

# THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW

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## I. INTRODUCTION

In both articles and textbooks, numerous authors have focused on the issues of the position of the individual in international law. Although the subject seems to be one of the classic topics of study and research in international law, opinions are strongly divided over both the status and the legal position of the individual in international law, as well as what constitutes the background and frontiers of this legal position.

The evolution and progressive development of the international legal system in the twentieth century, and particularly after World War II, has caused a considerable increase in the importance of humanitarian values in the process of creation of international legal rules. The protection of both individuals and groups from any kind of violence, guaranteeing their freedom and dignity, has become one of the essential concerns of the international community. The Charter of the United Nations (U.N.) states that the "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" is one of its organizational objectives.<sup>1</sup> Moreover, Member-States (States) are required to take joint and separate action in cooperation with the U.N. to achieve the objectives set forth in the charter.<sup>2</sup> Furthering U.N. objectives, a number of U.N. States have entered into several universal and regional international agreements for the protection of rights of the individual.<sup>3</sup> These agreements contain a variety of substantive rights and procedures for their implementation.<sup>4</sup> Along with being

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1. U.N. CHARTER art. 1, para. 3.

2. *Id.* art. 56.

3. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (1950-52) (entered into force Sept. 3, 1953).

4. For example see, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, U.N. Doc. A/6316; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 48th Sess., Supp. No. 16, at 49, U.N. Doc.

enshrined in treaty obligations, the rights of the individual are part of universal customary law and are recognized as part of *jus cogens*.<sup>5</sup>

There is no longer any doubt that the rights of the individual exist outside the domestic jurisdiction of States and that these rights concern the whole international community.<sup>6</sup> Furthermore, in cases where human rights violations against individuals are so grave and extensive as to endanger international peace and security, the U.N. Security Council can take coercive non-military and military action<sup>7</sup> to achieve the cessation of these violations and the elimination of their consequences.<sup>8</sup> In addition to the U.N. Security Council, other main bodies of the U.N. are concerned with ensuring the rights of individuals.<sup>9</sup>

The evolution of individual rights in international law has been exten-

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A/6316 (1966); International Convention for Elimination of all Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195; Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984) [hereinafter Torture Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 221; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Council of Europe Doc. H (87) 4, reprinted in 27 I.L.M. 1152 (1988); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series, No. 36, at 1, OEA/ Ser. L./VII.23 doc.rev.2., (entered into force July 18, 1978).

5. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 48 (1989); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 425-521 (1988) (discussing Peremptory Norms in the International Law of Human Rights). *Jus cogens* is described as "a peremptory norm of general international law [that] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." The Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 336. See also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62 (1999) (describing *jus cogens*).

6. See Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

7. U.N. CHARTER arts. 2(7), 39, 41-42; JOCHEN A. FROWEIN ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 612 (Bruno Simma ed. 1994).

8. Violations of human rights were held as constituent elements of threats to international peace and security in the terms of Article 39 of the U.N. Charter. U.N. CHARTER art. 39. See for instance Resolutions of the U.N. Security Council 841 and 940 on Haiti and Resolution 688 on Iraq. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994); S.C. Res. 841, U.N. SCOR, 3238th mtg., U.N. Doc. S/RES/841 (1993); S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/INF/47 (1991). See also S.C. Res. 764, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/764 (199); S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992); S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); S.C. Res. 955, U.N. SCOR, 48th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994). In these resolutions, the Security Council stressed the indispensable link between protection of human rights and the maintenance of international peace and security by stating that the punishment of persons having committed crimes against humanity and war crimes was necessary for restoration of international peace and security in the sense of the U.N. Charter.

9. U.N. CHARTER arts. 10, 13(1) & 63(2).

sive. This evolution becomes readily apparent when one compares the recent treatment of individual rights under international law with so-called "classical" international law that only recognized States and exclusively governed State's rights and duties.<sup>10</sup> Under "Classical" international law, States had unlimited freedom in the treatment of their nationals.<sup>11</sup>

This article will analyze whether the evolution of individual rights in international law has changed the international legal status of an individual or more specifically, whether an individual has achieved international personality. This article intends to clarify this question by way of analyzing the legal doctrine, international treaties, and the practice of States and international organs in this regard. The article's principal aim is to clarify the international law on this subject as it presently stands. An attempt will be made to outline the relationship between the interest of the international community in safeguarding an individual's basic rights on the one side, and the international legal framework of expressing and protecting such interests on the other. It should be remembered that international law has no monopoly on accumulating and protecting the basic values and interests of the international community. There are other normative systems, such as international morality or *comitas gentium*, which also deal with these aims and interests.<sup>12</sup> When the legal performance of a given interest or value, however, is discussed, the inherent structural and functional limitations within law should be considered based on its sources, subjects, and means of enforcement.

## II. APPROACHES IN DOCTRINE

There are many theoretical views on the nature and extent of the position of the individual in international law. The attitudes vary from totally rejecting the international personality of the individual to the recognition of the individual as the sole subject of international law. The assertion that the

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10. CARL A. NORGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* 11 (1962) (stating that under the classical theory, "states were the sole subjects of international law, whereas no direct relation between that law and individuals existed.").

11. *Id.*

12. International comity is defined as follows:

International comity, *comitas gentium*, is a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighbourliness, mutual respect, and the friendly waiver of technicalities are involved, and the practice is exemplified by the exemption of diplomatic envoys from customs duties. . . . Particular rules of comity, maintained over a long period, may develop into rules of customary law.

Apart from the meaning just explained, the term "comity" is used in four other ways: (1) as a synonym for international law; (2) as equivalent to private international law (conflict of laws); (3) as a policy basis for, and a source of, particular rules of conflict of laws; and (4) as the reason for and source of a rule of international law.

IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 29 (1998)(citations omitted).

individual is the subject of international law emerged at the end of the nineteenth century.<sup>13</sup> After World War II, the weight of this approach considerably increased. Theorists invoke many reasons for asserting international personality of the individual under international law. These reasons mainly have been based on considerations, such as the nature of international law, the progressive development of international legal order, including the increasing incorporation of humanitarian values and principles, the primacy of international law over domestic law, and the direct regulation of the individual's rights and duties by international law. One view, promoted by the French Scholar George Scelle early in the twentieth century, considered a State, as such, as fiction and that the only real subject of international law was the individual human being.<sup>14</sup> This view prompted considerable criticism. Wolfgang Friedmann, for example, commented on Scelle's view "that [if] only individuals were the true subjects of international law, . . . [it could only] be understood . . . in a figurative and moral, rather than a legal and practical, sense."<sup>15</sup> Humphrey Waldock also commented on Scelle's view by saying, "to express the matter in that way is to abandon [the] law for philosophy."<sup>16</sup>

Although opinions are divided regarding the individual under international law, Hersch Lauterpacht, in his revision of Oppenheim's treatise, has been one who has linked the need for, and recognition of, individual legal personality in international law with human rights and humanitarian values.<sup>17</sup> He argues that the traditional position of the individual cannot be unaffected by certain developments that result in empowering the individuals to protect their rights before international tribunals and imposing on them duties directly under international law.<sup>18</sup> In this sense, he has noted, that

[t]he various developments since two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of international law. In proportion as the realisation of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International law.<sup>19</sup>

Lauterpacht, taking into account the lack of rules that would permit the exercise of international personality of individuals and the decisive role of

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13. Humphrey Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 192 (1962). See also POLITIS, *LES NOUVELLES TENDANCES DU DROIT INTERNATIONAL* 59 (1926).

14. See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 233 (1964) (citing to GEORGE SCELLE, *PRECIS DE DROIT DES GENS* 42-44 (1932)).

15. *Id.*

16. Waldock, *supra* note 13, at 192.

17. L. OPPENHEIM, *1 INTERNATIONAL LAW* 636 (H. Lauterpacht ed., 8<sup>th</sup> ed. 1955). Although Oppenheim is listed as the author, Lauterpacht has revised the treatise and has made significant contribution to this treatise. *Id.* at vii.

18. *Id.* at 639.

19. *Id.*

State action in the process of laying down the rights and duties for the individual, recognizes that the individuals are, as a rule, the objects of the law of nations.<sup>20</sup> This circumstance leads Lauterpacht to the assertion that “the fact that individuals are normally the object of international law does not mean that they are not, in certain cases, the direct subjects thereof.”<sup>21</sup> No doubt, Lauterpacht speaks about exceptions that confirm the general rule.

Hans Kelsen is another scholar that is sympathetic to need for individual legal personality under international law.<sup>22</sup> Although he recognizes the general rule that only States are the subjects of international law, he speaks about exceptions to this rule, about “Fälle . . . in denen Einzelmenschen unmittelbar als Subjekte des Völkerrechts auftreten [cases where individuals directly appear as subjects of international law].”<sup>23</sup> Kelsen speaks about exceptions that are, in principle, limited to the possibility that the individual can be held responsible under international law for a violation of a rule of conduct imposed by international law.

Wolfgang Friedmann has formulated an evaluation of the opinions of scholars regarding the recognition of the individual under international law. Friedmann’s evaluation is helpful for perceiving their real essence of the issue,

The most eminent advocates of an active position of the individual in international law, notably Lauterpacht and Jessup, are well aware that in a strict legal sense, the individual cannot be a subject of the law of nations, except within very definite limits and for special purposes. They have therefore drawn a distinction between the individual, as the subject of enforceable claims on the international level and the individual as the beneficiary of a system of international law, in which the states are the subjects and actors, but in which they are directed to take action and assert claims on behalf of individuals.<sup>24</sup>

It must also be noted that the views discussed above derive from authors adhering to the monistic doctrine of international law.<sup>25</sup> The scholars not familiar with monism are more skeptical as to the existence of the international personality of an individual. Oppenheim categorically rejects this proposition, stating, “[s]ince the Law of Nations is primarily a law between States, States are, to that extent, the only subjects of the Law of Nations.”<sup>26</sup> Waldock also appears to reject this proposition as he acknowledges the progressive changes in international law in favor of individual human beings and their

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20. *Id.*

21. *Id.*

22. HANS KELSEN, REINE RECHTSLEHRE [PURE THEORY OF LAW] 327-28 (1960).

23. *Id.*

24. FRIEDMANN, *supra* note 14, at 234.

25. Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993) (describing the monistic doctrine of International Law). See also OPPENHEIM, *supra* note 17, at 38.

26. OPPENHEIM, *supra* note 17, at 636.

rights.<sup>27</sup> Friedmann's attitude appears generally to be the same, although he does not use the concept of the subject of international law in connection with the individual.<sup>28</sup> Brownlie states that although general international law does not prohibit the personality of the individual, it would not be useful to grant the individual international personality because it would mean acknowledging rights that do not exist in reality and would not remove the necessity of distinguishing between individuals and other subjects of international law.<sup>29</sup>

The opinion of Schwarzenberger, a non-monist, also deserves some attention. In his opinion, the individual personality is a question merely of fact and not of principle.<sup>30</sup> Although he generally considers individuals as objects in international law, he admits the possibility of creation of a norm that would grant the individual international personality.<sup>31</sup> Schwarzenberger considers the creation of rules of any character established by an agreement between States permissible. The consequence of Schwarzenberger's approach is that States have unlimited discretion and neither *jus cogens*, nor public policy exists in international law.<sup>32</sup> This is the basis of distinction between Schwarzenberger's view and that of the monist scholars. If, for example, Lauterpacht explains the individual personality by progressive development of international legal order and moral considerations, the attitude of Schwarzenberger is derived from a pragmatic positivism.

The peculiarity of approaches to the issue of international personality is characteristic of the policy-oriented school of thought in international law. In his description of world power processes, Myres McDougal states that the main basis of power is derived from nation-States and intergovernmental organizations.<sup>33</sup> In his opinion, "[t]he other participant groups and entities [including transnational party movements, private associations, and individuals] frequently either act through the state or function as instrumentalities of state policy."<sup>34</sup> In his other research characterizing the position of the indi-

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27. Waldock, *supra* note 13, at 191-211.

28. FRIEDMANN, *supra* note 14, at 232 & 375.

29. BROWNLIE, *supra* note 12, at 66.

30. GEORG SCHWARZENBERGER & E. D. BROWN, A MANUAL OF INTERNATIONAL LAW 64 (1976).

31. *Id.*

32. *Id.* at 24.

On the level of international customary law, any rules of international public order by which the absolute freedom of contract of individual parties is limited are lacking. Thus, in international customary law the legality of conflicting treaty obligations cannot be tested by reference to overriding principles of public policy or *jus cogens*.

*Id.* at 131 (citations omitted). See also HANNIKAINEN, *supra* note 5, at 201.

33. MYRES S. MCDUGAL & FLORENTINO P. FELITIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 13-14 (1961).

34. *Id.*

vidual, McDougal uses extra-legal categories to explain his position.<sup>35</sup> Invoking the names of some famous personalities, he upholds the opinion that the individual can play an important role in world processes.<sup>36</sup> In this research, however, his approach as to the legal position of the individual remains ambiguous.

Rosalyn Higgins, who is an adherent to the policy-oriented theory of international law, has chosen an original approach in evaluating the position of individual in international law. Instead of embracing or rejecting individual personality, she simply proposes to abandon the concept of the subject of international law altogether, replacing it by one of the participant instead.<sup>37</sup> This approach is the consequence of the policy-oriented point of view, according to which international law is not a body of rules governing the conduct of States and other entities, but a particularized form of the decision-making process. A decision making process that is distinguished from mere political decision-making by the significance of reference to the accumulated trend of past decisions, the emphasis on the authority of the persons making the decision and the *a priori* identification of the purposes of the decision as those that will benefit the community as a whole.<sup>38</sup>

By eliminating the concept of the subject of law from international relations, the policy-oriented school introduces into the system of international law the entities that have only occasional interest to this system. In other words, subjects have very little or practically no interests protected under international law. These entities include trans-national political party movements, several churches acting on a trans-national plane, commercial structures, etc. Discussing the place of these entities within the system of international law, Higgins focuses mainly on their interests in a material or transcendent sense, rather than on the possible extent to which these interests could perform under international law.<sup>39</sup> The purpose of replacing the concept of the subject by that of a participant seems to be to remove the necessity of applying the established criteria for determining whether the given entity is the subject of international law. Almost all scholars, whether for or against individual personality, always try to evaluate the position of the individual according to some criteria and to make the conclusion on that basis. Higgins, on the other hand, rejects this method and speaks about participants. She suggests no objective definition of participant in the sense she proposes, saying that the determinations on this are to be made in concrete

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35. See Myes S. McDougal, Harold D. Lasswell & W. Micheal Reisman, *The World Constitutive Process of Authoritative Decisions*, in 1 THE FUTURE OF INTERNATIONAL LEGAL ORDER 73 (Richard Falk & Cyril Black eds., 1969).

36. *Id.* at 93-94.

37. ROSALYN HIGGINS, PROBLEMS AND PROCESS INTERNATIONAL LAW AND HOW WE USE IT 48-55 (1994).

38. *Id.* at 50.

39. *Id.*

cases.<sup>40</sup> Thus, it can be understood that every entity having some contact with international relations can be treated as a participant. This approach does not suggest which entities can and which cannot be participants in the international legal system. Moreover, it cannot answer the same question concerning the subjects of international law.

According to the main tendencies of international legal doctrine in former socialist countries, the individual is not an international person. This has been the dominant orthodox approach of Soviet legal theory for many decades. Some deviations from this point of view can also be observed in the writings of the late 1980s and early 1990s. In the opinion of some scholars from the former Soviet Union, the concept of the subject of law in general legal theory, which is identified with an entity having rights and duties, is to be fully extended to international law.<sup>41</sup> More recent contributions divide the international persons into two groups. The first group covers entities independent from one another in the international system that are entitled to create and enforce international law. The second group covers entities having rights and duties under international law, including the individual. On the basis of such assumptions, the conclusion is made that the individual is an international person.<sup>42</sup> It has also been concluded that the individual is the international person with partial legal capacity, whose importance is gradually increasing.<sup>43</sup>

After this overview of the principal trends in theory concerning the subject of the inquiry, some general conclusions can be made. First, it is generally (and also by eminent advocates of individual personality) accepted that the capacity of States and individuals are of a different degree and character. The majority of those who recognize individuals as international persons also concede that individual capacity is based on a treaty requiring the consent of States, and that it only exists for special purposes or in exceptional cases.

There are many instances of individual legal capacity alleged to be the background of the international personality of the individual. These instances are: 1) the individual has rights and duties under international law; 2) the individual has standing before some judicial and quasi-judicial international institutions for protecting his rights; 3) the rules of international law can be directly applied to the conduct and legal relationships of the individual; 4) the individual, along with private transnational corporations, can participate in international law-making; and 5) under certain conditions, in

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40. *Id.*

41. 1 COURSE OF INTERNATIONAL LAW 159-61 (1990) (in Russian) [hereinafter INT'L LAW COURSE]; CHERNICHENKO, INDIVIDUAL AND INTERNATIONAL LAW 149 (1973) (in Russian).

42. MULLERSON, HUMAN RIGHTS: IDEAS, NORMS, REALITIES, 15-16 (1991) (in Russian); INT'L LAW COURSE, *supra* note 41, at 180-81 (1990) (in Russian).

43. V.A. KARTASHKIN, HUMAN RIGHTS IN INTERNATIONAL AND DOMESTIC LAW 103 (1995) (in Russian).



cases of some breaches of international law, the individual can be held responsible and tried under international law, by international judicial bodies, irrespective of the national State's will and its domestic law.

In the course of inquiry, these instances described above will be discussed, and an attempt to clarify whether these instances create sufficient background for holding the individual as the international person will be made.

### III. INTERNATIONAL PERSONALITY: SOME GENERAL OBSERVATIONS

The starting point in the inquiry as to whether an individual possesses international personality is to clarify some objective preconditions of legal personality in international law. The principle suggested here is that the subject of international law must satisfy both static and dynamic aspects of international personality. Through these categories, the scope and degree of international legal capacity of various entities can be defined. Under the static aspect of international personality, we understand the nature and extent of rights and duties of a given entity and its relationships to other entities acting under international law. The dynamic aspect of international personality explores how the entities concerned acquire and lose their capacity under international law. Acquisition and loss of this capacity and changes in it depend both on the will of the given entity itself and on the will of other actors. Both the static and dynamic aspects are to be applied to an entity that is alleged to possess international personality.

The International Court of Justice (the I.C.J.), with its advisory opinion *Reparations for Injuries in the U.N. Service* (Reparations case),<sup>44</sup> discussed the static aspect of international personality. In the Reparations case, the Court concluded that international rights and duties are an integral part and basis of international personality.<sup>45</sup> Willing to show that the United Nations Organization is able to sue for vindication of its interests, the Court asserted that the international organization was the subject of international law.<sup>46</sup>

At the same time, the Reparations decision is sometimes quoted as confirming that every entity has some rights and duties or can be subjected to international law. Despite its importance as a foundation for international legal order, this decision cannot be understood as confirming the existence of a rule or principle that the Court did not imply or was not called to pronounce upon. One must bear in mind the extent of the questions the U.N. General Assembly included in its request for an advisory opinion.<sup>47</sup> Neither

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44. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11) (Advisory Opinion).

45. *Id.* at 178-79.

46. *Id.*

47. The questions put by General Assembly to the Court were as follows:

I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of as State, has the

the letter nor the spirit of the Opinion corresponds to the attitude that the Court has in any extent touched the legal position of any other category of entities acting in the international plane other than the international organization. Nor can one infer from the Opinion that the Court intended to determine all aspects of international legal personality in general, or by example, of its treatment of the U.N. The Opinion constitutes only the concrete answer to concrete questions contained in the request. Moreover, the rights and duties of the U.N. as described in the Opinion to explain its international personality are much wider than the rights and duties of an individual in international law. The Court spoke about the capacity of the U.N. to enter into treaties, or in other words, to participate in international lawmaking.<sup>48</sup>

The Court's opinion strengthens the proposition that if a given entity is deemed to be an international person, it must be alleged to possess all the attributes of international personality. Even if an actor possesses some aspects of the legal capacity pertaining to the static aspect of international personality, the actor cannot automatically be treated as an international person. This is a natural requirement of international legal order that needs to have the circle of its subjects objectively determined.

The static aspect of international personality, as described in the Court's Opinion, includes the international capacity to have rights and duties, to sue under international law, and the ability to participate in the norm-creating process. The dynamic aspect of international personality, as mentioned above, is concerned with acquisition and loss capacity in international law: how the new subject emerges and how it ceases to exist and, in particular, whether or not the acquisition and loss of legal capacity by a given entity is dependent on the consent of other actors.

As for a State, it is historically considered the sole subject of international law, and its status is derived from general international law. The creation of States and their emergence as subjects of international law is not dependent on the will of any other actor. The legal position of a State cannot be changed without, or against, its will. The institutions that permitted the forced changes in the status of a State, such as protectorate, vassalage, annexation, *debelatio* and others are, no doubt, outlawed under contemporary international law. The principles of the U.N. Charter and, in particular, the principle of sovereign equality no longer permits such institutions to exist.<sup>49</sup> The

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United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining reparation due in respect of the damage caused (a) to the United Nations, (b) to the victims or to persons entitled through him?

II. In the event of an affirmative reply to the point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the state of which the victim is a national?

*Id.* at 175.

48. *Id.* at 179.

49. See generally U.N. CHARTER.

emergence of a State cannot be dependent on recognition from other States. It is generally regarded that recognition of States under modern international law has only declaratory character. For it is not in a position to bring about a state where the factual and legal requirements of the latter's formation are not met, nor is the absence of a recognition in a position to prevent the formation of a State where the factual and legal prerequisites for its formation are met.

It cannot be denied, however, that international law of State responsibility permits the imposition of limitations of various kinds on the legal capacity of the State without requiring the consent of that state. This occurs most often when a State commits an exceptionally grave wrongful act, called by various authors "international crime,"<sup>50</sup> including creating situations that threaten international peace and security as defined in the U.N. Charter.<sup>51</sup> The limitations of this kind may be broad indeed and affect the very essence of statehood and international personality.<sup>52</sup> At the same time, two observations should be made. First, such limitations are of a functional character. They are aimed at, and limited to, the enforcement of legal consequences of an internationally wrongful act, including the particular forms of reparation. Second, the State targeted by these measures retains its residual sovereignty, which will be restored to its full extent after the remedies have been performed and the wrongful consequences have been eliminated. Outside the scope of this exception, the legal capacity of a State remains unaffected by

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50. Giorgio Gaja, *Jus Cogens, Obligations Erga Omnes and International Crimes: A Tentative Analysis of Three Related Concepts*, in INTERNATIONAL CRIMES OF STATE, A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 151 (Joseph H. Weiler, Antonio Cassese & Marina Spinedi eds., 1989). Bruno Simma, *International Crimes: Injury and Countermeasures*, in INTERNATIONAL CRIMES OF STATE, A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 283 (Joseph H. Weiler, Antonio Cassese & Marina Spinedi eds., 1989). Bernhard Graefrath, *International Crimes - A Specific Regime of International Responsibility of States*, in INTERNATIONAL CRIMES OF STATE, A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 161 (Joseph H. Weiler, Antonio Cassese & Marina Spinedi eds., 1989) [hereinafter Graefrath, *International Crimes*]; ANDRE DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES (1996); Bruno Simma, *Bilateralism and Community Interest in the Law of State Responsibility*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 821 (Yoram Dinstein ed. 1988), Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 301 (1994 VI); Bernhard Graefrath, *Responsibility and Damages Caused: Relationship Between Responsibility and Damages*, 185 RECUEIL DES COURS 43 (1984) [hereinafter Graefrath, *Responsibility and Damages*]; Bernhard Graefrath, *International Crimes and Collective Security*, in INTERNATIONAL LAW: THEORY AND PRACTICE 237 (Karel Wellens ed., 1998) [hereinafter Graefrath, *Crimes and Collective Security*]; C. Tomuschat, *International Crimes by States: An Endangered Species? in INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY* 253 (Karel Wellens ed., 1998).

51. Graefrath, *International Crimes*, supra note 50, at 164. Graefrath, *Crimes and Collective Security*, supra note 50, at 41-43.

52. Reparations imposed on Germany after World War II and the provisions of various U.N. Security Council resolutions. See S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

other entities acting on the international plane.

International organizations differ from States in the method of their creation. Their existence, as a rule, is based on a treaty concluded between States,<sup>53</sup> and their powers are expressly fixed in such treaties. In addition to this, international organizations enjoy the objective international personality, as confirmed by the I.C.J. in the Reparations case. The independence and extent of legal capacity of international organizations is increased by the right of its Members to take action not mentioned in the founding treaty if it serves the purposes and principles of the organization.<sup>54</sup> Even the possibility of subsequent evaluation of whether the member has really acted for achieving one of the purposes of the organization does not diminish the objective element in the capacity of organization. As for dissolution of international organization, States, having once created it, are not more entitled to dissolve it. International organizations typically have charters that contain clauses that require the consent of one or more of the organizations' members before the charter can be amended. The charters of many international organizations require that a majority of States consent before an amendment can be added. When a single State withdraws from an organization, it ceases only its membership in it and is not able to affect the objective legal personality of the organization.

With this background, the distinction between the nature of legal capacity of States and international organizations on the one hand, and individuals on the other, is apparent. The individual does not have any legal capacity under general international law. The individual cannot bring a claim against a State when the State is alleged to have violated his rights, only the State of the individual's nationality can bring a claim in international forums, such as the International Court of Justice. Furthermore, the domestic remedies available in the host State must be exhausted before the international forum can be utilized. The claim against the violating State must be made, not on behalf of an injured individual, but on behalf of the State of his nationality. The damage suffered in this case is considered damage to the State, rather than damage to the individual.

This is the model of relationships based on traditional bilateralism. One would look with interest whether the situation is different in the area of fundamental international obligations—obligations *erga omnes*<sup>55</sup>—that comprise obligations, in the field of human rights, having an objective character. These obligations protect individual human beings as such, without regard to their nationality. The claims against their violation can be made not only by the State of nationality of the victim, but also by any other State or international organization, because any subject of international law has the legal in-

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53. The exception is the Organization for Security and Cooperation in Europe (OSCE).

54. See *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (July 20).

55. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (discussing *erga omnes*, obligations of such importance that all States can have a legal interest in their protection).

terest in their protection; they are owed to the international community as a whole. The requirement of exhaustion of local remedies will also not apply in certain cases when the violations concerned are large in extent, have massive and systematic character, or constitute the policy and practice of the State concerned.<sup>56</sup> But here the differences with the bilateralism model end. In cases where *erga omnes* obligations have been violated, individuals do not acquire any direct standing or other feature of capacity under international law. The subjects of international law react not to violations of the rights of the individual purely and simply, but to violations that result in the injury to the interests of the international community on behalf of which they are entitled to claim. Though looking ironic, the importance of the obligations violated does not have any impact on the discretion of States in presenting the claim and demanding cessation and reparation. Though having moral duties in this respect, legally the States remain at liberty to do or to not do this. Also, the U.N. Security Council, with the authority and capability to suppress gross violations of human rights that threaten international peace and security, retains complete discretion in applying non-military or military measures with a view to countering such breaches.<sup>57</sup> The general international law does not recognize the capacity of the individual other than that of a (passive) beneficiary of the rules of international law.

The instances of individual capacity under international law fall mainly within the area of international treaty law. States may, by bilateral or multi-lateral treaties, provide for the rights of individuals or even confer certain competences on international bodies for implementation of these rights. In particular, States may enable individuals to assert their rights before international bodies provided the State against which the complaint is filed has recognized the competence of the judicial or quasi-judicial body. According to the First Optional Protocol to the International Covenant on Civil and Political Rights, the U.N. Human Rights Committee may receive communications from individuals who claim to be the victims of violations of rights enshrined in the Covenant.<sup>58</sup> The Convention against Torture of 1984 enables the Committee Against Torture to receive petitions of individuals from States having recognized the appropriate competence of the Committee.<sup>59</sup> The European Commission of Human Rights and the European Court of

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56. It is generally recognized that the rule on exhaustion of local remedies does not apply in cases when local remedies are ineffective due to the state policy and legislative or administrative practice. Administrative practice is composed of two elements: repetition of acts and official tolerance. PIETER VAN DIJK & G.J.H VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 129-30 (1998).

57. The Security Council, due to its voting procedures, retains complete discretion whether to adopt military or non-military measures for maintenance or restoration of international peace and security. U.N. CHARTER art. 27.

58. See generally *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

59. See generally *Torture Convention*, *supra* note 4.

Human Rights can receive individual applications concerning the alleged breaches of provisions of the European Convention on Human Rights and Fundamental Freedoms.<sup>60</sup> The American Convention on Human Rights guarantees the possibility of making individual applications before international bodies, such as the American Commission and the Court of Human Rights.<sup>61</sup> The African Charter on Human and People's Rights confers on the African Commission of Human Rights the competence to receive individual communications concerning the existence of cases of serious and massive violations of Human Rights.<sup>62</sup> The extent of the capacity under international law conferred upon individuals in such a way is expansive indeed. And this capacity has been one of the main theoretical arguments supporting the perception that the individual is a subject of international law. For clarifying whether the access to international human rights bodies can qualify the individual as an international person, an analysis of the legal nature of this capacity is necessary.

The access of individuals to international human rights organizations is based, as already emphasized, on a treaty concluded between States. It is derived from the consent of States to bestow upon individuals such a capacity. Under international law, the States are entitled to free themselves from engagements, which create standing for individuals before international bodies.<sup>63</sup> The conclusion can be that the individual has no inherent capacity under international law. International capacity comes into existence if and insofar as the States deem it appropriate. This proposition is not an empty statement. The necessity of consent of States makes itself clear not only at the stage of signing and ratifying the human rights instrument but also in the additional requirement that the States must have recognized the competence of the international bodies in order to be subjected to their procedures.<sup>64</sup> In the case of human rights organizations, the general character of its founding declaration on the recognition of competence suffices. Some other instruments, for instance, the International Convention on Settlement of Investment Disputes (ICSID), requires the consent of a State in each concrete case to be subjected to the conciliation or arbitration procedure of the conven-

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60. See generally European Convention on Human Rights, *supra* note 4.

61. See generally American Convention on Human Rights, *supra* note 4.

62. See generally African Charter on Human and Peoples' Rights (Banjul Charter) June 27, 1981, 21 I.L.M. 59.

63. "Under general treaty law . . . States can amend or terminate treaties which provide rights for individuals." CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 121 (Ian Brownlie ed. 1993). See also European Convention on Human Rights, *supra* note 4, art. 12; American Convention on Human Rights, *supra* note 4, art. 78; Torture Convention, *supra* note 4, art. 31.

64. The 11th protocol of the European Convention on Human Rights removed the requirement of making declarations for recognition of jurisdiction of the European Court of Human Rights. Eleventh Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, *Europ. T.S. No. 155*, art. 34. The procedure of individual applications, however, is based on the consent of Contracting Parties.

tion.<sup>65</sup> From such a state of affairs, one hardly can infer any indication as to the international personality of the individual.

This situation leads to more general considerations. International personality, being a general concept and applicable throughout the whole fabric of the legal system within which it operates, has an objective character and is opposable to any other actor touching the given legal system. The capacity of the individual human being under international treaties is far from possessing any objective character. An individual cannot use his international legal capacity everywhere and against everyone: only against those States that have recognized such standing. Although created by States in a subjective manner by a treaty, the legal capacity of international organizations assumes an objective character and is opposable to everyone. An international organization is an international person, according to the undeniable intent of the States that created it. The same intent is not present in the case of the individual. The illustration of this through examples seems helpful. Suppose that individual X is a national of France, a country that recognizes the competence of the European Court of Human Rights to receive individual applications for redress. X claims that France has violated his rights while under its jurisdiction. X may apply to the European Court and request a judgment against France. The Court will consider the case and give its decision. If X, however, claims that the United States, a country that does not recognize the competence of international human rights bodies, violated his rights while in the United States, X will not have any capacity in international law. Neither the European Court, nor any other international body, will accept his complaint. The only way for X to redress his injury against the United States under international law is if France exercises its right of diplomatic protection of its nationals. In such a case, the individual does not have any standing under international law. The sole source of his claim is the will of the State of his nationality.

Let us consider another example. Individual Y is a national of Thailand, a country that does not recognize the competence of any international human rights body. Y alleges her rights guaranteed under the international obligations of Thailand were violated. Y has no international remedy against her government because she has no international capacity. Assume Y arrived in the United Kingdom and while she is there her rights are violated. Now Y can exercise her international legal capacity and apply to the European Court of Human Rights for redress. The Court will consider the case and deliver its decision.

These examples show that the capacity of the individual under international law can be exercised only in limited circumstances. It does not have an objective character and is opposable in only a very small part within in-

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65. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18. 1965, art. 36.2, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter I.C.S.I.D. Convention].

ternational legal relations. The concept of the subject of law in general, and not only in international law, envisages the capacity of objective character opposable to all the actors within the legal system concerned.

Along with features of the subject of law in general, some components of the concept of the subject of international law should be emphasized. For international law, the legal personality means much more than for the purposes of domestic law. Under the decentralized nature of international legal order, the legal personality is not merely identical with the possession of rights and duties. Because there are no centralized law-making and law-enforcing authorities in the international society, the functions concerned lie with entities called international persons. The essence of international personality consists, therefore, not only in having rights and duties, but also in the capacity to participate in international lawmaking and to enforce the rules of international law, i.e., to assume some functions of public character along with pursuing one's own personal or private interests. The capacity to protect and to vindicate public interest is an inherent component of international personality. With the emergence of concepts of common interest and also with incorporation of humanitarian values in international legal order, the States, as international persons, have assumed the tasks of suppressing the crimes against the law of nations, such as piracy and slave trade. In contemporary international law, the States and international organizations are entrusted with the function of protecting the interests of the whole international community by enforcing *erga omnes* obligations.<sup>66</sup> Under international law, the capacity to exercise such a function falls within the monopoly of States and international organizations.

#### IV. INTERNATIONAL LAWMAKING AND THE INDIVIDUAL

An important aspect of international personality is the ability to participate in the norm-creating process in international law. This proposition can be confirmed by the fact that all kinds of entities whose international personality is beyond doubt (in theory and in practice) possess such a capacity. First of all, the treaty-making capacity of States and international organizations, which is conferred upon them by international law, should be mentioned. Customary international law on treaties is embodied in The Vienna Convention of 1969 on the Law of Treaties and the Vienna Convention of 1986 on the Law of Treaties Concluded between States and International Organizations or between International Organizations.<sup>67</sup> These conventions do not govern the agreements concluded between States and private indi-

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66. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

67. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21). See also *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 53, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).



viduals or corporations because such agreements are regulated by the domestic legal system that the contract is mainly connected.<sup>68</sup>

There is, however, a considerable trend in theory and in practice that favors placing the contracts concluded between a State and a foreign private corporation (State contracts) on an equal footing with international agreements by assuming that State contracts are, or may be, governed by international law. The main reasons for such thinking are the wide political and economic implications of such contracts, both on the economy of the State concerned and on international political relations in general.<sup>69</sup> The necessity of applying international law to State contracts arises from the high level of discretion possessed by host States that permits amendments to their legislation that might be unfavorable to a private contracting party.<sup>70</sup> The need for radical revision of traditional private law approaches to State contracts has also been asserted.<sup>71</sup> Neither the theory, nor the practice, is unanimous on all points in this area. There are many judicial and arbitral decisions based on points of view different from one another.

The classical approach of international law to the status of State contracts is manifest in the decision of the Permanent Court of International Justice (the P.C.I.J.) in the *Serbian Loans* case.<sup>72</sup> In that case, the Court held that insofar as the agreement is not concluded between subjects of international law, the municipal law of the State concerned shall govern it.<sup>73</sup> The International Court of Justice, the P.C.I.J.'s successor, has manifested the adherence to this principle. In the *Anglo-Iranian Oil Company case*, the I.C.J. refused to exercise jurisdiction over a contract dispute between Iran (then the Persian Government) and a British oil company because the Persian government did not consent to the court's jurisdiction over a "concessionary contract between a government and a foreign corporation," implying that an oil company was not a subject of international law.<sup>74</sup> The Court held that this con-

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68. See and compare the various positions, McNair, *The General Principles of Law Recognized by Civilized Nations*, 1957 BRIT. Y.B. INT'L L. 1; Derek W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 1988 BRIT. Y.B. INT'L L. 49, 52-53; Waldock, *supra* note 13, at 73; Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEGAL STUD. 259 (1997); Andrea Giardina, *State Contracts: National versus International Law*, 5 ITAL. Y.B. INT'L L. 147 (1980-81); Tharanjan Amerasinghe, *State Breaches of Contracts with Aliens and International Law*, 58 AM. J. INT'L L. 881, 904-06 (1964); SORANRAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT 331, 338-55 (1994).

69. FRIEDMANN, *supra* note 14, at 222.

70. Giardina, *supra* note 68, at 153.

71. Myes McDougal, *International Law, Power and Policy: A Contemporary Perspective*, 82 RECUEIL DES COURS 249-53 (1953); Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEGAL STUD. 259 (1997).

72. Götz, *Serbian Loans Case*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 256-57 (Rudolph Berhardt et al., eds., 1992).

73. *Id.*

74. Rudolf Dolzer, *Anglo-Iranian Oil Company Case*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 167-68 (Rudolph Berhardt et al., eds., 1992).

tract was not an international treaty and declared itself incompetent to hear the matter.<sup>75</sup>

The arbitral practice, however, is characterized by considerable diversity. The decisions distinguish and depart from one another in matters concerning the governing law in respect with contract, as well as arbitration procedure.

The *Aramco*<sup>76</sup> arbitration supports the viewpoint that the municipal law of a host State governs State contracts. *Aramco* also supports the idea that municipal law is the starting-point for determining the rights and obligations of the parties.<sup>77</sup> After it was ascertained that the law of the host State did not contain the rules on concessionary contracts, the *Aramco* tribunal referred to general principles of law, customs, and practice in the oil business, and the notions of pure jurisprudence.<sup>78</sup> Moreover, it expressly excluded the application of the rules on interpretation of treaties to concession agreements.<sup>79</sup> International law, according to *Aramco*, can have relevance only in areas that are incapable of being governed by any system of domestic law. Therefore, in *Aramco*, domestic law applied because of State sovereignty in its territorial waters.<sup>80</sup>

The arbitration decisions in the *Abu-Dhabi Oil Arbitration*<sup>81</sup> and *Ruler of Qatar* advanced the view that municipal law governs State contracts. In *Abu-Dhabi Oil Arbitration*, the tribunal held that municipal law is of primary relevance in such cases because of the intrinsic connection between a contract and the law of the host State, stating:

This is a contract made in Abu-Dhabi and wholly to be performed in that country. If any municipal system were applicable, it would prima facie be that of Abu-Dhabi. But no such law can reasonably be said to exist. The sheikh administers a purely discretionary justice with assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.<sup>82</sup>

This was the starting point of the arbitrator's decision before resorting to "principles rooted in the good sense and common practice of the generality

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75. *Id.*

76. Rudolf Dolzer, *Aramco Arbitration*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 207 (Rudolph Berhardt et al., eds., 1992).

76. *Id.* at 208-09.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Rudolf Dolzer, *Abu-Dhabi Oil Arbitration*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1-2 (Rudolph Berhardt et al., eds., 1992).

82. McNair, *supra* note 68, at 13 (citing *Petroleum Dev. Ltd. v. Sheikh of Abu Dhabi*, 18 I.L.R. 144 (1951) (Award of September, 1951)).

of civilised nations—a sort of modern law of nature.”<sup>83</sup> In the *Ruler of Qatar* arbitration, it appears the municipal law of Qatar was not applied for the same reason. The arbitrator ascertained that the law of Qatar “does not contain any principles which would be sufficient to interpret this particular contract” and on this basis the arbitrator found that the “principles of justice, equity and good conscience” applied.<sup>84</sup> In the *Sapphire* arbitration, the arbitrator relied on a different rationale when he excluded the application of Iranian domestic law. Unlike the *Ruler of Qatar* and *Abu-Dhabi Oil* arbitrations, the *Sapphire* arbitrator concluded that domestic law could not protect the company against discretionary legislative changes by the host State.<sup>85</sup> On this basis, the arbitrator decided to apply general principles of law recognized by civilized nations.<sup>86</sup> The *Lena Goldfield* decision appears more radical because the tribunal decided not to apply the law of the host country (which it recognized to be otherwise applicable) simply because it concluded that Russian law, as domestic law, was inappropriate to apply before the international tribunal. Additionally, it concluded that the acting Foreign Commissary of Russia signature on the agreement sanctioned “application of international rather than merely national principles of law.”<sup>87</sup> Here again, the rules found applicable were the general principles of law.<sup>88</sup>

The possibility of applying international law to State contracts is most widely reflected in the *Libya-Oil Companies Arbitration* decision.<sup>89</sup> *Libya-Oil Companies Arbitration* was a dispute between Libya and two American oil companies arbitrated by Umpire Dupuy.<sup>90</sup> Dupuy held that the contract between the State (Libya) and the private oil private company could be based on international law and that international law was the basis of binding force for such contracts.<sup>91</sup> The law governing the contract, according to Dupuy, consists of principles common to Libyan law and international law and, in the absence of either, the general principles of law.<sup>92</sup> *Libya-Oil Companies Arbitration* exemplifies the idea of the internationalization of State contracts.

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83. *Id.*

84. *Id.* at 14 (citing *Ruler of Qatar v. International Marine Oil Co.*, 20 I.L.R. 534 (1953) (Award of June, 1953)).

85. *The Sapphire Arbitration*, 35 I.L.R. 136 (1967).

86. *Id.*

87. McNair, *supra* note 68, at 11 (citing *Lena Goldfields, Ltd. v. Russia* (Judgment of Sept. 3, 1930)). In the author's opinion, *Lena Goldfield* contains internal contradictions. The tribunal shared the view that the contract was governed by Russian law, however, it refused to apply Russian law without trying to find some exception or justification in applicable law or in contract itself.

88. *Id.*

89. Rudolf Dolzer, *Libya-Oil Companies Arbitration*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 215, 216 (Rudolph Berhardt et al., eds., 1997).

90. *Id.*

91. *Id.*

92. *Id.*

The *BP v. Libya Arbitration*,<sup>93</sup> from the logical point of view, can be placed somewhere in between the two approaches mentioned above. The arbitrator found that Libyan law primarily applied and, where it would be incompatible with international law, the general principles of law had to apply.<sup>94</sup> In this decision, however, the applicability of international law, as such, was not mentioned.

After this analysis, it is possible to categorize the decisions. Municipal law governed the State contracts in the *Aramco, Ruler of Qatar, and Abu-Dhabi Oil* disputes. Applying the principles advanced in these cases, the State's own legislation governs the contracts and companies, and neither international law, nor general principles of law (understood in whatever sense) will be applicable. This is the approach supported by the largest group of decisions.

The *Sapphire* and *Lena Goldfield* decisions exclude the application of municipal law to State contracts on a voluntary and subjective basis, rather than on objective considerations. These decisions nevertheless do not make international law, as such applicable to the contract. Although serving as a test for the legality of domestic law in the *BP v. Libya* decision, international law still did not directly govern the State contract in that arbitration. In *BP v. Libya*, the arbitrator determined that Libyan law was incompatible with international law, hence the general principles of law applied. The only case supporting applicability of international law to State contracts is *Libya-Oil Companies Arbitration*. In *Libya-Oil Companies Arbitration*, however, international law was not held exclusively applicable and was applied concurrently with Libyan law. In cases where the two legal systems diverge, the general principles of law apply rather than international law. Although *Libya-Oil Companies Arbitration* is often quoted as the most radical reflection of the role of international law in the area of State contracts, *Lena Goldfield* and *Sapphire* seem in some aspects more far-reaching; they simply render the domestic law *prima facie* inapplicable, while *Libya-Oil Companies Arbitration* acknowledges the role of domestic law to some extent.

Common principles can hardly be deduced from the decisions considered. The significance of domestic law is confirmed in a majority of the decisions. Although the role of international law is mentioned in two of the decisions, the ultimate grounds for all of the decision considered was the general principles of law. The question may arise whether this fact is tantamount to application of international law in these decisions. The nature of the general principles of law implies that they exist both within and outside international law. And mention made to them in an arbitral award cannot in itself be evidence of an intention on the part of an arbitrator to apply international law. As McNair considers, mention of this source of law does not in-

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93. Rudolf Dolzer, *British Petroleum v. Libya Arbitration*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 505 (Rudolph Bernhardt et al., eds., 1992).

94. *Id.* at 506.

volve applicability of international law, the latter being the law applicable between States.<sup>95</sup>

A reference to the general principles of law in some decisions, as in *Libya-Oil Companies Arbitration* and *Lena Goldfield*, is not sufficient grounds for holding that international law applies to State contracts under the heading of general principles of law. As confirmed both in theory<sup>96</sup> and judicial practice,<sup>97</sup> the general principles of law as incorporated in the I.C.J Statute comprise not only the principles belonging to international law, but also the principles common to most domestic legal systems, to all kinds of societies, and also principles stemming from the very idea of law. They are not the product of international law, but simply are incorporated by it for the purpose of adaptation to progressive legal values. Moreover, the decisions associate the general principles of law with natural law (*Abu-Dhabi Oil Arbitration*), with private international law, and with the ideas of law (*Aramco*), equity, and justice (*Ruler of Qatar*). It is difficult to find here any invocation of international law *per se*. The *BP v. Libya* decision, where the roles of the general principles of law and of international law are separately defined and are different from each other, also makes it clear that the arbitrators do not consider the general principles of law as being identical to international law.

This overview of the arbitral practice on State contracts suggests the conclusion that the capacity of an individual, as well as of a corporation, to participate in international law-making is not well-founded in law. The decisions, though mentioning international law in some aspects and relations, do not intend (except one of them) to place the State contract on an equal footing with international treaties. Moreover, the unwillingness to apply the domestic law of a State is justified by some exceptional circumstances specific to the particular case.

Moreover, it can be suggested that, owing to the nature of State contracts, they are not designed to be governed by international law. The main requirement for every kind of agreement, whatever its name and governing law, is that it must be concluded and performed under conditions of equality of its parties. If we assume that a State contract is governed by international law and that the private corporation, as an international person, can make claims against the State under international law, the equality of parties will be nothing more than illusory. International law, owing to its inter-state structure (however conservative it may look) cannot offer an equal remedy to the State. The State cannot sue the private corporation under international law.<sup>98</sup> Moreover, international law does not include the provisions as to how

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95. McNair, *supra* note 68, at 10, 15 & 19.

96. Compare OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 47-48 (1991) with Waldock, *supra* note 13, at 54.

97. Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen, (Denmark v. Norway) 1993 I.C.J. 169, 237 (Weeramantry, J., sep. op.);

98. Amerasinghe, *supra* note 68, at 905.

its rules against private corporations shall be enforced. In case an owner of a private corporation ends his business in a host country without having paid the price of concession to the government, the latter has no remedy under international law. No claim can be made nor any counter-measures taken against the State of the private corporation because the State does not commit an international wrong purely and simply when one of its nationals (a corporation) breaches a State contract.<sup>99</sup>

Based on the foregoing considerations, the traditional model of diplomatic protection seems to be equally applicable to the cases involving State contracts. In case of a breach of contract by a State, and after the corporation has exhausted its available domestic remedies, the national State of corporation is entitled to present an international legal claim to the violating State and to demand reparation under international law.

Arbitration and stabilization clauses within State contracts may be seen as factors removing it from the host State's legal system.<sup>100</sup> However, the duty of the parties, particularly of the State, to appear before an arbitral tribunal, does not in itself place the contract outside the host State's domestic law. Private arbitration is one of the means of dispute settlement in civil, corporate, and contract law in many countries. The arbitration mechanism under the International Convention on Settlement of Investment Disputes (ICSID) seems to reflect the traditional diplomatic protection system.<sup>101</sup> The ICSID confirms the right of a State to require the exhaustion of all domestic remedies by an investor.<sup>102</sup> According to the Convention, the State is, in every case, free to give its consent to arbitration.<sup>103</sup> The arbitral tribunal primarily applies the domestic law of the State and such rules of international law as may be applicable.<sup>104</sup> *Non liquet* may not be invoked.<sup>105</sup> The situation bears some semblance to the outcomes reached in the *Aramco*, *Ruler of Qatar*, and *Abu-Dhabi Oil Arbitration* cases, but one caveat should be borne in mind—a State may, before giving its consent to arbitration, prevent the application of international law, although it cannot prevent the application of general principles of law due to the prohibition of *non liquet*.

Stabilization clauses impose a duty on the State not to amend its legislation governing the contract after it has been concluded. In a wider plane, stabilization clauses are not able to restrict the freedom of States to take action in the public interest.<sup>106</sup> The parties, while incorporating stabilization clauses,

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99. See Draft Articles of the ILC on State Responsibility, [1976] 2 Y.B. INT'L L. COMM'N 95, 70 (Part II)[hereinafter Draft articles of ILC].

100. Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEGAL STUD. 259 (1997).

101. I.C.S.I.D. Convention, *supra* note 65, art. 26.

102. *Id.*

103. *Id.* preamble & art. 36, para. 2.

104. *Id.* art. 42, para. 1.

105. *Id.* art. 42, para. 2.

106. SORANRAJAH, *supra* note 68, at 328-29.

do not intend to remove the contract from the area of domestic law. On the contrary, stabilization clauses merely serve to create a safe environment for the operation of contract within the domestic law of the State.

The approach favoring the submission of State contracts to the domestic law of the State has received support in practice after the Charter on Economic Rights and Duties of States was adopted by the U.N. General Assembly.<sup>107</sup> Confirming the permanent sovereignty of every State over its natural resources, article two of the Charter states that every State has the right “[t]o regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment.”<sup>108</sup>

A further provision of the same article specifically concerns the applicable law in case of nationalization: “[I]n any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals.”<sup>109</sup>

The Charter on Economic Rights and Duties of States, as a resolution of the U.N. General Assembly, is not, of course, a binding document, but only a body of recommendations. The Charter’s provisions may well have been crystallized into customary international law in a sense advanced by the I.C.J. in the *Nicaragua* case.<sup>110</sup> This view, however, has been strongly doubted because the capital-exporting States have not supported the Charter.<sup>111</sup> It has also been emphasized that the capital-exporting States did not insist on the applicability of international law to State contracts in the course of adoption of the Charter. The main focus of their interest was that the State, while regulating State contracts under its domestic law, shall comply with its international obligations.<sup>112</sup> It is important to note that in the *Nicaragua* case the I.C.J., trying to deduce the customary law character of the U.N. General Assembly resolution, referred not only to its provisions, but also to the attitudes of States expressed in the process of its adoption.<sup>113</sup>

Even if the invoked provisions of the Charter on Economic Rights and Duties do not embody international customary law, the proposition that State contracts are governed by international law cannot be tolerated. Taking into account the proportion of votes given in the General Assembly for and against adoption of this resolution, it is apparent that such a view cannot be

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107. G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974), reprinted in 14 I.L.M. 251, 255 (1975).

108. *Id.* art. 2.

109. *Id.*

110. In *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. REP. 14, para. 188 (June 27).

111. HIGGINS, *supra* note 37, at 27-28. For statistical data of U.N. General Assembly voting on the Charter see, Giardina, *supra* note 68, at 162.

112. Giardina, *supra* note 68, at 162.

113. *Nicar. v. U.S.*, 1986 I.C.J. REP. 14, para. 188 (June 27).

in accordance with the will of majority of States within the international community. Moreover, if the Charter remains the document of purely recommendatory character, the state of law under general (customary) international law leaves the regulation of foreign investments with a State. The State is not allowed, according to the *Lotus* case, "to overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."<sup>114</sup>

#### V. THE ISSUE OF DIRECT APPLICABILITY OF INTERNATIONAL LAW TO INDIVIDUALS

The issue whether the rules of international law can directly govern the rights and duties of individuals has been one of the important considerations for answering the question whether an individual is the subject of international law. In this respect, it has been widely argued that the rules of international treaties, which provide for the rights for individuals, are directly applicable to them.<sup>115</sup> The main points stressed as evidence of direct applicability of international law to individuals have been the primacy of international law over domestic law as perceived by the monistic doctrine and the language and structure of treaty obligations established for protection of the individual. It is therefore necessary to analyze the nature of the obligations enshrined in such treaties, the main category of these being the human rights treaties.

It is undeniable that the human rights treaties do not aim to safeguard the interests of States. The object and purpose of these treaties is to protect the individual human being, not to create the subjective and reciprocal rights of contracting parties themselves. This principle has been affirmed many times in international jurisprudence.<sup>116</sup>

Although human rights treaties are distinct from other types of treaties, international agreements have many similarities. The interests underlying the Boundary Delimitation Treaty and those underlying, for example, the U.N. Convention against Torture, are different from each other. In the first Treaty, the contracting parties intend to ensure security and certainty at their borders by pursuing their subjective interests by way of reciprocity. In the second Treaty, the contracting parties are interested in the protection of individuals from torture, regardless of their nationality. Though the interests involved in these two treaties are different, it must be conceded that the legal framework for embodying these interests in international obligations, particularly in treaty obligations, is the same. The treaty, whatever its objective, defines the

114. S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 19 (Sept. 7).

115. OPPENHEIM, *supra* note 17, at 637.

116. Reservations to the Convention on Genocide, 1951 I.C.J. REP. 15, 23 (Advisory Opinion of May 28); The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A), no. 2, para. 27 (Sept. 4, 1982).



obligations and rights of States. Human rights treaties are no exception to this principle. Though affirming their objective to protect individual human beings and, moreover, to create collective enforcement mechanisms for this purpose,<sup>117</sup> the human rights treaties create rights and impose obligations on States. This is clear from the general obligations enshrined in treaties such as the Covenant on Civil and Political Rights,<sup>118</sup> the Convention for Elimination of all Forms of Racial Discrimination,<sup>119</sup> the Convention against Torture,<sup>120</sup> the European Convention on Human Rights,<sup>121</sup> the American Convention on Human Rights,<sup>122</sup> and others.

The analysis of these general obligations reveals that in these instruments no mention is made as to their direct applicability to individuals. Moreover, these instruments give the States the freedom to choose the means by which they will guarantee to individuals the exercise of the rights guaranteed in these instruments. This also includes the freedom to decide whether to make these instruments directly applicable to individuals. In this sense, the obligations undertaken under human rights treaties are obligations of results and not those of means, as distinguished from each other in the International Law Commission's draft articles on State responsibility. Obligations of result, as emphasized by the Commission, do not require a particular course of conduct on the part of the State. The Commission stresses, moreover, that the obligations defining the rights of the individual in human

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117. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, preamble, para. 4.

118. International Covenant on Civil and Political Rights, *supra* note 4, art. 2.

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to their jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes . . . to adopt such legislative and other measures as may be necessary to give effect to the rights recognised in the present Covenant.

*Id.*

119. International Convention for Elimination of all Forms of Racial Discrimination, *supra* note 4, arts. 2-7.

120. Torture Convention, *supra* note 4, art. 2 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.").

121. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, art. 1. "The High contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention." *Id.* See also VAN DIJK & VAN HOOFF, *supra* note 56, at 17-18.

122. "The states parties to this convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms." American Convention on Human Rights, *supra* note 4, art. 1. According to article two the states-parties undertake to adopt the necessary legislative and other measures "to give effect to those rights and freedoms." *Id.* art. 2.

rights treaties do not impose on States the obligations of means, but only obligations of result.<sup>123</sup> Obligations of result are based, by their essence, the respect of international law for the internal freedom of the State. This means that the State adopting the human rights instrument, being bound to implement the obligations enshrined therein, is not obliged to make their norms directly applicable to individuals under its jurisdiction. Although, as Meron states, the "obligations of means are increasingly stated in contemporary international human rights treaties for government-citizen relations,"<sup>124</sup> these treaties do not obligate the States to apply them to individuals directly and without transformation, but rather to create conditions by way of their legislative, administrative, and judicial measures for achieving performance of the obligations stated therein. This fact creates the considerable basis for arguing that human rights treaties, by their very nature, are not intended to be directly applicable to individuals under the State's jurisdiction.

International human rights instruments can be directly applicable to individuals only if the constitutional legislation of the State concerned recognizes the primacy of international treaties over domestic law and thus permits their direct application within its domestic legal order by its national courts. If the constitution of a State contains no such clause, the human rights instruments cannot be directly applicable to individuals.<sup>125</sup> Their provisions can be applicable to individuals only if transformed into domestic law by legislation of the State. Both of these cases, although differing from each other in method of compliance with human rights instruments, show that international law does not predetermine whether the rule of international law directly applies to individuals. The decisive point in this regard is the domestic law of the State. One should draw a clear distinction between undertaking the obligations under human rights instruments, on the one hand, and the status of these obligations under the domestic law of the State. The content and extent of these obligations is determined solely by international law. Their status in domestic law, and therefore their applicability to individuals, falls within the exclusive competence of the domestic legislator. Even in legal systems recognizing the direct applicability of treaties in domestic legal order, this phenomenon exists in virtue of domestic and not of international law.

Lauterpacht, for instance, confirms that the rules of international law providing the rights for individuals are not directly applicable:

International Law is indeed the background of these rights, in so far as the duty to grant them is imposed upon the several States by International Law. It is therefore quite correct to say that individuals have these rights in

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123. Commentary to draft article 20, [1977] 2 Y.B. INT'L L. COMM'N 19-20 (Part II) 19-20.

124. MERON, *supra* note 5, at 184.

125. Even if it contains such a clause, this must be understood as a kind of adoption by a state of a legislative measure for giving effect to the rights and freedoms embodied in an international instrument in its domestic law as required by an instrument itself.

conformity with, or according to, International Law, provided it is remembered that, as a rule, these rights would not be enforceable before national courts had the several States not created them by their Municipal Law.<sup>126</sup>

And further:

Such treaties do not normally create these rights, but they impose the duty upon the contracting states of calling these rights into existence by their municipal laws. [The] individuals do not, as a rule, acquire any international rights under these treaties, but the states whose subjects they are have an obligation towards the other States of granting such favours by its municipal law.<sup>127</sup>

While Lauterpacht admits that this is the normal operation of international law, he speaks about cases when “States may, and occasionally do, confer upon individuals, whether their subjects or aliens, international rights *stricto sensu*, i.e., rights which they acquire without the intervention of municipal legislation.”<sup>128</sup> While there may be no doubt as to the possibility of such a process, it must be conceded that it cannot work solely on the basis of international law. The treaty conferring the rights on individuals might impact them only if the direct applicability of the international treaty within the domestic legal order of the State concerned is possible. International law cannot guarantee such an option, since it is outside of its reach.

Some precedents are, nevertheless, invoked. A question was posed to the Permanent Court of International Justice in *The Jurisdiction of the Courts of Danzig*<sup>129</sup> whether pecuniary claims could be brought by individuals before municipal courts on the basis of an international agreement. The Court replied that “it cannot be disputed that the very object of 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.”<sup>130</sup>

In doctrine there exists difference of opinion on how the advisory opinion of *The Jurisdiction of the Courts of Danzig* should be understood. Lauterpacht, for instance, considers this decision to be an evidence of individual personality.<sup>131</sup> Lord McNair disagreed,<sup>132</sup> as did Friedmann, who wrote that Lauterpacht’s view of the *Danzig* Opinion was “somewhat over-

126. OPPENHEIM, *supra* note 17, at 637.

127. *Id.* at 637-38.

128. *Id.* at 638.

129. *Jurisdiction of the Courts of Danzig*, 1928 P.C.I.J. (ser. B) No. 15, at 17-18 (Advisory Opinion of Mar. 3).

130. *Id.*

131. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 28 (1950).

132. CHINKIN, *supra* note 63, at 13-14 n.63 (noting McNair’s disagreement with Lauterpacht’s interpretation of the *Jurisdiction of the Courts of Danzig Case*, 1928 P.C.I.J. ser. B, No. 15, 16-24 (Mar. 3) (advisory opinion), while citing to A. McNair, *THE LAW OF TREATIES* 337-38 (1961)).

enthusiastic.”<sup>133</sup> In general, the precedents established by the judicial system in that case are considered in doctrine as “products of a power of victors in a major war, to impose, by virtue of their temporary political or military superiority, not only their political conditions, but also their legal concepts.”<sup>134</sup> And further “[t]he victors of the First World War were able, in the Treaty of Versailles, to couple the granting of independence to the newly formed States, such as Poland, with the imposition of legal obligations going beyond the general state of international law - not repeated or continued since.”<sup>135</sup> Although this comment is from the 1960s, it is just as valid today.

In arguing that international human rights treaties directly provide the rights for individuals, the language of some instruments is invoked. The substantive provisions of the Covenant on Civil and Political Rights,<sup>136</sup> the European Convention of Human Rights,<sup>137</sup> and the American Convention on Human Rights<sup>138</sup> describe not the obligations of States, but the rights of individuals. This circumstance does not make the instruments mentioned self-executing if they are not made so according to the domestic law of States. Another group of human rights instruments, including the Genocide Convention,<sup>139</sup> Convention on Elimination of All forms of Racial Discrimination,<sup>140</sup> Convention Against Torture,<sup>141</sup> the Covenant on Economic, Social and Cultural Rights,<sup>142</sup> and the Convention on the Rights of the Child,<sup>143</sup> use different language in their substantive provisions. They do not mention immediately the rights of individuals, but instead the obligations of States to respect and to ensure these rights. No conclusion can be made on that basis that these two groups of documents differ from each other as to the nature and reach of the obligations. All of these instruments create the obligations and corresponding rights for States. The later reserve the freedom to regulate how these instruments will come in contact with individual human beings.

It is thus clarified that international law does not impose obligations on States to make their rules directly applicable to individuals under their jurisdiction. The obligation of States stemming from rules protecting individual

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133. Wolfgang Friedman, *The General Course in Public International Law*, 127 RECUEIL DES COURS 125-26 (1969).

134. FRIEDMANN, *supra* note 14, at 238.

135. Friedman, *supra* note 133, 125-26.

136. International Covenant on Civil and Political Rights, *supra* note 4, arts. 6-27.

137. European Convention of Human Rights, *supra* note 4, arts. 2-13.

138. American Convention on Human Rights, *supra* note 4, arts. 3-25.

139. Genocide Convention, *supra* note 4, arts. 1-7.

140. International Convention on Elimination of All forms of Racial Discrimination, *supra* note 4, arts. 2-7.

141. Torture Convention, *supra* note 4, arts. 2-16.

142. International Covenant on Economic, Social and Cultural Rights, *supra* note 4, arts. 6-15.

143. Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 9, at 166, arts. 2-40, U.N. Doc. A/44/49 (1989), 28 I.L.M. 1448 (1989).

human beings is to grant appropriate benefits to individuals, retaining the free choice of the means through which to implement these rules.

## VI. INDIVIDUAL CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW

Although international law is not directly applicable to individuals, it does, as concluded in the previous section, provide rights for the individual. Furthermore, international law does directly apply to individuals in some limited instances. The most common instance is when individuals are subjected to international criminal responsibility for crimes against the peace and security of mankind. The concept of individual criminal responsibility has some important peculiarities that become apparent when compared with the other instances where individuals come in contact with international law.

When accused of crimes against humanity, individuals may be tried directly under international law, regardless of the will and domestic laws of the State of their nationality. This concept is, therefore, often invoked as important evidence of the international personality of the individual. The methodological construction is, at the same time, quite different from the reasoning in instances of *locus standi* of the individual under international law or the individual's capacity to participate in international lawmaking. The concepts considered above are invoked as instances of international personality for the purpose of protecting the rights, interests, and legitimate expectations of individual human beings. The instance under consideration now serves totally different goals. Being subjected to criminal responsibility under international law, the individual is not to be provided with benefits; rather, the individual is to be held responsible and punished for certain violations of international law.

The necessity of holding individuals responsible for grave breaches of certain fundamental international obligations has been incorporated into international law to protect humanitarian values and to prevent excessive violence. The atrocities committed during wide-scale military conflicts or by dictatorial regimes against their own population precipitated the need to punish guilty individuals. The insufficiency of financial and material reparations in such situations has necessitated that natural persons who have committed war crimes, crimes against peace, and crimes against humanity shall be held personally responsible under international law.<sup>144</sup> It is also beyond doubt that the punishment of individuals having committed war crimes and crimes against humanity constitutes an important condition for maintenance and restoration of international peace and security in the sense of the U.N. Char-

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144. For example, Theodor Meron emphasizes the incompleteness of the reparations regime imposed by the U.N. Security Council on Iraq, because this regime did not include the performance of international criminal responsibility of persons having committed grave breaches of Geneva Conventions. Theodor Meron, *The Case for War Crimes Trials in Former Yugoslavia*, FOREIGN AFF. (Summer 1993) at 124.

ter.<sup>145</sup> The rule that individuals committing the above-mentioned acts shall be personally responsible is a universally recognized principle of international law (a *jus cogens* principle).<sup>146</sup>

The first serious precedents in this regard were the tribunals and judgments of Nuremberg and Tokyo at the end of World War II.<sup>147</sup> These tribunals were created for the punishment of the major war criminals of Germany and Japan.<sup>148</sup> More current examples are the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The U.N. Security Council established the ICTY and the ICTR for the prosecution of persons guilty of genocide, crimes against humanity, and war crimes.<sup>149</sup> Most recently, the Statute for the permanent International Criminal Court (ICC) has been signed at the diplomatic conference in Rome.<sup>150</sup> According to the ICC Statute, the Court is competent to try persons accused of genocide, crimes against humanity, war crimes, and crime of aggression.<sup>151</sup> These institutions are endowed with powers to try accused individuals by application of international law, without regard to the domestic law of the State under whose jurisdiction the violations involved occurred.

In order to clarify whether individual responsibility under international law in such situations is evidence of an international personality, it is necessary to analyze when and under what conditions individuals are accountable to these tribunals under international law. For this purpose, it is necessary to make an analysis of the founding documents of international criminal tribunals and to also consider the preconditions and causes of their creation. The nature and legal context of international obligations involved should likewise be considered.

It is hardly contestable that the commission of war crimes and crimes against humanity by an individual is not a phenomenon that takes place by itself in isolation. The ultimate source of such illegal action is the activities of one or more States that results in violation of their international obligations. Individuals can be held internationally responsible for violations of prohibited acts enshrined in the multilateral conventions<sup>152</sup> and customary in-

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145. S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990); S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992); S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

146. HANNIKAINEN, *supra* note 5, at 1.

147. *Id.* at 119-20.

148. *Id.*

149. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); S.C. Res. 955, U.N. SCOR, 48th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

150. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, art. 5, available at <http://www.un.org/icc>, reprinted in 37 I.L.M. 998 (1998) [hereinafter ICC Statute].

151. *Id.*

152. See, e.g., Genocide Convention, *supra* note 4; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International

ternational law<sup>153</sup> that States are obliged to follow. The relevant instruments define the content of these State obligations. For instance, the Genocide Convention confirms that “genocide, whether committed in time of peace or in time of war, is a crime under international law which they [the States] undertake to prevent and to punish.”<sup>154</sup> According to article five of the same instrument, the States must enact the necessary legislation to give effect to the provisions of the Convention.<sup>155</sup> Similar obligations are enshrined in instruments of humanitarian law applicable to armed conflicts. It is recognized both in doctrine and international instruments that the State has the duty to adopt the legislative, administrative, and judicial measures that shall prevent the commission of war crimes and punish their perpetrators.<sup>156</sup>

The first time such an obligation was stipulated was in the 1906 Convention for the Amelioration of the Condition of Wounded Persons in the Field of War.<sup>157</sup> The Geneva Conventions of 1949 also contain a number of articles that require the States to adopt laws to ensure that the conventions would be carried out and that violators would be apprehended and punished.<sup>158</sup> The Hague Convention on Protection of Cultural Property in the Event of Armed Conflict of 1954 and other humanitarian instruments have analogous provisions as well.<sup>159</sup> Owing to these factors, it may be submitted that to prevent commission of war crimes and crimes against humanity by individuals (either State officials or private persons) international law imposes a duty on States to punish individuals under their jurisdiction that committed such crimes.

When crimes for which individuals may be held accountable under international law are committed, the State under whose jurisdiction the crime occurred incurs international responsibility. The State is responsible under international law for all internationally wrongful acts or omissions of its organs as these wrongs constitute acts of the State.<sup>160</sup> The unlawful conduct of individuals acting in private capacity, however, does not in itself constitute

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Armed Conflicts (Additional Protocol I), 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977); Commentary to draft article 19, Draft Articles of the ILC on State Responsibility, [1976] 2 Y.B. INT’L L. COMM’N 95 (Part II)[hereinafter Draft Articles of ILC]. See also MERON, *supra* note 5, at 209; Graefrath, *Responsibility and Damages*, *supra* note 50, at 83-86.

153. The International Court of Justice has confirmed that legal validity of obligations enshrined in Genocide Convention is not limited to international treaty law but is binding on states even without any conventional obligation. Reservations to the Convention on Genocide, 1951 I.C.J. 15, 22-3 (Advisory Opinion of May 28). No doubt, this provision extends to conventions that concern the issues of individual criminal responsibility.

154. Genocide Convention, *supra* note 4, art. 1.

155. *Id.* art. 5.

156. See FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING WAR* 64-66 (1991).

157. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906.

158. Geneva Conventions of Aug. 12, 1949, *supra* note 152, arts. 49, 50, 129 & 146.

159. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 19, 1954, art. 28, 249 U.N.T.S. 358 (entered into force August 7, 1956).

160. Draft articles of ILC, *supra* note 152, pt. 1, arts. 5-10.

an act of the State under international law. The State can be held responsible if the State—through its legislative, administrative, or judicial activities—supported, assisted, consented to, or failed to punish the acts committed by the individual.<sup>161</sup>

The consequences arising out of the commission of war crimes and crimes against humanity gives rise to secondary obligations in the field of State responsibility. The State responsible for such crimes is under obligation to provide full reparation vis-à-vis to the victims of the breaches. The reparation includes *restitutio in integrum* and compensation for both material and moral damage. Additionally, the State has the obligation to punish the individuals that committed the crimes. This obligation is independent of the obligation to prevent the initial breach and survives the violation of it.

It is necessary to emphasize that under international instruments, the State is obliged to try persons accused of breaches before its national courts. Individual international criminal responsibility does not arise by the mere act of committing the crime. Actual practice confirms that the issue of individual criminal responsibility comes into question only if there are reliable evidences that the State under whose jurisdiction the crimes were committed has no intention of fulfilling its obligation to punish the perpetrators. This circumstance is usually present in situations where the commission of war crimes or crimes against humanity is connected with political objectives, whether foreign or domestic, of the State concerned, and the crimes are attributable to the normal operation of the state machinery. Under these conditions, it hardly can be expected that the State concerned will punish persons that it relied on to achieve its own political objectives.

The Nuremberg and Tokyo tribunals were established on the basis of well-recognized evidence that the war crimes and the crimes against humanity that had been committed were one of the methods of achieving the political objectives of Germany and Japan during World War II and, therefore,

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161. *Id.* at 70, pt. 1, art. 11. This phenomenon is called the difference between original and vicarious responsibility of the state. OPPENHEIM, *supra* note 17, at 365. The State has to guarantee through its national law that the fundamental rights of persons under their jurisdiction will not be violated by private individuals. Otherwise the state incurs international responsibility for these violations. VAN DUJ & VAN HOOFF, *supra* note 56, at 24. Moreover, as the Inter-American Court of Human Rights has noted in *Velasquez-Rodriguez case*,

in principle, any violation of rights recognized by the convention carried out by an act of public authority or persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor in all the cases in which the State might found be responsible for an infringement of these rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to the international responsibility of the State, not because of the act itself, but because of lack of due diligence to prevent the violation or to respond to it as required by Convention.

Velasquez Rodriguez Case, 4 Inter-Am. Ct. H.R. (ser. C), para. 172 (1988).



there was no reasonable expectation that these States would voluntarily comply with their international obligations to punish the alleged war criminals. In Nuremberg and Tokyo, judicial bodies with international jurisdiction were created to provide a mechanism to punish the alleged criminals. The international tribunals of Nuremberg and Tokyo replaced the domestic jurisdiction of the German and the Japanese States. Hence, the German and Japanese war criminals of World War II were held accountable directly under international law. The true basis for the creation of these tribunals, however, was the grave breaches by Germany and Japan of their international obligations to punish war criminals.

Another important instance of individual criminal responsibility under international law has been the creation of the ICTY.<sup>162</sup> This tribunal was created by the U.N. Security Council under its mandate of maintenance and restoration of international peace and security. The Council held that restoration of international peace and security required the prosecution of persons guilty of grave violations of international humanitarian law in Yugoslavia.<sup>163</sup> Dealing with the situation in former Yugoslavia, the Council stressed “the need for the effective protection of human rights and fundamental freedoms, including those of ethnic minorities.”<sup>164</sup> The Council reaffirmed that all parties to the conflict were bound to comply with their obligations under international humanitarian instruments, particularly with the Geneva Conventions of 1949, and persons who commit or order the commission of grave breaches of these instruments were individually responsible with respect to such breaches.<sup>165</sup> The U.N. Security Council demanded that “unimpeded and continuous access to all camps, prisons and detention centers be granted immediately to the International Committee of the Red Cross and other relevant humanitarian organizations and that all detainees therein receive humane treatment, including adequate food, shelter and medical care.”<sup>166</sup> In resolution 771, the U.N. Security Council expressed its grave concern with widespread violations of international humanitarian law and, particularly, with the occurrence of “ethnic cleansing.”<sup>167</sup> The Council demanded that all parties to the conflict put an end to these grave breaches and reaffirmed that persons committing such acts were individually responsible for these breaches.<sup>168</sup> In later resolutions, the U.N. Security Council acknowledged the continuance of mass killings and ethnic cleansing.<sup>169</sup> In all the resolutions,

162. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

163. *Id.*

164. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082 mtg., U.N. Doc. S/RES/757 (1992).

165. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., para. 10, U.N. Doc. S/RES/794 (1992).

166. *Id.* para. 3.

167. S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., para. 5, U.N. Doc. S/RES/771 (1992).

168. *Id.*

169. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992); S.C. Res. 798, U.N. SCOR, 47th Sess., 3150th mtg., U.N. Doc. S/INF/48 (1992).

the U.N. Security Council did not speak about trying criminals under international jurisdiction; rather the Council emphasized the obligations of parties to the conflict to try war criminals. It was not until Resolution 808 that the need for international action was stressed when the Council announced that it was determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for grave breaches of international humanitarian law.<sup>170</sup> On that basis, the Security Council decided to create an international criminal tribunal for prosecution of these persons.

The establishment of ICTY appears to be based on considerations similar to those that caused the establishment of the Nuremberg and Tokyo Tribunals. The Council, before establishing ICTY, concluded that the parties to the conflict could not be expected to punish persons committing crimes against international law and, therefore, the breaches by individuals could be attributed to the States as internationally wrongful acts. Clearly, the establishment of ICTY, therefore, is an element of State responsibility. If the parties to the conflict had not failed to show their willingness to punish perpetrators of international law crimes, ICTY would not have been needed or created. The U.N. Resolutions made it clear that the Security Council intended to replace the jurisdiction of States involved by establishing tribunals to secure the performance of the States' international obligations.

Statute of International Criminal Court (ICC) reflects a similar intent.<sup>171</sup> The International Criminal Court takes jurisdiction when it acknowledges that the State concerned has incurred international responsibility for the wrongful conduct of the individual because it either aided or failed to punish the alleged offender.<sup>172</sup> The conditions of admissibility contained in article seventeen of the ICC Statute confirm the correctness of this approach.<sup>173</sup>

Article seventeen of the Statute confirms that if the wrongful conduct of individuals is not attributed to the State concerned, the Court shall declare the issue inadmissible.<sup>174</sup> In considering whether the conditions for admissibility are met, the Court will need to clarify the issues of State responsibility. In case the admissibility of the issue is challenged, the Court will need to determine responsibility of one or another State in order to either accept or reject the motion.<sup>175</sup>

Another situation where individuals can be held accountable under international law is the situation where, owing to the objective circumstances,

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170. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/INF/49 (1993).

171. Statute of International Criminal Tribunal was approved by Diplomatic Conference in Rome in July 1998. ICC Statute, *supra* note 150. See also James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404, 406-07, 409, 416 (1995).

172. See ICC Statute, *supra* note 150, art. 17.

173. See *id.*

174. *Id.*

175. *Id.*

there is no national legal order that could prevent and punish the crimes in question. This is the case of so-called failed State and also the case when part of the territory of one or another State is under the control of insurgents or separatists. It is well recognized that the duty of observance of international humanitarian law is not limited to States but extends also to various non-State entities. The Somalia situation can be invoked as an example.<sup>176</sup>

The case of Rwanda is somewhere in the middle between the situation in former Yugoslavia and the situation in Somalia. Rwanda, after commission of the crime of genocide, was practically the "failed State."<sup>177</sup> The Rwandan government was essentially ineffective and could not ensure compliance with international humanitarian law.<sup>178</sup> Moreover, the Rwandan judiciary was absolutely non-functional.<sup>179</sup> For these reasons, the Rwandan government requested that the U.N. Security Council establish a tribunal to adjudicate the crime of genocide and other violations of humanitarian law committed during the conflict in Rwanda.<sup>180</sup> The International Criminal Tribunal for Rwanda (ICTR) was established pursuant to U.N. Security Council Resolution 955.<sup>181</sup>

The cases of "failed States" and the mixed cases, as illustrated above, do not seem to impair the validity of the principle that individual criminal responsibility under international law is part of State responsibility. Apart from the marginal nature of these cases, they share the common background with cases occurring in the context of State responsibility. Individual criminal responsibility can be put on an international tribunal's agenda only if there is no national legal order that would be both able and willing to punish perpetrators of crimes under international law. The applicability of international law directly to the individual and, therefore, international criminal responsibility of the individual, is of subsidiary character. It is thus interwoven with the objective consequences of violation of State obligations rather than being some inherent capacity of the individual under international law.

The issue to be clarified next is the place of individual criminal responsibility within the system of general law of State responsibility and, in particular, in the scheme of material consequences of an internationally wrongful act. It should be conceded that, in theory, this problem is not sufficiently focused upon, although some considerable attempts in this direction have al-

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176. In U.N. Security Council Resolution 794, the Security Council "strongly condemn[ed] all violations of international humanitarian law occurring in Somalia" and "affirm[ed] that those who commit or order the commission of such acts will be held internationally responsible in respect of such acts." S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., at 5, U.N. Doc. S/RES/794 (1992).

177. See Madeline H. Morris, *Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349 (1997).

178. *Id.*

179. *Id.* at 353.

180. *Id.*

181. S.C. Res. 955, U.N. SCOR, 48th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

ready been made.<sup>182</sup> The opinions expressed about individual criminal responsibility as a part of State responsibility indicate that the punishment of individuals for crimes against international law constitutes satisfaction for the wrongs of States.<sup>183</sup> The specific basis for replacement of national jurisdiction by an international one is provided by provisions addressing international crimes. The exceptional and grave nature of the committed acts justifies the performance of satisfaction even if doing so impairs the dignity of the Wrongdoer State.<sup>184</sup>

The foregoing analysis shows that the content and context of rules governing individual criminal responsibility do not provide evidence in favor of the international personality of the individual. In every case when international criminal responsibility is imposed on the individual, it appears that acts that are committed by the individual are not expected to be punished within one or another national legal order. If the State concerned is able and willing to fulfill its international obligations with respect to punishment of persons committing crimes against peace and security of mankind, an individual is not to be punished through direct application of international law.

## VII. CONCLUSION

The present contribution has been aimed at clarifying whether the increasing recognition of human rights and, moreover, the emergence of some instances of individual capacity in international law, have caused the emergence of a new kind of international person—the individual human being. The analysis of various areas where the individual has been brought into contact with international law does not provide sufficient evidence to support such a conclusion.

Developments in various areas of international legal order have provided considerable means and methods through which the obligations of States, laid down for the protection of each individual human being, can be implemented and enforced. Evolutionary changes in international human rights law have not led to the creation of a new category of international persons. These changes instead have moved toward providing a comprehensive set of secondary rules on State responsibility for international obligations in the area of human rights. Considering the wide ramifications which human rights protection have imposed as obligations on States, it seems merely superfluous to speak about the existence of an international personality of the individual. This notion makes no real contribution to the protection of the individual human being but instead can lead to considerable confusion and misunderstanding in theory as well as in practice.

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182. MERON, *supra* note 5, at 208; Graefrath, *Responsibility and Damages*, *supra* note 50, at 88-89.

183. *Id.*

184. Draft Articles of ILC, *supra* note 152, art. 52.