Some remarks on the international legal personality of individuals

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Abstract

This article analyses the shift from the state-centric system of international law to the system in which other entities such as inter-governmental organisations, and individuals enter the sphere of international legal personality. The main focus falls on the influence of human rights development and the emergence of individual criminal responsibility on the international legal personality of an individual. In spite of the significant changes in the domain of international legal personality, the majority view remains that individuals have not gained the status of international law subjects. This conclusion is based on the notion that individuals, by having rights and duties under international law, acquire some form of international legal personality in certain areas, but that it is states which make this possible. As much as this holds true, the growing role of the individual in international law should be properly acknowledged. Although individuals are not likely ever to become international law subjects equal to states, such identity is not necessary for their recognition as international law subjects.

INTRODUCTION

The position of the individual in international law has long been debated. An individual not only is the subject of international law, but is the *sole* subject of that law; to those who deny individuals any legal personality. There has also been a wide range of scholars in-between who recognise individuals as the beneficiaries of rights and bearers of obligations, but believe that individuals lack some of the characteristics essential for international law subjects.

Until the 20th century, international law was exclusively preoccupied with states as its most important subjects. The principal purpose of international law was to secure coexistence and to keep states apart in peace by

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restraining and restricting state action.[1] A traditional positivist approach, which was particularly dominant in the 19th century, has been associated with an emphasis on state will – in the absence of central authority, law can only be based on the consent of states.[2] Although states still enjoy their status as the preeminent subjects of international law, they are no longer the *sole* subjects of that law. In light of numerous changes in the second half of the 20th century in political, economic and other domains, some new entities have entered the realm of international legal personality. One of the most significant of these is the international organisation, which is nowadays undoubtedly an international law subject – although admittedly differing from the state.

It was the development of human rights law in the second half of the 20th century that most notably raised the issue of the international legal personality of the individual. In contrast to the historical notion of human rights – as rights falling within the domestic jurisdiction of a particular state – the Charter of the United Nations (the Charter) and documents subsequently adopted, introduced the protection of human rights to the international arena. Some of these documents not only granted human rights, but also contained concomitant procedural provisions governing how the rights should be implemented. Apart from their listing in treaties, most of the human rights have by now become part of customary international law, some of them even acquiring the status of *jus cogens*.

In this article I analyse how the status of the individual has changed over time and what the results of that change are when it comes to international legal personality. In particular, I examine what rights and obligations individuals have in certain fields of international law. Relevant treaties and other international documents, as well as the decisions of international bodies are analysed. Finally, I offer a conclusion as to the current status of the individual in international law.

INTERNATIONAL PERSONALITY

Subjects of international law are commonly understood as entities which possess rights and obligations and which have the capacity to initiate legal actions within the international legal system. This capacity includes bringing

1 Menon 'The international personality of individuals in international law: a broadening of the traditional doctrine' (1992) 1 *Journal of Transnational Law and Policy* 151.

2 Parlett *The individual in the international legal system: continuity and change in international law* (2011) 7.

International claims, or bearing the responsibility for a breach of international law obligations. Some authors believe that international law subjects should be able to take part in the creation and modification of norms of international law.[3] If a specific entity satisfies the criteria above, it is considered to be a legal person which enjoys legal personality. However, some authors point out that even if certain of the characteristics of international law subjects are lacking, there can still be a limited legal personality, dependent on the agreement or acquiescence of recognised legal persons and opposable on the international plane only to those in agreement or acquiescent.[4] Others regard the term 'international persons' as inadequate and claim that it should be replaced by terms such as 'participants' or 'actors'.[5]

In the past, states were considered the only subjects of international law. This reasoning was explained by the fact that 'the law of nations is based on the common consent of individual states, and not of individual human beings', and therefore states were the sole and exclusive subjects of international law.[6] The creation of states and their emergence as subjects of international law is not dependent on the will of any other actor, nor can their legal position be changed without or against their will.[7] The creation of a state is a factual rather than a legal question. Three preconditions for the creation of a state must be met – territory, population and organised political authority – for a state to exist.[8] On occasion, the capacity to enter into relations with other states is identified as a precondition for the state's international personality.[9] In spite of the fact that the latter requirement might imply that recognition by other states is a necessary element for the existence of a state, this is not the case. The recognition by other states is considered to have a declaratory character, which means that a state exists regardless of such recognition, provided that the three core requirements above have been met.

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3 See, for example: Degan *Medjunarodno pravo* (2011) 205.

4 Brownlie *Principles of public international law* (4ed 2003) 57.

5 Higgins *Problems and process: international law and how we use it (*1994) 50.

6 Oppenheim *International law* (2ed 1912) par. 13, available at: http://www.gutenberg.org/files/41046/41046-h/41046-h.htm# 107 (last accessed 15 March 2015).

7 Orakhelashvili 'The position of the individual in international law' (2001) 31 *California Western International Law Journal* 246.

8 'The Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No. 1' (1992) 31 *International Legal Materials* 1488.

9 Montevideo Convention on Rights and Duties of States 1933 art 1, 165 *League of Nations Treaty Series* 19.

As I have indicated, states – as unquestionably the oldest and the most important international law subjects – were long considered the only subjects of international law. During the 20th century, this notion gradually started to change, as new significant actors began to emerge onto the international plane. Following this trend, legal commentators started to advance the idea that actors other than states might be considered international law subjects. Yet, not all of the writers were ready to acknowledge the emergence of new actors as bearers of international legal personality. Among those who persisted in advocating the idea that states were the *only* subjects of international law most vociferously, were the Soviet authors.[10] It was not until the close of the 20th century that these authors accepted the possibility of other entities enjoying the status of international law subjects.[11]

Indeed, during the 20th century – and especially after the Second World War and the adoption of the Charter – new entities entered the realm of international legal personality. This in no way meant that they were identical to states. As the International Court of Justice (ICJ) found in the *Reparations* case, '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.'[12] While states possess full international personality as an inherent attribute of their statehood, all other entities possessing personality do so only to the extent that states allow, that is, their personality is derived from states.[13] Consequently, certain international law subjects can, unlike states, have limited or no procedural capacity in sense that they cannot, either completely or partially, undertake actions to acquire rights or undertake obligations. There can be a whole range of limitations on procedural capacity – limitations of active and passive right of legation, of the conclusion of treaties, or, until war became prohibited in international law, of *jus belli gerendi*.[14]

It is, therefore, widely accepted that there are different international law subjects on the international scene, each possessing its own characteristics

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10 Kovler 'The individual as a subject of international law (discussion revisited)' (2013) 2 *Law of Ukraine Legal Journal* 40.

11 Müllerson 'Human rights and the individual as subject of international law: a Soviet view' (1990) 1 *European Journal of International Law* 33.

12 *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion ICJ Reports 1949 179.

13 Wallace *International law* (5ed 2005) 60.

14 Andrassy *et al Medjunarodno pravo, part I* (2010) 70.

in terms of legal and procedural capacity. It must be noted, however, that not each entity performing on the international scene will be a legal person, since for the international personality to exist there must be both participation and some form of community acceptance.[15]

Alongside states, international inter-governmental organisations have emerged as distinct subjects of international law. The most significant international organisation having an objective legal personality is the United Nations, as confirmed by the ICJ in the *Reparations* case above. Unlike states, which are created independently of the will of any other actor, international organisations are created by treaty concluded between states. Functions, membership, structure and other relevant features of the organisations are spelled out in these founding treaties. However, despite the fact that the creation and functioning of the organisation is based on the states' will, the same cannot be said of its dissolution. In order to create an organisation, each member state must consent to its establishment. However, once an organisation has been created, it has a life of its own, determined by the provisions of its founding document. In that sense, the charter of an organisation will typically contain clauses requiring a certain majority of member states for its dissolution or for any amendment to its charter. This means that not every state will have to consent to the organisation's dissolution before it may be dissolved. On the other hand, when a single state withdraws from an organisation, the withdrawing state simply stops being a member of the organisation – it does not affect the objective legal personality of the organisation, which subsists in the absence of that member.[16]

Belligerents and insurgents may, under certain circumstances, also enjoy a measure of legal personality. Apart from being able to enter into valid agreements, they are bound by the rules of international law with respect to the conduct of hostilities, may be entitled to the protection accorded by these rules, and may in due course be recognised as governments.[17]

An entity that might possess international personality is a national liberation movement. For example, the Palestinian Liberation Organisation (PLO) was granted observer status at the United Nations. The 1974 General Assembly Resolution 3237 (XXIX) (GA res), invited the PLO to participate in the

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15 Shaw *International law* (4ed 1997) 138 139.
16 See Orakhelashvili n 7 above at 247.
17 *Id* at 173.

sessions and the work of the GA as an observer.[18] Granting such a status does not necessarily amount to recognising the legal personality of such an entity. Although in the case of the PLO a conclusion on the existence of such personality can be deduced from the ICJ Advisory Opinion, in which the court – in deciding whether as a party to the Agreement between the UN and the USA on the Headquarters of the United Nations, the US was under an obligation in terms of article 21 of the Headquarters Agreement – concluded that the United States was bound to respect the obligation to have recourse to arbitration under the Headquarters Agreement, even in its dealings with the PLO and regardless of its non-recognition of the organisation.[19]

Two other entities enjoying permanent observer status at the UN – the Holy See and the Sovereign Order of Malta[20] – are considered to have international personality in that they enter into relations with other entities on the international plane. Unlike these two entities which are closely akin to states, the International Committee of the Red Cross (ICRC) is considered to be the subject of international law of a completely different character. It owes its legal personality to its significant status under international humanitarian law. The ICRC, therefore, represents an exception to the general rule that only inter-governmental organisations can be international law subjects.

The above subjects are today, undoubtedly regarded as subjects of international law. Apart from these, there are other entities which have some characteristics of international legal personality and are consequently considered to be potential candidates for international legal personality.

These entities include, for example, non-governmental organisations (NGOs), international public companies, transnational corporations, and individual persons.[21]

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18 In Resolution 43/177 of 15 December 1988, the General Assembly acknowledged the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988 and decided that the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organization' in the United Nations system. On 29 November 2012, the General Assembly granted Palestine non-member observer state status at the United Nations. See: A/RES/43/177; A/RES/67/19.

19 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, par 57.

20 See *Nanni v Pace and the Sovereign Order of Malta* (1935) 8 *International Law Review* 2.

21 See Shaw n 15 above at 175 176. See also: Hickey 'The source of international legal personality in the 21st century' (1997) 2 *Hofstra Law and Policy Symposium* 3 9.

In recent decades there has been a growing tendency among legal writers to discuss the issue of legal personality for an individual person. Most of the international law textbooks do not include individuals among existing subjects of international law.[22] The majority discuss the position of an individual within the sphere of international legal personality so pointing to their distinct status. In the following chapters I analyse how the position of an individual has changed during the previous decades and whether such a change has resulted in individuals becoming international law subjects.

INDIVIDUALS IN INTERNATIONAL LAW – GENERAL REMARKS

In the past, the state-centred system was based on the differentiation between those entities which have rights and duties and those which do not. States had rights and duties, and that is why they were classified as international law subjects, while all the others – including individuals – who did not have rights and duties, were merely 'objects' of international law. As Higgins has correctly observed, individuals were as much objects as were 'boundaries', 'rivers' or 'territory'.[23]

The traditional object theory of the individual in international law regarded individuals as incapable of being international law subjects in that they had no rights or duties under international law, they could not invoke it for their protection, they could not violate its rules, and they had no international right or claim against states. Only the nationals of a particular state could be protected against states which violated their rights, but then only if the violating state was not their state of nationality.[24] Under the umbrella of diplomatic protection, an individual who suffered a violation of his/her rights by a state other than his/her own, could have his or her rights protected only if his or her own state brought a claim against the violating state. The claim and the damage suffered by the individual were regarded as a claim accruing to and injury suffered by the individual's state of nationality – as opposed to the individual concerned.[25] Consequently, once the state has taken up a case on behalf of its subject before an international

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22 For authors who do include individuals among the international law subjects, see: Nijman *The concept of international legal personality – an inquiry into the history and theory of international law* (2004) 473; Kaczorowska-Ireland *Public international law* (5ed 2015) 172 194; Trindade 'The historical recovery of the human person as subject of the law of nations' in *The access of individuals to international justice* (2011) 15.

23 See Higgins n 5 above at 49.

24 Manner 'The object theory of the individual in international law' (1952) 46 *American Journal of International Law* 428 429.

25 See Orakhelashvili n 7 above at 247.

tribunal, in the eyes of the tribunal the state is the sole claimant.[26] Therefore, in order for an individual to have his or her rights protected under international law, there must have been a nexus between the individual and the state of his/her nationality.[27] In the absence of such a nexus – for example in the case of stateless persons – there was no possibility of an individual protection.

Today, an individual can be protected against both foreign states and his state of nationality. However, this protection is not granted under general international law, but rather under treaty law – a treaty that the state in question has chosen to conclude. And unlike international organisations created by treaty concluded by states' will, but which upon their creation exist as distinct subjects of international law, individuals enjoy benefits provided by treaties only for so long as states choose to be party to the treaties granting the benefits.

This aside, an object theory no longer adequately describes the position of individual in international law. It is commonly accepted nowadays that individuals can be holders of rights and bearers of obligations. After all, states are made up of individuals. Treating individuals as objects would prevent the enforcement of international law against the individuals who are the intended subjects of the legal obligations. In addition, states are held internationally liable for the condemned acts of their citizens and are expected to recompense their citizens injured by violations of international law.[28] Bearing all this in mind, as well as the notion that the essence of international law has always been the ultimate concern of the human being,[29] an object theory is now considered outdated.

It was mostly, but not exclusively, the human rights movement that prompted the change in the notion of the international legal personality of an individual. In what follows I analyse particular fields in which individuals do enjoy legal personality, meaning that they come closest to being recognised as international law subjects.

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26 *Mavrommatis Palestine Concessions* (Jurisdiction), PCIJ, Ser A, No 2, 1924 6.
27 *Nottebohm Case* (second phase), Judgment of April 6th, 1955: ICJ Reports 1955 23.
28 See Manner n 24 above at 431.
29 See Shaw n 15 above at 183.

HUMAN RIGHTS LAW AND THE LEGAL PERSONALITY OF INDIVIDUALS

It is widely accepted that the development of human rights law has influenced the evolution of the international legal personality of individuals the most.

The idea of the protection of human rights originally emerged in the field of domestic legislation, as in the 1215 Magna Carta of King John in England, the adoption of the British Bill of Rights in 1689, the Bill of Rights in the United States Constitution, the French Declaration of the Rights of Man in 1789, and in other laws and declarations.[30]

On the international plane, one of the early examples of human rights protection was the abolition of slave trade. The movement for the abolition of slavery emerged in the 18th century, first in Britain and subsequently in certain other European countries. After the prohibition of slavery in domestic legal systems, states started to conclude bilateral agreements, and in 1926 the Slavery Convention was adopted.[31]

In the treaties concluded after World War I, the Treaty of Versailles of 1919 and the Polish-German Convention of 1922 relating to Upper Silesia, individual claimants were allowed access to various mixed arbitral tribunals set up pursuant to the provisions of these instruments, even against the state of which they were nationals.[32] Similarly, the 1907 Treaty, which established the Central American Court of Justice, provided the possibility for individuals to submit their cases to the court.

In this regard, it is also worth mentioning the *Jurisdiction of the Courts of Danzig* case of 1928. In its advisory opinion in this case, the Permanent Court of International Justice found that 'it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts'.[33] By reasoning in this manner, the court rejected Poland's allegations, according to which the failure to enforce treaty rights not

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30 See Menon n 1 above at 168.

31 Text of the Convention available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx (last accessed 24 March 2015).

32 Verma *An introduction to public international law* (2004) 85.

33 *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ (ser B) No 15 (3 March).

incorporated into its municipal system would be a matter between the two states, and not between Poland and individuals who were granted these rights.

Although the roots of human rights protection were present way before World War II, it is the end of that war and the adoption of the United Nations Charter that are considered a starting point for the rapid development of human rights law. Apart from the Preamble to the United Nations Charter, which 'reaffirms faith in fundamental human rights',[34] the Charter promotes the protection of human rights primarily in two of its provisions. First, article 1(3) states that one of the purposes of the United Nations is 'to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion.' Second, article 55 provides that the United Nations shall promote, among other things, 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. In addition, in article 56 all members of the United Nations pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set out in article 55. Apart from these provisions, which grant the Organisation's promotion of human rights, the Charter mentions these rights in several other provisions: article 13(1) provides that the General Assembly will initiate studies and make recommendations for 'assisting in the realization of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion'; article 62(2) provides that the Economic and Social Council 'may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'; article 76 speaks of 'encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion'.

The Charter provisions on human rights refer to the Organisation's obligation to grant those rights. Although the Organisation is an international law subject separate from its member states, it is actually the states that 'pledge themselves' to take an action for the achievement of the respect for human rights, as indicated in article 55 of the Charter. Whether a 'pledge'

[34] United Nations Charter, available at: http://www.un.org/en/documents/charter/ (last accessed 24 March 2015).

corresponds to an 'obligation', might be a matter of controversy.[35] However, the wording of article 6 of the Charter, which provides for the possibility of a United Nations' member state to be expelled from the Organisation where it persistently violates principles in the Charter, among which are human rights, supports the conclusion that the respect for human rights is indeed an obligation resting on states.

However, it must be said that the Charter provisions guaranteeing the respect for human rights potentially contradict some other Charter provisions, notably those banning the use of force[36] and intervention in the internal affairs of states.[37] The Charter allows states to use force only in self-defence and with the authorisation of the Security Council.[38] However, the practice shows that in times of armed conflict – in which grave violations of human rights occur – the permanent members of the Security Council cannot agree on how to react, resulting in the council being deadlocked by veto. Absent the authorisation of the Security Council, it is difficult to see how the human rights can be protected without violating the Charter provisions on the use of force.

The same problem arises with the Organisation's obligation not to intervene in the internal affairs of states unless it acts under Chapter VII of the Charter. The problem of reconciling these potentially opposing obligations has existed ever since the adoption of the Charter. The principle of 'responsibility to protect' (R2P) was intended to resolve the discrepancy between these divergent obligations, but it is the majority opinion that the R2P principle merely emphasises that the *moral* obligation rests on states to react to grave breaches of human rights, and introduces nothing new as regards reconciling divergent states' *legal* obligations.[39]

Another human rights document within the United Nations system is the Universal Declaration of Human Rights, adopted by the General Assembly in 1948.[40] It encompassed civil and political, as well as economic, social and

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35 See Parlett n 2 above at 304.
36 Article 2(4) of the Charter.
37 Article 2(7) of the Charter.
38 Chapter VII of the Charter.
39 On the 'responsibility to protect', see: Perišić 'Responsibility to protect – an emerging norm of international law?' (2013) 2/9 *Academic Journal of Interdisciplinary Studies* 443.
40 Text of the Declaration available at: http://www.un.org/en/documents/udhr/ (last accessed 27 March 2015).

cultural rights. As it was adopted 'merely' as a declaration, it has not created a legal obligation. Today, however, there is no doubt that the Declaration principles do have a binding character, although disagreement persists on two questions. Firstly, do all of the Declaration provisions have a binding character, or only certain of them; and second, does the obligatory nature of the Declaration derive from its being an authoritative interpretation of the United Nations Charter provisions on human rights, or does it derive from its status of general principles of law, or from its forming a part of customary law?[41]

In 1966 two legally binding instruments were adopted: The International Covenant on Civil and Political Rights (ICCPR),[42] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[43] The First Optional Protocol to the ICCPR is of a particular importance to our analysis because it provides that

> a state party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that state party of any of the rights set forth in the Covenant.[44]

Individuals who claim that any of their rights enumerated in the Covenant have been violated, and who have exhausted all available domestic remedies, may submit a written communication to the Committee for consideration.[45] The procedure before the Committee is not a judicial one and the views of the Committee are not binding on states. It, however, does create an opportunity for an individual to appear before an international body and claim the violation of his or her rights and seek redress.

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41 Buergenthal & Shelton & Steward *Medjunarodna ljudska prava u sazetom obliku (*2011) 37.

42 Text of the Covenant available at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last accessed 27 March 2015).

43 Text of the Covenant available at: http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (last accessed 27 March 2015).

44 Article 1 of the Optional Protocol. Text of the Protocol available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx (last accessed 27 March 2015).

45 *Id* at art 2.

The ICESCR did not – unlike the ICCPR – establish a Committee to monitor its implementation. However, in 1985 the United Nations Economic and Social Council (ECOSOC) established a Committee on Economic, Social and Cultural Rights,[46] which was intended to replace the then-existing Working Group[47] and which was tasked with submitting a report on its activities, including a summary of its consideration of the reports submitted by states party to the Covenant, to the Council, and to make suggestions and recommendations of a general nature on the basis of its consideration of those reports and of the reports submitted by the specialised agencies, in order to assist the Council to fulfil its responsibilities under the Covenant.[48] In 2008, the United Nations General Assembly adopted the Optional Protocol, which provides for the competence of the Committee to 'receive and consider communications'.[49] Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a state party, who claim to be victims of a violation of any of the economic, social and cultural rights set out in the Covenant by that state party.[50]

In the system of both of the Covenants, individuals are granted certain rights, while states are obliged to ensure respect for those rights. Individuals are also given the opportunity to appear before international bodies when they believe that their rights have been violated.

Many other conventions conferring rights on individuals have been adopted within the United Nations system. For example, the 1965 International Convention on the Elimination of all Forms of Racial Discrimination provides for the possibility of submitting an individual petition to the Human Rights Committee, where violations of the Convention by the individual's home state are alleged – provided that the home state has recognised the competence of the Committee to receive communications from individuals.[51] Likewise, the Optional Protocol to the Convention on the Elimination of Discrimination against Women, provides for the possibility of individual

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46 ECOSOC Resolution 1985/17.

47 ECOSOC Decision 1978/10; 1981/158; ECOSOC Resolution 1982/33.

48 Note 46 above.

49 Article 1 of the Optional Protocol. Text of the Protocol available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx (last accessed 30 March 2015).

50 *Id* at art 2.

51 International Convention on the Elimination of All Forms of Racial Discrimination, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (last accessed 2 April 2015).

petition.[52] The Convention against Torture also provides for the Committee against Torture to receive communications from individuals subject to the jurisdiction of a state party to the Convention, if that state has recognised the Committee's competence.[53]

Alongside the human rights development within the United Nations system, there has been a significant development of human rights protection on the regional level. The first regional instrument to confer rights on individuals, was the European Convention on Human Rights and Fundamental Freedoms (ECHR).[54] Not only does the Convention oblige state parties to 'secure to everyone within their jurisdiction the rights and freedoms' provided in the Convention,[55] it also provides an effective mechanism for the protection of those individual rights. Under article 34 of the ECHR, the European Court of Human Rights (ECtHR), established by the Convention, 'may receive applications from any person, non-governmental organization or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'.[56] The ECtHR may only deal with the matter if all the admissibility conditions have been complied with, including the exhaustion of all domestic remedies and the time frame of six months from the date on which the final decision was taken.[57]

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52 Optional Protocol to the Convention on the Elimination of Discrimination against Women, available at: http://www.un.org/womenwatch/daw/cedaw/protocol/ (last accessed 2 April 2015).

53 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46 (1984), art 22.

54 European Convention on Human Rights and Fundamental Freedoms, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed 4 April 2015).

55 *Id* at art 1.

56 Initially, the European system of human rights protection provided for two bodies: the Commission and the Court. Only states and the Commission could submit cases to the Court, while the Commission's jurisdiction for individual petitions was optional. Protocol 9 to the Convention provided the possibility for individuals to bring cases before the court. This Protocol has been replaced by the Protocol 11, which established a new organ – the European Court of Human Rights, replacing the two previously existing ones. The ECtHR may receive applications by individuals. For the text of the Protocols see: http://conventions.coe.int/Treaty/en/Treaties/Html/140.htm; http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm (last accessed 5 April 2015).

57 Article 35 of the Convention n 54 above.

Similar procedures to those provided within the European system of human rights protection, have been provided in a further two regional systems – the Inter-American and the African regional systems. The American Convention on Human Rights (ACHR)[58] established two bodies: the Inter-American Commission of Human Rights and the International Court of Human Rights. In terms of article 44 of the ACHR, any person or group of persons, or any non-governmental entity legally recognised in one or more member state of the Organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a state party. The petition is admissible if local remedies have been exhausted, and if it is submitted within a period of six months.[59] The Commission requests the information from the government of the state indicated as being responsible, it can hold hearings or conduct investigations.[60] The parties may reach a friendly settlement, but if they do not, the Commission may compile a report setting out the facts and stating its conclusions, and transmit it to the states concerned.[61] The case may also be referred to the Inter-American Court of Justice, but only by state parties or by the Commission and not by the individuals.[62]

The African Charter on Human and Peoples' Rights,[63] adopted by the Organisation of African Unity (now the African Union), established the African Commission on Human and Peoples' Rights. Apart from providing a possibility for a member state to submit a written communication to the Commission where it has good reason to believe that another state party has violated the provisions of the Charter,[64] the Charter also provided an individual complaint mechanism by referring to the 'communications other than those of state parties to the present Charter'.[65] In 2004, another supervisory body for the African Charter was established by the Protocol to the Charter – the African Court of Human

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58 American Convention on Human Rights, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (last accessed 10 April 2015).

59 *Id* at art 46.

60 *Id* at art 48.

61 *Id* at art 49.

62 *Id* at art 61.

63 African Charter on Human and Peoples' Rights, available at: http://www.achpr.org/instruments/achpr/#ch2.1 (last accessed 12 April 2015).

64 *Id* at art 47.

65 *Id* at art 55.

and Peoples' Rights.[66] In terms of article 5 of the Protocol, a case can be brought before the court by a state party, by the Commission and by African inter-governmental organisations, while there is optional jurisdiction for the court with respect to NGOs with observer status before the Commission and for individuals.

Aside from the treaties providing certain rights for individuals, it is worth noting decisions of the ICJ which are indicative in this regard. In the *LaGrand* judgment, the ICJ affirmed the existence of 'individual rights', derived from article 36 of the Vienna Convention on Consular Relations.[67] The court thus concluded that rights for individuals need not derive necessarily from the human rights treaties but may also derive from other treaties. Referring to the findings in the *LaGrand* decision, the court again confirmed the existence of 'individual rights' in the *Avena* judgment.[68] Some authors, like Gaja, believed that the ICJ, by confirming the existence of individual rights, acknowledged that individuals are subjects of international law. Moreover, he opined that such an approach may lead the ICJ to assert the legal personality even of the NGOs, because 'it would be difficult to understand why individuals may acquire rights and obligations under international law, while the same could not occur with any international organization, provided that it is an entity which is different from its members'.[69] It remains disputed whether the ICJ's affirmation of individual rights, in addition to state rights, outside of the human rights context in the *LaGrand* and *Avena* judgments implies international personality of the individual or, by analogy, even of other non-state entities.[70]

The second half of the twentieth century has been characterised by the adoption of treaties in which individuals have been given various rights, whereas states have been obliged to safeguard the protection of those

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66 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, available at: http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf (last accessed 12 April 2015).

67 *LaGrand* (*Germany v United States of America*), Judgment, ICJ Reports 2001, par. 77.

68 *Avena and Other Mexican Nationals* (Mexico v United States of America), Judgment, ICJ Reports 2004, par. 40.

69 Responsibility of International Organizations, Document A/CN.4/532, First Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, 26 March 2003, available at: http://legal.un.org/ilc/documentation/english/a_cn4_532.pdf (last accessed 20 April 2015).

70 Portmann *Legal personality in international law (*2010) 11.

rights. The most efficient guarantees for human rights protection exist within regional human rights systems, especially that of Europe. The ECHR not only grants rights to individuals, but provides the possibility for individuals to refer directly to the ECtHR in cases of alleged violation of those rights. Other regional systems provide similar kinds of protection. Individuals vested with such rights do not need a state as mediator in seeking redress for violation of their rights, as is the case with diplomatic protection.

When speaking of human rights and their protection, it is necessary to distinguish two separate questions. First, what human rights are granted to individuals by international treaties; and second, is there a mechanism for the enforcement of those rights. With regard to both issues, it must be borne in mind that international human rights instruments can be directly applicable to individuals only if the constitutional legislation of the state concerned recognises the primacy of international treaties over domestic law. If not, human rights provisions can be applicable to individuals only if transformed into domestic law by the legislation of the state.[71] This means that individual rights provided in treaties exist exclusively due to the states' will and that same will can terminate treaties and consequently lead to the extinction of those treaty rights. Yet, we must not forget that most of the human rights have by now become a part of customary international law. Individuals will thus enjoy those rights regardless of their state's participation in the treaty, but the legal basis for this will not be treaty law but customary international law. The same, however, does not apply to the issue of mechanisms of the enforcement of those rights. Absent a treaty provision providing for the possibility of an individual appearing before an international body and claiming the violation of his or her rights, an individual enjoys no such right under general international law.

INDIVIDUAL CRIMINAL RESPONSIBILITY AND THE LEGAL PERSONALITY OF INDIVIDUALS

Even centuries ago, when there was no doubt that states were the only subjects of international law, it was evident that individuals were capable of violating international law norms and could be punished for this. For instance, in case of piracy, offenders were considered guilty of a crime against international society and could thus be punished by international

[71] See Orakhelashvili n 7 above at 256.

tribunals or by any state at all.[72] Today, individuals can be responsible for number of violations of international law rights and can consequently be punished for that. In contrast to states, which cannot be criminally responsible, individuals who violate international law norms can.

Whether the specific act of an individual will be considered an act of a state or a ground for his or her individual responsibility, depends on whether such an act can be attributed to the state under the rules on attribution. The Draft Articles on Responsibility of States for Internationally Wrongful Acts provide that the conduct of any state organ shall be considered an act of that state under international law.[73] Furthermore, the conduct of a person or entity which is not an organ of the state but which is empowered by the law of that state to exercise elements of government authority, will also be considered an act of the state.[74] These rules apply even if the person or entity in question exceeds its authority or contravenes instructions.[75] The conduct of a person or group of persons is considered the act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that state in carrying out the conduct.[76] However, if a person commits an unlawful act acting in his or her private capacity, he or she will be individually responsible.

Is then, this individual responsibility completely separable from the state's responsibility? The answer is no. The state is expected to prevent the commission of unlawful acts and punish those responsible for them. The responsibility of a state can thus be incurred not for the commission of the act itself, but for the failure on the part of that state to either prevent or punish the commission of the act. Take, for example, the Genocide Convention. In its article 1, the Convention obliges states to prevent and punish the commission of the crime of genocide.[77] In addition, states are obliged to provide effective penalties for persons

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72 See Shaw n 15 above at 184. See also: Andrassy *et al* n 14 above at 73.

73 Article 4. Draft Articles on Responsibility of States for Internationally Wrongful Acts, available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last accessed 22 April 2015).

74 *Id* at art 5.

75 *Id* at art 7.

76 *Id* at art 8.

77 Convention on the Prevention and Punishment of the Crime of Genocide, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf (last accessed 24 April 2015).

guilty of genocide.[78] These persons can be constitutionally responsible rulers, public officials, or private individuals.[79] If the state fails to fulfil its duty to punish the responsible individuals, the international criminal responsibility of that individual arises. This is usually the case if the state itself is a part of the endeavor in which an individual committed the act in question.

Following World War I, it was agreed in the Treaty of Versailles that the German government recognised the right of the Allied and Associated Powers to bring persons accused of having committed acts in violation of the laws and customs of war before military tribunals.[80] Furthermore, the Nuremberg and Tokyo Tribunals were established in order to prosecute individuals for war crimes and other atrocities committed during World War II. Since these individuals were high-ranking political and military leaders of Germany and Japan respectively, it was not expected that these states would prosecute them themselves. Upon the adoption of the principles implied at the Nuremberg trials first in the General Assembly,[81] and then by the International Law Commission (ILC), the issue of individual responsibility in international law arose within the ILC. The discussion resulted in no general conclusion, as different members had different views on the topic. Some of them asserted that individual responsibility undoubtedly derives from the Nuremberg Charter and the trial, but that it constitutes 'a new concept, for up to then the individual had not been considered as capable of being guilty of an international crime'.[82] Others argued that the Charter and the judgment had not created, but rather confirmed, principles already existing in positive international law or still in the process of development. Thus, individual responsibility was merely the application of a more general principle – that of the individual being the subject of international law.[83] During the 45th meeting of the ILC, it was suggested that the following sentence be added to the general principle of individual responsibility (Principle I): 'Thus the individual is subject to

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78 *Id* at art 5.

79 Note 77 above.

80 Article 228 of the Treaty of Versailles, available at: http://avalon.law.yale.edu/imt/partvii.asp (last accessed 27 April 2015).

81 GA Res 95(I).

82 26th Meeting, 24 May 1949, Yearbook of the International Law Commission, 1949, par 11.

83 *Id* at par 13.

international law, at least in criminal law.'[84] On a vote being taken, the addition of this sentence was rejected.[85] Following the submission of the text adopted by the Commission, the General Assembly did not formally adopt the Nuremberg principles in their elaborated form.[86] It invited member states to make observations,[87] which very few states did, and did not elaborate any further on the Nuremberg principles.

As much as the Nuremberg judgment was at times challenged as representing 'victor' justice, the subsequent establishment of the criminal courts was based on different motives – punishing breaches of human rights and humanitarian law.[88] In the 1990s, two *ad hoc* criminal tribunals were established – the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both were created by Security Council's resolutions[89] as a part of the Council's endeavours to restore international peace and security – a task entrusted to it by the Charter.[90] It was believed that the establishment of these Tribunals would discourage the further commission of crimes and would secure the punishment of the individual crimes which were unlikely to be punished by the states of nationality of the accused.[91]

The Statute of the ICTY provides in article 1 that 'the … Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the … Statute'.[92] The jurisdiction of the Tribunal includes grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war,

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84 45th Meeting, 13 June 1950, Yearbook of the International Law Commission, 1950, par 50.

85 *Id* at par 103.

86 Cassese *Affirmation of principles of international law recognized by the Charter of the Nuremberg tribunal*, available at: http://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf (last accessed 2 May 2015).

87 GA Res 488(V).

88 See Kaczorowska-Ireland n 22 above at 196 197.

89 SC Res 827 (1993); SC Res 955 (1994).

90 Article 24 of the UN Charter n 34 above.

91 It was controversial whether the establishment of the Tribunals could be interpreted as fulfilling the mandate of restoring the international peace and security. Some opined that the Council exceeded its powers under the Charter by establishing them. See: Cassese & Gaeta *Cassese's international criminal law* (3ed 2013) 260.

92 Statute of the International Criminal Tribunal for the former Yugoslavia, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last accessed 5 May 2015).

genocide, and crimes against humanity.[93] Any person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of any of these crimes, shall be individually responsible for the crime.[94] The jurisdiction of the ICTR, on the other hand, refers to crimes committed within a non-international armed conflict and includes genocide, crimes against humanity, and violations of common article 3 of the Geneva Conventions and Additional Protocol II.[95]

In addition to the *ad hoc* Tribunals, there is the permanent International Criminal Court, established by the Rome Statute of 1998 (entered into force in 2002). In terms of the Statute, the court has jurisdiction over natural persons[96] for the crimes of genocide, aggression, crimes against humanity, and war crimes.[97] Apart from these international tribunals, there are several hybrid courts that apply international law.[98] The crimes specified in the Statutes of all of these judicial bodies are punishable regardless of their criminalisation under the domestic law of the respective states. This means that in these situations, the criminal responsibility of individuals is based exclusively on international law. The question, however, arose as to whether that responsibility derives from customary international law, as suggested by the ICTY in the *Tadić* case,[99] or from the Statutes of the Tribunals, as the ICTR opined in the *Kanyabashi* case.[100] It seems correct to embrace the view of the ICTY, for it would be untenable that individuals would only be obliged not to commit international crimes in circumstances in which there is a statute establishing an international/hybrid tribunal's jurisdiction to prosecute.[101] Besides, even before the adoption of the abovementioned

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93 *Id* at arts 2–5.

94 *Id* at art 7.

95 *Id* at arts 2–4 available at: http://www.unictr.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf (last accessed 6 May 2015).

96 Article 25 of the Statute. Text of the Statute available at: http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf (last accessed 6 May 2016).

97 *Id* at art 5.

98 On the Special Court for Sierra Leone, the Serious Crimes Panels of the District Court in Dili (East Timor) and the Extraordinary Chambers of Cambodia see: Smith *Text and materials on international human rights* (2ed 2010) 218-223.

99 *Prosecutor v Tadic* case no IT-94-1-AR72, Appeals Chamber, Judgment on Jurisdiction, 2 October 1995, par. 134 (see also pars 128–37)

100 *Prosecutor v.Kanyabashi* case no ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997, par 33 35.

101 See Parlett n 2 above at 277.

statutes, the Security Council had stated that 'persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches'.[102]

Unlike under human rights law, in which individuals can refer to the international bodies only if their states of nationality have agreed to such jurisdiction, individuals may be prosecuted under international law regardless of their home states' consent. Such direct application of international law to individuals makes individual criminal responsibility an area in which individuals come closest to being recognised as subjects of international law.

INDIVIDUALS AS OBJECTS OF SECURITY COUNCIL SANCTIONS

During the 20th century. it became clear that individuals and groups of people may influence international peace and security to the same extent as states. This is particularly true of terrorist organisations and their members, who have become a global threat and who are not necessarily connected to any particular state. After 9/11, the international community was faced with the problem of not knowing exactly how to respond to such heinous acts, since international law regulates only inter-state relations in this area, while the status of non-state actors in international law remains ambiguous.

In an attempt to deal with the threat of terrorist activity, the United Nations Security Council began imposing sanctions on groups and individuals who were considered a danger to international peace and security.[103] The Security Council is empowered by the United Nations Charter to undertake actions necessary for the maintenance of international peace and security,[104] including imposing sanctions on responsible actors.[105] However, as much as the Security Council resolutions have always to some extent affected individuals or certain groups, it could hardly be imagined at the time of the adoption of the Charter, that hundreds of individuals would be 'blacklisted' by the

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102 SC Res 780 (1992).

103 SC Res 1137 (1997); SC Res 1267 (1999); SC Res 1333 (2000); SC Res 1390 (2002); SC Res 1455 (2003); SC Res 1483 (2003); SC Res 1526 (2004); SC Res 1617 (2005); SC Res 1735 (2006); SC Res 1822 (2008); SC Res 1904 (2009); SC Res 1989 (2011); SC Res 2083 (2012); SC Res 2161 (2014).

104 Article 24 of the Charter.

105 Articles 41 and 42 of the Charter.

Security Council as suspected terrorists[106] and would be subject to sanctions.[107] This has led to numerous human rights concerns. First of all, individuals under sanction are deprived of the procedural rights which are necessary in any judicial proceedings. If the Security Council imposes financial sanctions or travel bans on individuals, those individuals have no possibility of referring to the Security Council and ask for a review of the Council decision. The imposed sanctions may lead to the violation of various other human rights, such as the rights to health, to freedom of movement, to a private and family life, and others. In addition to general human rights concerns, another problem arose. Since the Security Council decisions bind states, not individuals, the sanctions imposed affect individuals only indirectly. This is to say that states need to invoke measures necessary for the application of the Security Council sanctions. These measures might conflict with states' other international obligations, primarily those involving respect for human rights.[108]

Although states are intermediaries in the process of imposing the Security Council sanctions on individuals, the fact that individuals are the intended targets of those sanctions shows that they are capable of violating the relevant international law norm and consequently be sanctioned for that. This proves that an individual has delictual capacity, which is one of the components of legal personality.

CONCLUSION

Individuals are no longer perceived as objects of international law. Whether they have morphed into subjects of international law remains a matter of controversy among legal writers. Individuals, no doubt, possess certain rights at the international level. What is more, they have mechanisms to enforce those rights even against their own states, although not under general international law. Apart from having rights under international law, individuals can be criminally responsible for the

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[106] At the time of writing, 229 individuals have been 'blacklisted' by the so-called '1267/1989 Committee'. Data available at: http://www.un.org/sc/committees/1267/1267.pdf (last accessed 8 May 2015).

[107] Birkhäuser *Sanctions of the Security Council against individuals – some human rights problems* (2005) http://esil.-sedi.org/english/pdf/Birkhauser.Pdf (last accessed 9 May 2015).

[108] *Nada v Switzerland, ECHR* Grand Chamber, Judgment of 12 September 2012; *Al-Jedda v The United Kingdom*, ECHR, Grand Chamber, Judgment of 7 July 2011; *Case C–402/05 P and C–415/05, P. Kadi and Al Barakaat International Foundation v Council and Commission*. [2008] ECR I–6351.

violation of international law norms. They can be prosecuted before international tribunals, regardless of their home states' consent.

Whether the emergence of individual criminal responsibility and the development of human rights law will be regarded as evidence of individuals assuming the role of 'new' subjects of international law, appears to depend on the notion of the international legal person. In this regard, it is necessary to determine what characteristics are required for an entity to constitute a subject of international law. If one takes a view that an international law subject should have characteristics identical to those of states, in terms of legal, procedural and delictual capacity, individuals would not stand the test for international legal personality. For instance, they do not participate directly in the creation and modification of international law norms, and they enjoy rights arising from treaties solely because states choose to afford them those rights by being parties to the treaties.

Yet, the ICJ stated clearly in the *Reparations* case that the subjects of law are not necessarily identical in their nature or in the extent of their rights. The court rightly observed that the development of international law has been influenced by the requirements of international life, and that the nature of the international law subject depends on the needs of the community at the given time.[109] Following the court's reasoning, it seems appropriate not to apply the same criteria to establish the legal personality of different actors on the international scene.

The majority view is that individuals have not yet become international law subjects. This view rests, in the main, on the assumption that individuals lack some of the characteristics relevant to states. If individuals are expected to acquire all the rights which states currently enjoy, they will probably never become international law subjects. However, one cannot deny that individuals, as holders of rights and duties in international law, do evidence characteristics of international law subjects. If the approach taken by the ICJ in the *Reparations* case is used – that not all the international law subjects need to be identical – there is no reason not to consider individuals as subjects of international law, although with limited capacity in comparison to that of states.

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[109] ICJ Reports 1949 178.