been set in place by the global multiple *pouvoirs constituants*, it no longer makes sense to speak of 'original' legal subjects, because all subjects have been transformed into *pouvoirs constitués*. Therefore, the distinction between 'original' and 'derivative' subjects breaks down. The various types of members of a constitutional community have

² Prosper Weil 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413–442, at 441.

³ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, paras 155–157; Art 48 sec. 1 lit. a) and b) ILC Articles.

different rights and obligations, as defined by constitutional law, but there is no categorical distinction between states and all others.

Certainly, the constitutionalist approach does not deny, and to my mind even explains better than traditional approaches, the difference between being (only) able to *have* international rights and obligations (as is currently the case for individuals), and being capable of *making* international law. But while insisting on this categorical difference, the constitutionalist view promotes the future evolution of the international rules on law-making in the direction of an involvement of natural persons in the international law-making process. From a constitutionalist perspective, natural persons should in the long run acquire some kind of limited law-making power.

This leads us to the third and related normative point. The constitutionalist approach offers a new foundation for the view that the ultimate international legal subjects are individuals, as has already been espoused by Georges Scelle⁴ and others. Constitutionalism, as I understand it, postulates that natural persons are the ultimate unit of legal concern. Global constitutionalists abandon the idea that sovereign states are the material source of international norms.⁵ In consequence, the ultimate normative source of international law is—from a constitutionalist perspective—humanity, not sovereignty.

Fourth, the current trend of the reopening of the circle of members of the global community, so as to now include international organizations, individuals, non-governmental organizations (NGOs), transnational corporations (TNCs), hybrid actors such as public–private partnerships and quasi-governmental organizations (quangos), or even terrorist groups, can be explained from a constitutionalist perspective. It should be recalled that historically international legal relations were restricted to states only in the course of the 19th century. Before, the *jus naturae et gentium* had not dealt with legal relations between independent entities (states), but was concerned with the universal validity of certain rules for all peoples and humans.⁶ Because ultimately all law was derived from nature, the *jus gentium* was not distinguished sharply from internal law.⁷ Consequently, its actors were also not sharply distinguished. But because in a pluralist world natural law is no viable path, the current trend which reverses the narrowing-down tendency of the 19th century must be interpreted and backed up differently than with a resort to natural law. It can be interpreted and welcomed as a trend towards inclusiveness and towards empowerment, which means a trend towards the realization of basic tenets of constitutionalism.

⁴ See the references below in note 13.

⁵ See also below p. 179.

⁶ Ulrich Scheuner 'Die grossen Friedensschlüsse als Grundlage der europäischen Staatenordnung zwischen 1648 und 1815' reprinted in *idem Schriften zum Völkerrecht* (Duncker & Humblot Berlin 1984 Tomuschat ed) 352–354.

⁷ Hugo Grotius in *De iure belli ac pacis* (first published 1625) did distinguish between the national law and the *jus gentium* (book I, chapter I, XIV (at 44)). However, Grotius treated numerous legal issues that are today counted as domestic law, such as contracts, rights of persons, promises, donations, and the like within the *jus gentium*.

Finally, the constitutionalist vocabulary can help explain the transnational activities of NGOs and also of TNCs as an emerging global civil society. The concept of a global civil society in turn facilitates the formulation of consistent proposals on the reform of the international legal status of both types of actors (see below pp. 219–262, and also chapter 6).

But while supporting inclusion, the constitutionalist approach prevents abandonment of the distinction between legal subjects and actors devoid of international legal personality, as suggested by adherents of the New Haven School and other authors.⁸ A constitutional order defines and determines the law-making processes. It thus introduces a high degree of formalism into the legal process. On the premise that international law includes a body of constitutional rules, the distinction between informal and formal participation in the international legal process must be upheld. One reason for this is the need to safeguard legal clarity and certainty. If all kinds of activities, ranging from lobbying to codifications by interested academics, could without further official acts of public authority create international law, citizens would have no means to recognize and readily identify the law. Ultimately, the rule of law would be undermined, and this runs counter to constitutionalist aspirations. A second reason for upholding the distinction between international legal persons and other actors is that the concept of international legal personality has the ‘function of forming an essential link between the international legal system, democracy and the individual’,⁹ which corresponds to constitutionalist objectives.

While opposing the abandonment of the concept of the (international) legal person, constitutionalist-minded international lawyers tend to favour the formalization of the legal status of those actors who are currently still devoid of international legal personality, notably NGOs and TNCs, although the current discrepancy between the *de facto* influence of those actors and their formal incapacity is, from a constitutionalist perspective, ambivalent. On the one hand, NGOs and transnational corporations should be kept at a distance from the international law-making process. The reason is that civil society actors need to stay outside the formal political and legal process in order to fulfil their watchdog and opposition function. On the other hand, the irregular international status of corporations, and also of NGOs, is pernicious because it leaves space for the exploitation of their power for self-interested goals to the detriment of the public good and of affected individuals. In this respect, the formalization of

⁸ See Myres McDougal ‘International Law, Power, and Policy: A Contemporary Conception’ (1953/I) *Recueil des Cours* 137–259, at 173–174; Rosalyn Higgins ‘Conceptual Thinking about the Individual in International Law’ (1978) 4 *BYIL* 1–19, at 5. See also Philip Allott *Eunomia: New Order for a New World* (OUP Oxford 1990), at 372: ‘[I]nternational law must abandon the conceptual category of subjects of international law.’

⁹ Janne Elisabeth Nijman *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press The Hague 2004), at 27.

the status, e.g. of business actors, would engender legal clarity and containment, which is laudable from a constitutionalist perspective.

To conclude, the constitutionalist account can on the descriptive level rely on legal experience. It offers explanations for important current legal phenomena relating to the international community and saves the trouble of citing controversial philosophical accounts of communitarianism. At the same time, normative constitutionalism as an agenda of legal politics functions as a heuristic device, as a guideline for the (dynamic) interpretation of international law towards a more constitutionalized community. Overall, a dialectical process occurs: the emergence and extension of a global constitutional community is both a manifestation and a driver of global constitutionalism, while the constitutionalization of international law is at the same time an explanation and a promoter of this communitarization. That said, one should keep in mind that the normative and practical power of international law ultimately does not depend on the use of the term international community as such (nor the use of the concept of constitution), but rather on concrete institutions, principles, and rules.¹⁰

2. Individuals

2.1 Primary international legal persons

In a constitutionalized world order, natural persons are the primary international legal persons and the primary members of the global constitutional community, as will be explained in this section.¹¹ I have already mentioned that historically speaking private individuals were embedded until far into the 18th century in the 'natural and public international' legal order. Only the gradual emancipation of public international law from natural law (completed only in legal positivism in the 19th century¹²), the personification of the state, and the legal focus on inter-state relations had led to the expulsion of individuals from the realm of public international law. Today, the re-introduction of the individual should not come as natural law in disguise, but should rely on other considerations, and I deem constitutionalist considerations a useful starting point.

The view that individuals are not only the actual beneficiaries of all international law, but even the ultimate or even sole legal persons (or subjects) of this order, was

¹⁰ Bruno Simma 'From Bilateralism to Community Interests in International Law' (1994/VI) 250 *Recueil des Cours* 217–384, at 248.

¹¹ Cf. Tesón's 'normative individualism', i.e. the insistence 'that our moral concepts should be referred in the last analysis to individual rights and interests'. Fernando Tesón *A Philosophy of International Law* (Westlake Boulder 1998), at 27.

¹² See Albert Zorn *Grundzüge des Völkerrechts* (2nd edn Verlagsbuchhandlung von JJ Weber 1903), at 3: 'Träger völkerrechtlicher Beziehungen sind also niemals Privatpersonen, sondern ausschliesslich Staaten...' See also *idem*, at 26 *et seq.*

espoused by international scholars notably in the inter-war period.¹³ The inter-war international legal individualism, which foreshadowed the general recognition and codification of international human rights, was not only a reaction to the human rights abuses of the Great War. It was also strongly motivated by concerns for democracy, and by a fear of the society of the masses. More specifically, the ‘individualistic’-minded international lawyers sensed the rise of totalitarianism, and sought to defend human individuality via international law.¹⁴ A second boost for moving individuals to the centre of the international legal system were the Nuremberg trials of 1946, which established the international responsibility and criminal liability of human beings and removed the smokescreen of the state behind which perpetrators of crimes sought to hide.¹⁵ Since then, the *lex lata* has evolved in the direction foreseen by academics in the 1930s. Contemporary international lawyers diagnose a paradigm-shift in international law in the sense that the integration of individuals in the international legal process, far beyond human rights, has become ‘the basic axiom’ of the international legal order.¹⁶ This has been called a shift ‘from the law of nations to the law of the world’¹⁷ or a ‘humanization of international law’.¹⁸ From that perspective, ‘[t]he individual is the ultimate unit of all law, international and municipal’.¹⁹

2.2 The individual’s right to have international rights

The right to legal personality, the ‘right to have rights’,²⁰ is acknowledged in international law (Article 6 Human Rights Declaration; Article 16(2) ICCPR).

¹³ See Hans Kelsen ‘Les Rapports de Système entre le Droit Interne et le Droit International Public’ (1926/IV) 14 *Recueil des Cours* 231–329, at 281: ‘L’idée qu’il y aurait entre l’État et les individus, et par suite d’État à État, des rapports qui ne seraient pas des rapports entre individus est une simple illusion, qui ne s’explique que par l’inadmissible hypostase de l’État en un surhomme.’ Bourquin diagnosed ‘une poussée, chaque jour plus visible, en faveur de ce qu’on pourrait appeler l’émancipation internationale de l’individu.’ (Maurice Bourquin ‘Règles Générales du Droit de la Paix’ (1931/I) 35 *Recueil des Cours* 5–229, at 46). See notably also Georges Scelle *Précis de Droit des Gens, Principes et Systématique* vol I, Introduction, le milieu intersocial (Sirey Paris 1932), at 42: ‘Les individus seuls sont sujets de droit en droit international public.’ Also Brierly taught that ‘en dernière analyse, seuls les individus sont susceptibles d’être sujets de ce droit-là [i.e. international law]’. (James Leslie Brierly ‘Règles Générales du Droit de la Paix’ (1936/IV) 58 *Recueil des Cours* 5–237, at 47).

¹⁴ See for an excellent analysis Nijman, *International Legal Personality*, 2004, at 87, 126–127, 130, 147–148, 171, 187, 225 and *passim*.

¹⁵ See below pp. 174–179.

¹⁶ Oliver Dörr ‘Privatisierung des Völkerrechts’ (2005) 60 *Juristen-Zeitung* 905–916, at 905; see also P K Menon ‘The Legal Personality of Individuals’ (1994) 6 *Sri Lanka Journal of International Law* 127–156, at 148.

¹⁷ Angelika Emmerich-Fritsche *Vom Völkerrecht zum Weltrecht* (Duncker & Humblot Berlin 2007).

¹⁸ Theodor Meron *The Humanization of International Law* (Martinus Nijhoff Leiden 2006).

¹⁹ Hersch Lauterpacht ‘The Grotian Tradition of International Law’ (1946) 23 *BYIL* 1–53, at 27.

²⁰ Hannah Arendt *The Origins of Totalitarianism* (Harcourt, Brace and Company New York 1951), at 287–298, esp. at 294, deploring the plight of persecuted persons and refugees who were often divested of their nationality, stateless, and thus rightless.

Historically, these codifications responded to the practice of totalitarian regimes to divest political opponents of their rights ('civil death'). These provisions have therefore been traditionally interpreted as relating only to the national level, as a guarantee of domestic legal personality. However, in times of globalization and of the intermingling of the national and international spheres of law and governance, the guarantee would be seriously weakened if limited to domestic law. Given the fact that international rules matter for persons' lives, the lack of an international legal status would affect them a similar way as the lack of a domestic legal status in former times affected slaves and outlaws.

From a constitutionalist perspective, the empowerment of individual beings is a core objective of any constitutional order. This premise leads to interpreting the relevant guarantees in a teleological way along the line just drawn. The constitutionalist interpretation of Articles 6 Human Rights Declaration and 16 (2) ICCPR is that these provisions may not reasonably be limited to the domestic legal capacity, but that they enshrine a human right to have international legal personality.²¹

2.3 Individual rights to participation: towards individuals' law-making power

Although individuals already have rights and obligations under international law as it stands, they do not possess the capacity to make international law. They can not conclude treaties, and their behaviour does not constitute relevant practice which could lead to the formation of customary law. On these grounds, some authors conclude that individual persons are therefore still not international legal subjects,²² or at best merely 'passive subjects'.²³ In this view, individuals are still considered as 'an object on which to bestow or recognize rights, not as agents from whom emanates the power to do such bestowing [,] ... as an object or, at best, as a consumer of outcomes, but not as an agent of process.'²⁴

I submit that the characterization of individuals as mere consumers of international law does not do justice to their current standing in the international legal system. Although it is technically correct that states have created the

²¹ See in this sense also Nijman, *International Legal Personality*, 2004, at 466.

²² Prosper Weil 'Le droit international en quête de son identité: Cours générale de droit international public' (1924/VI) 237 *Recueil des Cours* 9–370, at 122: individuals are only objects of international law because they do not themselves make international law but are only conferred certain rights and obligations by states.

²³ Robert Kolb 'Nouvelle observation sur la détermination de la personnalité juridique internationale' (2002) 57 *Zeitschrift für öffentliches Recht* 229–241, esp. at 236 and 239.

²⁴ Joseph H H Weiler 'The Geology of International Law—Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547–562, at 558. See also Michel Cosnard 'Rapport introductif' in Société française pour le droit international (ed) *Colloque de Mans: Le sujet en droit international* (Paris 2005) 13–53, at 51 '[L]es individus ne sont pas maîtres de leurs droits internationaux'.

international legal status (rights and obligations) of natural persons, this status has allowed and continues to allow individuals to emancipate themselves. They have in legal terms become active legal subjects and in political terms transnational citizens (pp. 296–313).

A first aspect of this emancipation or empowerment are internationally guaranteed rights to participation in the international legal process and in transnational governance. Participatory rights are at least on the halfway point between merely having rights and making law, and blur the line between law-producers and bystanders. Most participation of natural persons in the international legal process happens through NGOs (see below pp. 220–235). There are also other types of participation, which, however, remain quite weak. One type is contained in the safeguard policies adopted by the World Bank since 1997. Although these policies do not refer to international human rights instruments, a number of them foresee participation and empowerment of persons affected by bank-financed projects. For instance, the operational policy on indigenous people requires free, prior, and informed consultation with affected communities about the proposed project throughout the project cycle.²⁵ The operational policy on involuntary resettlement highlights that '[t]he involvement of involuntary resettlers and hosts in planning prior to the move is critical'.²⁶ A similar instance are participatory rights in (to some extent transnationalized) settlements on indigenous rights, e.g. fishing rights, between indigenous populations and states. The Human Rights Committee has interpreted the minority rights provision (Article 27 ICCPR) so as to require states to allow representatives of minorities to participate in the process of adopting governmental regulation which affects the rights of that minority.²⁷ Another example is the 'Equator Principles', a global financial industry benchmark for determining, assessing, and managing social and environmental risk in project financing, adopted by financial institutions in 2006. One of the principles concerns consultation and dialogue. The banks that have committed themselves to the Equator Principles pledge not to provide loans to projects where the borrower, the respective government, has not 'consulted with affected communities in a structured and culturally appropriate way'.²⁸ These (hard or soft) legal requirements of consultation empower affected individuals and communities

²⁵ Operational Policy 4.10: 'Indigenous People' of January 2005, Art 2.

²⁶ Operational Policy 4.12: 'Involuntary Resettlement' of January 2001 (the operational policy statement was updated in March 2007), Art 8.

²⁷ UN Human Rights Committee, *Apirana Mahuika et al v New Zealand*, comm. No 547/1992, CCPR/C/70/D/547/1993 (2000), paras 9.6–9.8.

²⁸ Equator Principles, Principle 5: 'Consultation and Disclosure'. The principle also states that for projects with significant adverse impact on affected communities, that consultation must 'ensure their free, prior and informed consultation and facilitate their informed participation, as a means to establish, to the satisfaction of the [borrowing financial institution], whether a project has been adequately incorporated affected communities' concerns.' See <<http://www.equator-principles.com>>.

only to a very limited extent. They are not entitled to initiate a project themselves, for instance.

The second, more robust, vehicle of emancipation is the individuals' *standing to initiate judicial or arbitral proceedings*, such as under the European Convention on Human Rights (ECHR) or the International Centre for the Settlement of Investment Disputes (ICSID). These claims have given rise to case law which progressively develops the corpus of international law in general,²⁹ and more specifically fortifies and enlarges the rights and obligations of natural persons. Because international judges enjoy independence, this law-making happens without direct state control. Therefore the individual capacity to claim is a limited functional equivalent to the law-making power of states (see p. 340).

These two factors have empowered individuals under international law, and are contributing to their gradual, yet merely rudimentary transformation into agents, as opposed to mere recipients or consumers of international legal rules. From a constitutionalist perspective, it is desirable that the trend towards individual empowerment continue. This could and should happen first in the context of general rule-making, where democracy is the bridge principle: the international human right to political participation includes, as I will argue in chapter 6, the right to contribute to the creation of international law. Second, the judicial and quasi-judicial claiming options of individuals before international courts and tribunals should be extended against states³⁰ and against international organizations. That second strategy of empowerment will now be discussed.

2.4 Towards individualized law-enforcement

Significance of individual enforcement power for the international legal personality of the individual

The individual's international legal personality, and thereby its membership in the international constitutional community, does not depend on international procedural enforcement mechanisms. This assertion contradicts the traditional view that individuals were partial and derivative subjects of international law only where and to the extent they could avail themselves of procedural venues before international courts and tribunals and enforce their rights without having to rely on diplomatic protection by their state.³¹ The traditional view thus linked substance to procedure.

²⁹ An independent development of substantial law has recently been notably performed by NAFTA (North American Free Trade Agreement) tribunals.

³⁰ See on the merits and drawbacks of granting business actors access to the WTO dispute settlement mechanism pp. 253–254 below.

³¹ Hans Kelsen *Principles of International Law* (2nd edn Holt Rinehart and Winston New York 1967), at 234, and the bulk of contemporary scholarship.

I suggest severing this link.³² From a constitutionalist perspective, the 'proceduralist' conception of the individual's international legal personality is unpersuasive for several reasons. First, it stands in the positivist tradition of defining law in general, and rights in particular, by sanctions and enforceability. The better view seems to be that law is not defined by sanctions, but rather by certain criteria of (procedural) fairness (see pp. 106–111). A constitutionalist mindset can easily accommodate this insight, because constitutional norms in particular are often not justifiable, while undeniably law. On the other hand, rights should not be confused with mere aspirations. It should be recognized that conflicts determine the very contents of the rights and cannot be defined away.³³ Therefore, rights are meaningful only if they confer entitlements and when there is a remedy ('no right without a remedy'). However, the remedy can take various forms. The enforcement of rights can happen on different levels of governance, on the international and on the domestic level. And it does not necessarily require judicial action, as the 'proceduralist' view of the individual's international legal personality implied.

The old view that rights must be actionable is rooted in the common law, which traditionally defined claims by their actionability through a writ. But this tradition is not universally shared. Most legal systems make a distinction between substance and procedure. While the Roman adage, '*ubi actio, ibi jus*', may be correct, it is not reversible: there can be '*jus*' without '*actio*'.³⁴ To tie the existence of substantial individual rights and the individual's legal personality on the availability of procedural remedies against states is particularly inappropriate in the realm of international law, where states are not subject to the compulsory jurisdiction of an international court.

Finally, and most importantly, the 'proceduralist' conception of the individual's international legal personality underestimates the important role of national bodies to enforce international law in a decentralized fashion. In the emerging multi-level constitutional system, the domestic courts are not only a functional equivalent to international courts and tribunals. The constitutional principle of subsidiarity³⁵ and practical considerations require the domestic institutions to be even the prior forum. This order of priority is particularly well established in human rights practice. Here the international forums are only the last resort and function as a safety valve. Given the important systemic protective function of domestic courts, it is doctrinally inconsistent to make the procedures before international bodies a defining element of the international legal

³² See in this sense already Hersch Lauterpacht 'The Subjects of the Law of Nations (Part I)' (1947) 63 *The Law Review Quarterly* 428–460, at 455. In contemporary scholarship Karl Doehring *Völkerrecht* (2nd edn CF Müller Heidelberg 2004), paras 246–250.

³³ Michael Ignatieff 'The Attack on Human Rights' (2001) vol 80 No 6 *Foreign Affairs* 102–116, at 108–109.

³⁴ Cf PCIJ, *Peter Pázmány University Case*, Ser. A/B, No 61 (1935), at 231: '[i]t is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself.'

³⁵ See on subsidiarity p. 76.

personality of the individual. Nevertheless, constitutionalists welcome the extension of access of individuals to international courts and tribunals.

Individual enforcement of international law in international forums

It is well known that in the last decades individuals have obtained a variety of procedural options to claim breaches of international law far beyond human rights violations, in numerous judicial, quasi-judicial, or administrative international forums. I leave aside the European Court of Human Rights and those human rights expert committees which can be directly acceded by natural persons. The best-known case beyond human rights are ICSID tribunals which are relevant for business actors (see below pp. 251–252). A further example is the compliance-control of the Aarhus Convention on environmental information. The compliance committee may receive communications brought forward by ‘members of the public’,³⁶ with ‘public’ meaning NGOs and individuals.³⁷ Finally, in international criminal proceedings before the International Criminal Court (ICC), the victims have the right to participate in the proceedings and enjoy a limited right to be informed of progress of the criminal trial.³⁸

Another international complaint mechanism available to individuals is the World Bank Inspection Panel. Groups of two or more natural persons who believe they have been hurt by World Bank-financed projects can request an inspection. The Panel will examine whether a failure of the World Bank to follow its own operational policies and procedures or contractual documents during the design, appraisal, or implementation of a Bank-financed project has adversely affected the material rights or interests of those persons.³⁹ In these procedures, the private requesters also have participatory rights.⁴⁰ But a finding of a violation of these policies does not as such suspend or cancel the lending agreement between the Bank and the borrowing state. And in cases of non-compliance with contractual conditions on the part of the borrower, the Bank—and not the Inspection Panel—has discretion to decide on such

³⁶ UNECE, Decision I/7 *Review of Compliance*, adopted at the first meeting of the parties, Annex ‘Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance’, MOP 1 (2002), Doc ECE/MP.PP/2/Add.8 (2004), sec. VI ‘Communications from the Public’.

³⁷ See the definition in Art 2(4) Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, (1999) 38 ILM 517–533).

³⁸ See Art 68(3) ICC-Statute. See ICC Appeals Chamber, *Prosecutor v Lubanga: Decision on Participation of Victims*, (ICC-01/04–01/06 OA 12 of 6 August 2008).

³⁹ The legal basis is International Bank for Reconstruction and Development and International Development Association, Resolution No IBRD 93–10 and Resolution No IDA 93–6 ‘The World Bank Inspection Panel’ of 22 September 1993, (1995) 34 ILM 520–523. The Operating Procedures (OP) of the Inspection Panel are reproduced in: The World Bank Inspection Panel, ‘Accountability at the World Bank—The Inspection Panel 10 Years On’, Washington 2003, Annex VIID.

⁴⁰ Art 47 Operating Procedures.

measures. So the World Bank inspection procedure is essentially an in-house review system, forming part of the purely internal management review. It does not furnish a judicial remedy. In all mentioned cases, the judicial analogies are more or less weak.

The most obviously insufficient forum from an individual rights' perspective is the focal point within the UN Secretariat for receiving delisting and exemption requests by individuals targeted by Security Council sanctions.⁴¹ The focal point was established after the World Summit Outcome Document of 2005 had called upon the Security Council to ensure that 'fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions'.⁴² The focal point empowers targeted individuals (whose names figure on a currently 73-page long web-published consolidated list⁴³) to act themselves as a petitioner and request delisting, without having to wait for diplomatic protection of their state of nationality. However, the focal point is not much more than a 'revamped letter box'.⁴⁴ Its role is mostly that of a clearing house which puts the governments of the designating state and of the state of citizenship or residence in contact with each other, which may then recommend delisting. But the power to decide on delisting remains entirely with the respective sanctions committee and this includes the power of a permanent member of the Security Council to veto a delisting proposal. This mechanism does not constitute an independent review. It is inadequate to safeguard the minimum procedural standards under the rule of law.⁴⁵ The ongoing critical debate on the listing process, which has not been silenced by the establishment of the focal point, benefits greatly from a look into the constitutionalist toolbox. The Fassbender study commissioned by the UN Office of Legal Affairs had defined the minimum standards for the required 'fair and clear procedures' as comprising four basic elements, namely the right to be informed, the right to be heard, the right to an effective review mechanism, and a periodical review of targeted sanctions by the Security Council.⁴⁶ Moreover, the study qualified the rights of a targeted person as 'subjective rights *vis-à-vis*

⁴¹ Established by SC res 1730 (2006). See, e.g., the guidelines of the 1267-sanctions committee, as amended on 9 December 2008, para 7 lit. g) on the focal point.

⁴² UN GA res 60/1 (2005), para 109 (emphasis added).

⁴³ See 'Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them' (as updated on 24 March 2009). See <<http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>>.

⁴⁴ Michael Bothe 'Security Council's Targeted Sanctions against Presumed Terrorists' (2008) 6 *Journal of International Criminal Justice* 541–555, at 547.

⁴⁵ See in this sense explicitly Parliamentary Assembly (PA) of the Council of Europe, PA res 1597 (2008), esp. para 6; see also PA res 1824 (2008).

⁴⁶ Bardo Fassbender 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations', repr. in (2006) 3 *International Organizations Law Review* 437–485.

the United Nations that derive from the Charter'.⁴⁷ A second study by the Watson Institute suggested various mechanisms for review, either under the authority of the Security Council itself, such as a monitoring team, an ombudsman as an interface with the UN, a panel of experts (following the models of the human rights committee or the anti-torture committee), independent arbitral panels (e.g. under the auspices of the Permanent Court of Arbitration, or hosted by an international organization such as the ICSID tribunals by the World Bank), or finally judicial review (e.g. by a body like the UN Administrative Tribunal).⁴⁸

So far, these recommendations were largely ignored by the Security Council. Nevertheless, I deem it important that here the constitutionalist approach has offered a vocabulary to claim and design improved procedures which move further in the direction of rule-of-law based procedural standards, fair trial guarantees, and review mechanisms. I submit that it is preferable and inevitable to draw on global norms, such as the Universal Declaration on Human Rights with its guarantees of procedural due process (Article 10 UDHR). This approach is compelling if one wants to safeguard constitutional minimum standards without undermining the coherence of the UN system of collective security, as the inward-oriented posture of the European Court of Justice (ECJ)⁴⁹ threatens to do.

To conclude, individuals have been empowered to enforce international law beyond human rights in international non-judicial forums. This development has strengthened their international constitutional status. However, these forums are in many respects deficient in the sense that they do not properly safeguard the affected individuals' rights and procedural fairness.

*Individual enforcement of international law in national forums:
direct application*

There seems to be a general trend in real-life litigation practice, and in the accompanying academic discourse, to broaden the areas of international law whose direct applicability by domestic courts acting upon complaints by individuals is an issue. A preliminary question here is whether the question of direct applicability really pertains to domestic law, and is left to the municipal courts to decide for themselves. The traditional answer is positive, based on the argument that the entire matter concerns the application of public international law, and that the modes of application fall within the *domaine réservé*. In contrast, the constitutionalist stance is that the question of direct applicability is

⁴⁷ Fassbender, Targeted Sanctions, 2006, at 438.

⁴⁸ Strengthening Targeted Sanctions through Fair and Clear Procedures: White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006, Appendix B (UN Doc A/60/887-S/2006/331).

⁴⁹ ECJ, Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, judgment of the Court (Grand Chamber) of 3 September 2008.

first of all a question of the interpretation of a treaty provision, and that the interpretation of an international instrument, even if performed by a national court, must follow international principles.⁵⁰ In fact, the practice of municipal courts with regard to direct applicability seems to be guided by some common principles, and does not diverge that much. Municipal judiciaries normally take into account the intentions of the contracting parties and inquire whether the parties wanted to endow a treaty provision with direct effect. National judiciaries also look at the structure of the treaty as a whole, and at the relevant provision's suitability for judicial application, notably at its precision and unconditionality.

Traditionally, the possibility of a direct application (or direct effect or self-executing nature) was basically limited to human rights treaties and to EU law and it has been intensely discussed with regard to World Trade Organization (WTO) law.⁵¹ In recent times, the direct application of international criminal law by municipal criminal courts has become a normal event, at least in an intermediary stage until the international criminal provisions have been formally inserted in wording or substance into the domestic criminal codes. Besides, as will be discussed later, the direct application of norms of international humanitarian law has become a battlefield.⁵²

Finally, the invocation of breaches of international law in domestic extradition proceedings has become important. Increasingly, persons facing extradition or criminal trial claim that international legal principles, e.g. respect for another state's territorial jurisdiction, has been breached in the course of their arrest.⁵³ This tendency is distinct from the parallel global trend to make respect for (international) human rights an integral part of extradition procedures by, for example, refusing extradition to countries where the death penalty or discriminatory proceedings are looming.

Overall, the current trend is one of increasing the options for individuals to enforce international law either in international or in domestic forums. Constitutionalists welcome it. The mere availability of diplomatic protection is insufficient, because it paternalizes individuals and prevents ownership and agency.⁵⁴ The process of empowerment is a core element of the constitutionalization of the international legal system.

⁵⁰ See in that sense already Joe Verhoeven 'La notion d' "applicabilité directe" du droit international' (1980) 15 *Revue Belge de droit international* 243–264, at 258–259.

⁵¹ See references below at p. 207

⁵² See below pp. 169–170.

⁵³ See, e.g., German Constitutional Court, order of 5 November 2003 (BVerfG, AZ 2 Bv R1506/03), paras 39–62, rejecting the claim that international law mandates the staying of criminal proceedings when a person was arrested in violation of the territorial jurisdiction of another state, with references to previous case law of various national courts. Accessible via <http://www.bverfg.de>. See on this issue also ICTY, *Nicolic*, case No IT-94-2-AR73, decision on interlocutory appeal concerning legality of arrest, of 5 June 2003.

⁵⁴ See below pp. 172–174.

2.5 The expansion of international human rights

Under the premise that international human rights are international constitutional rights,⁵⁵ the recent expansion of international human rights in various dimensions is a manifestation of the constitutionalization of international law. International human rights have first expanded in substance. Some have been explicitly endorsed in new international human rights treaties, such as the human right against forced disappearance. Others have been acknowledged even without explicit textual foundations in international covenants, such as the right to be free from discrimination on the ground of sexual orientation or of genetic features. Other liberal rights, such as the right to property, were already enshrined in the Human Rights Declaration, but have been concretized and spelled out only more recently, for example due to dense case law by ICSID tribunals. In the field of social and economic rights, much has changed only in the last 15 years. It is meanwhile acknowledged that all human rights must be positively protected, and that the economic and social rights are no second-class rights. Also, new rights without an explicit textual basis, such as the human right to water, are acknowledged. Finally, ecological rights are recognized, especially for indigenous populations.

The circle of addressees of human rights has also widened. International human rights are no longer opposable only to states. It is meanwhile generally admitted that international organizations, such as the United Nations and its peace-keeping operations, are bound to observe international human rights and international humanitarian law.⁵⁶ Because the organizations are not formally a contracting party to the relevant conventions, the doctrinal path to construe bindingness is controversial. Especially in this context, the idea that the UN Charter is a constitution is frequently employed as an argument for applying the human rights norms to the UN.⁵⁷ However, the use of the term constitution cannot simply conjure up human rights constraints. It would have to be shown concretely that the constitutional quality of the Charter necessarily comprises (unwritten) human rights standards for the organization, which is not very plausible.

International human rights are increasingly held to have at least indirect 'horizontal' effects for other private actors, notably for transnational corporations (see below pp. 243–246). Outside the business context, human rights

⁵⁵ Cf. Stephen Gardbaum 'Human Rights as International Constitutional Rights' (2008) 19 *EJIL* 749–768.

⁵⁶ See for the UN only August Reinisch 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Implementation of Economic Sanctions' (2001) 95 *AJIL* 851–871. See for the EU the Charter of Fundamental Rights of the EU of 7 December 2000 (OJ 2000 C 364, 1).

⁵⁷ Nigel D White and Dirk Klaasen 'An Emerging Legal Regime?' in *idem* (eds) *The UN, Human Rights and Post-Conflict Situations* (Manchester UP 2005) 1–16, at 7.

standards *de facto* constrain the behaviour of private persons. For example, the principle of *non-refoulement* prohibits states from expelling foreign women who are menaced by domestic violence at home, which means that private perpetrators' actions are measured at a human rights standard. Along this line, a debate on the human rights obligations of NGOs should be initiated, because, from a constitutionalist perspective, these should be held accountable as well. Overall, the human rights expansion is not only, as stated in the beginning, a manifestation of global constitutionalization, but a constitutionalist approach can dialectically furnish insights and arguments to refine, channel, and limit this process, notably to prevent a human rights inflation.

2.6 Beyond human rights

Another important legal trend which highlights the move of individuals to the centre of the international legal system is the emergence of international individual rights beyond human rights. The probably best-known 'ordinary' international individual rights are the rights to consular assistance granted to detained foreign nationals by Article 36 paragraph 1 of the Vienna Convention on Consular Relations (VCCR). The relevant provision expressly speaks of 'rights' of arrested or imprisoned persons, and thus cannot be understood to stipulate merely inter-state obligations, as the United States had unsuccessfully argued in the *LaGrand Case*. In that case, the International Court of Justice (ICJ), relying on the clear wording of the provision, held 'that Article 36, paragraph 1 creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the arrested person'.⁵⁸ In a different context, the German Constitutional Court found Article 36 VCCR to embody an individual 'subjective' right and the treaty provision to be self-executing and directly applicable in German criminal procedure law.⁵⁹

The individual's rights to communicate with, to have access to consular officers, and to be informed about the former rights are ancillary to the human rights to due process or fair trial. In that sense, the Inter-American Court of Human Rights had stated in a 1999 Advisory Opinion that non-observance of Article 36 VCCR is prejudicial to the guarantees of the due process of law, and that the imposition of the death penalty in such circumstances violates the right to life.⁶⁰ Also Germany had argued in the *LaGrand Case* that the right of the

⁵⁸ ICJ, *LaGrand Case* (Germany v United States of America), ICJ Reports 2001, 466, para 77.

⁵⁹ German Constitutional Court, First Chamber of the 2nd Senate, of 19 September 2006, BVerfG, 2 BvR 2115/01, repr. in *Europäische Grundrechte-Zeitschrift* 33 (2006), 684 *et seq.* But see US S.Ct., *Medellín v Texas*, judgment of 25 March 2008, No 06-984, 552 U.S. (2008).

⁶⁰ Inter-American Court of Human Rights, Advisory Opinion OC-16/99 'The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law' (of 1 October 1999), para 137, see also paras 124 and 129.

individual to be informed without delay under Article 36 'has today assumed the character of a human right'. But the ICJ did not find it necessary to consider that additional argument.⁶¹ And in the later *Avena* judgment, the Court seemed to find an eventual human rights qualification irrelevant.⁶² This view is the better one, because the right to consular assistance is not sufficiently fundamental to warrant the human rights label. It is also no simple emanation of the human right to a fair trial, because consular assistance on the one hand concerns not only accused persons in criminal proceedings but all foreigners, and on the other hand serves only foreign detainees, but not national detainees. In contrast, a human right should benefit all persons who are in a similar situation.

Another case in point are the four freedoms within the European Union which can hardly be understood as human rights. They are—in contrast to human rights—linked to transborder activities, and they are primarily instrumental to the creation of a common market, and not granted for the sake of the individuals themselves.⁶³ Nevertheless, they are real international (or European) subjective rights. Further international individual rights arguably flow from bilateral investment treaties (see below p. 251). In international humanitarian and criminal law, a similar evolution towards individual ownership is taking place. Antonio Cassese has argued that it would be 'consistent from the viewpoint of legal logic but also in keeping with new trends emerging in the world community' to acknowledge that customary law generates rights which directly accrue to individuals: 'They are entitled to respect for their life and limbs, and for their dignity, hence they have a right not to become a victim of war crimes, crimes against humanity, aggression, torture, terrorism.'⁶⁴ Such a customary international entitlement not to become victim of an international crime, deriving from general international rules, would be an international right directed against private persons. The practical consequence of the suggested international direct individual entitlement is that this right is held by persons even if a nation state has not adopted appropriate criminal legislation or has even acted contrary to international law. However, such a conception seems to inflate individual rights, and, in practical terms, might not be helpful.

Specifically in international humanitarian law (IHL), nobody denies that the purpose of most primary norms is to benefit individuals, and that states as parties to a military conflict are obliged to protect natural persons. But according to the traditional view, these obligations were inter-state obligations, owed to the other contracting parties. However, some norms of IHL explicitly mention

⁶¹ ICJ, *LaGrand*, para 78.

⁶² ICJ, *Case Concerning Avena and other Mexican Nationals* (Mexico v United States of America), ICJ Reports 2004, 12, para 124.

⁶³ Alexander Schultz *Das Verhältnis von Gemeinschaftsgrundrechten und Grundfreiheiten des EGV* (Duncker & Humblot Berlin 2005), esp. at 107–109, 111, 182.

⁶⁴ Antonio Cassese *International Law* (2nd edn OUP Oxford 2005), at 145.

individual rights or entitlements.⁶⁵ This wording supports the constitutionalist interpretation that these obligations are owed to individuals and arguably even confer on those individuals the corresponding rights to protection. However, individuals lack standing to enforce IHL before international tribunal or other international bodies, e.g. before a commission under Article 90 AP I. The secondary level of remedies for breaches of IHL is even more controversial. Treaty provisions on the liability to pay compensation for war-related damages, such as Article 91 of AP I, were traditionally understood to foresee only inter-state compensation. From an individualist and emancipatory, in short: from a constitutionalist perspective, these textually open clauses can and should be understood as creating rights for individuals. But even on this premise, the problem remains that an international forum is lacking. The only options are domestic courts. But international treaty law does not prescribe states to establish jurisdiction for processing claims for breach of IHL, and there is no customary law in that sense.⁶⁶ A constitutionalist approach would be to develop international law in that direction. For the time being, remedies for violations of IHL are available for individuals only where domestic courts recognize first the individual 'ownership' of rights both on the primary and on the secondary level. Moreover these same courts must also recognize the direct applicability (or self-executing character) of the relevant norms of IHL. I submit that the mounting pressure for the admissibility of municipal civil-law actions for financial compensation for violations of IHL is one manifestation of the overall trend to 'individualize' international law both in terms of substance and procedure, coupled with a strengthening of domestic courts as enforcers of international law. And this in turn demonstrates constitutionalization.

The question arises how to determine whether an individual right is a human right, and thus a constitution-based right, or merely an ordinary, subjective right. A formal approach would be to define as human rights only those rights that carry this official label and have been codified in a Human Rights Convention. Another formal approach would be to look for a universal consensus on a novel human right in form of a General Assembly Resolution.⁶⁷ I submit that the criterion for a human right must also be substantial, not only formal in the sense of universal recognition. Only rights that are both universally recognized and of paramount importance for the well-being of individuals can be human rights.⁶⁸

⁶⁵ See notably common articles 7/7/7/8 of the four Geneva Conventions of 1949.

⁶⁶ The authoritative compilation of customary IHL only diagnosed 'an increasing trend of enabling victims . . . to seek reparation directly from the responsible State', without confirming the existence of an international customary rule to that effect (Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* vol I, Rules (CUP Cambridge 2005), at 541).

⁶⁷ Philip Alston 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 *AJIL* 607–621.

⁶⁸ Cf Sinai Deutch 'Are Consumer Rights Human Rights?' (1994) 32 *Osgoode Hall Law Journal* 537–578, at 549 with further references.

Because the world changes and with it the potential threats to human flourishing, human rights can change, and new human rights can emerge as a response to the perceived need for protection arising from novel threats or due to changed societal sensibilities.

The emergence of international individual rights 'below' the level of human rights is a corollary of the constitutionalization of international law first because it refines and intensifies the international status of the individual. Second, it is a corollary of constitutionalization because it contributes to the conceptualization of various levels of international law, namely 'ordinary' international law and international constitutional law. In a constitutionalized international order, human rights form part of the corpus of international constitutional law, whereas other individual rights pertain to the body of ordinary international law.

Third, the recognition of simple international individual rights strengthens the normative power of international human rights, because it works against their inflation. The current proliferation of human rights assertions in the international legal discussion tends to devalue or debase those very rights, because the attribution of a human rights label to all sorts of claims inadvertently promotes their trivialization.⁶⁹ Reserving the human rights seal for rights which are really important helps preserving their pedigree. And this in turn helps to strengthen the idea of global constitutionalism.

2.7 Individuals as creditors of international responsibility

From a constitutionalist perspective, individuals are not only 'owners' of certain primary rights to performance of international obligations, but should in principle also own the correlative secondary rights flowing from international (state) responsibility in the event of a breach of the respective primary international norm, because otherwise their emancipation remains seriously incomplete. Put differently, international state responsibility should move further beyond a purely inter-state responsibility. In the context of human rights law and IHL, the secondary right is called the right to a remedy.⁷⁰ The human rights conventions typically foresee that states parties must create effective remedies within their domestic legal order.⁷¹ These provisions have been traditionally interpreted as

⁶⁹ Cf Mary Ann Glendon *Rights Talk: The Impoverishment of the Political Discourse* (The Free Press New York 1991), at 16: '[O]ne must ask whether an undifferentiated language of rights is really the best way to address the astonishing variety of injustices and forms of suffering that exists in the world.' See also Laurence R Helfer 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 *Columbia Law Review* 1832–1911.

⁷⁰ See General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Doc A/Res/60/147 (21 March 2006).

⁷¹ See, e.g., Art 2(3) ICCPR or Art 13 ECHR.

procedural obligations addressing states, which must then enact appropriate legislation.⁷² From a constitutionalist perspective, these provisions should be read as enshrining international (secondary) rights owed by the states directly to individual victims, so as to eliminate their dependency on supportive state activity. This would also mean that individuals possess this right independent of their nationality, and even against their home state. The content of international (state) responsibility towards individuals would then be, according to general principles, cessation, non-repetition, and reparation.⁷³ Reparation may in principle include restitution, compensation, rehabilitation, and satisfaction.⁷⁴

Notably monetary compensation is problematic and controversial. In the law as it stands, the Human Rights Committee has not interpreted the entitlement to an 'effective remedy' under Article 2(3) ICCPR as encompassing a right to (monetary) compensation. Such an obligation can only be derived from additional sources, such as Article 41 ECHR or Article 75 ICC Statute which obliges the ICC to 'establish principles relating to the reparation to, or in respect of, victims, including restitution, compensation and rehabilitation'.⁷⁵

Notably the current controversy whether victims of violations of IHL have or should have an (internationally grounded) direct personal and individual right to a remedy, including eventual compensation, could benefit from a constitutionalist approach. That approach, with its focus on individual rights, highlights that the underlying issue is similar to that in the field of human rights. It suggests that even in the absence of an explicit right to a remedy codified in the Geneva Conventions and Protocols for violations short of grave breaches, at least a procedural obligation for states to establish domestic civil law remedies against states, government officials, and private perpetrators should be acknowledged. The constitutionalist approach at least supports progressive interpretation of the law in that direction. To conclude, the emancipation of individuals as creditors of secondary obligations is ongoing, and can be furthered through a dynamic, constitutionalist interpretation of the norms on international responsibility.

2.8 Individual agency in the law of diplomatic protection

Another example for the trend towards individual agency in international law, which can in turn be further promoted and bolstered by a constitutionalist approach, is the evolution often called 'humanization' of the international law of

⁷² For instance, Art 14(1) of the 1984 Anti-Torture Convention does not stipulate a direct international individual right to compensation against states or state officials, but merely obliges each state party to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.

⁷³ Arts 30 and 31 ILC-Articles on the Responsibility of States for International Wrongful Acts of 2001 (UN Doc A/CN.4/L.602, Rev.1).

⁷⁴ General Assembly, Principles on the Right to a Remedy, 2006, principles 11, 18–23.

⁷⁵ That provision is complemented by section III, Victims and Witnesses (rules 85–99) of the Rules of Procedure and Evidence of the ICC, which detail some of the conditions for the granting of compensation to victims (UN Doc PCNICC/2000/1/Add.1 (2000)).

diplomatic protection.⁷⁶ The traditional legal fiction that a state exercising diplomatic protection claims a violation of its 'own' rights has been basically given up. But individuals are still not entitled to diplomatic protection under international law, not even in the event of the violation of a *jus cogens* norm. The respective proposition of ILC rapporteur John R Dugard in the first ILC Report on Diplomatic Protection did not meet with approval.⁷⁷ ILC draft Article 19 of 2006 now (only) declares that a State entitled to exercise diplomatic protection 'should ... give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'.⁷⁸ The rapporteur suggested that, despite the continuing insistence of states on the discretionary nature of diplomatic protection, 'international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising diplomatic protection on behalf of a national who has suffered a significant injury abroad'.⁷⁹ In fact, numerous mostly modern state constitutions enshrine the government's obligation to protect their nationals abroad, and some even contain explicit individual rights, entitlements, or guarantees of protection.⁸⁰ Various recent judgments of national and international courts on diplomatic protection have found that citizens abroad are entitled to due consideration and to a fair procedure in processing their request, that governments may be required to furnish reasons for their decisions, that protection may not be refused in an arbitrary fashion, and that legitimate expectations can arise.⁸¹

⁷⁶ But see Vasileios Pergantis 'Towards a "Humanization" of Diplomatic Protection?' (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 351–397, arguing that there is not and should not be 'humanization', because an entitlement to diplomatic protection would be inoperational.

⁷⁷ John R Dugard *First Report on Diplomatic Protection*, UN Doc A/CN.4/506 (of 7 March 2000), Art 4 (1), at 27 with paras 75 *et seq.*

⁷⁸ Report of the International Law Commission, Fifty-eighth session (1 May–9 June and 3 July–11 August 2006), General Assembly Official Records, Sixty-first session, supplement No 10 (A/61/10), at 94 (emphasis added).

⁷⁹ John R Dugard 'Commentary on Article 19' *ibid* at 96–97 (emphasis added).

⁸⁰ E.g. Art 10 of the Croatian Constitution of 21 December 1990; Art 69(3) of the Hungarian Constitution of 20 August 1949; Art 13(1) of the Estonian Constitution of 28 June 1992; Art 61 of the Russian Constitution of 12 December 1993.

⁸¹ See most of all Constitutional Court of South Africa, *Samuel Kaunda and others v President of the Republic of South Africa and others*, 4 August 2004, repr. in ILM 44 (2005), 173, especially Ngcobo, C.J., para 192. See also UK Supreme Court of Judicature—Court of Appeal, Civil Division, *Abasi v Secretary of State for Foreign and Commonwealth Affairs*, repr. in ILM 42 (2003), 355. Here the English Court of Appeal departed from the traditional position that the exercise of diplomatic protection is a matter beyond the jurisdiction of courts. In that case, the court accepted a complaint by a British detainee in Guantánamo Bay who was dissatisfied with the measures of protection offered by the British government and who sought judicial review to compel representations about the illegality of his detention. Although the court rejected the claim that a general duty to exercise specific protective measures existed, it assumed that legitimate expectations could arise in that context. See also the ECHR, holding that, even in the absence of effective control over the Transdniestrian region, Moldova had 'a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention'. ECHR, *Ilascu v Moldova* (application No 48787/99), judgment of 8 July 2004, para 331 (emphasis added).

A constitutionalist approach to international law highlights and supports this development, because constitutionalists work on the premise that international law should—if in doubt—be interpreted in a way which empowers individuals. Because the constitutionalist perspective is a comprehensive one, it allows the reconciliation and accommodation of the law of diplomatic protection with the human rights paradigm of a ‘duty to protect’. The duty to protect is not limited to protection against harmful private activities, and requires both preventive and remedial action. From a constitutionalist perspective, the duty to protect should in principle include diplomatic protection *vis-à-vis* third states. Moreover, a comprehensive approach requires taking into account the effects of state immunity in the event of lawsuits instituted by individuals against states before domestic tribunals. If state immunity is upheld even in the event of gross human rights violations, this could and should be compensated by a reduction of the discretion of the victim’s home state to exercise diplomatic protection for the victim on the international plane.⁸²

Finally, constitutionalism is as a general matter concerned with the prevention of arbitrary power and thus with the circumscription and limitation of discretion. So while not denying that diplomatic protection remains a political institution with discretion, constitutionalism claims that under the rule of law, all discretion has limits, and that there are no completely law-free zone of politics. A constitutionalist reading of the current state practice with regard to diplomatic protection therefore leads to acknowledging an international obligation to give due consideration to the possibility of exercising diplomatic protection. At least, constitutionalist-minded lawyers welcome the progressive development of the law of diplomatic protection in this direction.

2.9 International individual obligations

Individuals are increasingly addressed by international law. This is significant for the constitutionalization of international law, not because the international obligations incumbent on individuals are ‘constitutional’ ones, but because that development contributes to the normalization of the international legal status of individuals. ‘Fundamental duties’ corresponding to fundamental rights, as enshrined in the African Charter on Human and Peoples’ Rights (Articles 27–29) are problematic and will not be discussed here.

The most obvious field where international individual obligations short of ‘fundamental duties’ seem to exist is international criminal law. However, the traditional pre-Nuremberg international criminal law conventions and the Geneva Conventions on international humanitarian law did not directly

⁸² François Flauss ‘Vers un aggiornamento des conditions d’exercice de la protection diplomatique?’ in *idem* (ed) *La protection diplomatique: Mutations contemporaines et pratiques nationales* (Bruylant Bruxelles 2003) 29–61, at 53.

prohibit let alone criminalize individual behaviour. They merely obliged states to enact domestic criminal law and to try individuals in domestic criminal procedures. In particular, the Geneva Conventions' provisions on grave breaches merely address states, and do not suggest that the international norms in themselves can justify criminal punishment. The traditional but nowadays challenged interpretation therefore has been that the respective Geneva law provisions cannot be applied in the internal sphere of states without implementing legislation, and that they are most of all not fit to form the legal basis of a criminal judgment without being supplemented by a domestic criminal statute.⁸³

This scheme of only 'indirectly' addressing individuals is still present in modern conventions such as the 1984 UN Convention Against Torture (CAT). Recently, the anti-torture committee stressed that the CAT imposes obligations only on states parties and not on individuals.⁸⁴ The same holds true for Security Council resolutions. The important resolutions on targeted sanctions only oblige states to take domestic measures, e.g. to freeze assets, or to prohibit travel.⁸⁵ Technically speaking, the individual is here still mediated by the states (or by the EU). Furthermore, numerous Security Council resolutions hold that terrorism (committed by private persons) is a threat to world peace in terms of Article 39 of the UN Charter.⁸⁶ But they do not directly impose clear obligations on terrorists. Likewise, the first resolution on weapons of mass destruction in the hands of non-state actors seeks to reduce the risk that non-state actors acquire those weapons, and explicitly formulates that objective,⁸⁷ but then goes on to define obligations of states only.

The constitutionalist reading of these and other international norms favours their interpretation as in principle being apt to directly impose obligations on individuals, independently of any intermediating act of a national authority. The Nuremberg judgment against the principal war criminals of 1946 stated this clearly, albeit only with regard to the Nuremberg crimes:⁸⁸ 'That

⁸³ Michael Bothe 'The Role of National Law in the Implementation of International Humanitarian Law' in Christophe Swinarski (ed) *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Dordrecht 1984) 301–312, at 302. But see Kai Ambos *Völkerstrafrecht* (Beck München 2006), at 96: The progressive development of IHL may have modified the meaning of the Geneva conventions. Notably Art 85 of the AP I qualifies the grave breaches as 'crimes'. Ambos concludes that IHL itself is the actual source of the criminalization of the prohibited acts.

⁸⁴ CAT, General Comment No 2: Implementation of Article 2 by States Parties (UN Doc CAT/C/GC/CRP.1/Rev. 4 of 23 November 2007), para 15.

⁸⁵ Such as UN SC res 1267 (1999) against the Taliban; 1591 (2005) against Sudanese officials.

⁸⁶ See, e.g. UN SC res 1368 (2001); 1377 (2001); 1735 (2006); 1757 (2007).

⁸⁷ UN SC res 1540 (2004) preamble, para 8.

⁸⁸ I.e. crimes against peace, war crimes, and crimes against humanity (as enumerated in Art 6 of the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis of 8 August 1945 (concluded between the UK, USA, France, and Soviet Union) with the Charter of the International Military Tribunal (so-called 'Nuremberg-Charter') as an annex of the Agreement (text in (1945) 39 *AJIL* suppl. 257 *et seq.*).

international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. . . . [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.⁸⁹

Since then, it is conceded that the prohibitions on committing international crimes in the strict sense, i.e. those enshrined in the ICC Statute and entrenched as custom, are addressed to every human being in the world in his or her private and personal capacity. Not only state officials or agents acting in their official capacity as militaries or politicians, but also private businessmen are under obligation.⁹⁰ It is immaterial for the quality as an *international* obligation whether the international norms are enforced by international criminal courts or merely by municipal courts which apply international law either directly or indirectly.⁹¹

A slightly different matter are the legal consequences of a violation of these international criminal-law obligations, namely criminal punishment. Generally speaking, the issue is one of direct applicability. May a domestic criminal court directly apply international criminal law, or are these provisions too imprecise to warrant criminal conviction? From a constitutionalist perspective, the real reason for the need for implementation is not dualism or justiciability as such, but the principle *nulla poena sine lege*. This principle is guaranteed in international human rights conventions (Article 15(1) ICCPR; Article 7 ECHR) as an underogable right (Article 4 ICCPR, Article 15 ECHR).⁹² It is a central achievement of liberal constitutionalism rooted in the idea that the citizen owes obedience to the state only on the basis of clearly codified rules and is otherwise free. The *nulla poena* principle thus has constitutional status as a core element of the rule of law. It requires that criminal laws must in principle be written and precisely worded, including a clear circumscription of the punishment, and these conditions are not always met in international law. The constitutionalist approach highlights that two objectives may be in conflict: on the one hand the targeting of individuals directly, without a state smoke screen, and on the other hand the demand to comply with the *nulla poena* principle.

⁸⁹ Judgment of the international military tribunal of Nuremberg for the trial of German major war criminals of 30 September/1 October 1946.

⁹⁰ US Military Tribunal at Nuremberg, *US v Alfred Krupp et al*, The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol X, 1949, 130–159, reprinted in Marco Sassòli and Antoine A Bouvier *How Does Law Protect in War* (ICRC Geneva 1999), at 666; ICTR, *Prosecutor v Kayishema and Ruzindana*, Judgement, Case No ICTR-95-1-T, of 21 May 1999.

⁹¹ Gerhard Werle *Völkerstrafrecht* (2nd edn Mohr Siebeck Tübingen 2007), paras 109–112.

⁹² The *nulla poena* principle is also endorsed in domestic constitutions (see, e.g., Art 103(2) German Basic Law. It also forms part of international customary law and applies to international criminal trials, cf Arts 22–24 ICC-Statute.

In other areas of international law as well, primary and secondary obligations that are incumbent on individuals are in *statu nascendi*. I have already mentioned the debate on human rights responsibilities of transnational corporations and on civil liability for private violators of IHL. In international environmental law, the civil liability conventions in the field of oil pollution, nuclear damages, transboundary movements, or other carriage of hazardous waste and noxious substances oblige the contracting states parties to ensure liability and payment of damages by business actors. Again, these conventions directly and formally address the states only, which must enact implementing legislation. In substance, however, these conventions target private actors. It has therefore been suggested abandoning the doctrinal distinction between the (directly international law-based) state responsibility and the (but indirectly international law-based) so-called ‘civil liability’ of firms: ‘Plainly stated, the treaties place duties on business not to cause pollution’, writes Steven Ratner.⁹³

From a constitutionalist perspective, the current evolution and progressive interpretation of international law as comprising both primary and secondary international obligations of individuals⁹⁴ is welcome. Individual international legal responsibility should be recognized with the consequence that individuals are saddled with international legal duties to compensate victims for breaches of international law. This evolution on the side of obligations would properly mirror the rise of individual rights beyond human rights, and refine the constitutional status of individuals as the ultimate international constitutional unit.

2.10 By way of conclusion: from *bourgeois* to *citoyens*

In synthesizing the international constitutional status of individuals, I want to highlight three aspects. First, the constitutionalist approach, focusing on the centrality of individuals, unveiled the hidden parallels in the seemingly diverse debates on problems such as criminal punishment based on international law, direct effect, and monetary compensation for violations of IHL. They all revolve around piercing the state veil and empowering individuals.

Second, many, if not all of the new individual rights, such as the rights to consular assistance, rights to due consideration in diplomatic protection, the numerous rights to institute judicial and arbitral proceedings, and finally the right to environmental information and participation,⁹⁵ are procedural or procedure-related ones. This corresponds to the general trend, visible in many legal

⁹³ Steven Ratner ‘Business’ in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (OUP Oxford 2007) 807–828, at 814.

⁹⁴ Dörr, *Privatisierung des Völkerrechts*, 2005, at 913–14.

⁹⁵ The 1998 Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, (1999) 38 ILM 517–533) grants individuals rights to environmental information, to participation in relevant administrative proceedings, and to access to justice.

systems, to care more for procedural safeguards. This trend has a special significance in international law, because it is a strategy to overcome disagreement on substance and on material values, which is normal in pluralist societies, but extreme in the highly diverse global society. Procedural safeguards cannot erase or overcome all dissent in substance, and are no full substitute for agreement on minimal substantial principles. Still, the application of some procedural principles, such as notice and comment by affected persons, can increase the likelihood of fair and acceptable outcomes of those procedures. The proceduralization is to that extent a manifestation of a 'thin' constitutionalization of the international legal system.

The third conclusion to be drawn from this section is that individuals are so far quite firmly entrenched as international *bourgeois*. I also showed that there is a very weak trend towards empowerment of individuals in the international legal process and in global governance, which means a trend towards transnational *citoyenneté*. Expressed in terms of constitutional philosophy, I have discerned an increasing number of elements of a 'jus cosmopolitanum' in a Kantian sense⁹⁶ in international law. International law as it stands has already overcome the Hegelian idea that individuals can be free, and a legal subject, only through and in a state.⁹⁷

The individual's ongoing transformation 'from subject of international law to international citizen is (an essential) part of the transformation of the international legal system from a Vattelian inter-state system into a universal constitutional democracy in which the individual is not only imputed with international rights and duties but in which he is (directly) represented and in which he participates in the international institutions that create and apply international law.'⁹⁸ A fuller constitutionalization of international law would

⁹⁶ Immanuel Kant 'Perpetual Peace' in *idem Perpetual Peace, and Other Essays on Politics, History, and Morals* (Hackett Publ Indianapolis 1983 (German orig. 1795) Humphrey trans), section II, third definitive article. See also *idem Die Metaphysik der Sitten, erster Theil, metaphysische Anfänge der Rechtslehre* (orig. Königsberg 1798) in *idem Die Metaphysik der Sitten, works* (Werkausgabe) vol VIII (3rd edn Suhrkamp Frankfurt am Main 1978 Weischedel ed) § 62, at 476 on the 'jus cosmopolitanum' (which Kant did not conceive as a right to political participation).

⁹⁷ See Georg W F Hegel *Vorlesungen über die Philosophie der Geschichte, I. Band: Einleitung—Die Vernunft in der Geschichte* (Meiner Leipzig 1920 Lasson ed), at 89–90: 'Dies Wesentliche nun, die Einheit des subjektiven Willens und des Allgemeinen, ist das sittliche Ganze und in seiner konkreten Gestalt der Staat. Er ist die Wirklichkeit, in der das Individuum seine Freiheit hat und genießt, . . . Im Staat allein hat der Mensch eine vernünftige Existenz. Alle Erziehung geht dahin, dass das Individuum nicht ein Subjektives bleibe, sondern sich im Staate objektiv werde. . . . Alles was der Mensch ist, verdankt er dem Staat; er hat nur darin sein Wesen. Allen Wert, den der Mensch hat, alle geistige Wirklichkeit, hat er allein durch den Staat.' *Ibid*, at 97: 'Gesellschaft und Staat sind diese Zustände, in welchen die Freiheit vielmehr verwirklicht wird.' Cf also Christoph Enders *Die Menschenwürde in der Verfassungsordnung: zur Dogmatik des Art. 1 GG* (Mohr Siebeck Tübingen 1997), at 243: 'Wer als frei anerkannt sein will, muss in den staatlichen Zustand treten: Nur dort ist er Person, Rechtssubjekt' (on Hegel).

⁹⁸ Nijman, *International Legal Personality*, 2004, at 424.

require a prolongation and reinforcement of that trend. This is the issue of the democratization of the global legal order, which will be discussed in chapter 6.

3. States

3.1 States as *pouvoirs constitués*, not *pouvoirs constituants*

The global constitutional community is dominated by states. States are the most powerful international legal persons. But the narrowed version of international law as pure and exclusively inter-state law, which had been established by Emer de Vattel⁹⁹ and had its heyday around the turn of the 19th to the 20th century,¹⁰⁰ has been gradually abandoned since the Second World War. I have already pointed out that the constitutionalist reading of international law relativizes the dichotomy between states as the makers of international law and all other legal subjects, to the extent that all subjects are *pouvoirs constitués*. The various types of members of a constitutional community have differing rights and obligations, as defined by international constitutional law, but there is no categorical distinction between states and all others (pp. 154–155). So the constitutional approach engenders a shift of perspective: the traditional view suggested that the international legal limits on statehood and state action are imposed on the state from the outside (which implied that the state is not constituted by international law). From a constitutionalist perspective, by contrast, states—as international legal subjects—are *constituted by* international law.

Moreover, because, from a constitutionalist perspective, the well-being, interests, needs, and rights of individuals should be the prime concern of all governance arrangements,¹⁰¹ states should not be conceived as the ‘primary’ subjects of international law. While states are indeed the principal, though not exclusive, creators of international law, this is a technical status only. The states’ international constitutional legitimacy, however, depends on how they serve individuals as members of humanity. It has been argued that only representative and well-functioning states should be acknowledged as ‘full’ international legal persons.¹⁰² However, there is no central institution which could ‘withdraw’ the

⁹⁹ Vattel defined the ‘law of nations’ as ‘the science of the rights which exist between Nations or States, and of the obligations corresponding to these rights’ (Emer de Vattel *Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires de Nations et des Souverains*, vol I (London 1758), in James Brown Scott (ed) *The Classics of International Law* (Carnegie Institution Washington 1916 Fenwick trans), § 3).

¹⁰⁰ See, e.g., Heinrich Triepel ‘Les Rapports entre le Droit Interne et le Droit International’ (1923) 1 *Recueil des Cours* 77–121, at 82.

¹⁰¹ See above p. 157.

¹⁰² ‘If a state functions well and its citizens are represented properly by the government, the international legal personality which the state derives from its citizens remains with the state. The state is then the legitimate representative of its citizens at the international level with the authority to pursue their interests. . . . The well-functioning state has full international legal personality, but only derived from its citizens.’ (Nijman, *International Legal Personality*, 2004, at 473, see also 458).