The European Journal of International Law Vol. 21 no. 1 © EJIL 2010; all rights reserved

The Role of the Individual in International Law

Andrew Clapham*

Abstract

This contribution reminds us that as individuals we play a role in the formation and understanding of international law. After recalling the key steps in the acknowledgement of international rights and obligations for individuals the article goes on to ask if the time has come to acknowledge that individuals can have obligations under international law that go beyond international crimes. In other words might there be international civil law obligations for the individual?

This short piece tackles the role of the individual in international law. We could start by noting that we often underestimate the role of individual teachers. International lawyers have introduced themselves to me with the preamble 'I was taught by Myers McDougal'; some of us might claim we were 'schooled by Antonio Cassese'; individuals have an impact, not only on their charges, but also on doctrine and the law. Not only are some textbooks more popular and influential than others, but we all learn early on that international law considers that what certain individuals teach and publish as their version of the law is to be a source for judges to take into account when applying international law. We know that the International Court of Justice is instructed under its Statute to apply 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.[1] Although the Court has been shy about explicitly listing those teachings which it is actually relying on for determining the relevant rules to apply in the cases before it,[2] we may recall here when considering the role of the individual that there is a real role, not only for individual teachers from the 'various nations', but also for their teachings. And we

* Professor of Public International Law, Graduate Institute of International and Development Studies, Geneva, Director of the Geneva Academy of International Humanitarian Law and Human Rights. Email: andrew.clapham@graduateinstitute.ch.

1 Art. 38(1)(d) Statute of the International Court of Justice.

2 For a discussion see Pellet, 'Article 38', in A. Zimmermann, K. Oellers-Frahm, and C. Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (2006), at 677, 790–792.

EJIL (2010), Vol. 21 No. 1, 25–30 doi: 10.1093/ejil/chq001

should not be too surprised if there is little 'case law' from the Court to back up this assertion. As Pellet points out, it would be invidious for the Court to refer to individual teachers by name, and in any event the Court would often be hard pressed to show that the views were mirrored by individual teachers from various other nations.[3]

This book launch for Cassese's selected papers, *The Human Dimension of International Law*,[4] not only asks us to consider the role of the individual in international law but also asks the question: are we are facing progress or stagnation? Let me continue with the theme of the role of the individual. Ever since the 1966 edition of *Principles of International Law* Brownlie has asserted, 'There is no general rule that the individual cannot be a "subject of international law", and in particular contexts he appears as a legal person on the international plane'.[5] Indeed it does make sense to shift the discussion from subjectivity to personality, and from general theory to particular contexts. But this still begs the question: what exactly does this appearance of the individual on the international scene bring with it in term of rights and obligations under general international law?[6]

Let us consider first the issue of individual obligations under international criminal law. In the soliloquy which opens his book of selected papers Cassese quotes the two US members of the Commission on the Responsibility of the Authors of the War and on the Enforcement of the Penalties who stated in 1919 that 'the laws and principles of humanity are not certain, varying with time, place and circumstances, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity'.[7] But he narrates that by the end of World War II the International Military Tribunal judges argued:

> To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, *and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.*[8]

[3] *Ibid.*, at 792.

[4] A. Cassese, *The Human Dimension of International Law. Selected Papers* (2008).

[5] (7th edn, 2008), at 65.

[6] Shaw's discussion in the 6th edition of his *International Law* (2008), at 258, asserts that 'modern practice does demonstrate that individuals have become increasingly recognised as participants and subjects of international law', but the subsequent paras are confined to recalling those treaties which allow individuals to appeal directly to an international body, and he recalls at 259 that it is now established that international law proscribes certain heinous conduct so that it 'imports direct individual criminal responsibility'.

[7] 'Soliloquy', in Cassese, *supra* note 5, at pp. lxii–lxiii, quoting the 'Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on the Enforcement of penalties', in *Violations of the Laws and Customs of War, Report of Majority and Dissenting Reports of Americans and Japanese members of the Commission of Responsibilities, Conference of Paris 1919* (1919), at 13.

[8] *Ibid.*, at p. lxii with a reference to *Trial of the Major War Criminals before the International Military Tribunal-Nuremberg 14 November 1945–1 October 1946* (Nuremberg International Military Tribunal, 1947), at 219 (emphasis added).

Individual judges acting collectively felt they could determine what was obviously wrong, against humanity, and unjust, to the extent that they felt it was obvious that individuals had obligations under international law and could be punished, even with death by hanging, for violating those international obligations.

So we find the individual as the bearer of individual obligations under international criminal law in the context of international armed conflicts. Almost 50 years later, in the *Tadić* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, the idea is applied to individual criminal responsibility for certain violations of humanitarian law committed in non-international armed conflicts.[9] By 2002 we have a Statute in force for a permanent International Criminal Court with jurisdiction over individuals covering not only war crimes but also genocide and crimes against humanity.

Over the last 60 years we have also seen a change in the status of the individual as a holder of rights under international law. How can we deduce these international rights? For Cassese one can assume 'corresponding rights' to every individual's 'strict international obligation fully to respect some important values (maintenance of peace, protection of human dignity etc.)'.[10] He claims:

> It would be not only consistent from the viewpoint of legal logic but also in keeping with new trends emerging in the world community to argue that the international right in respect of those obligations accrues to all 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. At least for the time being, this international right, deriving from general international rules, is not, however, attended by a *specific* means, or power, of enforcement that belongs to individuals.[11]

In other words individuals currently have obligations and rights but no remedies under general international law. A traditional international lawyer might claim that inducing rights from obligations in this way is not appropriate, as states can impose obligations on individuals under criminal law without automatically generating the rights to a civil remedy for the victim. Similarly, the traditionalist might argue that even human rights treaties simply created rights and obligations for the states parties. Individuals were the beneficiaries of these treaties, just as animals might be the beneficiaries of an endangered species convention. Although the treaty might create rights enforceable at the national level, that might be a quirk of national law, rather than an inevitable consequence of international law (it could be argued). Originally under the regional human rights treaties the international law in question was sometimes seen as merely granting individuals procedural rights to seise, say, the European Commission of Human Rights, but the settlement of the dispute in legal terms demanded that

[9] See ICTY, Appeals Chamber, Decision on the defence motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, (IT-94-1-AR72), 2 Oct. 1995, especially at paras 128–137.

[10] *International Law* (2nd edn, 2005), at 145.

[11] *Ibid.*

the Commission decide whether to present a case to the Court. As is well known this changed for that Convention in 1998 with the adoption of the 11th Protocol allowing the individual victim to seise the Court directly. The same is now possible with regard to the African Court of Human and Peoples' Rights.

Can we reason therefore that the individual has not only criminal law obligations but also rights under international law? At this point we should recall the doctrinal debate which has raged over whether it made sense for individuals to be considered 'subjects' of international law. Gaja has recently addressed the issue in the context of the question whether non-governmental organizations should be included in the scope of the ILC's work on the responsibility of international organizations. Here the doctrine concerning the current category of subjects seems to exclude non-governmental organizations, but Gaja, having recalled the International Court of Justice's conclusions regarding the UN and its specialized agencies, exposes the indeterminate nature of the concept (or conception) of subjects of international law. Gaja recalls the implications of the same Court's *LaGrand* dictum:

> The Court's assertion of the legal personality of international organizations needs to be viewed in the context of its more recent approach to the question of legal personality in international law. The Court stated in the *LaGrand* case that individuals are also subjects of international law.[12] This approach may lead the Court to assert the legal personality even of non-governmental organizations. It would be difficult to understand why individuals may acquire rights and obligations under international law while the same could not occur with any international organization, provided that it is an entity which is distinct from its members.[13]

In his contribution to this symposium Gaja confirms that individuals may enjoy a double protection under international law. Once as the beneficiaries of their state's rights when such a state is exercising diplomatic protection or some other state right, and again where a 'treaty provides for remedies that are directly actionable by individuals'.[14] As a member of the International Law Commission Gaja knows more than the rest of us how this matter is seen by that group of individual publicists. It is significant therefore that he points to the savings clause in the Draft Articles on Diplomatic Protection to conclude that individuals can exercise their rights unaffected

[12] Footnote 47 in the original reads: '*I.C.J. Reports 2001*, para. 77. The Court referred to the Vienna Convention on Consular Relations of 24 April 1963 and concluded that "article 36, paragraph 1, creates individual rights"'.

[13] First report on responsibility of international organizations, UN Doc. A/CN.4/532, 26 Mar. 2003, at para. 17. See also the Report of the ILC Working Group, 'The Responsibility of International Organizations: Scope and Orientation of the Study', UN Doc. A/CN.4/L.622, 6 June 2002, at para. 11: '[t]he topic would be considerably widened if the study were to comprise also organizations that States establish under municipal laws, for example under the law of a particular State, and non-governmental organizations. Thus, it may seem preferable to leave questions of responsibility relating to this type of organization aside, at least provisionally.'

[14] Gaja, 'The Position of Individuals in International Law: An ILC Perspective' in this volume at 11.

by any international law which provides for a remedy for that individual's injury.[15] In sum, individuals can have international law rights without remedies.[16]

Before closing I would like to address the question posed in Cassese's 'soliloquy' viz: 'Does an International Community Proper Exist?'.[17] Cassese opens his piece with a reference to Brierly and his essay 'The Rule of Law in international Society'. Writing at a time when the League system seemed incapable of stemming the resort to force and aggression Brierly contrasted material links across borders with the need to find a 'spiritual as well as a material basis' for society: a Rousseauian *volonté générale*.[18] And he suggested that individuals from different nations are not strangers in the sphere of the 'deeper essentials of morality'.[19] He wrote in 1936:

> These common standards, too, do sometimes issue in common action, and though the action may be half hearted and its results meagre, it is evidence of the general acceptance of at least some degree of common responsibility for the common welfare. The Mandates system, the Minorities treaties, the Nansen office for refugees, the international Red Cross organization, the manifold social and humanitarian work of the League of Nations – these things are not enough, but they are not negligible. Moreover, the acid test of the reality of a community is that common standards of conduct should be held with a conviction strong enough to induce its members to take common action, even at the cost of sacrifices to themselves, in defence of the law.[20]

Brierly is alluding to the Italo-Ethiopian dispute and the possibility of common action in defence of the law. Our question today is: stagnation or progress? If we take Brierly's list evoking common responsibility and common conviction we can see that, far from stagnating, the human dimension of the international community has actually progressed. Individuals now benefit, not just tangentially from minority treaties or Mandates, but from multiple human rights treaties; the Nanson office for refugees is now a billion dollar annual operation called the Office of the High Commissioner for Refugees, the International Committee of the Red Cross has a worldwide operation

[15] 'Article 16 *Actions or procedures other than diplomatic protection*; The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.' UN Doc. A/61/10, at p. 86. The Commentary leaves space for the idea that the individual might have rights and remedies under international law even absent a treaty body: 'The individual is also endowed with rights and remedies to protect him or herself against the injuring State, whether the individual's State of nationality or another State, in terms of international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body': *ibid.*, at 87–88.

[16] For the corresponding point that international criminal law might create obligations without remedies for their enforcement see my 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', 6 *J Int'l Criminal Justice* (2008) 899.

[17] Cassese, *supra* note 5, at p. lxxviii.

[18] 'The Rule of Law in International Society', reprinted in J.L. Brierly, *The Basis of Obligations in International Law and other Papers* (1958), at 250, 251.

[19] *Ibid.*, at 252.

[20] *Ibid.*

and a similarly huge annual budget; the humanitarian work of the League has developed into a plethora of UN agencies and programmes as well as the development of the UN Office of the High Commissioner for Human Rights with over 1,000 staff. All this is progress. Do we have the strong conviction that makes a 'community'?

I think not, and I agree with Cassese's idea that what 'is lacking is a "*community sentiment*",[21] the idea that each member state is a part of a common whole. But states are abstract entities and I wonder if the solution does not rather partly lie in ensuring that individuals feel more sentimental about each other.

Or, to put this in terms of the role of the individual in international law, is it not time to admit that, not only do individuals have international rights and criminal law obligations, but perhaps they also have civil law international obligations? This is admittedly a progressive idea. The International Law Commission, implicated in both stagnation through codification and progressively developing international law, has been quite cryptic about this idea but has left the door open for its promotion.

To be clear I am suggesting that individuals may have a role to play with regard to respect for international law which goes beyond their international criminal law obligations. This could involve obligations which have not been criminalized, or simply mean that an act could give rise to simultaneous criminal and civil violations of international law.

Article 58 of the ILC's Drafts Articles on State Responsibility reads: 'These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.' The ILC's Commentary explains that Article 58 was drafted so as not to preclude any development with regard to international civil liability for individuals.[22]

To summarize the status of the individual in international law: since Nuremberg and *Tadić* we have known that individuals have criminal law obligations under the laws of armed conflict. Despite doctrinal reticence to accord individuals subjectivity, individuals are now seen as having not only criminal law obligations but also rights under international law. If we do not want the development of international law to stagnate we should perhaps admit the progressive idea that individuals have, in addition to these rights and criminal law obligations, certain international civil law obligations; this step could help to build an international community which properly recognizes the role of the individual in international law.

[21] Cassese, *supra* note 5, at p. lxxviii.

[22] 'So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility. As a saving clause Article 58 is not intended to exclude that possibility; hence the use of the general term "individual responsibility"': Draft Articles on Responsibility of States for Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, at 142 (footnote omitted).