

# Contents

|                                     |                  |
|-------------------------------------|------------------|
| <i>Foreword</i>                     | <i>page xiii</i> |
| <i>Acknowledgements</i>             | xv               |
| <i>Select list of abbreviations</i> | xviii            |
| <i>Table of cases</i>               | xx               |
| <i>Table of treaties</i>            | xxxiii           |

|  |          |
|--|----------|
| <b>Part I: The Framework</b>   | <b>1</b> |
| 1. Structures of the international legal system  | 3        |
| 1.1 Introduction   | 3        |
| 1.2 Methodology: a rules-based approach  | 7        |
| 1.3 The engagement of individuals in the international legal system: structural issues               | 10       |
| (a) Prelude: differing legal structures in the early period  | 10       |
| (b) The long nineteenth century  | 13       |
| (c) The inter-war period   | 16       |
| (d) The post-1945 international legal system   | 26       |
| 1.4 International legal personality as the measure of engagement in the international legal system   | 29       |
| (a) Development of the doctrine of subjects: the <i>Reparations</i> Opinion                          | 30       |
| (b) <i>Sui generis</i> subjects of international law   | 32       |
| (c) The individual as a ‘subject’ of international law   | 36       |
| 1.5 Challenges to the centrality of states in the international legal system: alternative approaches | 38       |
| (a) Positivism in its classical and modern forms   | 40       |
| (b) Process approaches   | 42       |
| (c) ‘Cosmopolitanism’  | 43       |

|   |           |
|---|-----------|
| <b>Part II: The Individual in International Law</b>   | <b>45</b> |
| 2. The individual and international claims  | 47        |
| 2.1 Introduction  | 47        |
| 2.2 Doctrine and practice pre-1914  | 48        |
| (a) Vattel's articulation   | 49        |
| (b) The practice  | 50        |
| (i) Arbitration of specifically defined diplomatic protection claims                        | 52        |
| (ii) Claims tribunals and commissions   | 54        |
| (A) Control of the claim  | 55        |
| (B) Payment of awards   | 57        |
| (C) Binding effect of the decision on an inter-state basis                                  | 58        |
| (D) Standing before the International Prize Court and the Central American Court of Justice | 60        |
| (c) Conclusions   | 62        |
| 2.3 Doctrine and practice in the inter-war period   | 65        |
| (a) The development of doctrine   | 65        |
| (b) The practice of international claims tribunals  | 71        |
| (i) Mixed arbitral tribunals after the First World War                                      | 72        |
| (A) The mixed arbitral tribunals under the Peace Treaties                                   | 72        |
| (B) The US Mixed Claims Commissions   | 73        |
| (C) The Upper Silesian Mixed Commission and Arbitral Tribunal                               | 74        |
| (ii) Mexican Claims Commissions 1923-1932   | 77        |
| (c) Conclusions   | 83        |
| 2.4 Diplomatic protection and individual claims after 1945                                  | 85        |
| (a) The development of doctrine   | 85        |
| (i) Diplomatic protection   | 85        |
| (ii) Individual rights  | 94        |
| (b) International claims tribunals and commissions  | 97        |
| (i) Post-Second World War commissions and tribunals   | 97        |
| (ii) The Iran-US Claims Tribunal  | 98        |
| (iii) The UN Compensation Commission  | 101       |
| (c) Investment treaty arbitration   | 103       |
| (d) Conclusions   | 119       |

|              |   |     |
|--------------|---|-----|
| 2.5          | Conclusions: the position of the individual relative to international claims  | 120 |
| Appendix I   | Arbitration of diplomatic protection claims 1794–1914                         | 124 |
| Appendix II  | International claims tribunals and commissions 1794–1914                      | 134 |
| Appendix III | International claims tribunals and commissions 1919–1939                      | 162 |
| 3.           | The individual in international humanitarian law                              | 176 |
| 3.1          | Introduction  | 176 |
| 3.2          | The individual in international armed conflict                                | 177 |
| (a)          | Regulation of international war pre-1914                                      | 177 |
| (b)          | Developments in the inter-war period  | 180 |
| (c)          | The individual in international armed conflict after 1945                     | 181 |
| (i)          | The 1949 Geneva Conventions   | 182 |
| (ii)         | Additional Protocol I of 1977   | 189 |
| (iii)        | Customary international humanitarian law                                      | 191 |
| (iv)         | International human rights law applicable in international armed conflict     | 193 |
| 3.3          | The individual in internal armed conflict                                     | 196 |
| (a)          | Regulation of civil war pre-1914  | 198 |
| (b)          | The inter-war period  | 206 |
| (c)          | The individual in internal armed conflict after 1945                          | 208 |
| (i)          | Common Article 3 of the Geneva Conventions                                    | 208 |
| (ii)         | Additional Protocol II  | 213 |
| (iii)        | Customary international humanitarian law                                      | 219 |
| (iv)         | International human rights law applicable in non-international armed conflict | 222 |
| 3.4          | Conclusions: the position of the individual in international humanitarian law | 224 |
| 4.           | The individual in international criminal law                                  | 229 |
| 4.1          | Introduction  | 229 |
| 4.2          | Individual responsibility before 1919   | 230 |
| 4.3          | The inter-war period: the Kaiser and the Leipzig trials                       | 234 |
| 4.4          | Individual responsibility after 1945  | 241 |
| (a)          | Post-Second World War prosecutions  | 241 |
| (i)          | The Nuremberg Tribunal  | 241 |
| (ii)         | The Tokyo Tribunal  | 249 |

|       |  |     |
|-------|--|-----|
| (iii) | Control Council Law No. 10 trials and military commissions in the Pacific  | 251 |
| (b)   | The 'Nuremberg Principles'   | 253 |
| (c)   | Development of substantive international criminal law in the United Nations  | 258 |
| (d)   | International criminal tribunals and courts  | 260 |
| (i)   | Ad hoc international tribunals   | 261 |
| (ii)  | The International Criminal Court   | 267 |
| (iii) | International crimes before 'hybrid' and domestic courts   | 271 |
| 4.5   | Conclusions: the position of the individual in international criminal law  | 274 |
| 5.    | The individual in international human rights law   | 278 |
| 5.1   | Introduction   | 278 |
| 5.2   | Antecedents: the case of slavery   | 279 |
| 5.3   | Protection of individuals during the inter-war period  | 282 |
| (a)   | Minorities   | 282 |
| (b)   | Inhabitants of mandated territories  | 287 |
| (c)   | Refugees   | 291 |
| (d)   | The International Labour Organisation  | 294 |
| (e)   | Conclusions  | 295 |
| 5.4   | International protection of human rights after 1945  | 296 |
| (a)   | Human rights rhetoric during the Second World War  | 296 |
| (b)   | Preparation for an international bill of rights  | 299 |
| (c)   | The United Nations Charter: a promise postponed  | 301 |
| (d)   | The Universal Declaration of Human Rights  | 306 |
| (e)   | From moral imperative to legal articulation: state obligations, individual rights and international enforcement in the European system | 307 |
| (f)   | Human rights and state obligations in the UN system  | 312 |
| (i)   | Subject-specific conventions   | 313 |
| (ii)  | The International Covenants  | 315 |
| (iii) | Declarations of specific rights  | 320 |
| (iv)  | Special procedures before the Human Rights Commission (now the Human Rights Council)   | 321 |
| (g)   | Customary international human rights law: from soft to hard law?   | 322 |
| (h)   | <i>Jus cogens</i> human rights norms   | 326 |

|  |            |
|--|------------|
| (i) The evolution of enforcement mechanisms: the regional systems                                      |            |
| (j) Conclusions  | 327        |
| 5.5 Conclusions: the position of the individual in international human rights law                      | 337        |
| <b>Part III: Reassessing the Framework</b>   | <b>341</b> |
| 6. Reflections on the structures of the international legal system                                     | 343        |
| 6.1 Introduction   | 343        |
| 6.2 Historical development of the position of the individual in the international legal system         | 343        |
| (a) The nineteenth century international legal system  | 343        |
| (b) The inter-war period   | 346        |
| (c) The post-1945 international legal system   | 349        |
| 6.3 International legal personality as the measure of engagement: the case of the individual           | 353        |
| (a) 'Subjects' versus 'objects'  | 353        |
| (b) Locating individuals: rights, obligations and capacities   | 358        |
| (c) Moving from the actor to the action? The notion of international law relationships                 | 363        |
| 6.4 Reflections on structural transition in the international legal system: the case of the individual | 365        |
| (a) Relative openness and flexibility of the system  | 365        |
| (b) Forces for structural change: solutions above theories   | 367        |
| (c) States in the international legal system   | 369        |
| <i>Bibliography</i>  | 373        |
| <i>Index</i>   | 394        |