

The Individual in International Law: ‘Object’ versus ‘Subject’

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Abstract

There is uncertainty about the status of the individual in international law. The traditional positivist doctrine of international law is that States are the sole subjects of international law and that the individual is the object. The contemporary approach is that the individual is an original subject of international law and the owner of international individual rights. This approach relies for its justification on areas of international law such as investment protection treaties, intellectual property treaties, international human rights law, individual criminal liability in international law and Vienna Convention on Consular Relations where the individual has been brought into contact with international law.

The objects of this article are: (i) to assess critically the various areas where the individual has been brought into contact with international law with a view to showing that the individual is not a full subject of international law; and (ii) to show that insofar as the individual possesses a limited *locus standi* in international law and a limited array of rights, that is, *limited legal capacity*, the proffered existence of an international legal personality of the individual is not only superfluous but also confuses international legal personality which involves the capacity to perform legal acts in the international sphere with legal personality in municipal law.

Keywords: the individual, international law, object, subject, treaties, international legal personality

1. Introduction

The personification of the State took place in the mid-eighteenth century in the works of Emrich de Vattel and Christian Wolff (Note 1). While Vattel’s emphasis on State personality and sovereignty led to the conception of an international law applicable strictly to the relations among States (*jus inter gentes*), Wolff added to the principle of sovereignty of States another principle, namely, the horizontal equality of all States. The traditional positivist doctrine of international law from the eighteenth century to date is that States are the sole subjects of international law because international law is binding on States in their relations with each other and does not normally impose duties or confer rights upon individuals (Manner, 1952). Therefore, the individual is the *object* and not the subject of international law.

The contemporary approach is that States are primarily but not exclusively the subjects of international law; that the individual directly possesses rights, powers and duties in international law; and that the individual may be regarded as a *subject* of international law and as possessing international personality (Parlett, 2011). It was in the early twentieth century that the protection of individual rights was introduced by the first two 1929 Geneva Conventions which were the first humanitarian law treaties that referred to rights for individuals. Since then, the Geneva laws developed in two moves: from the Geneva Conventions in 1949 to the two Additional Protocols of 1977. To date, the contemporary approach relies on areas of international law such as investment protection treaties, intellectual property treaties, international human rights law, individual criminal liability in international law and Vienna Convention on Consular Rights where the individual is brought into contact with international law. The fact is that although the treaties instantiated conferred selective rights and duties on the individual, the resolution of the problem of international personality of the individual depends on the concept of legal personality. In legal theory, the words “person” and “personality” are used in the legal and philosophical sense. Rather than using the word “personality”, perhaps the appropriate term is the Latin *persona*, the equivalent of the Greek word *prosopon*, which refers to the mask worn by an actor and was extended to the part played by the human being in legal proceedings (Paton, 1972). When the Latin word *persona* is substituted for “personality”,

the distinction between having rights and duties as an individual and being an international legal personality in international law becomes crystal clear. A “person” is any being of whom the law regards as capable of rights and duties (Fitzgerald, 1966). The term “international legal person”, or *persona*, is used only to designate an entity that enjoys abundance or density of rights and not an entity that has only “selective” or “particular” or “limited” rights. (Korowicz, 1956; Johns, 2010; and Peters, 2016)

In this article, the international rights and duties potentially held by the individual will be assessed critically with a view to showing that the individual lacks capacity to be designated a “full” subject of international law and that the description of the individual as an “international legal person” is unhelpful and confuses capacity to perform acts in municipal law with international legal personality in the international sphere. The themes to be discussed are as follows:

- (i) The individual as an ‘object’ of international law;
- (ii) The individual as a ‘subject’ of international law;
- (iii) The rights of the individual under investment protection treaties;
- (iv) The rights of the individual under intellectual property treaties;
- (v) The rights of the individual under international human rights law;
- (vi) The individual criminal liability in international law;
- (vii) The Vienna Convention on Consular Relations; and
- (viii) Concluding remarks on the status of the individual in international law.

But first, the positivist doctrine that the individual is only an ‘object’ of international law is critically assessed in a lexical order.

2. The Individual as an ‘Object’ of International Law

The engagement of the individual in international law raised structural issues which were not resolved until the mid-eighteenth century. In the seventeenth century, Hugo Grotius (1583-1645) in *De jure belli ac pacis libri tres* did not use the term *jus inter gentes* because he did not envisage a law exclusively concerned with relations between States but rather *jus gentium*: a law between rulers of nations and between groups of citizens or private individuals not in domestic relations to each other. Grotius did not see the State as a separate juridical entity but as a body of free persons associated together under the leadership of a ruler. For Grotius, the law of nations was not an inter-state law but an inter-individual law applicable on a universal basis (Note 2).

Two medieval scholars – Vitoria and Suárez – are worthy of note on the status of the individual in international law. Francisco de Vitoria (c. 1485-1546) based his concept of a universal community which encompassed all humankind on organised community of peoples which were themselves constituted politically as States. Vitoria added that natural law, the basis of *jus gentium*, is found not in the will but rather in the right reason (*recta ratio*) (Note 3). Francisco de Suárez (1548-1617) conceived of a rational basis of law as the moral and political unity of the human race and opined that States had the need for a legal system which regulated their relations as members of the universal society (Note 4).

In his *De Jure Belli Libri Tres* (1612), Alberico Gentili stated that the law of nations was “established among all human beings” and being “observed by all human beings” (Note 5). The idea that *jus naturalis*, based on reason, was binding on *jus gentium* was shared by medieval scholars and founders of international law but incongruous with the assertion of two Franciscan monks – Don Scotus (1265-1308) and William of Occam (1290-1349) – that “will” was superior to “reason”, anticipating David Hume and paving the way for legal positivism (Friedmann, 1967).

Positivism in international law is not represented by a coherent school of thought. However, the positivist theory of international law is that law is the product of a legally relevant will and that in the international sphere the States through their consent create international law among themselves (Westlake, 1904). Hence, the law of nations conceived by the founding fathers 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 relations with other States was transmogrified into a law the sole subjects of which were the States. The law of nations contrary to the law of nature dislocated the individual from his central position and was replaced by the sovereign state. The emphasis on state personality by Vattel in his work, *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct of Nations and Sovereigns* (1758), led to the conception of an international law applicable strictly to relations among States (the *jus inter gentes*), that is, an inter-State legal order admitting

only and exclusively States (Vattel, 1811).

Wolff, in *Jus Gentium Methodo Scientifica Pertratatum* (1749) stated that since all individuals were free and equal, all nations were likewise by nature equal to one another. Thus, the principle of horizontal equality of all States in international law was enunciated (Note 6).

From early twentieth century to date, the positivist theory of international law has been enunciated and restated. F. L. Oppenheim, writing in 1905, stated that States were subjects of international law and the individuals were objects (Oppenheim, 1905) (Note 7). Again, Brownlie in 2003, stated that although there was no general rule precluding the individual from being a subject of international law, it was unhelpful to classify him as such because of lack of full capacity (Brownlie, 2003) (Note 8).

In spite of the longevity of the positivist theory of international law, its opponents argue that the theory is incongruous with the present state of affairs and that the individual is a subject of international law.

3. The Individual as a ‘Subject’ of International Law

The juridical bases of the contemporary approach that the individual is a ‘subject’ of international law are: (i) that treaties impose duties and responsibilities and confer rights upon the individual; and (ii) ethical cosmopolitanism.

Some leading scholars such as Cornelius van Bynkershoek, Trindade, Lauterpacht and Kelsen argued that international rules imposed direct obligations and conferred rights upon individuals. Bynkershoek (1673-1743) lamented that the truly *universal* system of the founding fathers of international law was gradually surpassed by the emergence of legal positivism but continued to uphold a multiplicity of subjects of *jus gentium*: nations (*gentes*) and also “persons of free will” (*inter valentes*). For Bynkershoek, legal subjectivity embraced all those who acted in the field of *jus gentium* of his time (Note 9). Judge Cançado Trindade contended that along the evolution of contemporary international law, the international legal capacity became no longer the monopoly of the States and that humankind, in the new *jus gentium* of the twenty-first century, came also to appear as a ‘subject’ of international law (Trindade, 2010). But we must not overlook Westlake’s exhortation that we should hesitate to translate *jus gentium* as the “law of nations”. The Roman jurists, Westlake contends, regarded *jus gentium* as resting on the consent of mankind, “the whole body of men as thinking and feeling individuals distributed among the nations” (Note 10). To modern minds, “the law of nations” rests on the consent of nations or States.

Hersch Lauterpacht argues that the doctrine that only States are the subjects of international law is inaccurate. He contends that the Permanent Court of International Justice Advisory Opinion in the case concerning the *Jurisdiction of the Courts of Danzig* (Note 11) dealt a resounding blow to the barrier separating the individual from international law. In that case, the Court stated that the object of an international agreement between Poland and Danzig might be the adoption by the parties of some definite rules creating individual rights and obligations enforceable by national courts. This opinion, according to Lauterpacht, justified the conclusion that the individual could be the subject of international law if States decided to do so (Lauterpacht, 1948). Anzilotti, the then President of the Court, retorted extra-judicially that the opinion of the Court did not state that a treaty could create rights and obligations for individuals without the need for rules and those things associated with rules to be incorporated into internal law (Anzilotti, 1929). Another view is that while the Court’s opinion maintained the traditional positivist position that States are the sole subjects of international law, it also affirmed that individuals could acquire rights under international law (Parlett, 2008).

Perhaps insights could be embraced for subsequent consideration of the “object” versus “subject” debate on the status of the individual in international law in this excursus by highlighting the views of Hans Kelsen (1881-1973), an eminent legal theorist and international law scholar. Kelsen in *Principles of International Law* vacillates. In an oft-cited passage, Kelsen states that “International Law imposes duties and responsibilities and confer rights upon states only, and not upon individuals, human beings. This doctrine is untenable” (Kelsen, 1966). And yet, in another passage in the same book, he states that individuals may be subjects of international rights created by treaties but in the absence of any obligation on the part of the contracting parties to the treaties to recognise the jurisdiction of the tribunal to which individuals have access in case of a violation of their ‘rights’ by a State, it is misleading to speak of rights being conferred on individuals by treaty (Kelsen, 1966). After World War II, Kelsen seemed to soften his previous position against the personality of States when he consistently stated that law can impose duties and responsibilities or confer rights only upon individuals but was quick to add that: “States as juristic persons are subjects of international law in the same way as corporations are subjects of national law” (Kelsen, 1966).

The latest addition to the debate on duality conception of international law is cosmopolitanism. Cosmopolitanism has been traced to Diogenes the Cynic (412 or 404-323 BC) who, when asked where he came from, replied “I am a citizen of the world” (*kosmopolites*) (Henderson, 2005). But what is cosmopolitanism? Cosmopolitanism may mean two things: (i) *political cosmopolitanism* which advocates the elimination or radical transformation of state borders with the aim of achieving either a world government or some sort of representation that transcends political divisions or (ii) *ethical cosmopolitanism* which champions what might be called a global ‘sphere of equal moral standing’. Rawls, like Kant, felt that a world government is not feasible because it would either be “a global despotism” or “a fragile empire torn by frequent strife as various regions and peoples tried to gain their political autonomy” (Kant, 1903; Rawls, 1999). Adherents of both types of cosmopolitanism invoke the phrase ‘citizens of the world’ to show that we have duties to everyone globally and that there is a growing body of treaties containing references to humankind (Téson, 1992; Trindade, 2010).

The claim by ethical cosmopolitans is that cosmopolitanism clears the way not only for moral and ethical duties, but also legal duties justifiably arising outside the bounds of State (Feldman, 2007). This claim is problematic because the world order created after the Westphalian Peace of 1648 is based on two principles: state sovereignty and inherent equality of sovereign states regardless of their power or domestic system, and not on cosmopolitanism – political or ethical (Kissinger, 2015). For this reason, it is necessary to assess critically international rights and duties potentially held by the individual under (i) the investment protection treaties, (ii) the intellectual property treaties, (iii) the international human rights law, (iv) international criminal law, and (v) the Vienna Convention on Consular Relations with a view to determining whether the individual has rights in the sense that the individual can enforce the decisions favourable to him or whether the successful individual must depend on the State’s goodwill for reparation for, or cessation of, the wrongful act, in which case, the individual lacks full capacity to be a ‘subject’ of international law.

4. The Rights of the Individual under Investment Protection Treaties

Individual rights under international law arise in the field of international investment protection law. These rights are often conferred by bilateral investment treaties. Two-thirds of all treaty-based proceedings on investment protection are carried out under the rules of the International Centre for the Settlement of Investment Disputes (ICSID) and one-third follow the rules of the North American Free Trade Agreement (NAFTA), the United Nations Commission on International Trade Law (UNCTRAL), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the International Chamber of Commerce in Paris (ICC).

Under the ICSID Convention of 1965, private investors who are nationals of a State Party of the ICSID may institute arbitration proceedings in regard to “any legal dispute arising directly out of an investment” against another Contracting State in which they have made an investment (the Last State) provided the Last State has consented in writing to ICSID arbitration (Note 12). The right of the investor to institute proceedings is a procedural right under international law which is illustrated by reference to two arbitration proceedings. The first is *Asian Agricultural Products Ltd v Republic of Sri Lanka* (Note 13) where arbitration proceedings were brought against Sri Lanka under the terms of the ICSID Convention. Asian Agricultural Products Ltd. claimed that they suffered a total loss of their investments in Sri Lanka as a result of a military operation conducted by the armed forces of Sri Lanka. The Government of Sri Lanka responded that the venture which was the subject of arbitration proceedings was a failure from the outset because the claimed damages were based on the illusion of profitability. The Claimant won.

The second case is *Mondev International v United States of America* (Note 14). In this case, Mondev brought a claim against the United States for the loss caused to its interest, Lafayette Place Associates (LPA), a Massachusetts limited partnership under the Articles of the North American Free Trade Agreement (NAFTA) and the rules of ICISD. The claim failed because of technicalities: (i) the dispute arose before NAFTA came into force, and (ii) the breaches that arose after NAFTA came into force were time-barred. Although these Tribunals provide equal treatment for domestic and foreign investors, it seems that the rights of foreign investors are upheld only in extreme cases as in *Asian Agricultural Products Ltd. v Republic of Sri Lanka* (Note 15) and, in other cases, by privileging state sovereignty as the guiding principle as in *Mondev International Ltd. v United States of America* (Note 16).

5. The Rights of the Individual under Intellectual Property Treaties

Intellectual property rights allow owners – that is, individuals or corporations – to enjoy the fruits of their creative works and inventions. The nine categories of intellectual property rights protected by intellectual property treaties are: (i) copyrights and related rights, (ii) patents, (iii) trademarks and service marks, (iv) geographical indications, (v) undisclosed information or trade secrets, (vi) industrial designs, (vii) layout designs

of integrated circuits, (viii) cell-lines, micro-organisms and transgenic animals, and (ix) biogenetic resources.

The first treaty for the protection of intellectual property rights was the Paris Convention signed in 1883 (Note 17). Under the Paris Convention, an inventor obtains benefit of the filing date in his home country provided he files in another country within one year of the home filing date. The Patent Cooperation Treaty allows the inventor to file in multiple countries by one application and obtain the home country's filing date (Note 18). In EU countries, the European Patent Convention created a European Patent Office to serve EU Member States: one filing is sufficient to obtain patents in all EU countries (Note 19).

The Berne Convention for the protection of copyrights lacks effective provisions (Note 20). The specialised agency of the United Nations for the promotion and protection of intellectual property is the World Intellectual Property Organisation (WIPO). WIPO administers some 23 intellectual property treaties (Note 21). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which entered into force with other World Trade Organisation (WTO) Agreements establishes standard of protection for each of the main categories of intellectual property rights instantiated above (Note 22). Article 41 of TRIPS provides that Members shall ensure that enforcement procedures as specified are available under their laws so as to permit effective action against any infringement of intellectual property rights covered by this agreement. Article 61 of TRIPS also states that Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Therefore, TRIPS Agreement establishes rights and obligations between WTO Members, not private individuals or corporations.

6. The Rights of the Individual under International Human Rights Law

In positivist theory the individuals and groups of individuals protected by rules enacted in human rights treaties are still regarded as objects of international law. This is based on the assertion that the substantive rights that are laid down in human rights treaties may only be exercised by individuals within the domestic legal system. Where the individual is given only a procedural right to initiate international proceedings before an international body with a view to determining whether the State complained of has violated the treaty to the detriment of the individual, the right is usually limited to forwarding complaint for the complainant is not allowed to participate in the proceedings. There are three exceptions: (i) the European Convention on Human Rights of 1950, as revised in 1998 by virtue of Protocol 11 of 1994 and Protocol 14; (ii) Article 63 of the American Convention on Human Rights 1969; and (iii) Article 44 of the African Charter on Human and Peoples' Rights 1981.

6.1 The European Court of Human Rights

All Member States of the European Union (EU) ratified the European Convention on Human Rights (the Convention) drafted by the Council of Europe in 1950 which entered into force in 1953. The ratification of the Convention has been a condition of membership of the Council of Europe. The Convention accords favourable treatment to individual applicants as one of the keystones in the machinery of enforcement of Convention rights in *Klass and Others v Federal Republic of Germany* (Note 23). However, this procedural right is subject to limitations. It is true that the individual may institute proceedings under the Convention, but the European Court of Human Rights (the Court) "may only deal with the matter after all domestic remedies have been exhausted according to the general rules of international law and within a period of six months from the date on which the final decision was taken" (Article 35(1) of the Convention). Once the Court has adjudicated upon the alleged violation, the individual has no right to enforce or promote the enforcement of the decision favourable to him. The successful individual is left in the hands of the accused State and must depend on its goodwill for cessation of, or reparation for, the wrongful act. However, under the Convention the State is under an obligation to comply with the decisions of the Court. Theoretically, the Committee of Ministers composed of the 47 Council of Europe Members and, in practice, their Permanent Representatives in Strasbourg supervise the execution of the Court's judgment. It is obvious that the individual's procedural right to apply to the Strasbourg Court is precarious because it rests on the will of States.

6.2 The Inter-American Court on Human Rights

Unlike the EU where ratification of the European Convention on Human Rights is a condition of membership of the Council of Europe, the ratification of the American Convention on Human Rights (ACHR) which entered into force on 18 July, 1978 is not a condition of membership of Organisation of American States (OAS) (Note 24). Article 63(1) of the ACHR makes provision for the enjoyment of the individual's right and freedom that is violated and that such breach be remedied. Article 46(1)(a) makes provision for the exhaustion of domestic remedies. One view is that individuals are legally recognised by the ACHR as subjects of international law (Trindade 2003; Trindade, 2011). The better view is that international human rights instruments are directly applicable if the constitutional law of the State recognises the primacy of international treaties over domestic

law.

6.3 *The African Charter on Human and Peoples' Rights*

The African Charter on Human and Peoples' Rights 1981 (ACHPR) went beyond the European and the American Conventions on Human Rights in that it included both civil and political rights and economic, social and cultural rights. Article 7(1) of the ACHPR states that: "Every individual shall have his cause heard". Both States and individuals can bring complaints to the African Commission on Human Rights alleging violation of the ACHPR by State Parties. The African Commission is the main executive organ of the African Union responsible for protecting human and peoples' rights (Article 45(2) of the ACHPR). The African Court on Human and Peoples' Rights was set up on 22 January 2006. Article 5, paragraph 3 of the Protocol on the Statute of the African Court of Justice and Human Rights adopted on 1 July 2008 acknowledges direct access of individuals and certain non-governmental organisations to the Court.

Like the European Court of Human Rights, the enforcement of decisions of the African Court is left to the will of the accused State. Article 31 of the Protocol on the Statute of the African Court provides: "The State parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."

6.4 *Rights Granted to Individuals Directly by International Rules*

It has been argued that human rights treaties create rights and obligations on States. The International Convention on Civil and Political Rights 1966 (ICCPR), the International Covenant for Economic, Social and Cultural Rights 1966 (ICESCR), the Covenant against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment 1984 (UNCAT), and the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) are cited.

These treaties are a good example of showing the difficulty in determining whether the individual derives rights from international law or whether the individual derives benefits. One way of looking at the rights of the individual under human rights treaties is to say that the individual has rights under international law. A better view is that the individual State has rights in respect of the individual because the State is responsible for the promotion and enforcement of rights promulgated under the treaties instantiated above and the individual derives benefits.

7. **The Individual Criminal Liability in International Law**

The rules regulating the conduct of war could be traced to Vattel and Wolff in the eighteenth century (Remec, 1960). By the nineteenth century, rules which limited the conduct of armed forces such as the St. Petersburg Declaration 1868 which banned the use of projectiles, the Hague Declaration of 1899 which proscribed the use of asphyxiating gases by Contracting Parties, and the first Geneva Convention concluded under the auspices of the International Red Cross in 1864 that provided that ambulances and military hospitals should be "protected and respected by belligerents" engaged individuals in international law.

The Hague Convention II of 1899 and the Hague Convention IV of 1907 both included the 'Martens' clause inserted at the suggestion of the Russian publicist Fyodor Fyodorovich Martens (1845-1909). Cutting away the frills, the Marten clause stated that until a complete code of law of war has been promulgated in cases not included in the 1907 Hague Regulations adopted by High Contracting Parties the inhabitants and belligerents remain under the protection and rules of the law of nations (Meron, 2000; Cassese, 2000; and Cassese, 2008).

In 1929, the two Geneva Conventions were the first humanitarian law treaties to refer to rights for individuals but it was not clear whether the language "shall have the right" was broad enough to encompass creation of individual rights by treaty or was a requirement that the individual right be created under a municipal law (Note 25).

Since 1945, two developments are worthy of note. The first is the famous statement of the International Military Tribunal at Nuremberg in 1946 acknowledging that:

"[C]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit crimes can the provisions of international law be enforced which transcend the national obligations imposed by the individual state" (Note 26).

The second development, the development of the Geneva law, is in two waves: (i) the Conventions of 1949 and (ii) in the 1970s, the two Additional Protocols of 1977. The Common Article 1 of each of the Geneva Conventions states that the high contracting parties "undertake to respect the present Convention in all circumstances." The provisions of Conventions are expressed in terms of obligations imposed on State Parties

rather than rights directly conferred on individuals (Note 27).

International human rights law may also apply in armed conflict. In its Advisory Opinion on *Nuclear Weapons* in 1996, the International Court of Justice stated that human rights “[do] not cease in time of war except where there is a valid derogation in times of national emergency (Note 28). In the *Wall Opinion* in 2004, the Court stated that the construction of the wall and its associated regime impeded the liberty of movement of the inhabitants of the Occupied Palestinian Territory as guaranteed by Article 12(1) of the ICCPR 1966 (Note 29). In *DRC v Uganda* in 2005, the Court held that Uganda was responsible for acts of looting, plundering and exploitation of natural resources in occupied territory which constituted violations of human rights and humanitarian law obligations (Note 30).

While international criminal law concerning war crimes derives from or is linked with international humanitarian law, international criminal law concerning crimes against humanity is predicated upon international human rights. Both war crimes and crimes against humanity are tried by the International Criminal Court. The *ad hoc* Tribunals for the trial of war crimes committed in the territory of the former Socialist Federal Republic of Yugoslavia in the 1990s, the International Criminal Tribunal for Yugoslavia (ICTY) and in 1994 in Rwanda, the International Criminal Tribunal for Rwanda (ICTR) provided the spur for the emergence of the International Criminal Court (ICC). (Hybrid tribunals or mixed tribunals were established in Kosovo, Timor-Leste, Cambodia and Sierra Leone.) The criminal liability of the individual under international law has evolved through the works of the *ad hoc* tribunals and the ICC.

The ICC was created by the Rome Statute adopted in Rome on 17 July 1998 with powers not only to prosecute and sentence individuals but also to impose obligations on Contracting States. The ICC has an automatic jurisdiction (i.e., jurisdiction following mere fact of ratifying the statute) only over genocide, and for other crimes such as war crimes and crimes against humanity (Article 21). Only State Parties or the Security Council could initiate proceedings (Articles 23 and 25): the Prosecutor has no such powers. The Security Council has extensive powers with regard to prosecution of cases under Chapter VII of the UN Charter (threat to peace, breach of peace and aggression). The ICC is a treaty-based court with powers not only to prosecute and sentence individuals, but also to impose obligations on Contracting States. Scheffer argues that a fundamental principle of international treaty law is that only States that are party to a treaty should be bound by it (Scheffer, 1999). And yet, Article 12 of the ICC Statute reduces the need to ratification of the treaty by national governments by providing the ICC with jurisdiction over non-party States which include the United States. The United States purportedly circumvented Article 12 by refusing to join or support the Court by pressing other countries to sign treaties exempting US citizens from the Court’s proceedings and by cutting US foreign assistance to selected countries unless they sign immunity agreement with Washington (Johansen, 2006). There is one pertinent question: Are treaties signed by the United States and less powerful States exempting US citizens from court proceedings legal? US officials, relying on Article 98(1) of the ICC Statute which stipulates that the ICC may not proceed with a request for the surrender or assistance which would require the requested State to act inconsistently with its obligations under international law relating to the State or diplomatic immunity of person or property of a third State, assert that the immunity treaties are valid.

Lawyers for EU and many other governments have concluded that the US-sponsored immunity treaties violate Article 98 and are in breach of their obligations under international law because the Article was designed to enable a State that had already existing status-of-forces agreement with other countries avoid violating these agreements with other forces they are hosting. Accordingly, EU Members have refused to sign immunity treaties with the United States on the legal and political grounds that to do so would breach the Rome Statute and undermine ICC’s prospect.

One problem, however, remains to be tackled. Crimes against humanity are perpetrated by State organs, that is, individuals acting in an official capacity such as military commanders and servicemen. The problem is: If crimes against humanity are perpetrated by individuals acting in an official capacity, might it be committed by individuals acting in a private capacity and without formal approval of their superior authorities? Article 7(1) of the ICC Statute provides that “crime against humanity” means acts against any civilian population which include murder, extermination, enslavement, deportation and forcible transfer of a population, imprisonment, torture, sexual violence, persecution and enforced disappearance of persons.” The last act prohibited – enforced disappearance of persons – is defined by Article 7(2)(i) of the ICC Statute as requiring “the authorisation, support or *acquiescence* of a State or a political organisation.” It has been suggested that the definition in Article 7(2)(i) of the ICC Statute has been repeated in Article 2 for the International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, which entered into force on 23 December 2010 and that this might be a good argument that it reflects customary international law. One might answer the

question by stating that individuals acting in private capacity with the acquiescence of the State are liable for crimes against humanity (Guilfoyle, 2015).

It must be stressed that whilst war crimes linked to humanitarian law and crimes against humanity linked to human rights law are both tried by the ICC, tension exists between diplomatic and consular law, on the one hand, and human rights law on the other.

8. The Vienna Convention on Consular Relations

Diplomatic protection which operates under the fiction that wrongs against individuals are transposed into wrongs against their state of nationality has been traced to Vattel. According to Vattel, an injury to an individual is an injury to his state of nationality (Vattel, 1811). Consular law is governed by the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations which 186 States by 2008 ratified or acceded to (Lee and Quigley, 2008). Article 3(1)(b) of the Vienna Convention on Diplomatic Relations enumerates the functions of a diplomatic mission as including “protecting in the Receiving State the interests of the Sending State and its nationals within the limits permitted by international law.”

Article 36(1)(b) of the Vienna Convention on Consular Relations 1963 (VCCR) provides that competent authorities of the receiving State shall inform the consular post of the sending State that a national of that State is in custody pending trial.

The International Court of Justice, in two death penalty cases, it dealt with, affirmed that individuals might acquire rights under international treaties. In *La Grand (Germany v United States)* (Note 31), the Federal Republic of Germany instituted proceedings against the United States of America in a dispute concerning the alleged violations of Article 36 of the VCCR. Germany stated that the authorities of the State of Arizona had detained the La Grand brothers, Karl and Walter, who were tried and sentenced to death without having been informed of their rights under Article 36, paragraph 1(b) of the Vienna Convention. Germany also alleged that the failure to provide the required notification precluded Germany from protecting its nationals’ interests provided by Articles 5 and 36 of the Convention at both the trial and the appeal level in the United States courts. Germany accompanied its application by an urgent request for the indication of procedural measures requesting the Court to indicate that the United States should take all measures at its disposal to ensure that its nationals were not executed pending the final judgment of the case. The Court delivered an Order for the indication of provisional measures to the United States. The Court held that by applying the default rule which did not allow the detained individuals to challenge a conviction and sentence by the competent national authorities, the United States violated Article 36, paragraph 2 because the Order “was not an exhortation” but “created a legal obligation for the United States”.

Again, in *Avena and other Mexican Nationals (Mexico v USA)* (Note 32), Mexico argued to the International Court of Justice that information about consular access must be provided at the time of arrest and, in any event, prior to interrogation. The Court concluded that the commencement of interrogation before information was given was a breach of Article 36.

The Vienna Convention on Diplomatic Relations 1961 requires a diplomat or consular agent to protect and promote in the receiving State the rights of its nationals within the limits of international law when the receiving State is the final arbiter of the rights of the nationals of the sending State. Hence, the enforcement of the rights conferred on the individual by the Vienna Convention on Consular Relations 1963 is precarious because the rights rest on the will of the receiving State (Wouters *et al*, 2019).

9. Summary and Conclusions

The debate on the status of the individual in international law is not only a structural debate between the traditional positivist theorists who claim that States are solely and exclusively the subjects of international law and the individual is an object and the contemporary theorists who claim that the individual is a subject of international law in his own right but the debate is also inextricably intertwined with the theory of international legal personality. Unfortunately, the same words *person* and *personality* have been used in the legal and philosophical sense instead of the Latin word *persona*, the equivalent of the Greek word *prosopon*, which originally referred to the mask worn by an actor to imitate the god or hero impersonated in a play and later extended to the part played by human beings in a legal proceeding (Paton, 1972).

The word *persona* best describes an international legal person as one recognised by international law as having full capacity, that is, *locus standi* to institute proceedings in international law (Menon, 1992). Article 34, paragraph 1 of the Statute of the International Court of Justice established a strict monopoly that “Only States may be parties in cases before the Court” and paragraph 2 states that the Court may request of public

international organisations information relevant to cases before it and shall receive such information presented by such organisations on their own initiative (Zimmerman *et al*, 2012).

The passing from the traditional positive doctrine to the contemporary approach of bringing the individual into contact with international law in areas of investment protection treaties, intellectual property treaties, international human rights law, international criminal law, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations has not effectuated real structural change in international law for five reasons.

First, investment protection treaties afford equal treatment for domestic and foreign investors and, except in extreme cases, privilege state sovereignty as the guiding principle in adjudicating on investment protection cases as in *Mondev* (Note 33). Second, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which came into force with other World Trade Organisation (WTO) Agreements establishes rights and obligations between WTO Members, not individuals or corporations. Third, international rules on human rights impose on States obligations towards other States concerning the treatment to be granted to the individual subject to their jurisdiction. Where the individual is given a procedural right to initiate proceedings before an international body such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Justice and Human Rights, those rules maintain their character as law among sovereign entities because the individual has no right to enforce or promote the enforcement of the decision favourable to him. The execution of the judgment depends on the will of the State accused of violating the individual's human rights. Within these frameworks, it is difficult to draw conclusions in favour of international legal personality of the individual (Randelzhofer and Tomuschat, 1999).

Fourth, in international criminal law, the individual has a few obligations deriving from customary international law, the Geneva Conventions of 1949 and the two Additional Protocols of 1977, and the ICC Statute for war crimes and crimes against humanity – discussed above – and international human rights law such as Article 3 of the European Convention on Human Rights and the UN Convention Against Torture 1984. In some cases, such as war crimes and enforced disappearance of persons, the state must be implicated in the sense of authorisation or support or acquiescence or claiming immunity for its citizens as is the case of the United States by signing immunity agreements with less powerful States exempting US citizens from court proceedings. In some cases, many States including the UK by virtue of the International Criminal Court Act 2001, have passed legislation so that their national courts possess jurisdiction over crimes envisaged in the ICC Statute committed by their citizens either at home or abroad.

Fifth, the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963 create rights for nationals of the sending State enforceable by their diplomatic or consular agents in the receiving State. However, despite the intervention of the International Court of Justice in two death penalty cases discussed above, the enforcement of these rights rests on the will of the receiving State.

From the foregoing analysis, it is safe to assert that the international legal status of the individual is unique in that the individual has a few obligations deriving from customary international law and the ICC Statute but limited array of rights. It is unhelpful to use terms such as “full subject”, “passive subject”, “limited subject” and “ordinary subject” when describing the status of the individual in international law. Conceptually, for an entity to be described as “an international legal person”, the entity – *persona* in Latin and *prosopon* in Greek – must possess full capacity to institute proceedings in international tribunals, which includes the right to enforce and promote the enforcement of the decision favourable to him. The individual is active in the international sphere as an “object” of international law but to classify the individual as a “subject” of international law implies the existence of full capacity which the individual lacks in order to be an “international legal person” (Note 34).

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Notes

Note 1. See Trindade (2010: 216-217).

Note 2. See Parlett (2011: 59).

Note 3. See Trindade (2010: 214).

Note 4. Ibid.

Note 5. Ibid., p. 215.

Note 6. Ibid., p. 216.

Note 7. See Phillimore (1879: 79) where he stated: "States are the proper, primary and immediate subjects of International Law." See, also, Schwarzenberger (1957: 596) and Chapman (2012: 235).

Note 8. See, also, Cassese (2005: 143-144).

Note 9. See Trindade (2010: 217).

Note 10. See Oppenheim (1914: 19).

Note 11. PCIJ, Advisory Opinion No. 5, series B, No. 15, pp. 17-21.

Note 12. See Article 36 in conjunction with Article 25 of the ICSID.

Note 13. Final Award, 27 June 1990, 4ICSID Rep. 256 (Case No. ARB/87/3).

Note 14. ICSID Case No. ARB (AF) 99/2, 11 October 2002.

Note 15. Supra, note 13.

Note 16. Supra, note 14.

Note 17. See the Paris Convention for the Protection of Industrial Property, 20 March 1883, as last revised at Stockholm, 14 July 1967, 21 U. S. T. 1538.

Note 18. See the Patent Cooperation Treaty, done at Washington on June 19, 1970, amended on September 28, 1979 and modified on February 3, 1984 and on October 3, 2001; available at <https://www.wipo.int/pct/en/texts/pdf/pct.pdf>

Note 19. See the European Patent Convention, 5 October 1973, T. S No. 20 (1978), 13 I. L. M. 270 (1974).

Note 20. See the Berne Convention for the Protection of Literary and Artistic Works adopted in 1886; available at <https://www.wipo.int/treaties/en/ip/berne>

Note 21. See the Convention Establishing the World Intellectual Property Organisation signed in Stockholm on July 14, 1967, entered into force in 1970 and amended in 1974; available at https://wipo.int/treaties/en/convention/summary_wipo_convention.html

Note 22. See the Agreement on Trade – Related Aspects of Intellectual Property Rights (TRIPS Agreement); available at https://www.wto.org/english/doc_e/legal_e/27_trips_01_e.htm

Note 23. (1978) 2 EHRR 214.

Note 24. See the American Convention on Human Rights which entered into force on 18 July 1978, available at https://www.oas.org/dil/treatiesb_32_american_convention_on_human_rights.pdf

Note 25. See the Geneva Convention Relative to the Treatment of Prisoners of War of 1929, available at <https://www.icrc.org/eng/resources/documents/misc/57jnws.htm>

Note 26. See International Military Judgment (Nuremberg), Judgment and Sentences, 1 October 1946, reproduced in (1947) *American Journal of International Law* 172, 220-221.

Note 27. See the Geneva Conventions of 12 August 1949; available at https://www.irc.org/en/doc/assets/files/publications/icrc_2002_0173.pdf

Note 28. [1996] ICJ Rep. 226, 240 (para. 25).

Note 29. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep. 36 (paras. 134 and 137).

Note 30. *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep. 116 (paras. 219, 345).

Note 31. [2001] ICJ Rep. 466, 481.

Note 32. [2004] ICJ Rep. 12.

Note 33. Supra, note 14.

Note 34. See Cassese (2005: 148-149); Crawford (2012: 121); and Malanczuk (2009: 100-101).

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