Meijknecht, Anna. ***Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law***, Antwerpen, Groningen, Oxford: Intersentia. 2001. Pp. 271. ISBN 90–5095-166-X.

Like a phoenix re-emerging from the ashes time and again in legal and diplomatic history, the protection of minority and indigenous groups is increasingly proving to be one of the most problematic post-Cold War issues facing state and non-state actors, including the human rights movement at large.[16]

[15] Alston, *supra* note 2, at 292.

[16] For comprehensive surveys, see e.g. G. Pentassuglia, *Minorities in International Law: An Introductory Study* (2002); S. J. Anaya, *Indigenous Peoples in International Law* (1996).

Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law, a revised version of a doctoral dissertation defended at Tilburg University, captures the corresponding renewal in legal scholarship by examining the international legal status of minorities and indigenous peoples. As framed by the author, the fundamental issue is 'whether, and to what extent minorities and indigenous peoples themselves are able to defend their rights on the international level', which, in turn, 'evokes the question of whether their position under international law enables them to do so' (at 21). This 'bottom-up' approach, prompted by the asserted insufficient role of states in enforcing human rights norms, seems to indicate a fundamentally procedural concern, in spite of a whole range of broader substantive considerations offered throughout the book.

Central to the author's interpretative framework is the development of the notion of international personality formulated by the International Court of Justice (ICJ) in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*.[17] Meijknecht suggests that 'personality' remains *au fond* 'an empty notion' (at 31) which needs to be filled in by three interrelated, but distinct, elements, i.e., international legal capacity, international legal subjectivity and international *ius standi*. In essence, the author construes international legal capacity as the 'internal' capacity of an entity to bear rights and duties. Such a capacity would indeed reflect the complex of factual qualities of the entity, most notably its degree of autonomy and its will to exist as a separate entity, which manifests itself, in the case of composite entities, with a degree of organization and representation instrumental in establishing relations with other entities. International legal subjectivity, to be enjoyed only by entities possessing legal capacity, would instead indicate the 'external' perspective of the international legal order, namely the act of attributing rights and duties to an entity. Meijknecht importantly argues that possessing legal capacity and being a subject of law, particularly in relation to non-state entities such as individuals, do not secure the actual protection of rights. Hence, the role of international *ius standi* as one of the constitutive elements of international personality, broadly construed as the right to bring a claim before not only strictly judicial bodies but also quasi-judicial and non-judicial or political bodies, at least in the general sense, as regards the latter bodies, of being entitled to make one's case for improving protection. Here again the author seems to acknowledge the crucial 'value added' of this procedural dimension in relation to the purpose of her study. However, this essentially pragmatic or practical concern is framed in theoretical terms in an attempt to combine Lauterpacht's view, that *ius standi* is not a prerequisite for the legal subjectivity of individuals (and other non-state entities), and Kelsen's view, that makes such subjectivity dependent on a faculty of independent action conferred upon them to enforce their rights. She indeed argues that while an entity can be a subject of international law without having *ius standi*, this right would be necessary to achieve the 'higher status' of international person.

By conceptualizing international personality as the function of these three elements taken together, while at the same time upholding each of them separately, a 'scale' is developed on the basis of which the author attempts to determine the international legal status of minorities and indigenous peoples. The line of reasoning as to legal capacity appears, though, unpersuasive at least in three respects. First, although Meijknecht refers to the notion of international legal capacity as deriving from 'internal', factual qualities of the entity in question, the acquisition of such a capacity by minority and indigenous groups is made dependent on an 'external' element, i.e., recognition of the representatives of the group as such, most notably by international institutions. Second, she characterizes this external element of recognition as 'political' (at 120), suggesting its purely declaratory effects in respect of the

[17] Advisory Opinion, ICJ Reports (1949).

existence (as opposed to the *exercise*) of legal capacity, while at the same time attaching essentially constitutive legal consequences to it regarding the capacity of the groups concerned as exercised through their representatives. Of course, there is a significant political backdrop against which the emergence of minorities and indigenous peoples (and especially the latter) on the international stage has to be measured. And yet, the developments affecting indigenous peoples mentioned by the author to substantiate 'external' recognition are not in themselves merely political or factual, but, as implied by Meijknecht's analysis itself, also reflect a legal process internal to the relevant bodies like the UN Working Group on Indigenous Populations (WGIP) (derogating from Article 71 of the UN Charter on the participation of NGOs in the meetings of the ECOSOC and its subsidiary bodies). This has resulted in the conferral of specific procedural capacities upon indigenous representatives acting on behalf of their groups, including participation in the drafting process of the UN Draft Declaration on the Rights of Indigenous Peoples, adopted by the WGIP in 1993. Third, recognition of such specific capacities seems to suggest that the question here is not so much whether or not the relevant groups have international legal capacity in general, but rather what kind of capacities, if any, they have been conferred. In other words, speaking of 'legal capacity' (at 120 and 223) may appear to imply capacities which in fact do not exist, and therefore does not avoid the task of distinguishing between the various capacities and between the entities which enjoy them. A different matter is whether specific capacities might have to be related to the wider framework generated by the attribution of substantive rights to an entity which is emerging as a 'subject of international law'.

Meijknecht identifies different ways in which the contemporary international legal order conceptualizes minorities and indigenous peoples. She observes, though, that 'the approach most frequently applied in international documents dealing with minorities and indigenous peoples is the indirect approach' (at 174), meaning an approach characterized by the formulation of specific state duties and the substantial referral of the attribution of rights to domestic law. Since this approach, chosen by states for states, unsurprisingly leaves them in principle a large degree of discretion in implementing norms, a major issue, according to Meijknecht, arises as to whether minorities and indigenous peoples can have a 'voice' in the form of *ius standi* as a way of practically constraining such a discretion. Three points need to be made here. First, despite the fact that Meijknecht embraces the notion of 'subjects to a lesser extent' with regard to non-state entities, explained in relation to the book's theoretical framework (at 55–56), she then oddly refers to what she identifies as a predominantly indirect approach to minorities and indigenous groups (somewhat encompassed by her understanding of limited subjectivity of non-state entities) as indicating the 'object or beneficiary of obligations of the state' (at 168). Second, in terms of minorities and indigenous peoples 'as such', the review of international instruments does not lead to a major breakthrough. Minorities *qua* groups are virtually non-existent as bearers of substantive rights, while indigenous peoples are conceptualized as bearers of rights. However, this either tends to be diluted into the language of state duties (ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries) or poses several issues which remain unclear, such as precisely which group rights are recognized and what their relation is to individual rights (Draft Declaration). Third, Meijknecht offers the conclusion that in order to contain state discretion regarding the protection of minorities and indigenous peoples a need arises for adequate supervisory mechanisms to be actionable by the groups themselves. This appears to shift the focus from the general (and in itself rather vague) perspective on legal subjectivity to the more pragmatic question whether these groups have the specific legal capacity to bring an international claim to defend the relevant rights or interests. To put it differently, the subjectivity approach, as a seemingly viable

one at present in relation to indigenous peoples, does not help provide answers to the concern of the author as to whether, and to what extent, the substantive rights supposedly attributed to them, or otherwise the norms protecting them, can be invoked by themselves to effectively defend their position.

This procedural dimension is discussed in Chapter V. Meijknecht mainly explores the role of quasi-judicial bodies, particularly the UN Human Rights Committee under the Optional Protocol complaints mechanism and the Inter-American Commission on Human Rights (IACHR) in the context of its petition procedure. In so doing, she addresses the specific aspect of the victim requirement as an impediment to a more independent procedural role of groups 'as such', like minority and indigenous groups as well as interested NGOs. Meijknecht observes that the Optional Protocol mechanism, although allowing for communications from a group of 'similarly affected' individuals as stated in *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*,[18] considers inadmissible not only complaints from allegedly directly affected collective entities but also complaints in the form of an *actio popularis*. However, she stresses that whereas such mechanism does not accept communications submitted by a third-party on behalf of individual victims, the IACHR petition procedure does allow at least this form of petitioning mostly on behalf of indigenous communities. Indeed, petitions have been filed with the IACHR by NGOs, indigenous groups and their representatives with or without the victims' knowledge or consent. By building on the IACHR practice, the author interestingly argues that a disconnection between the person of the victim and the person of the claimant is not only possible, considering the difference — emphasized by Lauterpacht — between being the holder of a right and having the capacity to enforce it, but is also highly desirable in practical terms, given the frequent lack of information or skills on the part of the victims or the difficulty of identifying all individual victims resulting from large-scale violations. However, the conclusions Meijknecht draws from this important aspect of the question appear to go far beyond what is warranted. She contends that 'in such cases, organisations representing the minority group or indigenous people "as such" should be able to speak and act before judicial or semi-judicial organs on behalf of the group', which, in turn, 'would enable minorities and indigenous peoples to participate in international fora as subjects of international law, thus as bearers of international rights and obligations' (at 222). How can a minority or indigenous organization, or even a third-party NGO, 'speak and act' *on behalf of the group* when, in the context of the supervisory procedures at issue, the substantive rights whose violation is claimed are *not* allocated to the group 'as such', but to its members? How can the distinction between the rights protected and the procedural capacity to defend them in a judicial-like body, following Lauterpacht's approach itself, justify the description of the simple extension of indirect enforcement possibilities for individual victims in terms of the direct emergence of new 'subjects of international law' understood as procedural creations designed to vindicate *others'*, not *their own*, rights? With regard to indigenous peoples, as long as collective rights are recognized and made available to them for judicial-like proceedings, as for instance suggested by the recent judgment of the Inter-American Court of Human Rights in the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[19] then one might argue that the respective indigenous group petitions would constitute more than a merely procedural phenomenon, perhaps fitting into Kelsen's paradigm linking the holding of a right to the capacity of the holder to enforce it as a requirement for international subjectivity. But absent such a link, speaking of subjectivity on a purely procedural basis goes in fact

[18] Communication No. 167/1984, Views of 26 March 1990, (1990) Annual Report II, 1.

[19] Case 11.555, Ser. C, No. 79 (31 Aug. 2001), www.corteidh.or.cr/seriecing/Mayagna_79_ing.html.

too far. The noteworthy issue of petitioning by groups or organizations other than the victims can and should be usefully viewed from the limited and practical perspective of achieving more flexible and functional procedural requirements, without having to link it to — rather questionable — wider repercussions.

As for non-judicial mechanisms, the author's thoughts somehow echo those of the chapter on legal capacity: while minorities are increasingly gaining access to the relevant bodies, it is indigenous peoples that stand out for 'making their voice heard' on the international level as true collective participants in a multilateral dialogue, as is crucially confirmed by their role within the newly established UN Permanent Forum for Indigenous Peoples.

Measured against the suggested 'scale' of international personality, the author concludes that minorities are caught in the individualistic, 'persons belonging to' model, which makes the 'development of minorities "as such" into entities with legal capacity and, subsequently, into subjects of international law, problematic, and to some extent, even improbable' (at 219). The story is quite different, Meijknecht maintains, with regard to indigenous peoples: they have legal capacity, they are a subject of international rights and duties, and they can even collectively represent their interests and protect their rights before non-judicial or political bodies. In other words, by meeting the first two constitutive elements of international personality, according to the author's construction, indigenous peoples seem to be on the road to becoming international legal persons. Meijknecht admits the lack of an indigenous group *judicial ius standi*, going beyond the individual-centred pattern of judicial-like procedures, but she notes that the current standing of indigenous peoples before non-judicial forums such as the UN Permanent Forum suggests either possible parallel future developments within a judicial-like context, or the emergence of an international person of a special kind, based on the previously explained broad understanding of *ius standi*. The usefulness of developing a legally stretched 'higher status', i.e., that of an international person, in connection with the 'valued added' of a broadly construed *ius standi* is somewhat puzzling. In fact, the doctrine by which Meijknecht is creatively inspired did not imply this distinction. If the focus is on *ius standi*, then does not the matter become more simply one of determining the existence of a special legal capacity, whose (possible) establishment should therefore be seen as either reinforcing the substance of legal subjectivity (if any) or reflecting an autonomous perspective to be appreciated on its own terms? The point here is that the author, by reinterpreting the *Reparation* decision in a way that considers legal capacity as a general prerequisite for a narrowly defined legal subjectivity, rather than a continuing legal parameter functionally designed to determine the content of subjectivity (if any) in the traditional sense of personality,[20] addresses the procedural dimension through a separate discourse, leading up to a rather artificial qualitative distinction between precisely 'subjectivity' and 'personality'. In other words, if one adheres to the subject approach to indigenous peoples in international law, the recognition of greater or lesser degrees of *ius standi* to them at the international level might usefully be viewed as amounting to nothing more than the conferral of special procedural capacities as the practical (as opposed to a largely theoretical) complementing content in which that individual subjectivity has resulted. If one does not adhere to the subject approach in this context, then the procedural dimension is to be valued simply for its autonomous, yet crucial, functional purpose of allowing the groups concerned to defend the relevant rights or interests before international bodies. After all, this is the fundamental concern motivating the author's inquiry, as further suggested by the pragmatic perspective chosen in Chapter V. Indeed, although Meijknecht in this chapter still looks for avenues to reinforce the

[20] See e.g. P. Sands and P. Klein, *Bowett's Law of International Institutions* (2001), at 472–473; Lyssitzin, 'Territorial Entities Other than States in the Law of Treaties', 125 *RdC* (1986) 9–15.

position of minorities and indigenous peoples *qua* groups, she nevertheless (quite unsurprisingly in regard to minorities) investigates how best to protect them through, among others, typical individual rights-based complaints mechanisms. The suggested disconnection between the person of the victim and the person of the claimant might be one important way of achieving this objective. The suggestion adds to the more general call for an effective 'division of labour' between judicial-like responses, focused on individual victims within a (reinforced) collective dimension, and non-judicial or political responses, geared towards supervising those aspects that affect whole groups and facilitating participation of the people concerned, especially indigenous peoples.[21]

Speaking of the position of individuals in international law, Brownlie notes that it is 'unhelpful' to characterize them as 'subjects of law' as the term remains somewhat empty-handed, or with little substance, when it comes to determining the actual legal capacities attached to it in this case, compared with those of other types of subjects.[22] Meijknecht is well aware of the, at best, limited legal status of non-state entities such as individuals, but, in the final analysis, it appears doubtful whether the 'scale' of international personality she develops proves, or may prove, realistically more effective to strengthen the international legal position of minorities and indigenous peoples. Although the range of international legal entities is not rigid and immutable, but is capable of changes and developments, with regard to minorities as such, the three-step personality discourse is at present (and perhaps over the longer term as well) largely, if not entirely, unpractical. It may apply to some extent to indigenous peoples, yet its ramifications, sometimes explained by Meijknecht in a rather tentative manner, tend to obfuscate the pragmatic overarching theme of what special procedural capacities these peoples actually have, be they entitlements to take part as equal partners with states in pertinent meetings or rights to bring international claims, as the truly functional substance of their presumed, 'qualified' (actual or emerging) legal personality.

On balance, *Towards International Personality* ends up usefully deconstructing the minority and indigenous rights discourse as it developed in the 20th century, thereby offering images of central questions such as the formulation of norms and the state duties attached to them and the possible expansion of enforcement possibilities for the benefit of minority and indigenous members as well as the respective groups as a whole. But precisely because of that, it leaves the reader with the impression, or even the conviction, that effective responses to the international legal advancement of minorities and indigenous peoples, particularly from the 'bottom-up' — as opposed to the 'statist' — perspective central to the author's line of reasoning, are more likely to be found in those more limited and functional aspects than in the language of international personality.

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[21] For a general analytical framework of the role of minority rights supervisory models, see Pentassuglia, 'On the Models of Minority Rights Supervision in Europe and How They Affect a Changing Concept of Sovereignty', 1 *European Yearbook of Minority Issues* (2001/2002) 29.

[22] I. Brownlie, *Principles of Public International Law* (1998), at 66.