

A MISTAKE BUILT ON MISTAKES: THE EXCLUSION OF INDIVIDUALS UNDER INTERNATIONAL LAW

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I INTRODUCTION

As a system grounded in the ideology of sovereign statehood, international law has traditionally denied legal capacity to non-state entities. In international forums, individuals have been unable to assume or exercise the attributes of personality. At the same time, they have been denied the capacity to enforce rights founded on international law within domestic legal systems. As a result, international rights and obligations have long been the exclusive domain of states, and their enforcement the exclusive entitlement of states.

The exclusion of non-state entities from the range of international legal persons can be traced to the birth of modern international law, within the framework of state sovereignty. Louis Henkin has called sovereignty 'a mistake built on mistakes' which has nonetheless 'been transmuted into an axiom of the inter-state system'.¹ From earliest times, writers have maintained that the principle of sovereignty entitles states to exercise exclusive internal jurisdiction² and, by necessary implication, requires that states be free from external control.³ These principles in turn have operated as a powerful legal barrier between the nation state and the outside world. On the international plane, individuals have been barred from participating in the production and execution of international law, which is made by and for states alone. On the domestic plane, individuals have been barred from agitating rights founded on international law within municipal legal systems,

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¹ Louis Henkin, 'Human Rights and State Sovereignty' (1996) 25 *Georgia Journal of International and Comparative Law* 31, 32.

² Emmerich de Vattel, *The Law of Nations, or The Principles of the Law of Nations Applied to the Conduct and Affairs of Nations and Sovereigns* (Charles G Fenwick trans, 1916 ed) vol 6, s 84 [trans of *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, first published 1758]; Thomas Hobbes, *Leviathan* (1651), ch XVIII.

³ Hugo Grotius, *The Law of War and Peace* (Francis Kelsey trans, first published 1625, 1916 ed), preliminaries, 28-44 [trans of *De Jure Belli ac Pacis*].

because sovereign supremacy shields the domestic constitutional system from international influence.⁴ The classical view remains basic: in Oppenheim's words, 'states solely and exclusively are subjects of international law'.⁵

However these circumstances are neither necessary nor fixed. The rapid expansion of international human rights and humanitarian law has prompted many scholars to challenge the traditional view that individuals are incapable of possessing international legal personality.⁶ These arguments are founded on the range of rights and obligations that international law now confers upon individuals: individuals may bear international criminal responsibility for acting or failing to act; and they are entitled to civil, political, economic and social rights. Individuals and corporations also have personal rights under international investment law. If individuals are owed rights and bear responsibility for obligations imposed by international law, why does their traditional insignificance persist? More generally if, as is often assumed, the only legitimate formulation of sovereignty is a popular sovereignty, based essentially on pooled individual rights, how can international law continue to endorse a command sovereignty that renders individual rights invisible in the face of sovereign power? These matters remain the subject of heated debate among international lawyers.

Against the backdrop of such contention, it is surprising that these issues receive so little scrutiny when they arise for consideration by domestic courts. The High Court of Australia had an opportunity to address these matters in the recent case of *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*.⁷ At the heart of this appeal was the question whether Australia's obligations under the Refugee Convention⁸ are capable of being owed to individual refugees, or whether they are owed exclusively to other contracting state parties. If, as the applicants contended, Australia's obligations were owed to individual refugees, then those rights could create a procedural entitlement to seek redress outside the Australian municipal system. Similar issues involving the existence and enforceability of internationally grounded individual rights have also arisen for consideration in other domestic jurisdictions.

⁴ The 'dualist' view of the relationship between international and municipal law, as expounded by Heinrich Triepel, 'Völkerrecht und Landesrecht' (1899) in Hague Academy of International Law, *Recueil des cours* (1923) vol 1, 77; Lassa Oppenheim, *International Law: a Treatise*, vol I (Peace) (2nd ed 1912), 37.

⁵ Lassa Oppenheim, above n 4, 19. Use of the term 'subject' in this context has received substantial criticism. See for instance American Law Institute, *Restatement of the Law* vol 1, pt II, 70.

⁶ See for instance, P K Menon, 'The Legal Personality of Individuals' (1994) 6 *Sri Lanka Journal of International Law* 127; Karl Partsch, 'Individuals in International Law' in Elsevier, *Encyclopaedia of Public International Law* (1995) vol 2, 957.

⁷ [2005] HCA 6 (2 March 2005) ('NAGV').

⁸ *Convention Relating to the Status of Refugees*, opened for signature 14 December 1950, 189 UNTS 150 (entered into force 22 April 1954) ('Refugee Convention').

Reflecting here on the High Court's decision in *NAGV*, it is argued that, in principle at least, substantive individual rights and obligations, drawn from international law, have now emerged. The remaining barriers to individual personality are essentially procedural: the absence of appropriate forums at the international level, and uncritical acceptance by domestic courts of the exclusionary status quo. In the ensuing discussion, we do not attempt to deny the many difficulties associated with the recognition of individuals on the plane of public international law, foremost among them the barriers to enforcement. Nor do we suggest that the international system is witnessing a wholesale departure from sovereignty. Instead, our purpose is to demonstrate that the exclusive personality of states is no longer axiomatic; and to suggest that close investigation is required when these matters arise before domestic courts.

II INDIVIDUAL LEGAL PERSONALITY UNDER PUBLIC INTERNATIONAL LAW

To say that an entity possesses international legal personality is to say that it is 'capable of possessing international rights and duties and has the capacity to maintain its rights by bringing international claims'.⁹ An entity with international legal personality has rights. If those rights are infringed or denied they may be enforced, to the extent that they are recognised in public international law, via procedures and institutions that lie outside the municipal legal system. An entity with legal personality also has correlative responsibilities to the international community and can be held accountable for non-performance of those responsibilities.

A *The Backdrop: Denial of Individual Rights*

The International Court of Justice has expressed the view that the categories of international legal personality are not closed or static:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international life ... and the progressive increase in the collective activities of states has already given rise to instances of action upon the international plane by certain entities which are not states.¹⁰

But, in spite of these sentiments, individuals have traditionally been afforded minimal recognition at public international law. The *Treaty of Westphalia* 1648 confirmed in legal terms the sovereign ideology described above. The nation state became the exclusive subject of international relations and international law, entitling a state to 'exercise plenary authority in its own territory without

⁹ *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

¹⁰ *Ibid* 178.

molestation, at least from its temporal rivals'.¹¹ During the nineteenth century, the nation state continued to flourish and became entrenched at the centre of an international legal system founded on state consensus. At the same time states 'succeeded in maintaining a practically unchallenged monopoly of exclusive or concurrent jurisdiction over the individual'.¹²

Some authors have pointed to the protections conferred upon individuals by so-called 'minority' treaties during the early years of the twentieth century as evidence of an embryonic legal personality.¹³ However, those treaties served only to protect members of 'minority' groups from their own governments and most were not renewed after the conclusion of World War I.¹⁴ Some early attempts were made to guarantee the protection of individuals generally, and of women and children particularly. The International Convention for the Suppression of Trafficking in Women and Children 1923 and the Slavery Convention 1926 (which codified a customary prohibition dating back to 1815)¹⁵ were two early examples of the attempt to confer protection on individuals under public international law. However, these developments ran against the tide and did not signify a fundamental shift in the treatment of legal personality under public international law. States retained the status of exclusive subjects, and the protection of individuals was a matter left to the jurisdiction of individual states. The predominance of state sovereignty also foreclosed external interference for the purpose of protecting citizens or preventing human rights violations.

The law of diplomatic protection was built on these foundations.¹⁶ The right of a national to protection (or a minimum standard of treatment) whilst in the territory of another state has never been a right owed to individuals or exercisable by individuals. It has always been a right owed to the individual's state by the host state. It may be waived by the individual's state and, where it is violated, only the individual's state may decide whether to pursue compensation through diplomatic channels or in an international forum. Rules such as these indicate that traditionally,

¹¹ Steven M Schneebaum, 'Ethnic Groups and International Law: a Status Report on International Legal Personality at the Beginning of the New Century' in David Wippman (ed), *International Law and Ethnic Conflict* (1998) 2.

¹² Georg Schwarzenberger, 'The Protection of Human Rights in British State Practice' (1948) 1 *Current Legal Problems* 152, 153.

¹³ Treaties were entered into by Poland, Greece, Czechoslovakia, Rumania and Yugoslavia. For authors who rely on these treaties as examples of the rights of individuals under treaty, see Menon, above n 6, 154-6; Alexander Orakhelashvili, 'The Position of the Individual in International Law' (2001) 31 *California Western International Law Journal* 241, 242-3.

¹⁴ The exceptions were the post-World War I peace treaties with Austria and with Italy, both of which retained reference to 'minority' rights.

¹⁵ *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention* 1926, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) ('Slavery Convention of 1926').

¹⁶ See generally Peter Malanczuk (ed), *Akehurst's Modern Introduction to International Law* (7th ed 1997) ch 7; Thomas C Wingfield and James E Meyen (eds), *Lillich on the Forcible Protection of Nationals Abroad* (2002); Franciszek Przetacznik, *Protection of Officials of Foreign States According to International Law* (1983).

even in those few circumstances where individuals obtained some protection from international law, or obtained a measure of legal personality at public international law, such personality was derivative, not original. Individuals, to the extent that they obtained procedural capacity, obtained it from the state – and the state was entitled to suspend those entitlements at will. Although the Permanent Court of International Justice recognised early that treaties could confer rights on individuals, and that those rights could be vindicated in domestic courts under certain conditions, such conferrals were the exception, not the norm.¹⁷ As discussed below, even in those circumstances where such rights might have existed under international law, domestic courts were usually reluctant to enforce them.

B *The Recognition of Non-state Entities Under International Law*

A succession of developments has challenged the traditional position of individuals in international law and the exclusivity of state legal personality. Certainly, the view that individual rights and freedoms deserve the protection of a ‘community of nations’ has a lengthy history.¹⁸ The concept of ‘inalienable rights’ developed concurrently with the ascent of the nation state, evolving as a reaction against the prevailing threat of unbridled sovereignty.¹⁹ Korowicz notes that the view of international law as ‘directly binding on individuals without the intermediary of their state’ is ‘at least as old as ... the sixteenth century’.²⁰ As such, individual rights have a long history, dating back to the genesis of international law.

But it was only after World War II that the scene began to change substantially. Until that time, few systematic attempts had been made to assemble a system of international law directed at the prohibition of war crimes, crimes against humanity and genocide. As Dunn notes, relative to the number of post-war treaties entered into for the purpose of addressing the rights and interests of individuals, a very small proportion ‘dealt with the relations of states as political atoms’.²¹ Whilst customary international law had long recognised the prohibition against piracy as a basis for individual criminal liability,²² this principle of liability expanded dramatically in the wake of the Nuremberg Trials to apply to other breaches of international criminal law. The principle was subsequently codified in conventions such as the *Genocide Convention* 1948, which mandated the punishment of individuals for breaches of the prohibition against genocide; and in the statutes of

¹⁷ *Danzig Railway Officials Case (Advisory Opinion)* [1948] PCIJ (ser B) No 15, 587.

¹⁸ Herbert Briggs (ed), *Law of Nations* (2nd ed 1952).

¹⁹ *Ibid.*

²⁰ Marek St Korowicz, ‘The Problem of the International Personality of Individuals’ (1956) 50 *American Journal of International Law* 533, 534. For Korowicz (*ibid* 534) the human being is ‘at the centre of the legal conceptions of Grotius’, whereas Pufendorf emphasised the binding character of natural law for both states and individuals.

²¹ Frederick S Dunn, ‘The International Rights of Individuals’ (1941) 35 *American Society of International Law Proceedings* 14.

²² The prohibition was codified in *United Nations Convention on the Law of the Sea*, 10 December 1982, 21 ILM 1261 (1982), art 101. See also art 105.

the *ad hoc* criminal tribunals²³ and the International Criminal Court.²⁴ Individual criminal responsibility now underpins a range of treaties prohibiting transnational crime.²⁵

These developments indicate that individuals may now bear greater responsibility under public international law. It is also arguable that individuals have come to possess rights under public international law, as well as obligations. Commencing in 1948 with the unanimous approval of the *Universal Declaration of Human Rights*,²⁶ the international community has given effect to a startling number of international treaties, resolutions and declarations designed to protect the human rights of individuals.²⁷ Individuals enjoy detailed and expansive rights under the *Fourth Geneva Convention* 1949, and instruments such as the *International Covenant on Civil and Political Rights* (ICCPR)²⁸ are designed to guarantee the protection of individuals from their own governments, seemingly undermining the classical prohibition on external interference in the exclusive territorial jurisdiction of a sovereign state.

During the final decades of the twentieth century, individual rights also began to flourish in international investment law. Historically, if an investor suffered injustice in a foreign state, the right to pursue recompense for that injury belonged exclusively to their home state²⁹ or state of incorporation.³⁰ As foreign investment became integral to Western economies in the twentieth century, these countries sought to establish more comprehensive legal structures for their nationals.³¹ Bilateral investment treaties (BITs), and to a lesser extent multilateral agreements, have become the instruments of choice for international investment protection.

²³ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, SC Res 827 (1993) art 7; *Statute of the International Criminal Tribunal for Rwanda*, SC Res 995 (1994) art 6.

²⁴ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25.

²⁵ See for instance *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000 (entered into force 29 September 2003).

²⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810/71 (1948).

²⁷ See eg *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²⁸ ICCPR, above n 27.

²⁹ *Panevezys-Saldutiskis Railway Case* [1939] PCIJ Series A/B N 76, 15-16. In that case Estonia challenged Lithuania's refusal to recognise a company's proprietary interest in a railway.

³⁰ *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (1970) ICJ Rep 3.

³¹ Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985) 54.

These investment treaties have come to represent a significant source of international law rights for individuals and enterprises, prompting some commentators to describe them as ‘economic bills of rights’ for foreign investors.³² Typically, they prohibit host countries from taking certain actions against investors. Basic prohibitions include: the expropriation of property,³³ restricting currency transfers,³⁴ failing to honour obligations made to investors³⁵ and implementing discriminatory measures.³⁶ Many treaties also allow states to enforce more positive and general obligations³⁷ such as customary³⁸ or treaty-based³⁹ international law rights (to justice, procedural fairness, protection and security).⁴⁰ Increasingly uniform expression of these rights has led at least one commentator to argue that ‘a foreign investor benefiting from a BIT may now look to a comprehensive, specific, and largely uncontested set of international legal rules’.⁴¹

It has been argued that these guarantees are subject to the consent of states, who may withdraw, vary or qualify their treaty commitments.⁴² However, in respect of human rights treaties, many of the guarantees detailed above now form part of customary international law and are not subject to unilateral variance or withdrawal by states.⁴³ Nor are states necessarily entitled to withdraw from human rights conventions to which they are party. Because the ICCPR contains no provision for termination and does not provide for denunciation or withdrawal, the UN Human Rights Committee has concluded that the course of unilateral withdrawal is not available to state parties. It is the opinion of the Committee that the ICCPR’s

³² Susan Frank, ‘The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future?’ (2005) 12 *University of California Davis Journal of Law and Policy* 47, 48.

³³ Eg *North American Free Trade Agreement*, 17 December 1992, US-Can-Mex, 32 ILM 296 (1993), art 1110 (‘NAFTA’).

³⁴ Common content dealt with under these provisions is discussed in Jeswald Salacuse and Nicholas Sullivan, ‘Do BITs Really Work?: an Evaluation of Bilateral Investment Treaties and Their Grand Bargain’ (2005) 46 *Harvard International Law Journal* 67, 85-6.

³⁵ Eg in contracts between an investor and a state party.

³⁶ Eg *Treaty Concerning Business and Economic Relations* (1990) USA and Poland, Senate Treaty Doc No 18 101st Cong 2d Sess, art 2(1). Common provisions of this sort allow for ‘national treatment’ (foreign investors must not be treated differently to nationals) or ‘most favoured nation’ treatment (investors not to be treated less favourably than investors from any other country).

³⁷ Joshua Robbins, ‘The Emergence of Positive Obligations in Bilateral Investment Treaties’ (2006) 13 *University of Miami International and Comparative Law Review* 403, 415.

³⁸ Eduardo Jimenez de Arechaga, ‘International Law in the Past Third of a Century’, Hague Academy of International Law, *Recueil des cours* (General Course in Public International Law, 1978), 59-61 cited *ibid* n 99.

³⁹ For example, the requirement to provide ‘effective means’ to enforce rights: *Treaty Concerning the Encouragement and Reciprocal Protection of Investment* (US-El Salvador) 10 March 1999, art 2(4) <http://www.sieca.org.gt/publico/OACUERDOS/Acuerto_reciproco_inversiones_Salvador-Estados_Unidos.htm> at 15 March 2006.

⁴⁰ Eg *Netherlands Revised Model Agreement on Encouragement and Reciprocal Protection of Investments*, art 3 in Robbins, above n 37, n 104.

⁴¹ Salacuse and Sullivan, above n 34, 70.

⁴² Malanczuk, above n 16, 100-4.

⁴³ Malanczuk, above n 16, 87 and 156.

drafters 'deliberately intended to exclude the possibility of denunciation', as the ICCPR does 'not have [the] temporary character typical of treaties where a right of denunciation [has been] deemed to be admitted'.⁴⁴

In light of these considerations, some departure from the strictures of sovereign ideology ought to be acknowledged. Individuals now bear obligations and are owed rights under international law; and it is by no means certain that these rights and obligations are granted only at the pleasure of state parties. Yet, even if we accept that individuals are owed rights and owe responsibilities, this only disposes of half of the problem. The key obstacle confronting the assertion of individual legal personality is the exclusion of individuals from international avenues of procedural redress.

C Rights without Remedies?

In light of the historical background, it comes as no surprise that individuals have traditionally been barred from seeking redress in international fora. In the past, certain exceptions sat alongside the general rule, but such exceptions were relatively rare. The Central American Court of Justice, established in 1908,⁴⁵ had jurisdiction over disputes between states and private individuals.⁴⁶ However, the Court only dealt with disputes arising in the contracting states and only ever issued five decisions, concluding its jurisdiction after only ten years.⁴⁷ The International Prize Court, which the abandoned *Hague Convention of 1907* sought to establish, would have granted standing to 'neutral' individuals in instances where a judgment of the Court was liable to affect the property of an individual.⁴⁸ However, the provisions were never ratified and the grant of standing would in any case have been subject to the power of the national's state to 'forbid' the initiation of proceedings or to take action in the individual's place.⁴⁹ In spite of these limited exceptions, individuals were up until this time denied procedural capacity on the plane of public international law.

The situation altered somewhat after World War I. With the entry into force of the *Treaty of Versailles*, individuals were granted standing to seek damages for loss sustained as a result of German war measures.⁵⁰ Of greater significance was the

⁴⁴ Human Rights Committee, General Comment 26 (61), General Comments under article 40, paragraph 4, of the *International Covenant on Civil and Political Rights*, adopted by the Committee at its 1631st meeting.

⁴⁵ *Convention for the Establishment of a Central American Court of Justice*, 20 December 1907, 2 *American Journal of International Law*, Supplement 231 (1908).

⁴⁶ *Ibid* art II.

⁴⁷ Menon, above n 6, 154.

⁴⁸ *Convention Relative to the Creation of an International Prize Court*, opened for signature 18 October 1907 (Hague Convention XII) art 4(2), (1908) 2 *American Journal of International Law*, Supplement 174, 177.

⁴⁹ *Ibid*.

⁵⁰ *Treaty of Versailles*, 28 June 1919, 13 *American Journal of International Law*, Supplement 151, art 297.

German-Polish Convention of 1922, which created the Upper Silesia Arbitral Tribunal, a body whose jurisdiction included the adjudication of claims brought by individual nationals against their state of nationality.⁵¹ In at least one claim, the Tribunal directly rejected Poland's contention that 'an individual cannot invoke an international authority against his own state'.⁵² A similar entitlement was established by the Supreme Restitution Court in 1952,⁵³ created for the purpose of settling compensation claims arising from the confiscation of property by the Nazi regime. Individuals were entitled to bring claims, and claims could be brought against individuals.

All of these instances were significant because they genuinely pierced the veil of state sovereignty by enabling individuals to bring claims directed not only against foreign powers, but also against their state of nationality. Even though the treaties in question were not universal in their accession or application, in procedural terms, they realised the same objective as post-war human rights and humanitarian law treaties: they rejected the assumption that sovereign states were the sole occupants of the plane of international law. It seemed that an evolution was underway. The classical inviolability of the sovereign, so axiomatic fifty years previously, was being replaced by a new era in which the domain of international legal personality would be shared between state and non-state entities.

In some respects, multilateral human rights treaties have continued the advance of individual procedural entitlements. A right of individual petition is now available under a number of international instruments, including the *Optional Protocol to the International Covenant on Civil and Political Rights* (ICCPR),⁵⁴ the *International Convention for the Elimination of all Forms of Racial Discrimination* (ICERD)⁵⁵ and the *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW).⁵⁶ Under the *Optional Protocol* to the ICCPR, an individual may make a communication to the Human Rights Committee about the violation of his or her rights under the ICCPR, provided he or she is within the territory or subject to the jurisdiction of a party to the Protocol and local remedies have been exhausted.⁵⁷ Article 22 of the *Convention against Torture*

⁵¹ See *Gross and Steiner v Polish State* (1928) 4 *Annual Digest of Public International Law Cases* 291.

⁵² *Ibid.*

⁵³ *Convention on the Settlement of Matters Arising Out of the War and the Occupation*, opened for signature 26 May 1952, 332 UNTS 219 (5 May 1955).

⁵⁴ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

⁵⁵ *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195, art 14 (entered into force 4 January 1969).

⁵⁶ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000).

⁵⁷ Art 4.

provides a right of communication in similar circumstances to the United Nations Committee Against Torture.⁵⁸

Similarly, under the *Optional Protocol* to CEDAW, signatories acknowledge the competence of the Committee on the Elimination of Discrimination against Women to receive discrimination complaints from nationals of state parties.⁵⁹ As with the *Optional Protocol* to the ICCPR, complaints may only be entertained where they are received from nationals of states that are parties to the *Optional Protocol* (rather than merely parties to CEDAW alone) and where local remedies have been exhausted. Entitlements conferred by ICERD are far more limited. That Convention requires the national's state to recognise the competence of the Committee on the Elimination of Racial Discrimination (CERD) prior to the hearing of complaints. As well as exhausting all other local remedies, individuals are also required to approach a national body designated by the state for satisfaction prior to approaching CERD.

Some regional and bilateral agreements also create an entitlement to individual remedies. Individuals are granted procedural capacity before the European Court of Human Rights.⁶⁰ The Iran-US Claims Tribunal offers similar, though more limited entitlements.⁶¹ The Permanent Court of Arbitration changed its rules in 1993 so as to encourage claims in which only one party is a state.⁶² However, the Inter-American Court of Human Rights, established under the *American Convention on Human Rights*,⁶³ is still confined in its jurisdiction to cases submitted by state parties or the Inter-American Commission on Human Rights.⁶⁴ In any case, the relevance of regional and bilateral agreements to the customary law recognition of individual legal personality is highly questionable. Individuals continue to be denied any form of procedural capacity before the International Court of Justice.⁶⁵

⁵⁸ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 39/46, UN Doc A/39/51 (1984).

⁵⁹ Art 1.

⁶⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11*, Rome, 4.XI.1950, art 34, 'Individual Applications', provides: 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.'

⁶¹ *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration)*, 19 January 1981, art III(3): 'Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than \$250,000, by the government of such national.'

⁶² *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State* (entered into force 6 July 1993).

⁶³ *American Convention on Human Rights*, opened for signature 22 November 1969, ch VIII.

⁶⁴ Art 61: 'Only the States Parties and the Commission shall have the right to submit a case to the Court'.

⁶⁵ Statute of the International Court of Justice, art 34. For a critical assessment of this restriction, see Elihu Lauterpacht, *Aspects of the Administration of International Justice* (1991).

In contrast, bilateral investment treaties now represent a significant if fragmented exception to the exclusion of non-state entities. Most BITs allow investors to pursue arbitration against a host state before a neutral panel such as the International Centre for Settlement of Investment Disputes (ICSID) or the International Chamber of Commerce (ICC), or an *ad hoc* panel appointed by the parties. This panel has the authority to issue an order that is enforceable in both countries. By the end of 2005, some 219 such direct claims against states had been filed, almost all of them in the last five years.⁶⁶ Some of these cases have involved successful challenges to the decision of a municipal superior court.⁶⁷ Unsurprisingly perhaps, a number of commentators and municipal judges have suggested that these rights represent an ‘alarming loss of sovereignty’.⁶⁸

Yet, while they represent a significant development in the emergence of non-state legal personality, the significance of these cases for the development of customary law should not be exaggerated. In the *Barcelona Traction Case*, the ICJ found that the direct protection of investors under bilateral treaties did not have the character of customary international law.⁶⁹ Certainly the proliferation of BITs has led to a dramatic increase in the number of potential principles, claimants and fora.⁷⁰ By the end of 2005 more than 2,500 investment treaties had been concluded,⁷¹ including some to which Australia is party.⁷² These treaties now represent a significant body of state practice. However, far from being an exception to sovereignty, these rights

⁶⁶ United Nations Conference on Trade and Development, *Investor-State Disputes Arising From Investment Treaties: a Review* (2005) UNCTAD/ITE/IIT/2005/4, 70. Of these, 135 have been brought before the World Bank’s ICSID centre and 94 before other arbitration bodies. Over two-thirds (69%) of the known claims were filed after 2001.

⁶⁷ For example the NAFTA, ch 11 provisions have allowed Canadian and Mexican investors to challenge the decisions of US superior courts: *Loewen Group, Inc. (Can.) v. United States*, ICSID ARB(AF)/98/3 (26 June 2003) (Award), <<http://www.state.gov/documents/organization/22094.pdf>> at 21 March 2006; *Mondev Int’l Ltd. v. United States*, ICSID ARB(AF)/99/2 (11 October 2002) (Award), <<http://www.state.gov/documents/organization/14442.pdf>> at 22 March 2006. In the later case a petition before the US Supreme Court had been denied.

⁶⁸ Charles H Brower II, ‘Investor-State Disputes under NAFTA: a Tale of Fear and Equilibrium’ (2001) 29 *Pepperdine Law Review* 43, 44; Douglas Branson, ‘The Very Uncertain Prospect of Global Convergence in Corporate Governance’ (2001) 34 *Cornell International Law Journal* 321, 352. In the USA, Chief Justice Ronald M George of the California Supreme Court said in an interview: ‘It’s rather shocking that the highest courts of the state and federal governments could have their judgments circumvented by these tribunals’ - Adam Liptak, ‘Review of US Rulings by NAFTA Tribunal Stirs Worries’, *New York Times*, 18 April 2004, 20, <<http://www.nytimes.com>> at 1 May 2006; Anthony DePalma, ‘Nafta’s Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say’ *New York Times*, 11 March 2001, <<http://www.nytimes.com>> at 1 May 2006.

⁶⁹ *Barcelona Traction, Light and Power Co Ltd* (Belgium v Spain) 1970 ICJ Rep 3, 46-7.

⁷⁰ Andrea K Bjorkland, ‘Reconciling State Sovereignty and International Investor Protection in Denial of Justice Claims’ (2005) 45 *Virginia Journal of International Law* 809, 812.

⁷¹ United Nations Conference on Trade and Development, *Recent Developments in International Investment Agreements* (2005) UNCTAD/WEB/ITE/IIT/2005/1, <http://www.unctad.org/en/docs/webiteit20051_en.pdf> at 1 May 2006.

⁷² *Australia-Thailand Free Trade Agreement* (5 July 2004) 2005 ATS 2, art 917; *Singapore-Australia Free Trade Agreement* (SAFTA) (17 February 2003) [2003] ATS 16, art 14(3).

are conferred on investors through the sovereign act of signing a treaty.⁷³ The growing number of BITs should be viewed in the context of continued unwillingness on the part of most states to permit the establishment of general customary principles in this area. Accordingly, it has been suggested that *Barcelona Traction* still reflects customary law in relation to diplomatic protection of corporations.⁷⁴ The absence of rules and principles addressing investment rights remains 'one of the great deficiencies of customary international law'.⁷⁵

Yet, if nothing else, developments in this area demonstrate how the increasing role of non-state actors can create a need for mechanisms to enforce their rights, directly and without resort to diplomatic protection. More generally, the recent history of investment rights can perhaps be seen as a cautionary tale for domestic tribunals considering rights in other areas: if domestic institutions fail to accommodate the international rights of non-state entities, those institutions may eventually find themselves bypassed in favour of emerging alternatives.

III INTERNATIONAL LEGAL PERSONALITY FOR INDIVIDUALS IN THE MUNICIPAL SYSTEM

At first glance, the emergence of non-state legal personality in public international law seems far removed from Australian municipal law. Yet the issue has been a contentious one in domestic jurisprudence, both in Australia and overseas. On a number of occasions, municipal courts have been asked to determine whether individuals have rights and obligations under international law, and whether such rights, if they do exist, can be enforced in domestic courts. In these cases it has been the internal aspects of sovereignty ideology – the belief that all external influences must be excluded from municipal law – that have impeded the development of recognised rights and obligations.

A *The Approach in Australian Courts: NAGV*

The High Court had an opportunity to examine these matters in the recent case of *NAGV*. A father and his son, both citizens of Russia, claimed that they would be persecuted if returned to Russia, because they were Jewish and because of the father's political opinions. Even though both would have been eligible for Israeli citizenship under the *Law of Return* 1950 (Israel), they did not seek protection there because the child's mother, who would join them, was not Jewish and they feared discrimination against a mixed marriage family. They also submitted that Israel's policy of compulsory military service would conflict with the child's pacifist upbringing.

⁷³ *SS Wimbledon* (Ger v UK, France, Italy and Japan), 1923 PCIJ (ser A) No 1, 16; cited in Bjorkland, above n 70, 809 n 13 and surrounding text.

⁷⁴ ILC, *Report of the 55th Session*, A/58/10, para 79; though the commission was not referring specifically to investment treaty procedures and its view is not final.

⁷⁵ Salacuse and Sullivan, above n 34, 87.

The Court was called upon to construe s 36 of the *Migration Act* 1958 (Cth), which creates the ‘protection visa’ and provides that, ‘[a] criterion for a protection visa is that the applicant ... is a non-citizen in Australia to whom Australia has protection obligations under [the Convention]’. The applicants argued that the language of s 36(2) gave recognition to the fact that Australia’s obligations under the *Refugee Convention*, drawn into Australian law by the *Migration Act*, are owed to individuals, rather than to other state parties. One aspect of the appeal therefore turned on the meaning of the phrase ‘to whom Australia has protection obligations under [the Convention]’.

A majority consisting of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ rejected the applicants’ submissions on this point. Subsection 2 was ‘awkwardly drawn’.⁷⁶ It erroneously assumed that, under the Convention, obligations could be owed by contracting states to individuals. Because states were necessarily the sole and exclusive subjects of international law, the Parliament had taken a ‘false’ step in implying, via sub-s 2, that individuals were capable of forming the subject of agreements between states.⁷⁷ The Convention was to be understood at ‘a state level’ and could not detract from the right of a contracting state such as Australia to determine which individuals should be allowed to enter its territory. Although the *Refugee Convention* was an example of a treaty that qualified the unfettered freedom of states in their treatment of nationals,⁷⁸ it could not have the effect of conferring upon refugees international legal personality and an associated capacity to ‘act outside municipal legal systems’.⁷⁹ The right of asylum was a right of states, not of individuals.⁸⁰

Whilst concurring in the order given, Kirby J cautiously departed from the majority on this point.⁸¹ He surveyed the evolution of public international law over the past fifty years and concluded that a central development had been the emerging recognition of individuals as subjects of international law.⁸² The proliferation of human rights and humanitarian law treaties, including the *Refugee Convention*, evidenced a decentering of the state as the sole subject of international law. It was therefore ‘potentially misleading’ to deny the existence of protection obligations under the Convention owed to individuals. Although individuals were not parties to the Convention, they were certainly subjects of it. As in Australian law, obligations could be owed ‘otherwise than by and to the parties to a binding agreement’.⁸³

⁷⁶ *NAGV*, [27] (Gleeson CJ).

⁷⁷ *NAGV*, [27] (Gleeson CJ).

⁷⁸ *NAGV*, [15] (Gleeson CJ), citing Menon, above n 6, 154-6; Orakhelashvili, above n 13, 242-3.

⁷⁹ *NAGV*, [15] (Gleeson CJ).

⁸⁰ *NAGV*, [15] (Gleeson CJ).

⁸¹ He did, however, concur in the majority’s orders.

⁸² *NAGV*, [68]. He felt that various provisions of the *Refugee Convention* evinced an intention that obligations be owed to individuals. By way of example, he referred to art 2: ‘Every refugee has duties to the country in which he finds himself’; and art 3: ‘The Contracting States shall apply the provisions of this Convention to refugees’ (emphasis added).

⁸³ *Ibid.*

The majority's comments on this issue sit comfortably with the classical view described above: that international legal personality is the sole property of states and that international obligations flow only between states. The cursory treatment of this matter indicates concurrence with the classical approach, in which the exclusion of individuals from public international law is entirely axiomatic. Any contrary suggestion was plainly the result of a drafting error, warranting only cursory investigation, if any.

The High Court gave some consideration to comparative law, with the majority placing extensive reliance on jurisprudence from the United Kingdom and the United States to support its findings. But is the exclusion of individuals from the class of international legal persons really self-evident from the jurisprudence of other domestic systems? Closer examination reveals that much of the case law relied upon is inconclusive in its treatment of this matter.

One decision that does lend support to the majority's conclusion is Lord Mustill's judgment in *T v Secretary of State for the Home Department*.⁸⁴ There, the House of Lords considered whether the applicant, an Algerian asylum-seeker, was entitled to the Convention's protection. Addressing the applicant's 'rights' under the Convention, Lord Mustill expressed a view, consistent with that of the majority in *NAGV*, that

neither under international law nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries.⁸⁵

Accordingly, any individual rights would flow not from international law, but from 'certain statutory restrictions ... which may in practice achieve the same result'.⁸⁶ These findings certainly support the majority's conclusions in *NAGV*: that, under the *Refugee Convention*, states maintain control over entry and determination procedures; and that Convention obligations are owed to States, rather than to individuals.

However, the later House of Lords decision in *Horvath v Home Secretary*⁸⁷ provides less decisive support than the *NAGV* majority suggested. That case was referred to by Gleeson CJ in support of the proposition that 'the Convention was worked out and agreed between states and it is at a state level that it has to be understood'.⁸⁸ Yet the House of Lords had been speaking in the context of a warning against overly technical construction of treaties; and the dangers of 'prolonged debate about the niceties of the language' when considering a document

⁸⁴ [1996] AC 742.

⁸⁵ [1966] AC 754 (Lord Mustill).

⁸⁶ [1966] AC 754, referring specifically to the *Asylum and Immigration Appeals Act 1993* (UK).

⁸⁷ [2001] 1 AC 489.

⁸⁸ *NAGV*, [508].

that is diplomatic rather than legal in origin.⁸⁹ There is no suggestion of a relationship between the proposition that the Convention should be understood 'at a state level' and the conclusion that obligations 'are owed between states, not between states and refugees'. To this extent, the authority relied upon⁹⁰ does not fully support the conclusion reached by the NAGV majority.

The United States Supreme Court jurisprudence relied upon is also inconclusive. The NAGV majority drew support from the Supreme Court decision in *Sale v Haitian Centres Council, Inc.*⁹¹ That case dealt with a claim that an executive order, directing the US Coast Guard to intercept and return vessels illegally transporting Haitian passengers, was invalid. The respondent put its case partly on the basis that the order had violated art 33 of the *Refugee Convention*. The Supreme Court found that it did not.

However, the Court's findings in *Sale* were narrowly based, confined to the construction of one article (33) of this particular treaty. It is true that, in the course of its considerations, the Court affirmed the view that state parties to the Convention have the right to determine who may enter their territory.⁹² However, in the Court's opinion, this right did not flow from any inherent incapacity in treaty law to accord individual rights. Rather, the right to control entry was founded on the Court's conclusion that, as a matter of construction, art 33 of this particular treaty, and any rights and obligations it may create, do not apply extra-territorially. In reaching this conclusion the Court gave extensive consideration to the text of the Convention⁹³ and to its preparatory history.⁹⁴ The Court did not reject the possibility that rights may accrue to individuals under conventional or customary international law.

B *The Approach of other Municipal Courts*

With a limited number of exceptions, common-law municipal jurisprudence does not evince clear support for the denial of international-law rights owed to individuals. Instead, the case law appears to have been steered by two constitutional concerns. In most of the cases, care has been taken to prevent international law from permeating municipal law, for fear of damaging domestic constitutional arrangements: either by allowing the executive to usurp the powers of the legislature by unilaterally setting up treaty rights; or by allowing the judicial branch to assume the parliamentary function of ensuring executive responsibility. Both are pressing concerns for any court operating within a constitutional democracy. The emphasis differs subtly, depending on the particular constitutional arrangements

⁸⁹ NAGV, [508]-[509].

⁹⁰ NAGV, [671].

⁹¹ 509 US 155 (1993) (*Sale*).

⁹² 509 US 187-8.

⁹³ 509 US 179-83.

⁹⁴ 509 US 184-7.

and the significance accorded to the separation of powers, responsible government and royal prerogative.

In Australia, emphasis has been placed on the first of these concerns, whereas British jurisprudence has focused on the second. Australia's reluctance appears to stem from a desire to protect a specific division between the Parliament and the Executive Government. This division allocates to the Executive Government responsibility for entering into treaties; and to the Parliament responsibility for enacting and altering municipal law.⁹⁵ According to this view, enabling treaties to create municipal rights facilitates a trespass by the Executive Government upon the functions of the Parliament.⁹⁶ In the UK, when the municipal effect of international law rights was first raised courts considered the constitutional question so unpalatable that they simply avoided deciding it.⁹⁷ In later English decisions, reservations about executive power similar to those heard in Australia were expressed: for example, that enforcing rights under the *Treaty of Versailles* would amount to authorising an executive treaty-making action to 'invade an area which is properly that belonging to the House of Commons'.⁹⁸ However, differences in English constitutional law mean that such concerns are less common. A more frequent English objection is that permitting subjects to enforce treaties would allow courts to usurp parliament's function of ensuring executive responsibility.⁹⁹ On other occasions British courts have considered a range of constitutional barriers – including fettering prerogative power¹⁰⁰ and the need to balance competing legislative rights in a federal system¹⁰¹ – in buttressing their proclaimed intention to exclude international law. In the United States, the separation of powers embodied in the US constitution has given rise to similar arguments about the perils of incorporating international law into a republican constitutional arrangement.¹⁰² Although, as discussed below, these concerns have in practice created less of a barrier in the United States than elsewhere.

In Australia, the constitutional concerns have often found expression in a blanket refusal to allow international law to permeate municipal law. Almost sixty years

⁹⁵ *Simsek v Macphee* (1982) 148 CLR 636, 642.

⁹⁶ This concern was raised expressly in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [102].

⁹⁷ *Baron de Bode's Case* (1845) 8 QB 208; 13 QB 364; 3 HLC 449 where the Queens Bench, the Court of Errors and the House of Lords all avoided deciding the issue when it was raised before them.

⁹⁸ *Civilian War Claimants Association v The King* [1932] AC 14, 32 (Lord Buckmaster).

⁹⁹ *Rustomjee v The Queen* [1876] 1 QB 487, 496 (Blackburn J) considering a petition to enforce rights to reparation under the *Treaty of Nanjing* 1842.

¹⁰⁰ *Laker Airways v Dept of Trade* [1977] 1 QB 643, 673-4.

¹⁰¹ *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326.

¹⁰² Louis Henkin, 'International Law as Law in the United States' (1984) *Michigan Law Review* 1555, 1565; Louis Henkin, 'The United States Constitution and Sovereignty: a Century of Chinese Exclusion and its Progeny' (1987) 100 *Harvard Law Review* 853, 864. On the constitutional primacy of the legislature over the municipal effects of treaty law see *Edye v Robertson* 112 US 580, 597-8 (5 S Ct 247 US 1884); *Taylor v Morton* 2 Curt CC 454 (CC Mass 1855).

ago, in *Chow Hung Ching v The King*, the High Court found that treaties have ‘no legal effect upon the rights and duties of the subjects of the Crown’.¹⁰³ Numerous later cases¹⁰⁴ have endorsed a broad municipal exclusion of international law,¹⁰⁵ and the principle has been clearly reaffirmed as recently as 2005.¹⁰⁶ Similar statements of blanket exclusion have been made in the UK.¹⁰⁷ A decade before *Chow Hung Ching*, Lord Atkin had declared in *Attorney-General (Canada) v Attorney General (Ontario)*¹⁰⁸ that ‘the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law’. Parties seeking to enforce international law rights in municipal courts have met with stern reluctance from the judicial branch.

But admitting judicial reticence to enforce rights is not the same as denying the existence of those rights, or the potential for individual legal personality that they imply. Even in Victorian England, courts accepted that, under a reparation treaty, there was ‘no doubt a duty arose as soon as the money was received to distribute that money amongst the persons towards whose losses it was paid by the Emperor of China’.¹⁰⁹ The duty was acknowledged, though the procedure for enforcement was denied. The barrier was a constitutionally motivated unwillingness to enforce rights, rather than the denial of their existence in principle.

In recent years similar concerns about the constitutionality of enforceable international law rights have been raised in the United States; however, historically US courts have been receptive to the existence and enforcement of such rights. The origins of this more inclusive approach can be traced to the ‘Supremacy Clause’ of the US Constitution, which provides that ‘all Treaties made or which shall be made ... shall be the supreme Law of the Land; and the Judges of every state shall be bound thereby’.¹¹⁰ Early cases interpreted this clause to mean that treaties were

¹⁰³ (1948) 77 CLR 449, 478.

¹⁰⁴ *Mayer v Minister for Immigration and Ethnic Affairs* (1984) 55 ALR 587, 589 (Davies J); then in *Peko-Wallsend v Minister for the Arts, Heritage and Environment* (1986) 70 ALR 523, 545 (Beaumont J): a treaty ‘cannot, of itself, deprive or prejudice a citizen of his liberty or his property’. In *O’Shea v DPP* (1998) 71 SASR 109, the South Australian Supreme Court cited *Simsek v MacPhee* (1982) 148 CLR 636, to the effect that ‘international instruments do not form part of Australian law’. In *Western Australia v Ward* (2002) 213 CLR 1, 394, the High Court referred to ‘the long settled principle that provisions of an international treaty do not form part of Australian law’.

¹⁰⁵ Except perhaps as the basis for a legitimate expectation: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. But it is doubtful whether the High Court would decide the same way now: *Minister for Immigration and Multicultural Affairs, Re; Ex parte Lam* (2003) 214 CLR 1. In the Federal Court, however, the opposite view had obtained extensively argued minority support in *Nulyarimma v Thompson* (1999) 165 ALR 621 (judgment of Merkel J).

¹⁰⁶ *Povey v Qantas* (2005) 216 ALR 427, [12] (Gleeson CJ; Gummow, Hayne, Heydon JJ): ‘entry into the international agreement can create no rights in Australian domestic law’.

¹⁰⁷ *Laker Airways v Dept of Trade* [1977] 1 QB 643, 674, stating that individual rights cannot be created by international law.

¹⁰⁸ [1937] AC 326, 347.

¹⁰⁹ *Rustomjee v The Queen* [1876] 1 QB 487, 497 (Lush J); similarly at 496 (Blackburn J).

¹¹⁰ *United States Constitution* art VI, cl 2.

simply to become law upon ratification¹¹¹ and could support domestic claims even in the face of inconsistent state legislation.¹¹² To this effect, Marshall CJ¹¹³ declared in 1809 that '[w]henever a right grows out of, or is protected by, a treaty ... it is to be protected [in municipal law]'.¹¹⁴ Gradually, a more cautious doctrine of 'self-executing treaties'¹¹⁵ came to dominate US jurisprudence. However, this principle still allowed that in certain circumstances no legislation was required to incorporate treaties into domestic law.¹¹⁶ It has been said that

in 'determining whether a treaty is self-executing' in the sense of it creating private enforcement rights, 'courts look to the intent of the signatory parties as manifested by the language of the instrument'.¹¹⁷

In practice the development of this doctrine significantly narrowed the range of international law rights enforceable under US law. In the early years of this decade, cases such as *Sale* seemed to show a further movement against admitting international law rights into domestic law. However the recent Guantánamo cases suggest, albeit peripherally, that the self-executing treaty doctrine has not been abandoned.¹¹⁸ Historically at least, the attitude of US courts to the municipal enforcement of international law rights has been more generous than the majority in *NAGV* acknowledge.

Although courts in Australia and overseas often state the exclusion with vigour, it is less commonly explained why, as a matter of logic or principle, such an exclusion is

¹¹¹ Eg *Hamilton v Easton* 11 F Cas 336, 340 (CCDNC 1792) where Ellsworth J noted that a treaty simply upon 'being ratified and made ... became a complete national act and law of every state'; likewise (337), Sitgreaves J found that ratification was 'alone sufficient' to ensure domestic legal effect. Also *Penhallow v Doane's Admin* 3 US (3 Dall) 54, 94 (1795) (Paterson J).

¹¹² See eg *Fairfax's Devisee v Hunter's Lessee* 11 US (7 Cranch) 603, 627 (1813); *Chirac v Chirac* 15 US (2 Wheat) 259, 274 (1817); *Carneal v Banks* 23 US (10 Wheat) 181, 189 (1825). See also Jordan Paust, 'Self-Executing Treaties' (1988) 82 *American Journal of International Law* 760.

¹¹³ Who had, while Secretary of State, also criticised the British reluctance to enforce treaties: 2 *American State Papers (Foreign Relations)* 386-87 (1832).

¹¹⁴ *Owings v Norwoods Lessee* 9 US (5 Cranch) 344, 348-9 (1809).

¹¹⁵ First outlined in *Whitney v Robertson* 124 US 190 (1888); more recently, the Supreme Court considered a self-executing treaty in *Trans World Airlines v Franklin Mint* 466 US 243 (1984); see generally Paust, above n 112. The concept itself has been criticised for its vagueness: see eg Myres McDougal, 'Remarks to the Annual Meeting of the American Society of International Law' (1951) 45 *Proceedings of the American Society of International Law* 101, 102.

¹¹⁶ *Trans World Airlines v Franklin Mint Corp* 466 US 243, 252 (1984).

¹¹⁷ *Committee of US Citizens Living in Nicaragua v Reagan* 859 F.2a 929, 938 (CA DC 1988), citing *Diggs v Richardson* 555 F.2d 848, 851 (DC Cir 1976). The same test was applied in *Islamic Republic of Iran v Boeing Co* 771 F 2d 1279, 1283 (9th Circuit 1985); certificate dismissed, 479 US 957, 107 S Ct 450, 93 L Ed 2d 397 (1986).

¹¹⁸ *Hamdan v Rumsfeld, Secretary of Defence* 548 US 1, 63-65 (2006) (Stevens J). Stevens J appears to conclude that it is not necessary to decide the issue. He implies that a treaty could create domestically enforceable individual rights, but he does not decide whether the scheme in the Geneva Conventions creates such rights.

necessary. The American self-executing treaty doctrine already shows how international law rights can be accorded municipal significance without doing undue mischief to either constitutional principle or state sovereignty. One hundred and fifty years ago, such rights may have been 'too wild a notion to require a single word of observation beyond emphatically condemning it',¹¹⁹ but in an increasingly globalised legal world, the maintenance of this exclusion at least merits considered justification. In this light it is difficult to accept the cursory treatment of these developments by domestic lawyers. The scale of these developments has been substantial enough to warrant considered scrutiny.

IV CONCLUSION

In *NAGV* the High Court gave only cursory attention to the question of individual rights under treaty. Municipal courts in other common law jurisdictions may have been moved by constitutional concerns, but have never excluded the possibility that individual rights might exist on the plane of public international law. In the international sphere there are signs that some elements of legal personality are gradually being accorded to individuals. However, these entitlements have so far been hobbled by continued dependence on the goodwill of states and by procedural barriers to enforcement at both the municipal and the international levels.

Yet, in spite of the difficulties that remain, a survey of international law developments over the last century reveals nothing to preclude the realisation of individual personality under public international law. Likewise, a conjectural glance toward the century ahead suggests that moving beyond the sovereign state monopoly on enforceable international rights may quickly become a matter of necessity, as an increasingly integrated legal world fills with a growing number of non-state actors. At such a time, neither a history of English constitutional anxiety, nor the more recent timidity of American courts, justifies superficial treatment of these matters when they arise before domestic courts. Though much remains uncertain – including the form that prospective avenues of redress might take – it is clear that such possibilities need not be foreclosed without discussion.

¹¹⁹ *Rustomjee v The Queen* [1876] 1 QB 487, 492 (Cockburn CJ).