From Access to Justice

Book Review of Judge Cançado Trindade's *The Access of Individuals to International Justice*, Oxford University Press 2011

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In the foreword of a recent book on the position of the individual in the international legal system, a well-known international lawyer noted in surprise that no work since the 1960s had comprehensively dealt with the issue of the individual's standing in international law.¹ The topic has recently drawn a flurry of interest, with a number of new books and articles addressing its core questions—this special issue of the CJICL being a case in point.² Yet while this matter may seem novel to some, others have devoted their life's work to advancing the role of the individual in the international legal order. As the former President of the Inter-American Court of Human Rights (IACtHR) and current Judge of the International Court of Justice (ICJ), Judge Cançado Trindade falls decisively in the latter category. His latest book on the access of individuals to international justice, derived from his 2007 General Course for the Academy of European Law in Florence, is thus a timely and fitting contribution to the growing field of literature on the individual in international law.³

Human rights lawyers often have to defend their field against claims that human rights are not law, but a system of “critical morality” applied to a system of law. In this book, Judge Cançado Trindade explains in detail how, in his

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¹ See James Crawford in K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP, 2011) at xiii.

² For example, on subjectivity of individuals, see R. Portmann, *Legal Personality in International Law* (CUP, 2010). On the individual's role in international law creation, see A. Boyle and C. Chinkin, *The Making of International Law* (OUP, 2007); C. Ochoa, *The Individual and Customary International Law Formation*, (2007–2008) 48 VJIL 119; More generally, see J. d'Aspremont, (ed.), *Participants in the International Legal System: Multiple perspectives on non-state actors in international law* (Routledge, 2011); A. Bianchi, *The Fight for Inclusion: Non-State Actors and International Law*, in U. Fastenrath et al., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP, 2011) at 39.

³ A.A. Cançado Trindade, *The Access of Individuals to International Justice* (OUP, 2011).

view, human rights have matured from a moral system to a legal order. He focuses his account on the evolving access of individuals to international justice, with particular reference to the case law of the IACtHR, the European Court of Human Rights (ECtHR), and, to a lesser extent, the new African Court of Human and People's Rights (ACHPR).

After a brief historical excursus on the international legal personality of individuals, culminating in the conclusion that the human being is the "final addressee of all legal norms, of national as well as international origin"⁴, Judge Cançado Trindade discusses a number of developments that he considers crucial to the "humanization" of international law.

First is the link between substantive norms of protection and the procedural capacity of individuals to petition international courts and tribunals. Driven by what he refers to as the "universal juridical conscience"⁵, the Judge hails the increasing opening of regional human rights courts to direct participation of individuals in proceedings. Initially, individuals could only access the ECtHR and the IACtHR through the intermediation of the European and Inter-American Commissions of Human Rights. However, since the entry into force of Protocol No. 11 to the European Convention on Human Rights (ECHR) on 1 November 1998, individuals have direct access to the European Court. In the Inter-American system, the Commission remains the gateway to the Court for private parties. Yet while alleged victims cannot bring cases to the Court directly, since 1 June 2001 they are allowed to participate in all stages of the proceedings at the IACtHR.⁶ This, the Judge argues, is a logical consequence, at the procedural level, of a system of protection, "as it is not reasonable to conceive of rights without the procedural capacity to vindicate them."⁷

While the Judge maintains that "the right of individual petition is undoubtedly the most luminous star in the universe of human rights"⁸, standing at international courts is only one side of the matter. The book quickly moves to discuss more material aspects of the right of access to justice, at both the international and the domestic level. It explains how regional human rights tribunals, inspired by the 1948 Universal Declaration of Human Rights, have come to recognize a right to *effective* domestic remedies. Initially, courts may have considered this an "auxiliary right", but over time they have acknowledged its "au-

⁴ *Ibid.* at 16.

⁵ *Ibid.* at 18.

⁶ Prior to the entry into force of the fourth Rules of the Court, individuals could only appear before the court in the reparations phase. See *ibid.* at 43.

⁷ *Ibid.* at 42.

⁸ *Ibid.* at 29.

tonomous existence”—the violation of which constitutes a human rights breach in itself.⁹ In the Judge’s view, the right to an effective remedy entails not only access to courts, but, as succeeding chapters explain, guarantees of due process of law, harmonization of domestic legislation and jurisprudence with international norms, and international supervision over the implementation of judicial decisions.

Towards the second half of the book, the focus shifts decisively from a discussion of “access” to an examination of “justice”. The procedural question of whether and how individuals can vindicate human rights at the international level is ultimately of residual importance; the Judge’s real interest lies in developing a rich substantive conception of the right of access to justice. Where the book opens with a discussion of *ius standi* at the international level, it concludes with a call for a “right to the realization of justice, in the framework of the rule of law (*État de droit*) in a democratic society”.¹⁰ This ultimately entails a “right to the Law, that is, the right to a legal order which effectively safeguards the fundamental rights of the human person.”¹¹

As may be expected from one of the most progressive Judges ever to serve on the bench in San José and The Hague, the book makes various concrete suggestions for the future of international human rights law. Commenting on the question of reservations to human rights treaties, which led to much discussion in the International Law Commission before the finalization of its “Guide to Practice” last year¹², the Judge argues that reservations to non-derogable provisions in these treaties should be held inadmissible. To further preserve the “integrity” of human rights treaties, the Judge envisions international supervisory organs to have the last word on the compatibility of reservations with the object and purpose of human rights treaties. Other suggestions to enhance the protection of individuals include the expansion of the notion of the victim to include the “indirect” and “potential” victim. This, in the Judge’s view, would bring human rights law one step closer towards its goal, namely being truly “victim-oriented”.¹³ The Judge draws attention to the plight of particularly vulnerable groups, such as street children, migrants,

⁹ *Ibid.* at 66.

¹⁰ *Ibid.* at 75.

¹¹ *Ibid.* at 197 (emphasis in original).

¹² See International Law Commission, *Guide to Practice on Reservations to Treaties*, UN Doc. A/66/10 (2011), para. 75. The debates did not only take place within the ILC, but also between the Commission and human rights organizations, resulting in the “Conclusions on the reservations dialogue”, annexed to the Guide to Practice.

¹³ Cançado Trindade, *supra* note 3, at 125-131.

detainees and civilians in armed conflict. Perpetrators, however, are not forgotten: the book pleads for an end to “self-amnesties”, under which leaders grant themselves immunity from prosecution following grave human rights abuses,¹⁴ and argues that international tribunals should keep an eye on the implementation of judicial decisions. To complement this array of measures, the Judge commends the gradual expansion of the material content of *ius cogens*, to include the basic principle of equality and non-discrimination and, indeed, the right of access to justice.¹⁵

The book benefits greatly from Judge Cançado Trindade’s extensive experience in human rights law, as a scholar, practitioner and international judge. Indeed, at times his work reads more as a commentary, or even a memoir, on the development of international human rights in the past four decades, than as an exposition of the law in this field. Many of the suggestions and proposals made in the book can be found in the Judge’s earlier writings, some dating back to his PhD thesis prepared at the University of Cambridge.¹⁶ Passages from his Separate or Dissenting Opinions as Judge and President of the IACtHR permeate the text. So do reflections from his time as rapporteur for various human rights bodies. These quotations demonstrate the passionate engagement of the Judge with the topic. They evidence his lifelong advocacy for the individual in international law, even as a member of the international judiciary.

Notably absent from the book is a discussion of the access to international justice of non-state actors outside the human rights sphere. For example, the book never mentions the rise in investor-State arbitration, which allows private entities to bring investment claims directly against states on the international plane. Nor does it engage with questions relating to the domestic application of human rights treaties as between private entities residing in different countries, currently under discussion by the United States Supreme Court in the *Kiobel* case.¹⁷ Given the Judge’s experience and expertise, the focus on international human rights law is understandable. In his view, this field has freed international law “from the chains of statism”¹⁸ and the “darkness”¹⁹ of legal positivism, causing the “rescue of the individual as a subject of

¹⁴ *Ibid.* at 194-196.

¹⁵ *Ibid.* at 212.

¹⁶ See A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its rationale in the international protection of individual rights* (CUP, 1983).

¹⁷ See *Kiobel v. Royal Dutch Petroleum*, US Supreme Court, No. 10-1491, argued on 28 February 2012 and reargued on 1 October 2012.

¹⁸ Cançado Trindade, *supra* note 3, at 209.

¹⁹ *Ibid.* at 4.

international law”.²⁰

In fairness to legal positivism, it is worth noting that the international legal system itself—as a system of law—has never excluded individuals as potential right holders. The Judge cites numerous scholars, from Georges Scelle to Hersch Lauterpacht, to support this claim.²¹ Rather, the exclusion of individuals as international right holders emanates from theories about the role of the state, prevalent in the late nineteenth and early twentieth century. These theories defined the relationship between the state and the individual in such a way as to exclude the latter’s capability to hold international rights.²² While legal positivism is compatible with this view, it is by no means its corollary—positivism can equally explain the existence of international rights of individuals. In any case, legal and political philosophy have moved on from the *fin-de-siècle*. Some scholars continue to invoke this out-dated conception of the state as a straw man to discredit the virtues of positivist thought and to question the continuing relevance of the state in the international legal order. Judge Cançado Trindade, however, steers clear from this approach. Instead, his book points to the evolving responsibilities of states as guarantors of the adequate protection of human rights. It also shows the way in which international human rights law is to develop, if the protection of individuals is to be taken seriously: expanding the notion of the victim; restricting reservations to human rights treaties; and enhancing international supervisory mechanisms. The past sixty years have seen a remarkable development in the relations between the state and the individual; with Judge Cançado Trindade’s recommendations in hand, we can feel more confident that the same will happen in the next sixty years.

²⁰ *Ibid.* at 6. See also at 18 and 209.

²¹ *Ibid.* at 6-10. These views can be summarized in the words of Eduardo Jiménez de Aréchaga, ‘that “there is nothing inherent to the structure of the international legal order” which impedes the recognition of rights for individuals emanating directly from International Law,’ *ibid.* at 10.

²² For an elaborate discussion, see Portmann, *supra* note 2, at 42-125.