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The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine

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THE INTERNATIONAL PERSONALITY OF INDIVIDUALS IN INTERNATIONAL LAW: A BROADENING OF THE TRADITIONAL DOCTRINE

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I. INTRODUCTION

THE International law of the previous centuries was to a large extent of a formal character. It was mainly concerned with the delimitation of the territory and jurisdiction of States. International organizations, as we know them today, were set up only in the nineteenth century. The individual played only an inconspicuous part because the international relations of the individual and his contacts across the frontier, if they ever existed, were rudimentary.

Until recently, the subjects of international law were exclusively independent States and their numerical strength was comparatively small. The principal purpose of international law was coexistence, that is, to keep the States peacefully apart. Its scope of activities was designed to restrain and restrict State action emphasizing rights and duties of one State to another. Relationships with other States were mostly bilateral in nature and involved only limited aspects of international law such as peace, alliance, navigation, and national boundaries.

During the last few decades, especially after the establishment of the United Nations, profound changes have taken place in the scope and content of international law. One of the most important changes is the massive horizontal expansion of the international society composed of nation States due to the sweeping wave of the decolonization

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process.[1] Another major development is the phenomenal growth of international organizations as permanent institutions for the cooperation of States.[2] A third important change is in the subject matter of international law which is at present becoming actively concerned with various vital topics affecting the promotion of human welfare rather than the mere prevention of national warfare.[3]

What is meant by the term "subject" of international law? According to text-book writers, a subject of international law is an entity capable of possessing international rights and duties and endowed with the capacity to take legal action in the international plane.[4] Such an entity is commonly referred to as an international legal person or as having legal personality.

Legal personality is an acknowledgement that an entity is capable of exercising certain rights and being subject to certain duties on its own account under a particular system of law. In municipal legal systems, the individual human being as well as certain entities such as limited companies or public corporations are legal persons. These entities are granted a personality distinct from the individuals who create them; hence, they can enter into legal transactions in their own name and on their own account.

In international law, the question of international legal personality arises in various situations, for example, to determine whether an entity has the capacity to make international agreements/treaties, to

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1. With the sweeping wave of the decolonization process, a large number of territories have attained independent statehood in recent years. These territories, with different historical backgrounds, religious beliefs, social cultures, and legal values, were in the past no more than objects of international law. They have now become subjects of that system. For the sequence of this development, one notes that only twenty-six states were represented at the First Hague Peace Conference in 1899. This number was increased to forty-four in the Second Hague Conference in 1907. The League of Nations had a representation of forty-five original members with an addition of five more members (Afghanistan, Egypt, Ethiopia, Iraq, and Turkey) which subsequently joined the Organization. The United Nations, founded in 1945 with fifty-one original members, has already expanded to 166 and continues to expand steadily by the increasing claim of legal sovereignty by dependent territories.

2. International organization is a phenomenon of the Multi-State system and is a characteristic feature of present day world society. In several cities of the world, new centers of activity of international organizations have appeared on the skyline after World War II. In sharp contrast to the inter-war period, when not more than twenty such centers could be counted, no fewer than 200 new organizations have been established since 1945.

3. International law today is seriously concerned with vital matters of human rights, human environment, pollution problems, terrorism, peaceful uses of nuclear energy, outer-space activities, resources of the seabed, health regulations, food production and distribution, international monetary control, and trade development. These matters penetrate into manifold economic and social aspects of day-to-day human life patterns.

4. *See, e.g., The Law of Nations: Cases, Documents, and Notes* 65 (Herbert Briggs ed., 2d ed. 1952).

make claims for breaches of international law, to enjoy the privileges and immunities from national jurisdictions, or to be a member in an international organization. Thus, the attributes of an international legal personality involve the capacity to perform legal acts in the international plane in distinction to legal personality within the municipal legal system.

Traditionally, international law is defined as law applicable to the relations between States. States are therefore said to be the subjects of international law; publicists usually proceed to examine the nature and characteristics of the fictitious State as the only jural person. This thesis is affirmed by the orthodox positivist doctrine. The positivist doctrine is identified with the assertion of sovereignty. Further, according to this doctrine, States themselves can become subjects of international law only by virtue of recognition granted by already existing States acting on the free and unfettered exercise of their discretion.

The above-mentioned traditional concept has been subject to severe criticism and a growing opposition has arisen to challenge this concept. For example, according to Nicolas Politis,

> [F]ormerly the sovereign State was an iron cage for its citizens from which they were obliged to communicate with the outside world, in a legal sense, through very close-set bars. Yielding to the logic of events, the bars are beginning to open. The cage is becoming shaky and will finally collapse. Men will then be able to hold free and untrammeled communication with each other across their respective frontiers.[5]

This was written in the first quarter of this century. The cage already has been broken; the old dogma has given way to new ones in the light of ongoing rapid technological advances of global dimensions affecting individuals and in the creation of a multitude of international organizations.

In this century, especially after the establishment of the United Nations and the subsequent outgrowth of international and regional institutions, it has become obvious that international law is no longer centered exclusively on the rights and duties of States, but has recognized the independent existence of a variety of international organizations and, in a number of situations, has imposed obligations on and granted rights to individuals. As a result of this change, in spite of the

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5. Philip C. Jessup, *The Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 383, 384 (1947) (quoting NICOLAS POLITIS, THE NEW ASPECTS OF INTERNATIONAL LAW 30, 31 (1928)).

fact that international organizations and individuals do not possess the same quality and features of States, they are increasingly becoming capable of asserting their rights before international tribunals. The following analysis will discuss the broadening of the traditional doctrine to include individuals as subjects of international law and to confer them legal personality though it is limited to certain purposes.

II. INDIVIDUALS AS SUBJECTS OF INTERNATIONAL LAW

In spite of the traditional doctrine that States exclusively are the subjects of international law, the position of individuals in international law is becoming increasingly important in light of technological and cultural advances of society. The traditional doctrine is being modified to the extent that an individual has become a subject of international law. States, however, are still the principal subjects of international law and international organizations are to a lesser extent subjects of that system. Nevertheless, there is no rule that individuals cannot have personality for certain purposes.

The concept of a direct relationship of individuals to the family of nations has a long history. According to the classical and medieval concepts of natural law, individuals enjoyed certain natural or human rights which should be protected by the world community of mankind.[6]

At the same time, individuals were also bound by certain natural or human obligations which should be enforced by the same community. This concept is based on the natural law which emphasizes the inalienable "rights of man" as reactions to the theories of State sovereignty.[7] In addition, Korowicz states that: "[t]he idea that international law rules not only the intercourse of independent states but also that its provisions are directly binding on individuals without the intermediary of their state, is at least as old as the science of international law, which originated in the sixteenth century."[8] Explaining this, Korowicz for example, has relied on the writings of Grotius,[9] Pufendorf[10] and Hobbes.[11] A century earlier, both Plutarch and Vitoria acknowledged

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6. *The Law of Nations*, *supra* note 4, at 93.

7. *Id.*

8. Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 534 (1956).

9. "The human being is a center of the legal conceptions of Grotius. . . . He considered the law of nations as a body of rules governing the activities of individuals in international relations rather than as a body of provisions binding on States in their relation with other States." *Id.*

10. "Pufendorf stresses the identity of the natural law binding for individuals and states." *Id.*

11. Hobbes also expressed a similar opinion as that of Grotius and Pufendorf. *Id.*

that "non-state entities had internationally recognized legal rights."[12]

In the eighteenth century, the dominant positivist philosophy brought about a remarkable change. This orthodox positivist doctrine is identified with the extreme assertion of State sovereignty leading to the thesis that only States create rules of international law, that such rules are valid only for States and that no place is left for the individual.[13] During the positivist period, "Sovereign States, the predominant types of bearers of rights and duties under international law, have so far succeeded in maintaining a practically unchallenged monopoly of exclusive or concurrent jurisdiction over the individual."[14]

According to the positivist school, in cases in which an individual obtains benefits under international law, such benefits are not gained through the virtue of the rights of the individual, but through the rights of the nation to which the individual belongs.[15] Thus, the State has the right and the individual is the object of that right.[16] A great number of jurists of the positivist school have asserted that individuals are only the objects and not subjects of the international legal system. They argue that:

> Under a legal system there exists only objects and subjects. In international law "subjects" is the term used to describe those elements bearing, without the need for municipal intervention, rights and responsibilities. . . . [T]hey are like "boundaries" or "rivers" or "territory" or any of the other chapter headings found in the traditional textbooks.[17]

In his study on the object theory of the individual in international law, George Manner cites several assumptions on which the theory is predicated.[18] First, the individual is not a subject of this law because

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12. Rosalyn Higgins, *Conceptual Thinking About The Individual In International Law, in* INTERNATIONAL LAW: a CONTEMPORARY PERSPECTIVE 476, 478 (Richard Falk et al. eds., 1985).

13. *See* Karl J. Partsch, *Individuals in International Law, in* 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 316, 316 (1985).

14. George Schwarzenberger, *The Protection of Human Rights in British State Practice*, 1 CURRENT LEGAL PROBLEMS 152, 153 (1948).

15. *See* H. Lauterpacht, *The Subject of the Law of Nations*, 63 L.Q. REV. 440, 440 (1947).

16. Thus, while it is an established principle acted upon by international tribunals that the alien resident within the territory of a State is entitled to be treated in accordance with a minimum standard of civilization, the traditional theory has been that, in strict law, it is not the alien who is thus entitled, but only his State. His membership of the State—his nationality—is an essential condition of the jurisdiction of international tribunals when resorted to for the purpose of redressing wrongs alleged to have been suffered by him. Much of the existing practice, in the form of the rule of nationality of claims and otherwise, seemed to lend support to that view. *Id.*

17. Higgins, *supra* note 12.

18. George Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 428, 428 (1952).

he has no rights and duties under it. He cannot invoke it for his protection nor violate its rules.[19] Second, the individual is a thing (object) from the point of view of this law, or that he is benefitted or restrained by this law, only to the extent that it makes it the right or the duty of States to protect his interest or to regulate his conduct through their domestic laws.[20] Third, the individual has no international right or claim against States.[21] Fourth, only nationals of States are objects of international law and that these persons are protected as objects of this law only against countries other than their own.[22] Fifth, a State cannot maintain a "status," since the term describes the condition of persons; instead, it must settle for a position in the law comparable to that held by beasts, ships, and the like.[23]

In recent years, the above theory has been refuted for a variety of reasons. First, according to Manner, the theory is not only odd but also illogical and immoral because it refers to mankind as things under international law, an opposite conclusion from all other advanced municipal legal systems.[24] Second, since individuals are behind the State, they are ultimately the subjects of international law.[25] Third, the theory is a threat to the security and democratic concept of the State and perhaps to the very existence of the international community.[26] Fourth, the theory demotes mankind beneath the State and prevents the enforcement of international law against the individuals who are the intended subjects of the legal obligations.[27] Fifth, individuals in practice often carry the rights and duties imposed upon them as the subjects of international law.[28] Sixth, States are held internationally liable for the condemned acts of their citizens, and expected to provide recompense to their citizens injured in violation of international law.[29] Seventh, the theory is founded upon erroneous premises regarding the nature of the State and the nature of international law and not upon practice.[30] Frederick Dunn attacks the theory as a highly misleading "legal fossil" and a "remnant of legal animism" adducing as evidence the unchallenged fact that international law has always been

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 428-29.
23. *Id.* at 429.
24. *Id.* at 430.
25. *Id.*
26. *Id.* at 430-31.
27. *Id.* at 431.
28. *Id.*
29. *Id.*
30. *Id.* at 432.

concerned with interests and needs of individuals as well as States, and adds:

> Only a relatively small proportion of the treaties entered into since the middle of the last century have dealt with the relations of States as political atoms. The great majority of them have been concerned with the rights and interests of private individuals . . . [with their] ability to travel about freely from country to country, to carry on trade across national boundaries with some degree of predictability . . . to be protected in matters of public health and morals and a host of other things which are not at all concerned with the advancement of the political interests of states.[31]

Law can not exist without human will. Individuals are either the direct subjects of international law as pirates or the indirect subjects as citizens of the State against whom sanctions are applied.[32] In his study on *The Problem of the International Personality of Individuals*,[33] Korowicz cites a large number of authorities who have consistently argued three main viewpoints: (1) individuals and States are both subjects of international law;[34] (2) the sole subject of international law is the individual;[35] (3) under the traditional theory, the sole subject of international law is the states.[36] Lauterpacht, however, follows a cautious approach.[37] According to him,

> [T]here is no rule of international law which precludes individuals and bodies other than States from acquiring directly rights under customary or conventional international law and, to that extent, becoming subjects of the law of nations. The question is largely one

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31. Frederick S. Dunn, *The International Rights of Individuals*, *in* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 14, 15 (1941).

32. Edvard I. Hambro, *Individuals before International Tribunals*, *in* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 22, 23 (1991).

33. *See* St. Korowicz, *supra* note 8, at 533.

34. Numerous writers of the nineteenth century [including Hefter, Fiore, Bluntschli, Heilborn, Martens, and Kaufmann] and of this century [for example, Westlake, De Lapradelle, Le Fur, Renard, Verdross, Ivor Jennings, De Louter, Rundstein, Reeves, Bourquin, Spiropoulos, Brierly, Jacques Dumas, Quincy Wright, Bishop, Accioly, Eustathiades, Charles Fenwick, Hyde, Guggenheim, Oppenheim, Pallieri, Sibert, and Jessup] proclaim the international personality of individuals as well as that of States. *Id.* at 534.

35. "This category of writers try to destroy the present structure of public law by depriving the State of its legal personality and conferring this quality exclusively on the individual." They are, for example, Leon Duguit, Gaston Jeze, Krabbe, Nicolas Politis, George Scelle, Hans Kelsen, and James Brown Scott. *Id.* at 539.

36. Writers who belong to this group "believe that [S]tates only are the subjects of international law." They include Anzilotti, Triepel, Strupp, Erich Kaufmann, Mankowski, Winiarski, Robert Redslob, Koretsky, and Levin. *Id.* at 541.

37. H. Lauterpacht, *The Subjects of the Law of Nations*, 64 L.Q. REV. 97, 112 (1948).

> of ascertaining what is the intention of States—and, generally, the practice of States—in each particular case. The conferment of such rights may cover either particular rights or the so-called fundamental rights of the individual in general.[38]

In the modern international law, the traditional doctrine of the positivist school of thought has been criticized. For example, the sociological school in France led by Duguit, Scelle, and Politis, not only regarded the human being and his protection as the object of the whole legal order including international law, but even considered the individual to be its exclusive subject.[39] The humanitarian ideology, especially developed after World War II, counterbalanced the political power of sovereign States and recognized a world community of individuals who were subjects of international law alongside States.[40] A third school of thought takes a rather cautious and realistic approach. This approach seeks to redefine the relationship between the individual, his State, and the international order, and derives from a trend apparent in international practice to show greater concern for the protection of human dignity. According to this school, corporate bodies-i.e., States and other entities—remain the primary subjects of the international order. In exceptional cases, however, the legal capacity of individuals to protect their own interests at the international level, and even their *locus standi* before international organs, may be recognized.[41]

A. The Rights of Individuals

1. The Procedural Capacity of Individuals

The traditional rule, which has found expression in Article 34 of the Statute of the Permanent Court of International Justice, establishes that "[o]nly States may be parties in cases before the Court."[42] To

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38. *Id.*

39. "States had only the function of providing a 'legal machinery' for regulating the rights and duties of collectivities of individuals." Partsch, *supra* note 13, at 316.

40. *Id.*

41. *Id.* at 315-16.

42. The Committee of Jurists appointed by the League of Nations to draft the Statute of the Permanent Court of International Justice in 1920 considered the question of conferring upon individuals the procedural capacity for action before the Court. Professors Loder and De Lapradelle supported in favor of individuals as parties before the Court, but both jurists met with strong opposition on this point. Thus the Statute contains the present provision which in effect means to say that the claim of an individual may be presented to the Court only through the channel of the State of which the individual is a national. St. Korowicz, *supra* note 8, at 543-44.

Lauterpacht, the importance of this provision should not be exaggerated as it is only a provision defining the competence of the Court and not intended to be a proclamation of a general principle of international law.[43] That provision does not prevent States, as we shall see during the course of following discussion, from securing to individuals access to international courts and tribunals.

a. *The Central American Court of Justice*

The Court which was created in 1907 in Cartago, Costa Rica by the Convention of Washington of December 20, 1907, signed by Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador,[44] appears to be the first international tribunal that recognized the procedural capacity of individuals to bring claims against States. The Court was composed of five judges, one being appointed by each of the contracting parties.[45] The Convention gave individuals access to the Court to bring claims against any contracting State except their own, providing that local remedies had been exhausted and a denial of justice was shown, but regardless of whether the individual's own State was willing to press the claim.[46] Thus, Article 2 of the Convention provided:

> This Court shall also take cognizance of the questions which individuals of one Central American country may raise against any of the other contracting Governments, because of the violation of treaties or conventions, and other cases of an international character; no matter whether their own Government supports said claim or not, and provided that the remedies which the laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown.[47]

Established for a period of ten years, the Court ceased to exist in 1918. During that period, five cases were brought by individuals against foreign Governments, but in none of these did the individuals succeed. It should be noted, however, that the Court provided redress only in cases where one citizen wished to sue a citizen of the other, i.e., foreign Central American State; but the Convention created no right for the individual to seek redress before an international court against his own State.

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43. Lauterpacht, *supra* note 37, at 451.

44. *Convention for the Establishment of Central American Court of Justice*, Dec. 20, 1907, 2 AM. J. INT'L L. 231 (Supp. 1908).

45. *Id.* at art. VII.

46. *Id.* at art. II.

47. *Id.*

b. *The International Prize Court*

The International Prize Court is another example where individuals could have brought claims against a foreign State. The abortive Hague Convention XII of 1907[48] provided for the establishment of the Court. According to Article 4 of the Hague Convention, an appeal from the decisions of national prize courts could have been brought before the International Prize Court, not only by the neutral State but also by private individuals injured by the decisions of the national prize courts.[49] According to Article 8, the International Prize Court could have pronounced the capture of a vessel to be null.[50] The court would have ordered restitution of the vessel or cargo, and should have fixed, if there is occasion, the amount of the damages. If the vessel or cargo have sold or destroyed, the Court should have determined the compensation to be given to the owner on this account.[51] The Hague Convention, however, has never been ratified and remained merely as an important example for the future.

c. *Treaty of Versailles*

Article 297 of the Treaty of Versailles provided that the nationals of the Allied and Associated Powers—individuals—could bring actions against Germany before Mixed Arbitral Tribunals established in conformity with Article 304 of the Treaty.[52] These private individuals were authorized to claim damages caused by to Germany's extraordinary war measures.[53] Further, in the Tribunals created in accordance with the corresponding articles of the peace treaties after the First World War, individual citizens of the victor States were authorized to bring claims against nationals and Governments of the defeated States. The Tribunals dealt with a large number of claims and functioned for about ten years.

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48. Convention Relative to the Creation of an International Prize Court, in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, 189-90 (James B. Scott ed., 1915). This Convention was signed by the great majority of States represented at the Conference but it was not brought into force chiefly for the reason that the London Declaration of 1909, which contained the substantive rules of prize law to be applied by the Court, was never brought into force.

49. *Id.* at 189.

50. *Id.* at 191.

51. *Id.* As to enforcement of the decisions of the International Prize Court, the Convention Provided in Article 9: "The contracting powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay." *Id.*

52. Treaty of Versailles, June 28, 1919, art. 297, 13 AM. J. INT'L. L. 151, 306 (Supp. 1919).

53. *Id.*

The Mixed Arbitral Tribunals expressly recognized the legal position of the individual.[54] For example, in *Lederer v. German Government*, the Anglo-German Mixed Tribunal said that "[i]t would, of course, have been possible for the framers of the treaty to have left these matters in the government of the Powers concerned, but they have not done so. The right to compensation granted by the treaty is granted as compensation to the national of an Allied and Associated Power."[55] In *Sigwald, Charles v. Germany*, the French-German Mixed Arbitral tribunal held the right granted under Article 297(e) was an individual right belonging to subjects of the Allied Powers, which might directly be forwarded against Germany without the interference of the French Government.[56]

d. *The German-Polish Convention of 1922*

The German-Polish Convention of May 15, 1922,[57] otherwise known as the Upper Silesia Convention, provided for a tribunal which was given jurisdiction to entertain actions brought by nationals of either party against their own State.[58] Article 5 of the Convention provided that "[t]he question as to whether or to what extent an indemnity for the abolition of diminution of vested rights must be paid by the State, will be settled directly by the Arbitral Tribunal on the complaint of the person enjoying the right."[59]

In *Steiner and Gross v. Polish State*,[60] the question arose as to whether a citizen can sue his own State before the arbitral tribunal and was answered affirmatively by the tribunal in its decision of March 30, 1929.[61] The tribunal said that the rule, that citizens may not proceed with an action against their own country under international law, was not proper to introduce in Articles 4 and 5.[62] Further, Articles 148-156 of the Convention provided that

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54. *See* Hans Aufricht, *Personality in International Law*, 37 AM. POL. SCI. REV. 217, 236-37 (1943).

55. 3 Recuil des Decisions des Tribunaux Mixtes 762, 768 (1924); *see also* Aufricht, *supra* note 54.

56. 255 Ann. Dig. 3 (1925) (discussed in HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW, 224 n.41 (Robert Tucker ed., 2d ed. 1967)).

57. German-Polish Convention, P.C.I.J. Series A/B, No. 40 at 45 (May 15, 1922).

58. St. Korowizc, *supra* note 8, at 554.

59. *Id.* The main text of the convention contains 606 articles, 25 paragraphs in the final protocol, numerous annexes, and a large bibliography. *Id.* at 533.

60. 4 Ann. Dig. 291 (Upper Silesian Arbitral Tribunal 1928).

61. *See* St. Korowicz, *supra* note 8, at 554.

62. *Id.* In this case:

> In this case, a Polish and a Czechoslovak citizen brought action against the Polish State before the Upper Silesian Arbitral Tribunal on the basis of the German-Polish

> "[U]pper Silesian minorities could file individual petitions with a minorities office established by their State, which, if it could not mediate the problem to the satisfaction of the petitioner, was obliged to forward the petition to the President of the Upper Silesian Mixed Commission. Individuals and representatives of the two Governments then stood equally before an international tribunal."[63]

The German-Polish Convention is of great significance because it grants individuals the capacity to claim their rights before an international tribunal not only against a foreign State, but also against their own State.[64]

e. *The Supreme Restitution Court*

In 1952, the Supreme Restitution Court was established pursuant to the World War II Convention on the Settlement of Matters Arising Occupation, between Germany and the United States, the United Kingdom, and France.[65] The court was given jurisdiction over equity claims for the restitution of property seized under the Nazi regime and for the restitution of identifiable property by the victims of Nazi oppression.[66] Before this court, individuals could appear as plaintiffs or defendants. In addition, in 1954 the Mixed Commission established, pursuant to the Agreement on German External Debts between twenty States (including the United Kingdom, the United States and France)

Convention of May 15, 1922. The Polish Government contended that the convention did not confer upon Polish nationals a right of action against the Polish State; that it was a general principle of international . . . authority against his own State; that this principle ought to be applied in regard to the interpretation of the convention; that any interpretation to the contrary would place the State against which such right was accorded in a position worse than that of States under the regime of capitulations and that the tribunal therefore had no jurisdiction. The Tribunal (1928) held that the Polish contention must be rejected and that the tribunal had jurisdiction. The Convention conferred in unequivocal terms jurisdiction upon the Tribunal irrespective of the nationality of the claimants, and, the terms of the convention being clear, it was unnecessary to add to it a limitation which did not appear from its wording. There was an additional reason for not introducing any such limitation, seeing that the guiding principle of this part of the convention was the respect of private rights and the preservation of the economic unity of Upper Silesia, and that no one of these considerations was compatible with the exclusion of any category of claims for the sole reason of the nationality of the claimant. KELSEN, *supra* note 56, at 225.

63. *Id.*

64. *See* Quincy Wright, *The End of a Period of Transition*, 31 AM. J. INT'L L. 604 (1937); *see supra* note 6, at 95; St. Korowicz, *supra* note 6, at 533.

65. Conventions on the Settlement of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411, T.I.A.S. No. 3425, 332 U.N.T.S. 219.

66. Shigeru Oda, *The Individual in International Law, in* MANUAL OF PUBLIC INTERNATIONAL LAW 469, 512 (Max Sorenson ed., 1968).

on one side, and Germany on the other, which had jurisdiction over disputes of German external debts between creditors and debtors.[67]

f. *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*

The Convention widely known as the World Bank Convention,[68] recognizing the need for granting the private foreign investor jurisdictional capacity in international law, has established the International Center for Settlement of Investment Disputes (the Center). The Center provides accommodations for conciliation and arbitration of investment disagreements between contracting States and nationals of other contracting States pursuant to the provisions of the Convention.[69] The jurisdiction of the Center extends to "any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State . . . which the parties to the dispute consent in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally."[70]

Further, according to Articles 28 and 36, any national of a Contracting State, who wishes for a conciliation/arbitration proceeding, should submit a written request to the Secretary-General, who shall send a copy of the request to the other party.[71]

It may thus be noted that the above Center fills a lacuna in the international arbitration process so that private foreign investors (including individuals) have direct access to governments in the event of disputes. Once consent has been given by both parties, the arbitral process will begin and an award will be rendered. Moreover, this award is binding on the parties.[72]

2. *The Rights of Individuals Under Treaties*

a. *Jurisdiction of the Courts of Danzig Case*

The personal status of the individual is recognized in various international treaties, and the validity of such agreements has been con-

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67. *Id.*

68. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature*, March 18, 1965, 71 U.S.T. 1270, 575 U.N.T.S. 159.

69. *Id.* at art. 1.

70. *Id.* at art. 25.

> (2) "National of another Contracting State" means:
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to . . . conciliation or arbitration as well as on the date on which the request was registered.

Id.

71. *Id.* art. at 28, 36.

72. *Id.* at art. 53.

firmed by the decisions of courts. The Advisory Opinion, given in 1928 in the case concerning the *Jurisdiction of the Courts of Danzig*[73] by the Permanent Court of International Justice (PCIJ) is exceptionally important in this context. In that case, Poland claimed that the agreement between her and Danzig, regulating the conditions of employment of Danzig officials whom she had taken over into her railway service, was an international treaty which created rights and obligations as between Poland and Danzig only. The agreement had not been incorporated into Polish municipal law, it did not create rights and obligations for individuals. Poland's responsibility was limited to that owed to Danzig and that therefore Danzig courts, before which the officials had brought an action in the matter, had no jurisdiction.[74]

The PCIJ rejected the above contention by Poland and said:

> It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*.[75]

The opinion, thus, lays down that nothing can prevent the individual from becoming the subject of international rights if States so wish. Moreover, Lauterpacht observes that the opinion "dealt a resounding blow to the dogma of the impenetrable barrier separating individuals from international law."[76] The above decision was followed in several other cases.[77]

b. *Minority Protection Treaties*

Under the minority protection treaties, concluded under the auspices of the League of Nations, States assumed international legal obligations to give specific rights to individuals. Examples of such treaties

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73. Advisory Opinion No. 15, Jurisdiction of the Courts of Danzig, 1928 P.C.I.J. (ser. B) No. 15, at 17-21 (March 3)[hereinafter *Danzig*].

74. Lauterpacht, *supra* note 37, at 98.

75. *Danzig*, 1928 P.C.I.J. at 17.

76. Lauterpacht, *supra* note 37, at 98.

77. Higgens, *supra* note 12, at 99.

are those entered into with Czechoslovakia, Greece, Poland, Rumania and Yugoslavia.[78] Referring to the German-Polish Convention of May 15, 1922,[79] concerning Upper Silesia, the PCIJ said that certain articles of that Convention "bestow upon every national the right freely to declare according to his conscience and on his personal responsibility that he does or does not belong to a racial, linguistic, or religious minority, and to declare what is the language of a pupil or child for whose education he is legally responsible."[80] This decision confirms the rights granted to every individual national by the treaty.

The treaties concluded after World War II make no special provision for the protection of minorities except the Treaty of Peace with Italy[81] and the State Treaty for the Re-establishment of an Independent and Democratic Austria of 1955.[82]

3. *Administrative Tribunals of International Organizations*

Members of the international civil services are bound to the organization through a contractual agreement. This relationship made necessary the establishment of special tribunals responsible for determining disputes arising among the organization.[83] For example, the United Nations Administrative Tribunal was established in 1949 adopted by the General Assembly on November 24, 1949. The Tribunal is competent to hear applications alleging non-observance of contracts of employment and terms of employment of staff members of the United Nations Secretariat.[84] Application may be made by staff members,

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78. *See* WILLIAM W. BISHOP, JR., INTERNATIONAL LAW: CASES AND MATERIALS 470 (3d ed. 1971). According to the treaty provisions, all nationals who belonged to racial, religious or linguistic minorities were assured the same treatment and security in law and, in fact, as other nationals and given the right to use their own language in private intercourse or publications or at public meetings as well as before the courts, and to establish schools and religious and charitable institutions. All these stipulations constituted obligations of international concern under the guarantee of the League of Nations, and could not be modified without the assent of the majority of the League Council.

79. German-Polish Convention, *supra* note 57.

80. P.C.I.J. Series A/B No. 45, at 40. The Court said further that the treaty would fail in its purpose if it were not to be considered as an established fact that persons who belonged de facto to such a minority must enjoy the protection which had been stipulated. *See also* P.C.I.J. Series B7, at 20.

81. *Id.* In accordance with the Treaty, the German-speaking inhabitants of Bolzano province were assured complete equality of rights with the Italian-speaking inhabitants. Treaty of Peace with Italy, Feb. 10, 1947, 49 U.N.T.S. 184.

82. *Id.* The Treaty gives to Austrian nationals, belonging to the Slovene and Croat minorities in certain specified areas, the same rights and on equal terms as all other Austrian Nationals. Treaty for the Reestablishment of an Independent and Democratic Austria, May 15, 1955, 217 U.N.T.S. 225, 229.

83. D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 317 (4th ed. 1982).

84. *Id.* at 321-22; U.N. TRIBUNAL, art. 2, ¶ 1.

their successors in case of their death, and any other person who is entitled to rights under any contract or terms of employment. Article 11, paragraph 1, of the Statute provides:

> If a Member State, the Secretary-General or the person in respect of whom a judgment has been rendered by the Tribunal (including anyone who succeeded to that person's rights on his death) objects to the judgment on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may . . . make written application to the Committee established by paragraph 4 of this Article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.[85]

In light of the above provision, it may be said that an individual in the capacity of a United Nations staff member or the staff member's legal representative has procedural capacity before the Tribunal equal to that of the organs of the United Nations.

4. *The Individual and the European Community*

The independent legislative, executive and judicial institutions exercising quasi-sovereign powers established under the European Community treaties elevate the individual to a subject of law alongside the member States. Individuals are now endowed with legal capacity to enforce certain rights and protect themselves against illegally imposed obligations and sanctions.

In *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*,[86] the Advocate General argued that the Community was authorized to make rules of law capable of bestowing rights and imposing obligations on private individuals as well as Member States.[87] In its landmark judgement, the European Court said:

> the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not

85. U.N. TRIBUNAL, art. 11, ¶ 1.

86. Case 26/62, 1 C.M.L.R. 82, 105 (1963).

87. In support of this argument, the Advocate General cited Articles 187, 189, 191 and 192 of the Treaty.

> only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and the institutions of the Community.[88]

The European Court has declared the certain provisions of the Treaty to be directly applicable to individuals.[89]

The concept of directly applicable treaty provisions, as developed by the European Court, has an overriding effect on conflicting national law and gives rights which an individual may enforce by action before municipal courts. A directly applicable provision thus confers rights on individuals which national courts must protect.[90] According to the declared policy of the European Court, "private individuals should enjoy rights under the [EEC] Treaty in a most direct and extensive manner and . . . undesirable and unnecessary intervention of the States precluding the individual from enjoying these rights and enforcing them in the courts should be avoided."[91] Individuals have two courts available to them: (1) the European Court of Justice, and (2) the national courts. Generally speaking, the European Court is available for actions against Community institutions (the Council and the Commission), while the national courts are open for act against Member States and individuals. Of the various powers conferred on the

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88. Van Gend en Loos, 1 C.M.L.R. at 129 (1963). The judgment has laid down the criteria to be applied in deciding whether or not a particular provision may be invoked by individuals in national courts. As summed up by the Advocate General in *Reyners v. Belgian State*, they are: (1) the provision in question must be clear and precise for judicial application; (2) it must establish an unconditional obligation; and (3) the obligation must be completed and legally perfect, and its implementation must not depend on measures being subsequently taken by Community institutions or Member States with discretionary powers in the matter. DERRICK WYATT & ALAN DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 28 (1980). *See also* Gerhard Bebr, *Directly Applicable Provisions of the Community Law: The Development of a Community Concept*, 19 INT'L & COMP. L.Q. 257 (1970); Gerhard Bebr, *How Supreme is Community Law in the National Courts?* 11 COMMON MKT. L.R. 3 (1974).

89. Free Movement of Goods [Article 9]; Elimination of Customs Duties [Article 12, 13(2), 16]; Elimination of Quantitative Restrictions [Article 31,32(1), 37(2)]; Free Movement or Workers [Article 48]; Right of Establishment [Article 52, 53]; Services [Article 59(1), 60(3)]; Rules Applying to Undertakings [Article 85, 86]; Aids Granted by States [Article 92(1), 95] A. G. Toth, *The Individual and European Law*, 24 INT'L & COMP. L. Q. 659, 661 n.8 (1975).

90. To be directly applicable, the provisions must leave no discretion to the Member States or to the Community.

91. J. A. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 COMMON MKT. L. REV. 425, 433 (1972).

European Court, its administrative jurisdiction is the most important for the legal protection of individuals. The administrative jurisdiction covers four particular types of action: (a) action for annulment; (b) action for failure to act; (c) action for damages; and (d) action against penalties.[92] In the national courts, individuals may seek such protection in three main situations: (a) community right; (b) non-directly applicable Community provisions, and (c) interpretation of a Community provision.[93]

5. *The Individual and Human Rights*

There can be no human dignity without "Human Rights".[94] In the many cases of individual rights, the rights belong to the individuals. The subject has been a preoccupation of political philosophers for a long time as may be seen from "Locke's theory of a social contract, Montesquieu's concept of the separation of powers, and Rousseau's theory of the sovereignty of the people. . . . [T]hese political ideas corroded and undermined absolute and despotic monarchy."[95] These ideas attempted to protect against the Westphalian model of State sovereignty which portrayed individuals as an incidental attachment of their State to be used, protected, or sacrificed for the interest of the State.[96] The concept of the protection of human rights has emerged originally in the field of domestic legislation, as in the Magna Carta of King John in England in 1215, the adoption of the British Bill of Rights in 1689, the Bill of Rights in the United States Constitution, the French Declaration of the Rights of Man in 1789, and other lesser known laws and declarations. This domestic concept was, however, translated into international terms only after World War II.[97]

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92. Toth, *supra* note 89, at 672-96.

93. *Id.* at 696-99.

94. JOHN HUMPHREY, NO DISTANT MILLENIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS 20 (1989).

95. ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 288 (1988).

96. *Id.*

97. The main reason was the shared conviction, of all the victorious powers, that the Nazi aggression and the atrocities perpetrated during the War had been the fruit of the vicious philosophy based on utter disregard for the dignity of man. One means of preventing a return to these horrors was the proclamation at all levels of certain basic standards of respect for human rights. This view was propounded with greatest force by the Western powers (in particular the U.S.), for the simple reason that their whole political philosophy and indeed the fundamental legal texts of some of their national systems were based on a 'bill of rights'. Therefore, it came naturally to them to project their domestic concepts and creeds onto the international community. *Id.* at 289-90.

a. *The United Nations and the Protection of Human Rights*

The promotion of respect for human rights is one of the foundations on which the United Nations (U.N.) stands. The preamble of the U.N. reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[98] And, one of the purposes of the U.N. is:

> [t]o achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion . . . .[99]

To achieve the above purposes, the basic obligations of the U.N. are set out in Articles 55 and 56. Article 55 puts the U.N. under an obligation to promote universal recognition for human rights and fundamental freedoms.[100] As stipulated in Article 56, all Member States will cooperate with the U.N. in initiating joint and separate actions to accomplish the purposes stipulated in Article 55.[101] Further, Article 13 authorizes the General Assembly to conduct studies and to submit recommendations to further the goal of realization of human rights and fundamental freedoms for all regardless of race, sex, language, or religion.[102] Thus, the Member States of the U.N. acknowledge human rights as a international consideration and no longer an interest limited to each separate nation.

In addition to the human rights provisions contained in the Charter, the United Nations in 1948 adopted the Universal Declaration of Human Rights[103] and, in 1966 adopted (1) the International Covenant on Economic, Social and Cultural Rights[104] and (2) the International Covenant on Civil and Political Rights.[105] The Optional Protocol to the Covenant on Civil and Political Rights[106] which is of great signifi-

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98. U.N. CHARTER pmbl.
99. *Id.* at art. 1, ¶ 3.
100. U.N. CHARTER art. 55.
101. U.N. CHARTER art. 56.
102. U.N. CHARTER art. 13.
103. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).
104. International Covenant on Economic Social and Cultural Rights, *open for signature* Dec. 15, 1966, 993 U.N.T.S. 3 (entered into force Jan 3, 1976).
105. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 933 U.N.T.S. 3 (entered into force, March 23, 1976).
106. Optional Protocol to the Covenant on Civil and Political Rights, *open for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force March 23, 1976).

cance for our present study was adopted as a separate instrument and it supplements the measures of implementation of the Covenant on Civil and Political Rights. In accordance with Article 1 of the Protocol:

> A State party to the Covenant [on Civil and Political Rights] that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party or any of the rights set forth in the Covenant.[107]

Further, in accordance with Article 2, "individuals claiming that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration."[108] In fact, the Human Rights Committee has found that in a number of cases there have been violations of the Covenant. For example, in *Sandra Lovelace v. Canada*, the Committee concluded that the exclusion of an Indian woman from her native Indian band for the sole reason of her marriage to a non-Indian was an unjustifiable denial of her rights and thus a violation of Article 27 of the Covenant.[109] In *Suerez de Guerrero v. Colombia*, the Human Rights Committee found that:

> [t]he action of the police resulting in the death of Mrs. Maria Fanny Suerez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to Article 6 (1) of the International Covenant on Civil and Political Rights.[110]

Other major United Nations Human Rights Treaties are (1) The Convention on the Prevention and Punishment of the Crime of Genocide;[111] (2) International Convention on the Elimination of All Forms of Racial Discrimination;[112] (3) International Convention on the Sup-

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107. *Id.*

108. *Id.*

109. U.N. GAOR, 36th. Sess., Supp. No. 40, U.N. Doc. A4/36/40 (1981); *see* HUMPHREY, *supra* note 94, at 187.

110. *Optional Protocol*, U.N. Human Rights Comm., U.N. Doc. CCPR/C/OP at 117, U.N. Sales No. E.84 XIV 2 (1981); *see also* HUMPHREY, *supra* note 94, at 187.

111. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, adopted by United Nations General Assembly Dec. 9, 1948.

112. Convention on the Elimination of All Forms of Racial Discrimination, (adopted by United Nations General Assembly Dec. 21, 1965), 660 U.N.T.S. 195.

pression and the Punishment of the Crime of Apartheid;[113] (4) Convention on the Elimination of All Forms of Discrimination Against Women;[114] and (5) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.[115]

Under the International Convention on the Elimination of All Forms of Racial Discrimination (EAFRD) of 1965, individuals have the right to communicate alleged violations to the Human Rights Committee on the EAFRD by their home State, provided that the home State has declared its recognition of the competence of the Committee to receive communications from individuals.[116]

b. The European System for the Protection of Human Rights

The European Convention for the Protection of Human Rights (ECPHR) was adopted on November 4, 1950, and entered into force on September 3, 1953.[117] All twenty-one Members of the Council of Europe have ratified the ECPHR.[118] The ECPHR has been amplified and amended by means of additional Protocols.

The Commission set up under Article 19 of the ECPHR may receive petitions from any individual or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the ECPHR.[119] This right of individuals, however, is conditioned on that State's prior recognition of the right of private petition.[120] The European Court has defined "a victim of a violation" to mean "an individual applicant should claim to have been actually affected by the violation he alleges . . . . Article 25 does not institute for individuals a kind of *actio popularis* for the interpretation of the

113. International Convention on the Suppression and the Punishment of the Crime of Apartheid, 1015 U.N.T.S 243 (signed November 30, 1973; in force July 18, 1976).

114. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. (1980) (entered into force Sept 3, 1981).

115. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Gen. Assembly Res. 39/46 (Dec. 10, 1980), draft *reprinted in* 23 I.L.M. 1027 (1984), substantial changes *noted in* 24 I.L.M. 535 (1985).

116. *See* Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 112, at art. 14.

117. On the history of the Convention, see generally Gordan L. Weil, *The Evolution of the European Convention on Human Rights*, 57 AM. J. INT'L L. 804 (1951).

118. These States are: Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

119. European Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4. 1950, art 19 213 U.N.T.S. 221 [hereinafter *Human Rights*].

120. The recognition requires a special declaration when the State ratifies the Convention. *Id.* at 306.

Convention."[121] The admissibility of petitions by individuals is governed by the provisions of Article 27 of the ECPHR which reads as follows:

> 1. The Commission shall not deal with any petition submitted under Article 25 which (a) is anonymous, or (b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.
> 2. The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill founded, or an abuse of the right of petition.
> 3. The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.[122]

c. *The Inter-American Human Rights System*

The American Convention of Human Rights (ACHR), which was adopted at San Jose, Costa Rica on September 22, 1969, came into force on July 18, 1978.[123] The ACHR created an Inter-American Commission of Human Rights consisting of seven members elected by the General Assembly of the Organization of American States (OAS) to act in their individual capacity and an International Court of Human Rights consisting of seven judges elected by a majority vote of the States' parties to the ACHR.

In accordance with Article 44 of the ACHR, "any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization"[124] may petition the Commission to the effect that the ACHR has been violated by a State party. The jurisdiction of the Commission in such a case does not depend on the acceptance of any optional clause by the respondent State.

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121. *Case of Klass and Others*, 28 Eur. Ct. H.R. 5, at 17-18 (1979).

122. *Human Rights, supra* note 119, at 306.

123. For text of the Convention, see American Convention of Human Rights "Pact of San Jose, Costa Rica", Nov. 22, 1969, 36 Organization of American States Treaty Series (O.A.S.T.S.) 1-21. The following States are parties to the Convention: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Suriname, Uruguay and Venezuela.

124. *Id.* at 13.

The admissibility of a petition is subject to the following qualifications: (1) the exhaustion of domestic remedies; and (2) the requirement that the petition be submitted to the Commission within a period of six months.[125] These requirements, however, do not prevent the admissibility of a petition if it can be shown that (1) there are no existing remedies to protect against the violation of the rights at issue; (2) there has been a denial of access to or interference with respect to the applicable domestic remedies; or (3) the domestic remedies have been subjected to unwarranted delay.[126]

In dealing with the petitions, the Commission examines the allegations, seeks information from the government concerned and investigates the facts. The Commission may also hold hearings in which the government and the petitioners participate. If the parties reach a friendly settlement, the Commission prepares a report for the General Assembly of the OAS for publication.[127] In case of failure of a friendly settlement, the Commission sends a report with recommendations to the States concerned.[128] The case may also be referred to the Inter-American Court of Human Rights by the Commission or the interested States. Individuals do not have a right to refer a case to the Court.

d. *The African System of Human and Peoples' Rights*

The African Charter on Human and Peoples' Rights (African Charter) which was adopted by the Organization of African Unity (OAU), was entered into force on October 21, 1986.[129] The African Charter, which has been ratified by at least thirty States, establishes a system for the protection and promotion of human rights within the institutional framework of the OAU.

The individual complaint mechanism of the African Charter is similar to the one provided in the UN System. It thus differs from the system of the European and American Conventions. According to Article 55 of the African Charter, the Commission on Human and Peoples' Rights (established within the framework of the OAU) compiles "a list of communications other than those of States parties to the

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125. *Id.*

126. *See* American Convention of Human Rights, *supra* note 123, art. 46(2), 36 O.A.S.T.S. at 13; *See also* Case 9102, Inter-Am. C.H.R. 57, OEA/ser. L/V/II, doc. 8 rev. 1 (1986).

127. *Id.* at art. 49.

128. *Id.* at art. 50.

129. *See* Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667 (1982); Manfred Nowak, *Introduction and Selected Biography to the African Charter of Human and Peoples' Rights*, 7 HUM. RTS. L.J. 399 (1986).

present Charter and transmit them to the members of the Commission."[130]

An important aspect of the individual petition system of the African Charter is that it is not designed to remedy isolated cases of individual violations of human rights. Article 58(1) limits the Commission to act only in "special cases which reveal the existence of a series of serious or massive violations human and peoples' rights."[131] If the complaint is admitted, the Commission refers it to the Assembly of the Heads of State and Government. The Assembly, then, decides whether to "request the Commission to undertake an in-depth study of these cases and make a factual report."[132] The in-depth study and report thus prepared by the Commission may only be published "after it has been considered by the Assembly of the Heads of State and Government."[133]

B. The Responsibilities of Individuals

1. The Prohibition of Piracy

Under customary international law, individuals who commit the offence of piracy on the high seas are liable as enemies of mankind to punishment by any apprehending State. The law has now been codified in the United Nations Convention on the Law of the Sea.[134] In accordance with Article 101 of the Law of the Sea Convention, Piracy consists of any of the following acts:

> (1) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircrafts, and directed:
> (a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (b) against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State;
> (2) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

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130. African Charter on Human and Peoples' Rights, art. 55, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, *reprinted in* 21 I.L.M. 59 (1982).

131. *Id.* at art. 58 ¶ 1.

132. *Id.* at art. 58 ¶ 2.

133. *Id.* at art. 59 ¶ 3.

134. *United Nations Convention on the Law of the Sea*, Dec. 10, 1982, U.N. Doc. A/CONF 62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter *Law of the Sea*].

(3) any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).[135]

International law authorizes every State to "seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board."[136] The punishment may be determined by national law. According to Article 105 of the Law of the Sea Convention, the courts of the State which carried out the seizure may decide upon the action to be taken with regard to the ships, or aircraft or property, subject to the rights of third parties acting in good faith.[137]

Thus, the penalty to be imposed upon the pirate is not directly determined by international law which leaves the question to national law. But in determining the penalty for piracy, the State executes international law and acts as an organ of the international community constituted by general international law. In essence, the doctrine of piracy assumes that individuals are subjects of the world community and that their acts are manifestly directed toward destruction of that community and are criminal. As Hans Kelsen observes: "the norm forbidding piracy is a norm of international law, it is individuals who are immediate subjects of international law, subjects of an international obligation."[138]

The act of sanctioning is directed against the particular individual or individuals and not against the State of which the pirate is a citizen. In the case of piracy, individual and not collective responsibility is imposed for a violation of international law.

2. *The Illegal Use of the Flag*

Under general international law, and in accordance with the Law of the Sea Convention, "[e]ach State shall fix the conditions for the grant of its nationality to ships . . . and for the right to fly its flag."[139] Thus, "ships have the nationality of the State whose flag they are entitled to fly."[140]

A ship should "sail under the flag of one State only and . . . [should] not change its flag during a voyage or while in port of call."[141] Furthermore, "a ship which sails under the flags of two or

135. *Id.* at art. 101.
136. *Id.* at art. 105.
137. *Id.* at art. 105.
138. KELSEN, *supra* note 56, at 204.
139. *Law of the Sea*, *supra* note 134, at art. 91.
140. *Id.*
141. *Id.* at art. 92.

more States, using them according to convenience . . . may be assimilated to a ship without nationality."[142]

It seems that general international law authorizes States to seize ships which illegitimately sail under their flags and to confiscate the ship by decision of their courts, as a penalty for abuse of flag.[143] This would demonstrate that the owner of the ship and the master of the ship are directly obliged by international law not to commit the delict, and the owner is made individually responsible for the delict.[144]

3. *Crimes Against Peace: The Laws of War*

Criminal liability for crimes against peace was accepted for the first time following World War II. In the Charter of the International Military Tribunal (Tribunal) annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Agreement) signed on August 8, 1945,[145] Article 6 provides that the following acts are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) crimes against peace; (b) war crimes; and (c) crimes against humanity.

On the issue of individual responsibility for such acts, the Tribunal said:

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as upon States has long been recognized . . . the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.[146]

The above mentioned Agreement of August 8, 1945 was originally signed by the United States, United Kingdom, France, and the

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142. *Id.*

143. KELSEN, *supra* note 56, at 205.

144. *Id.*

145. Quincy Wright, *War Criminals*, 39 AM. J. INT'L L. 258 (1945).

146. Ian Brownlie, *The Individual Before Tribunals Exercising International Jurisdiction*, 2 INT'L & COMP. L. Q. 701, 706-07 (1962) (quoting Judgement of the I.M.T. for the Trial of Major German War Criminals, Cmd. 6964, at 41-42).

U.S.S.R. Nineteen other States subsequently acceded to it.[147] Furthermore, in a resolution adopted unanimously on December 11, 1946, the United Nations General Assembly, after taking note of the Agreement, affirmed the principles of international law recognized by the Charter of the Nuremburg Tribunal and the Judgement of Tribunal.[148] Individual members of belligerent armed forces may become criminally responsible for violations of the rules of war and may be punished by enemy or international authorities.[149]

The Geneva Conventions on the treatment of prisoners of war authorizes a belligerent State to try individual members of enemy forces who violate the provisions of the Convention; they also require the State whose military authorities have committed these violations to bring them to punishment. Similar provisions apply to offenses against civilian populations in violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

4. Crimes Against Humanity: The Crime of Genocide

The worst crime that can be committed against minorities is that of genocide which the United Nations designated as a crime under international law. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Convention) was adopted on December 9, 1948, and came into force on January 12, 1951.[150] In accordance with Article I of that Convention, "genocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and to punish."[151]

Article II defines genocide as the commission of certain enumerated acts "with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such".[152] The acts constituting genocide are:

> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting of the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;

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147. *Id.* at 707.
148. *Id.*
149. *Ex parte* Quirin, 317 U.S. 1 (1942).
150. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 279.
151. *Id.* at art. 4.
152. *Id.* at art. 2.

(e) Forcibly transferring children of the group to another group.[153]

To be guilty of the crime of genocide, an individual must have committed one of the foregoing acts with the specific intent of destroying, in whole or in part, a national, ethnic, racial, or religious group. In accordance with Article IV of the Convention, persons committing genocide "shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals."[154]

5. Air Piracy (Hijacking and Sabotage of Aircraft) and Hostage-Taking

Close on the heels of adventurist Arab guerilla actives, under the auspices of the International Civil Aviation Organization, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention)[155] was adopted in 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation was adopted in 1971.[156]

The Hague Convention defined the offence of unlawful seizure of aircraft and provided that each contracting State should undertake "to make the offence punishable by severe penalties."[157] Article 4(2) established universality jurisdiction for hijacking as a safety-net to catch the person who escaped from, or was allowed to leave, a State with jurisdiction under Article 4(1).[158] In accordance with article 7,

> [t]he contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.[159]

Further, Article 8 makes hijacking an extraditable offence in present and future extradition treaties and practice between contracting parties.[160] The Montreal Convention provides for universal jurisdiction in

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153. *Id.* at art. 3.

154. *Id.* at art. 4.

155. Convention for the Suppression of Unlawful Seizure of Aircraft, (The Hague, Dec. 16, 1970), 22 U.S.T. 1641, T.I.A.S. No. 7192 [hereinafter *Aircraft*].

156. Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. NO. 7570, 10 I.L.M. 1151 (1971) [hereinafter *Montreal Convention*].

157. *Aircraft, supra* note 155, art. 2.

158. *Id.* at art 4, ¶ 2.

159. *Id.* at art. 7.

160. *Id.* at art. 8.

respect of violence, destruction or damage and the placing of a device on board an aircraft.[161]

Similar rules as to jurisdiction may be found in the 1979 International Convention against the Taking of Hostages[162] which is aimed at international terrorism. The offence of hostage taking, which each party must incorporate into its law, is defined in Article 1(1) as follows:

> Any person who seizes or detains and threatens to kill, to injure or continue to detain another person . . . in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages . . . within the meaning of this Convention.[163]

Contracting parties must either consider the prosecution of offenders found within their territory or extradite them.

6. *Other Crimes of International Legal Significance*

If international crimes are understood in a broad sense, the scope of international agreements with penal or quasi-penal provisions may become difficult to limit.[164] They may include espionage, counterfeiting currency, illicit traffic in dangerous drugs, slave trading, trading in women and children, pollution of the seas, damaging submarine cable, offenses against persons protected by international law, unlawful despatch of explosives through post, pirate broadcasting, and theft of national and archeological treasures.[165]

III. Some Concluding Observations

In its earliest beginnings, a sharp distinction was not made between international law and municipal law and it was easy to assume that individuals, like States, had legal personality and thus subjects of international law. The State, which is only a fiction of the brain, is an institution to safeguard and protect the rights of individuals constituting it. The State's personality is the sum total of the personalities of such individuals. Individuals are, on the other hand, the only natural

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161. *Montreal Convention*, *supra* note 156.
162. *See* International Convention Against the Taking of Hostages, 18 I.L.M. 1456 (1979).
163. *Id.* at 1457.
164. Hans-Heinrich Jescheck, *International Crimes*, 8 Ency. Pub. Int'l L. 335 (1985).
165. *Id.*

persons and, as such, the ultimate units of every society and the ultimate subjects of all law. The idea of a direct relationship of individual to the community of nations has a long history, and according to the naturalists, individuals enjoyed certain natural and human rights.

With the ascendancy of positivist writers on international law, States have succeeded in maintaining a practically unchallenged monopoly of exclusive jurisdiction over individuals. According to the positivist doctrine, States are the sole *dramatis personae* on the international scene, only they enjoy a *locus standi* in international law and are the wearers of international personality. The salient feature of international law was that it aimed at regulating the behavior of States. Thus, States have rights and duties directly supplied by international law in addition to the rights and duties supplied by the domestic law. Among these rights, there are the rights to free action, adoption and alteration of the constitution, the right of self-preservation, the right of trade and commerce, the right to enter into treaties with foreign States, the right to exercise jurisdiction over all persons and things within its territory, the duty of non-intervention. The State possessed the totality of international rights and duties.

In contemporary world, the question of the subjects of international law has acquired great significance. State practice has abandoned the traditional orthodox positivist doctrine that States are the exclusive subjects of international rights and duties. Although States are still considered the principal subjects, and the primary function of international law remains regulation of the relations of States with one another, contemporary international law has become increasingly concerned with international organizations and with the individuals. Thus, we may say that States are the primary concern of international law but not its sole concern.

To be a subject of law, three essential elements are to be satisfied: (1) incurring responsibility for any act or omission in breach of the rules of the system; (2) claiming rights from that system; and (3) possessing capacity to enter into legal relations with other legal persons recognized by the system.

Within the framework of any legal system, all the subjects are not identical; all do not possess exactly the same characteristics. As the International Court of Justice said in the Reparation for Injuries Suffered in the Service of the United Nations case:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their nature or in the extent of their rights, and their nature depends upon the needs of the community.[166]

166. Reparation for Injuries Suffered in the Services of the United Nations, 1949 I.C.J. 174 (1949).

Thus, a subject of international law need not be a State, and its rights and duties need not be the same as those of State. The fact that the individuals lack certain capacity possessed by States does not necessarily mean that they are not subjects of international law. Lack of personal capacity is not peculiar to international law. In most of the municipal legal systems, certain classes of persons—notably the insane and infants—have disabilities with respect to bringing actions. Actions are brought on their behalf. Yet, they are not considered as objects of the law or mere beneficiaries of the law.

The concept of the individual as a subject of international law has been developed by numerous publicists during the twentieth century. It has been recognized in official declarations and treaties which permit individuals of minority groups and mandatory territories to petition to international institutions. International tribunals have been established where individuals could be parties. International procedures exist for the protection of human rights and for punishing offenses against international law. Although the Statute of the international Court of Justice adheres to the traditional view that only States can be parties to international proceedings, a number of other international instruments have recognized the procedural capacity of the individual. It is, however, instructive to note again what PCIJ said in its *Advisory Opinion in the Danzig* case.[167] The PCIJ brushed aside objections in principle to treatment of individuals as subjects of international law and said that there was nothing in international law to prevent individuals from acquiring direct rights under a treaty provided that this was the intention of the parties.[168] The opinion suggests that individuals may be bound directly by any rule of international law, customary or conventional, if the intent of the rule was to bind them.[169]

The difficulty of granting individuals the access to international courts is straight forward. States which are not willing to be brought before a court by another State are even less willing to submit to claims by a national of that State. Further, the sovereignty of the State and the superiority of the domestic law over the individual may make it difficult for the individual to sue his own State in an international court. Furthermore, no international tribunal may exercise jurisdiction over a State unless the State consents. As observed by Antonio Cassese, the status of the individual is subject to the following limitations:

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167. *See Danzig, supra*, note 73.
168. *Id.*
169. *Id.*

> (1) Individuals are given only procedural rights: the rights to initiate proceedings before an international body, for the purpose of ascertaining whether the State complained of has violated the treaty providing for substantive rights benefiting individuals. . . .[170]
> (2) The procedural right in question is only granted by treaties (or, in a few instances, by international resolutions).[171]
> (3) Another limitation on the right at issue lies in the fact that not all States that are parties to the above treaties have accepted being made accountable to individuals. . . .
> (4) A further weakness in the international status of individuals is that the procedures they are authorized to set in motion are quite different from those existing in domestic law.[172]

Finally, it may be said that the usefulness of necessity of a limited personality of individuals, apart from that of the States under traditional international law, is becoming increasingly important. There are many practical and moral reasons for recognizing the right of an individual to the direct assertion before international bodies of his claims against a foreign State.

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170. *Cassese*, *supra* note 95, at 100. In addition, this right is usually limited to forwarding a complainant: the complaint is not allowed to participate in international proceedings (a notable exception is the European Convention of Human Rights of 1950). Much less has the individual a right to enforce or to promote the enforcement of any international decision favorable to him. . . .

> [O]nce the international body has pronounced upon the alleged violation, the applicant is left in the hands of the accused State: cessation of, or reparation for, the wrongful act will substantially depend on its good will.

171. "Consequently, it exists only with respect to certain well-defined matters (labor relations, human rights)." *Id.*

172. Three things in particular should be stressed.

> First, international bodies responsible for considering petitions are generally not judicial in character, although they often behave in conformity with judicial rules . . . . Second, international proceedings are themselves often quite rudimentary, in particular, there are notable limitations concerning the takings of evidence. Third, and even more important, the outcome of the procedure is not a judgment proper, but a fairly mild act such as a report setting out the views of the international body; a recommendation, and the like; no legally binding decision is envisaged (again, the European Convention is an exception). *Id.* at 101-02.