

Prospects for *Jus Standi* or *Locus Standi* of Individuals in
Human Rights Disputes before the International Court of Justice

by

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ABSTRACT

This research focuses on the desirability and feasibility of allowing individuals to access the International Court of Justice when their rights under international human rights treaties have been violated. International law now recognizes individuals as its subjects and that from such recognition flows a right of access to international courts. Using the Inter-American and European Courts of Human Rights as models, it is examined whether the right of individual access supersedes the will of states, the arguments for and against a global human rights court and how the ICJ's statute and rules could be changed to allow individuals a) to participate in the court's proceedings and b) gain direct access to the court as parties.

The conclusion is that individuals could have both *locus standi* before the ICJ if the Court modifies its procedural rules and *jus standi*, which requires not only procedural changes, but the modification of the U.N. Charter.

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INTRODUCTION

In the last century, the horrors of the two World Wars established that the positivistic system of international law that relegated individuals to the status of objects could not satisfactorily protect human rights. The post-War treaties sought to recognize that individuals had rights and duties under international law. Under this new paradigm, individuals are arguably once again subjects of the law of nations with access to international courts. However, not all individuals have access to tribunals that can make these international rights effective. Regional systems of human rights protection partly addressed this issue and made possible the direct access or participation of individuals in these systems' courts. However, there is no similar system at the global level. I argue that the International Court of Justice could be modified to fill this gap and effectively protect and apply international human rights norms.

International law has changed considerably since its early developments in the 17th century to modern times. It sought to adapt to the needs of the international community and especially to the prevailing subjects of international law: States. Early international law scholars included individuals together with Nations as part of the international community. Later, with the development of legal positivism, States were established as the sole subjects of international law and this State-centrism went even further to envisage a concept of international law that lies below the power of States, as a mere instrument that States could use to conduct their international relations.

An international society controlled by States and without a legal order above them proved to be ineffective in important ways. This system could not stop the outbreak of two world wars and the placement of individuals as objects of the law of

nations. Individuals had no place in international law and a State-centric international society ruled by values of self-interest could not protect its nationals to the fullest. To respond to the atrocities committed during 20th century major conflicts, international law developed following a different paradigm that placed individuals in a central position. The first chapter of my dissertation focuses on these changes - on how international law after the Second World War sought to bring human rights into the law of nations.

The establishment of international treaties applying rights to individuals and duties to States seeking the protection of human rights resurrected the argument that individuals were subjects of international law. The “founding fathers” of the law of nations, that is, international law scholars preceding Vattel, had envisaged an international community formed by Nations and individuals, but this view was abandoned by Vattel and Hegel. After the developments of international law, especially after the Second World War, scholars such as Hersch Lauterpacht and Cançado Trindade began to advocate the international legal personality of individuals and sought to establish the fundament of international law based on natural law concepts. In the second chapter of my dissertation, I advocate the international legal personality of individuals. After reviewing the theories that defend and deny the international legal personality of individuals, I argue that individuals together with States and international organizations are subjects of international law, but each one with its particularities and characteristics. I also show that the claim that individuals are subjects of international law has been present in the writings of prominent scholars throughout the development of international law. In the last part of chapter two, I contrast this claim with the theories that place international law above the will of States.

To accept that individuals have rights and duties under international law is a great advance for the protection of human rights, but it does not guarantee that human rights will be applied at the international level and, consequently, it does not grant international legal personality to individuals to the fullest. Individuals must first have access to international mechanisms of human rights protection. The access of individuals to international justice both establishes the international legal personality of individuals and makes human rights effective on the international plane. In chapter three, I analyze how individuals access the Inter-American and European Courts of Human Rights. The Inter-American Court of Human Rights grants *locus standi* or full participation to individuals in the Court's proceedings. The European Court, on the other hand, grants direct access or *jus standi* to individuals, recognizing their international legal personality. I argue that the individual's right of access to international courts, whether indirect or direct, is important to the effectiveness of human rights at the international level and transcends the regional elements of international law.

In the final chapter of my dissertation, I argue that the International Court of Justice could, by granting *locus standi* and *jus standi* to individuals, become an important organ of human rights protection. First, I analyze the jurisdiction of the International Court of Justice, and point out that it is a State-centric tribunal which denies individuals participation in its proceedings. Second, I argue that reforming the ICJ is better than creating a global human rights court because it would not contribute to the fragmentation of international law, that is, it would not contribute to possible conflicts of jurisprudence, *forum shopping* and over specialization of the law of nations. Third, the International Court of Justice, to adapt to the evolution of international law related to the protection of human rights, could grant access to

individuals in human rights disputes. This access could be direct when they are able to file complaints or indirect with their participation in the Court's proceedings. I propose changes to the Statute of the International Court of Justice and its Rules of Court taking into consideration the development of the Inter-American and European Courts of Human Rights related to the *locus standi* and *jus standi* of individuals. Reforming the ICJ's Rule of Court would not be difficult since these are norms related to its internal function. Amendments to its Statute would be more difficult to address, as they require consent of the members of the United Nations and, in particular, the Security Council.

The following questions are addressed in this dissertation: is international law the same as the 19th century law of nations? Are individuals subjects of international law? Is there a need for the international legal personality of individuals? What is international legal personality? How do individuals have access to the Inter-American and European Courts of Human Rights? Are the treaty-monitoring bodies enough to protect human rights at a global level? Could the International Court of Justice grant *locus standi* and *jus standi* to individuals? How could the International Court of Justice be adapted to provide individuals access?

The approach of this dissertation, therefore, is not State-centric.¹ The practice of States is important to the development of international law, including international human rights law, which may consubstantiate via the conclusion of treaties, customary practices viewed by States as mandatory, or general human rights principles that guide States' relations in international politics. Nevertheless, I have chosen not to focus my dissertation on these aspects of international law. In my view, international law, especially regarding human rights, finds its source above the will of

¹ Chapter II of this dissertation will explain why the State-centric view of international law based on voluntaristic positivism is not valid.

States; its principles seek to achieve the common good of the whole international community comprised of States, international organizations and individuals. The right of access and of international justice is a voice for individuals, as subjects of international law, on the international plane. I analyze the access of individuals to international tribunals in light of the legal evolution of the law of nations, including the expansion of individual access before international courts, from this perspective.

CHAPTER I

THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS LAW

This dissertation discusses the perspective of the access of individuals in human rights disputes before the International Court of Justice. It is important to understand how, from a State-centric conception of international law, human rights have given individuals a central place. Therefore, on an introductory basis, I briefly focus on the concept, evolution and scope of human rights at the international level.

The first part of this Chapter discusses the definition and the early development of human rights. The second topic focuses on the internationalization of human rights and the new paradigm after the First and Second World Wars, which led to the development, at the international level, of common goals regarding the establishment of norms and principles aimed at the protection of human rights. Especially after the Second World War, when organizations as the United Nations were created and international treaties that seek the protection of the human person were implemented, human rights became an important component of the international agenda.

I briefly explain the importance of the former League of Nations, the United Nations, the Universal Declaration on Human Rights, and the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights for the development of international human rights law. The questions that guide this chapter are: What are international human rights? How did human rights become part of international law?

1. Human Rights

Defining the word human rights in order to delineate the scope of this concept is a very arduous task because, as Peres Luño affirms, human rights represent “a great paradigm of misunderstandings”.² Dallari sustains that human rights are an abbreviated form to refer to fundamental rights of individuals, which are rights that are indispensable for humans to exist, develop and participate in life in its plenitude.³ Peces-Barba gives a more complete definition of human rights affirming those rights are attributes to individuals and social groups, the expression of individuals’ needs related to life, freedom, equality, political participation, or social or any other fundamental aspect that affect their integral development in a community of free people.⁴ Peres Luño⁵ and André Ramos⁶ state that human rights comprises a minimum group of essential norms that assure a life based on dignity, freedom and equality.⁷ In my view, all those definitions reflect the concept of human rights as fundamental norms assured to all individuals allowing equal standards of living based on a juridical minimum and on rights that seek to make human development feasible.

The discussion of the concept of human rights leads to the question of the basic elements of these rights. Mazzuoli explains that human rights find this source in the “law that is attributed to each person by the simple fact of existence”.⁸ That means

² Antonio Peres Luño, *Derechos Humanos, Estado de Derecho y Constitución* (Madrid: Tecnos, 1995) at 25 [translated by author].

³ Dalmo de Abreu Dallari, *Direitos Humanos e Cidadania* (São Paulo: Moderna, 1998) at 7.

⁴ Gregório Peces-Barba, *Derecho Positivo de los Derechos Humanos* (Madrid: Debate, 1987) at 14-15.

⁵ Peres Luño, *supra* note 2 at 48.

⁶ André de Carvalho Ramos, *Direitos Humanos na Integração Econômica* (Rio de Janeiro: Renovar, 2008) at 20.

⁷ Many scholars distinguish between human rights and fundamental rights. Fundamental rights are connected to the State’s protection of the individuals’ rights. They are assured most of the time by constitutional norms of protection because they are written in the States’ contemporary constitutions. Human rights, on the other hand, are rights written in treaties or established by international customs, norms that are already part of public international law. See Valério Mazzuoli, *Curso de Direito Internacional Público* (São Paulo: Editora Revista dos Tribunais, 2009) at 736.

⁸ Mazzuoli, *supra* note 7 at 738 [translated by author].

that the fundament of human rights is the dignity which every human being has. Mazzuoli concludes that human rights are derived from three basic principles. First, human inviolability, which provides that one cannot impose sacrifices on a person in order to benefit another person. Second, human autonomy, which establishes that everyone is free to act as long as he or she does not harm others. Third, human dignity which states that every person should be treated and judged by ones action and not by other attributes.⁹

The theory of human rights had its first origins in political, legal, and moral theories of scholars from different ancient civilizations, especially Greek and Roman.¹⁰ The Magna Carta,¹¹ the Habeas Corpus law (1679) and the Bill of Rights (1689) helped to establish the idea of rationalist *jus naturalism* and, in the 17th and 18th centuries, it influenced the idea of the social contract that would explain the origin of the State, society and the law established in the will of individuals.¹² The social contract theory, therefore, has a strong democratic connotation because it justifies the State and the Law not as a divine power or a sovereign power that can do as it pleases, but as a power that comes from individuals. The French Declaration of the Rights of the Man (1789)¹³ and the United States Declaration of Independence (1776), influenced by the *jus naturalism*, the social contract ideas and the

⁹ *Ibid.*

¹⁰ Mark Freeman & Gibran van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at 5. Freeman and van Ert affirm that the Greek and Roman civilizations were influenced by theories from the Egyptians and Sumerians.

¹¹ The idea of human rights was further developed in England in 1215 with the Magna Carta that even though sought to secure some basic rights that would later be called human rights, it was only applied to nobles, which shed its universal nature. See Rhona K. M. Smith, *Textbook on International Human Rights* (New York: Oxford University Press, 2007) at 5.

¹² Celso Lafer, “O Caso Ellwanger: Anti-semitismo como Crime da Prática de Racismo” (2004) 162 *Revista Informação Legislativa* 53 at 54.

¹³ See Rubim Santos Leão Aquino *et al.*, *História das Sociedades* (Rio de Janeiro: Editora Livro Técnico, 1993) at 145.

Montesquieu theory of division of Powers, helped crystallized the modern form of human rights.¹⁴ Smith affirms that

The French Declaration was inspired by the United States Declaration of Independence (though it predates the Bill of Rights). It begins by stating that 'Men are born and remain free and equal in rights'. The concept of liberty is defined in Article 4 – 'Liberty consists in being able to do anything that does not harm others'. Other articles relate to the exercise of the rule of law, including a fair trial process (Arts.10 and 11) while matters of taxation are also addressed (Arts. 13-14).¹⁵

Even though the French and American Revolutions helped to crystallize this concept of human rights, it was only made universal after the First and Second World Wars. Nevertheless, the American and French revolutions represent real steps towards the establishment of human rights, which evolved from few, limited rights given to specific individuals to fundamental norms created to allow individuals to live and attain their full potential.

1.1 The Internationalization of Human Rights

The major turning points in the internationalization of human rights are the First and Second World Wars. The horror of those wars prompted humankind to repudiate those practices and seek ways to prevent other wars. The atrocities committed prompted States to create mechanisms to prevent future violations of human rights.

¹⁴ *Ibid.* at 55.

¹⁵ Smith, *supra* note 11 at 6.

The international human rights protections of the 19th and beginning of the 20th centuries were focused on the preoccupation of States about the treatment of their nationals abroad. The doctrine of diplomatic protection aimed to protect individuals only when they were considered foreigners and it was in the interest of their national States to protect them.¹⁶ This doctrine was premised on the existence of norms for the adequate treatment of people when in a foreign territory.

For human rights to transcend the exclusive interest of States and develop towards the protection of all individuals was a slow and arduous process. This internationalization began with humanitarian law, the League of Nations and the International Labor Organization which all sought to secure minimum global human rights.¹⁷

Humanitarian law, which originated in the 19th century, sought to require the observation of fundamental rights by imposing ethical limits on States' acts.¹⁸ International humanitarian law aims to protect, in wartime, members of the armed forces, non-combatants (injured, sick and prisoners), and civilian populations located at or near conflict zones. It imposes limitations on the autonomy of States to regulate the implementation of violence in armed conflicts.¹⁹

Following the significant devastation and loss of life occasioned by the First World War, States created the League of Nations to promote international cooperation, peace among States and international security by the establishment of friendly relations between States and an understanding by States not to resort to war as provided in the 1919 Covenant of the League of Nations preamble:

¹⁶ Ramos, *supra* note 6 at 21.

¹⁷ Valério de Oliveira Mazzuoli, *Direitos Humanos e Cidadania: À Luz do Novo Direito Internacional* (Campinas: Minelli, 2002) at 37 [Mazzuoli, *Human Rights*].

¹⁸ *Ibid.* at 34.

¹⁹ See Celso Lafer, "prefácio" in José Augusto Lindgren, *Direitos Humanos como Tema Global* (São Paulo: Editora Perspectiva and Fundação Alexandre de Gusmão, 1994) at XXIV-XXV.

The high contracting parties, in order to promote international co-operation and achieve peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, agree to this covenant of the League of Nations.²⁰

Significantly, the League of Nations had generic provisions relating to human rights notably the mandate system of the League, the minority system and the establishment of international labor law norms – by which the States accepted to assure worthy labor conditions to men, women and children.²¹

The Versailles Treaty contributed to the formation and establishment of international human rights law through the creation of the International Labor Organization, mandated to ascertain rights which, in contrast with the doctrine of diplomatic protection, apply to all workers regardless of nationality.²² The creation of the International Labor Organization marked a shift in international human rights protection in two significant ways. First, it broke the paradigm that individuals were only under the protection of their States. Second, it sought to protect a specific category of individuals (workers).

The League of Nations established the Mandate System,²³ which transformed the former colonies that belonged to States that had lost the First World War into League Mandates administered by the victorious powers and supervised by the

²⁰ *Covenant of the League of Nations* [Versailles Treaty] 28 June 1919, 225 Consol. T.S. 188 at 199 (entered into force 10 January 1920) at preamble.

²¹ Flávia Piovesan, *Direitos Humanos e o Direito Constitucional Internacional* (São Paulo: Max Limonad, 2000) at 124.

²² Mazzuoli, *Human Rights*, *supra* note 17 at 37.

²³ *Covenant of the League of Nations*, *supra* note 19 at article 22.

Mandates Commission.²⁴ The Mandate System also sought to establish treaties protecting minorities of the newly created or expanded territories.²⁵

The period between the Great Wars was marked by many changes on the international plane that modified the existing international structures until then established. The absolute link between individuals and their State began to weaken. There was a movement towards the idea that international law could protect individuals regardless of their nationality. This concept created exceptions to the theory of absolute State sovereignty and brought human rights to the international plane.²⁶

The Second World War (1939-1945) and, in particular, the Jewish holocaust, showed why human rights protection should not be at the discretion of individual States. After the War a great number of human rights treaties were concluded seeking to better protect individuals by establishing State obligations toward individuals.²⁷

In order to create a structure to implement the international protection of individual rights and to prevent further atrocities, the international community formed the United Nations in 1945, and adopted the Universal Declaration of Human Rights in 1948.²⁸ Human rights were reconstructed along a new paradigm that approximated international law to moral and ethical values.²⁹ States could no longer argue that the international protection of human rights was a “domestic law matter” or an “offense to sovereignty”.³⁰

²⁴ Thomas Buergenthal *et al.*, *International Human Rights in a Nutshell* (St.Paul: West Group, 2002) at 8.

²⁵ William R. Slomanson, *Fundamental Perspectives on International Law* (Belmont: Thomson Wadsworth, 2007) at 532.

²⁶ Mazzuoli, *supra* note 7 at 744-745.

²⁷ Louis Henkin *et al.*, *International Law: cases and materials* (Minnesota: West Publishing, 1993) at 375-376.

²⁸ Mazzuoli, *Human Rights*, *supra* note 17 at 40-45.

²⁹ Smith, *supra* note 11 at 26.

³⁰ Mazzuoli, *Human Rights*, *supra* note 17 at 41-42.

1.1.1 Charter of the United Nations

The purpose of the United Nations³¹ is to respect human and fundamental rights based on international cooperation and the development of friendly relations between States.³² This goal is explicitly established in article 55 of the Charter when it states that the priority of this international organization is to seek: the promotion of higher standards of living; the solution of international, social, health and related problems; the universal and effective respect of human rights and fundamental freedom for everybody without any kind of distinction.³³

The Charter of the United Nations stands for the establishment and defense of human rights and fundamental freedom, but it does not define them.³⁴ The process of defining human rights began with the Universal Declaration of Human Rights in 1948.³⁵ The importance of the Charter, from the human rights point of view, was to recognize the universality of fundamental rights: these are now internationally protected and no longer restricted to certain types of rights aimed to protect specific individuals.

After the Second World War, States established a global system of international human rights law made up of instruments covering a wide range of rights or, alternatively, specific instruments that seek to protect specific rights or groups or rights.³⁶ In addition to this global system of protection, States established regional systems of human rights, including the American, European and African

³¹ *Charter of United Nations*, 26 June 1945, Can. T.S. N° 7 (entered into force 24 October 1945) [hereinafter “U.N. Charter” or “the Charter” or “the Charter of the United Nations”].

³² *Ibid.* at preamble and article 1.

³³ *Ibid.* at article 55.

³⁴ Smith, *supra* note 11 at 27.

³⁵ *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAAOR, 3d Sess., Supp. N° 13, UN Doc. A\810 (1948) [hereinafter the “Universal Declaration” or “Universal Declaration of Human Rights”].

³⁶ Mazzuoli, *supra* note 7 at 747.

systems. These regional systems also offer general (aimed at all individuals within a location covered by a regional system) and specific protection. The global general and global specific regimes and the regional general and specific regimes are complementary systems and victims of human rights violations can appeal to the system which best remedies a specific matter.³⁷

The Charter of the United Nations³⁸ and the treaties that followed it marked the development and consolidation of international human rights law. Developed and developing States got together to affirm respect for fundamental human rights, human dignity, equal rights, respect for international law and the promotion of better standards of life.³⁹

1.1.2 The Universal Declaration of Human Rights

The United Nations was created to secure respect for human rights, but the U.N. Charter did not define them. In December 10th of 1948 the General Assembly adopted the Universal Declaration of Human Rights⁴⁰ which sought to provide basic and ample human rights, and established human dignity as the fundamental value of human beings from which the other universal and inalienable fundamental rights flow.

³⁷ *Ibid.*

³⁸ The United Nations was more advanced and well organized organization than the League of Nations, especially when it comes to human rights. See Antonio Cassese, *International Law* (New York: Oxford University Press, 2005) at 41.

³⁹ *Charter of United Nations*, *supra* note 31 at preamble. The United Nations had big challenges ahead. Less than two months after the adoption of the U.N. Charter, the United States dropped atomic bombs in Hiroshima and Nagasaki and after the end of the Second War the cold war started, which divided the world in two blocks of political, economical and ideological influences (the capitalist and socialist worlds). See Cassese, *supra* note 38 at 41 and Eric Hobsbawm, *Era dos Extremos: O Breve Século XX 1914-1918* (São Paulo: Schwarcas, 2008) at 223-438.

⁴⁰ Smith, *supra* note 11 at 36.

The Universal Declaration spells out positive obligations by requiring the action of the subjects of international law⁴¹ and establishes negative obligations, which require their abstention from acting.⁴² The Universal Declaration of Human Rights does not have an enforcement mechanism, and some scholars, as the former judge of the International Court of Justice Francisco Rezek, have affirmed that the Declaration, which is not a treaty, does not impose any legal obligations on States. In their view, its status of U.N. resolution makes it non-binding.⁴³

Others argue that even though the Declaration is a General Assembly resolution, it may have acquired binding status under international law. The Declaration was created to have a strong moral force⁴⁴ integrating the values protected by the United Nations.⁴⁵ It helped to shape the constitution of many States and their actions in international relations.⁴⁶ Shaw states that “the Declaration has subsequently become binding either by way of custom or general principles of law, or indeed by virtue of interpretation of the UN Charter itself by subsequent practice”.⁴⁷

Indeed, the Universal Declaration has been widely accepted by States and international organizations. The Declaration’s values have become the parameters for the actions of the United Nations. Its obligatory nature rests not in the fact that it is a treaty or not, but that it is an *opinio juris* that represents the interests and goals of the whole international community.⁴⁸ Many provisions of the Declaration are customary norms of international law because they guard rules which are seen as mandatory by

⁴¹ Most of the positive obligations are economical, social and cultural rights and most of the negative obligations are civil and political rights.

⁴² Emerson Garcia, *Proteção Internacional dos Direitos Humanos: Breves Reflexões sobre os Sistemas Convencional e Não Convencional* (Rio de Janeiro: Lumen Juris, 2005) at 25.

⁴³ Francisco Rezek, *Direito Internacional Público: Curso Elementar* (São Paulo: Editora Saraiva, 2009) at 211.

⁴⁴ Smith, *supra* note 11 at 36.

⁴⁵ Garcia, *supra* note 42 at 27.

⁴⁶ J.D. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004) at 668.

⁴⁷ Malcolm N. Shaw, *International Law* (New York: Cambridge University Press, 2005) at 260.

⁴⁸ Fabiana de Oliveira Godinho, *A Proteção Internacional dos Direitos Humanos* (Belo Horizonte: Del Rey, 2006) at 13.

the subjects of international law not only in a moral sphere, but a legal one, as witnessed by the significant number of subsequent treaties in the human rights area. Moreover, the Universal Declaration has arguably reached the status of *jus cogens* or imperative norms of international law because it aims to protect rights that are basic to human life.⁴⁹

There is no doubt that whether the Universal Declaration is accepted as binding because it expresses general principles of law, customary norms of international law or *jus cogens*, the international community recognizes a special moral and legal condition to this Declaration that no other instrument of its kind has ever acquired.⁵⁰

1.1.3 Consolidation of International Human Rights Law

Following the General Assembly's adoption of the Universal Declaration of Human Rights, two international human rights instruments were established in 1966: the International Covenant on Civil and Political Rights⁵¹ and the International Covenant on Economic, Social and Cultural Rights.⁵² In contrast to the Universal Declaration, they are multilateral treaties and, therefore, legally binding on the member States.⁵³

⁴⁹ Mazzuoli states that the Universal Declaration is *jus cogens* because it represents aspirations, principles and values of the whole international community. See Valério Mazzuoli, *Tratados Internacionais* (São Paulo: Juarez de Oliveira, 2004) at 165 [Mazzuoli, *Tratados*].

⁵⁰ Buergenthal *supra* note 24 at 43.

⁵¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 1976 Can. T.S. N° 47 [hereinafter "ICCPR" or "Covenant on Civil and Political Rights"].

⁵² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 1976 Can. T.S. N° 46 [hereinafter "ICESCR" or "Covenant on Economic, Social and Cultural Rights"].

⁵³ Slomanson, *supra* note 25 at 543. S Slomanson states that both Covenants came into force in 1976, when they were ratified by a minimum number of States.

The Covenant on Civil and Political Rights establishes binding norms and allows time for the member-States to adapt to international human rights norms.⁵⁴ This Covenant also permits the limitation of certain rights, allowing States that do not have a strong and independent judiciary system to justify their non-conformity with the treaty.⁵⁵ However, it obliges the member-States to take the necessary measures to give effect to Covenant rights.⁵⁶ The ICCPR establishes a Committee to supervise the implementation of the treaty provisions which can analyze the reports sent by the member-States or individuals and investigate the veracity of those reports.⁵⁷ The Committee has no coercive power.⁵⁸

The International Covenant on Economic, Social and Cultural Rights⁵⁹ requires that the member-States provide adequate living conditions for their inhabitants and that they facilitate international cooperation to achieve this objective.⁶⁰ While the ICCPR establishes rights for individuals, enjoining States from acting in certain ways (negative obligation), the ICESCR imposes positive duties on States, requiring them to implement, to assure certain rights.⁶¹ The ICCPR is, therefore, self applicable although it may need legislative and judicial action. The ICESCR, on the other hand, requires States to take positive steps for the implementation of its provisions. These imply financial expenditure and different

⁵⁴ Article 5 of the Covenant, the derogation clause, states that “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” See *ICCPR*, *supra* note 51 at article 4.

⁵⁵ Godinho, *supra* note 48 at 15.

⁵⁶ *ICCPR*, *supra* note 51 at article 2 para. 2.

⁵⁷ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171.

⁵⁸ *Ibid.* at article 40 paras. 1, 2, 3 and 4.

⁵⁹ *ICESCR*, *supra* note 52.

⁶⁰ Slomanson, *supra* note 25 at 548.

⁶¹ Flávia Piovesan, *supra* note 21 at 175.

criteria may be applied to different States.⁶² Following the steps of the ICCPR, the Committee on Economic, Social and Cultural Rights created by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights may accept petitions sent by individuals.⁶³

As illustrated by this brief historical overview, international human rights law has been in constant development. After the Second World War, States created a new international organization (the United Nations) and, under this direction, developed many global human rights agreements that sought to establish international standards to guide the conduct of State parties based on respect of fundamental rights and human dignity.

The landmarks of the establishment of human rights as part of international law, as explained, were: humanitarian law, the creation of the League of Nations and the International Labor Organization. These organized and universalize the idea of international human rights at a global level, but did not establish mechanisms to prevent human rights violations. That only happened with the creation of the United Nations which has as one of the main objectives to protect human rights and fundamental freedom without any distinction of race, color, language and religion.⁶⁴ The U.N. Charter itself was incomplete, as it failed to define what human rights were. This gap was filled by the Universal Declaration of Human Rights. Because it defines the human rights protected by the U.N. Charter, the Universal Declaration has a binding nature and its norms could arguably be accepted as *jus cogens*. The Covenant on Civil and Political Rights and the International Covenant on Economic, Social and

⁶² Buergenthal, *supra* note 24 at 67. The ICESCR provisions are programmatic, although some norms, e.g. family rights, may need immediate application. See Godinho, *supra* note 48 at 19.

⁶³ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res. A/RES/63/117, UN GAOR, UN Doc. Doc.A/63/435 at article 2.

⁶⁴ *Charter of United Nations*, *supra* note 31 at article 1, III; article 13, I, b; article 55, c; article 62; article 76.

Cultural Rights, in my view, were not created to give a binding effect to the Universal Declaration, but to expand the enumeration of human rights and to establish mechanisms to supervise the execution of their provisions, which were not present in the 1948 Declaration. The Universal Declaration, in my view, stands above the will of States conferring rights directly to individuals.⁶⁵

International human rights law can be defined as a group of rights, established by international convention and non conventional mechanisms, which assure human dignity. Any international norm and principle that directly concerns individuals and enables them to have a life with dignity can be regarded as belonging to international human rights because this area of international law has individuals as its primary addressees. For the purpose of this dissertation, it is not important to establish whether a norm belongs to a specific generation of human rights, nor is it important to precisely delimit a specific group of norms comprising the corpus of international human rights.⁶⁶ The division of human rights in generations of rights is inaccurate. First, the term generation gives an idea of evolution, which is an erroneous conception because all human rights' norms are equally important without any hierarchy. Second, the division in generations could give a false understanding that, on the international plane, the first generation of rights was crystallized before the second generation, which is not true because the International Labor Organization was created after the First World War and the Covenant on Civil and Political Rights was only concluded in 1966. Third, human rights aspects of universality, impossibility to be divided and

⁶⁵ From a positivistic perspective, the Universal Declaration remains non-legally binding because it lacks treaty status. Under this approach, the declaration is a guideline to State practice and whereas the Universal Declaration may express certain customary norms or general principles, these norms and principles may bind states, but not the Universal Declaration itself: See Rezek, *supra* note 43 at 211.

⁶⁶ See Karel Vasak, ed. *The International Dimensions of Human Rights* (Westport: Greenwood Press, 1982) at 51. Scholars as Bonavides divide human rights in even more groups. See Paulo Bonavides, *Curso de Direito Constitucional* (São Paulo: Malheiros, 2000) at 516-525.

interrelation are not compatible with a theory that to exist needs to divide human rights norms into groups.⁶⁷

The new human rights paradigm established a line of evolution for international law. Treaties, customary norms, international organizations and other branches of the law of nations need to be analyzed taking into consideration human rights aspects. Consequently, the following chapters of this dissertation will be developed in the light of international human rights because international law, especially after the World Wars, initiated a process of humanization that guides its evolution in order to seek the full protection of human rights.⁶⁸

International law has developed based on a paradigm that places individuals in a central position, confers on them rights and requires the creation or improvement of international human rights mechanisms in order to better protect them. It follows from the evolution of international law based on this human rights paradigm that individuals must be subjects of international law, that is, must have rights and duties on the international plane, to truly benefit from these international instruments. In Chapter two I argue that individuals arguably always have been subjects of international law. However, further reforms are needed to reinforce this status. As I argue in Chapter four, the United Nations' bodies, as part of an organization established to respect and protect human rights, must be adapted to new human rights developments. In particular, the International Court of Justice – as the primary judicial organ of the United Nations – must be adapted in order to effectively protect and apply human rights.

⁶⁷ See Mazzuoli, *supra* note 7 at 740-742. But see Rezek, *supra* note 43 at 212-213, who affirms that the division of human rights in generations is important because is taken in consideration in State practice and not all human rights are equal.

⁶⁸ See Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff Publishers, 2006).

CHAPTER II

SUBJECTS OF INTERNATIONAL LAW

In Chapter one, I argue that the creation of international organizations and the conclusion of treaties seeking the application and consolidation of human rights on the international plane established a paradigm for the development of international law that placed individuals in a central position. In Chapter two, I claim that this central position crystallizes the international legal personality of individuals. I examine the evolution of the status of individuals as subjects of international law. I show that such status has long been advocated by international law scholars and argue that the recent evolution of international law grants international personality to States, international organizations and individuals. In this pluralistic world States retain their status as the main subjects of international law, but the importance of other actors and the international legal personality of individuals is acknowledged. While States have long been recognized as primary subjects of the law of nations, it is noteworthy that international organizations have, relatively recently, been recognized as subjects of international law. After briefly reviewing the historical evolution of the subjects of international law and the theories that accept and deny the international legal personality of individuals, I argue that individuals, like States and international organizations, should be recognized as subjects of international law, but in a manner consistent with their different specifications, requirements and role in the international community.

The definition of international law is connected to who are its subjects. The prevailing concept of the law of nations from the 19th and beginning of the 20th centuries defined it as a group of norms and principles that regulate the relation

between sovereign States; international law's only subjects. This was not always so. I will show that during the 19th and beginning of the 20th centuries, some scholars advocated a less State-centric international law, focused on individuals. Indeed, throughout the development of international law, important scholars sought to include individuals as part of the international community. The "founding fathers" of international law envisaged a system comprised of individuals and States. International law, to the "founding fathers", the common good of the whole international community and natural law were the basis of the law of nations. Even during the positivistic period when international law was established as a law between States, some scholars sought to argue the necessity of accepting the international legal personality of individuals.

In the last part of this chapter, I discuss theories that place international law above the will of States and do not exclude the possibility of the international legal personality of individuals.⁶⁹ *Erga omnes* obligations and *jus cogens* are not solely based on the will of States (voluntarist positivism) and a developing international jurisprudence characterizes certain human rights norms as *jus cogens* or *erga omnes* obligations. The theory of the universal juridical conscience, developed by Cançado Trindade, represents a rescue, from the "founding fathers" of the law of nations, of natural law concepts and the common good as the basis of international law. This theory places individuals in a central position in international law and affirms that the fundament of the law of nations is not the will of States, but the juridical conscience of the international community.

Having established that individuals are subjects of international law, I then explain, in Chapters three and four, how their international legal personality was

⁶⁹ The following theories are briefly discussed: *erga omnes* obligations, *jus cogens* and the universal juridical conscience.

consolidated in the American and European regional systems of human rights protection and how its recognition through a reformed International Court of Justice could effectively increase the human rights protection at a global level.

1. Individuals as Subjects of International Law

The concept of international law is intimately connected with the definition of who are its subjects. Franz von Liszt sustained that international law determined the reciprocal rights and duties of States that belong to an international community without the limitation of their sovereignty.⁷⁰ Brierly defined international law as “a body of rules and principles of action which are binding upon civilized states in their relations with one another”.⁷¹ Throughout the 19th century, the core of the concept of international law was the idea that its subjects were only States, as expressed by the term “*Staatenrecht*” (law of States) used then to describe international.⁷² States are the traditional subjects of the law of nations and continue to occupy a dominant position among the subjects of international law.⁷³

States began to play an important role in international law after the Peace of Westphalia in 1648, when the concept of modern States not subjected to religion and guided by principles of equality and sovereignty⁷⁴ created an international system based on a plurality of independent States, recognizing no superior authority over

⁷⁰ Franz von Liszt, *Derecho Internacional Público* (Barcelona: Gustavo, 1929) at 7. Silva commented that this is the same line of thought followed by Oppenheim that affirmed that the law of nations would be a group of norms and principles that regulate the relations between States and only States. See Roberto Luiz Silva, *Direito Internacional Público* (Belo Horizonte: Del Rey, 2008) at 45.

⁷¹ J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1963) at 1.

⁷² Silva, *supra* note 70 at 47.

⁷³ Mazzuoli, *supra* note 7 at 363

⁷⁴ Silva, *supra* note 70 at 50.

them.⁷⁵ According to international law the requirements of statehood are territory, population and sovereignty:⁷⁶ a State must have a group of people linked by a permanent legal and political bond⁷⁷ in a specific territory over which the State exercises effective authority.⁷⁸

States can be defined as

[A]n institution, that is to say, it is a system of relations which men establish among themselves as a means of securing certain objects, of which most fundamental is a system of order within which their activities can be carried on. Modern states are territorial; their governments exercise control over persons and within their frontiers.⁷⁹

The modern concept of State⁸⁰ for public international law is an entity with international legal personality formed by the gathering of individuals that are established permanently on a determined territory under the authority of an independent government and with the finality and for the purpose of seeking the common good of those who live there.⁸¹

Though States remain the primary subjects of the modern law of nations, they are not its only subjects. More recently, they have been joined by international organizations.⁸² Emerging in Europe during the nineteenth century,⁸³ international

⁷⁵ Cassese, *supra* note 38 at 25.

⁷⁶ Rezek, *supra* note 43 at 153.

⁷⁷ Silva, *supra* note 70 at 192.

⁷⁸ Cassese, *supra* note 38 at 73.

⁷⁹ Brierly, *supra* note 71 at 126.

⁸⁰ The word State, on its juridical meaning, refers to *Staatsgewalt* (that is a branch of the Executive Power that assures the internal and international sovereignty), to *Staatsgebiet* (a territory with clearly established boundaries) and to *Staatsvolk* (the group of people that are under its jurisdiction). See Mazzuoli, *supra* note 7 at 384.

⁸¹ *Ibid* at 385. Some scholars would add two extra criteria for statehood: government and the capacity to enter legal relations. In my view, these elements flow from the concept of sovereignty. For a contrary view, See Hugh M. Kindred *et al.*, *International Law Chiefly as Interpreted and Applied in Canada* (Toronto: Emond Montgomery Publications Limited, 2006) at 14.

⁸² However, not all international organizations are subjects of international law. This status depends of an organization's constitutive treaty and "implicit powers": see Rezek, *supra* note 43 at 145.

organizations became an established feature of international law only in the 20th century, after the First World War, with the creation of The League of Nations, and especially after the Second World War, with the establishment of the United Nations.⁸⁴

It is difficult to establish a precise definition of international organizations. The Vienna Convention on the Law of Treaties says that international organization “means an intergovernmental organization”.⁸⁵ Seyersted defines international organizations as

[I]nternational organs (i.e. organs established by two or more sovereign communities) which are not all subject to the authority of any other organized community (except that of participating communities acting jointly through their representatives on such organs), and which are not authorized by all their acts to assume obligations (merely) on behalf of the several participating communities.⁸⁶

Vallejo defines international organization as “voluntary associations of States established by international treaty, equipped with permanent, independent and separate bodies, created to administer some collective interests and capable of expressing a different legal will than the one of their members”.⁸⁷ International law doctrine and jurisprudence accepted that international organizations can, and indeed must, have legal personality. The International Court of Justice decided that it was indispensable for the United Nations to have an international personality to achieve its ends, thus recognizing the legal need for international organizations to be subjects of

⁸³ Shabtai Rosenne, *The Perplexities of Modern International Law* (Leiden: Martinus Mijhoff Publishers, 2004) at 250 [Rosenne, *Perplexities*].

⁸⁴ Silva, *supra* 70 at 180.

⁸⁵ *Vienna Convention on the Law of Treaties*, 1969, 1155 U.N.T.S. 331, 1980 Can T.S. No. 37 [Vienna Convention of 1969] at article 2, 1 (i).

⁸⁶ Finn Seyersted, *Common Law of International Organizations* (Leiden: Martinus Nijhoff Publishers, 2008) at 39.

⁸⁷ Manuel Diez de VelascoVallejo, *Las Organizaciones Internacionales* (Madrid: Tecnos, 1999) at 44 cited in Silva, *supra* note 67 at 312 [translated by author].

international law.⁸⁸ Like Vallejo, Ian Brownlie affirms that for international organizations to have legal personality, there must be a permanent association of States (with lawful objects and equipped with organs); a legal distinction between the organization and its State-members; and the existence of legal powers that can be exercised on the international plane and not only within the national system of one or more States.⁸⁹

The legal personality of international organizations is of a different nature than that of States. International organizations are secondary subjects of international law because they depend on the will of their members to exist and to pursue the execution of their objectives.⁹⁰ Their existence depends on a constitutive treaty which not only regulates how the organization will work, but also gives “life” without need for any preexistent element.⁹¹ Although international organizations have a different type of legal personality (a derivative personality because it is a legal creation),⁹² they can enter into relations with States and other organizations, they are subject to of a number of international rules and they can conclude treaties with other organizations and/or with States.⁹³

Corporations are not subjects of international law.⁹⁴ They are established by the laws of a specific State (where they were incorporated) and their agreements and

⁸⁸ *Reparation for the Injuries Suffered in the Services of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174 at 178. The Court stated that “[t]hroughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable”.

⁸⁹ Ian Brownlie, *Principles of Public International Law* (New York; Oxford University Press, 2003) at 649.

⁹⁰ Ricardo Seitenfus, *Manual das Organizações Internacionais* (Porto Alegre: Livraria do Advogado, 2005) at 62.

⁹¹ Rezek, *supra* note 43 at 145-146.

⁹² Silva, *supra* note 70 at 181.

⁹³ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, UN GAOR, UN Doc. A/CONF. 129/15 (1986).

⁹⁴ Rezek, *supra* note 43 at 146.

concessions are governed by municipal laws and not by the Vienna Convention on the Law of Treaties.⁹⁵ Some scholars claim that enterprises have international personality because they exercise influence on the international community (especially over States) and have rights and some responsibilities.⁹⁶ Ian Brownlie takes a more cautious approach, affirming that if the corporation has “in addition to independence from national law, a considerable quantum of delegated powers and the existence of organs with autonomy in decision and rule-making, then the body concerned has the characteristics of an international organization”.⁹⁷ In this view, a corporation that becomes a subject of international law ceases to be a corporation and becomes an international organization.

Indeed, the category of subjects of international law is not static and can expand over time taking into account the evolution of the law of nations and aspirations of the international community. With that lesson in mind, I turn to whether individuals are or not subjects of international law, the question at the heart of this chapter and the subject of much debate. If individuals have an international legal personality, what rights does it confer? Is legal personality an inalienable right or it is just a legal creation of States as real subjects of international law in their quest to achieve the international protection of human rights and revocable at their discretion?

As explained above, international law scholars of the 19th century and beginning of the 20th century did not agree that individuals could be subjects of international law, because this was an attribute unique to States and the law of nations itself was based on the will of States. Following the acceptance of international organizations as subjects of international law, many scholars still sustain that individuals do not have an international legal personality – that individuals do not

⁹⁵ *Vienna Convention on the Law of Treaties*, *supra* note 85.

⁹⁶ Kindred, *supra* note 81 at 67-69.

⁹⁷ Brownlie, *supra* note 85 at 66.

directly have rights and duties on the international plane and don't have the capacity to assert any international rights or be held liable internationally.

From this perspective, individuals do not take part in the production of international norms and have no direct and immediate relation to those norms. Francisco Rezek, for example, argues that fauna and flora, like individuals, constitute objects of international law protection but that nobody intended, because of that fact, to advocate their need to have international legal personality.⁹⁸ Three theories are invoked to deny the international legal personality of individuals: positivism, the human-object theory and the theory of international legal personality of States.

The positivistic theory, or voluntarist theory of international law, establishes that only States are subjects of international law. The law of nations is based on the consent of States in the same way that a State's internal law is built on the assent of its citizens.⁹⁹ The law of nations, therefore, is a consequence of the will of States. A corollary of this theory is that individuals have no space as subjects of international law; they are only subjects of the domestic law of States. Modern positivism admits the international legal personality of international organizations because they are formed by States and can participate in the elaboration of international treaties.¹⁰⁰

The human-object theory is a formulation of modern positivism and sustains that from the perspective of international law, individuals, like planes or ships, have the status of objects.¹⁰¹ Under this theory (followed by international law scholars like Rezek)¹⁰² the fact that an entity is mentioned in the provision of an international treaty does not mean it is a subject of international law. Individuals would just be in the

⁹⁸ Rezek, *supra* note 43 at 146.

⁹⁹ Charles Rousseau, *Principes Généraux du Droit International Public* (Paris: A. Pedone, 1944) at 44, cited in Mazzuoli, *supra* note 6 at 87.

¹⁰⁰ Silva, *supra* note 70 at 422.

¹⁰¹ *Ibid.*

¹⁰² Rezek, *supra* note 43 at 146.

range of interests of the law of nations, which may grant them rights as it could also do with objects or the environment. The role of individuals on the international plane is akin to that of property in domestic law; legal norms regulate property but do not turn it into a subject of law. This theory has important ramifications for international human rights law. Under this approach, human rights treaties, as sources of international law, place obligations on States which must, in turn, implement these obligations domestically. Thus, individuals remain objects of international law and are not direct addressees of human rights norms.¹⁰³

The third theory tries to apply characteristics of the international legal personality of States to individuals in an attempt to prove that the human person cannot be a subject of international law. The elements of State personality in international law are: competence to produce international legal acts; capacity to be held liable on the international plane; access to international courts; ability to become members of international organizations; and capacity to establish diplomatic and consular relations with other States.¹⁰⁴ Individuals do not have all the powers of States. They cannot conclude or be parties to treaties, be members of international organizations or have diplomatic relations with States. Individuals do have access to international courts and are subject to liability at international law, but not to the same extent as States. Cassese summarizes as follows the position of those scholars who do not accept individuals as subjects of the law of nations: “[i]f treaties provide for rights and duties of individuals, this would only mean that each State undertakes by agreement *vis-à-vis* the other contracting State to confer such rights and impose duties on individuals solely within its own legal system”.¹⁰⁵

¹⁰³ Mark Freeman & Gibran van Ert, *supra* note 10 at 38.

¹⁰⁴ Pierre-Marie Dupuys, *Droit International Public* (Paris: Précis Dalloz, 1993) at 43.

¹⁰⁵ Cassese, *supra* note 38 at 142.

The changes to international law following the Second World War, in particular the establishment of principles, norms and mechanisms of human rights protection, challenge these theories. They mark a change of paradigm from the idea of extreme voluntarism, where States could do what they wanted, to the idea that there are international law norms and principles about the protection of individuals that must be respected by the whole international community. International law cannot be an instrument of States; it must control their actions. After the creation of the United Nations, the Universal Declaration of Human Rights,¹⁰⁶ the Covenants on Civil and Political Rights¹⁰⁷ and on Economic Social and Cultural Rights,¹⁰⁸ the establishment of human rights as one of the areas of international law and the creation of international mechanisms to seek to enforce human rights provisions, it is not possible to deny that individuals are one of the main concerns of international law. The theories that deny the international legal personality of individuals are not in harmony with post-World War developments in international law.

Each has been subjected to an extensive critique, to which I now turn. Traditional voluntarist theory is an incomplete explanation of the basis of international law and of who can be its subjects. International law is not born by the will of one or a common will of many States. Rather, its obligatory force comes from the objective rule of the principle of the *pacta sunt servanda*.¹⁰⁹ This international principle, which holds that what has been freely agreed must be carried out, can be seen as the modern fundament of international law. Though its application presumes the will of States to agree to something (*e.g.* to conclude a treaty), this principle exists

¹⁰⁶ *Universal Declaration*, *supra* note 35.

¹⁰⁷ *ICCPR*, *supra* note 51.

¹⁰⁸ *ICESCR*, *supra* note 52.

¹⁰⁹ Alfred von Verdross, "Le Fondement du Droit International" (1927) 16 *Rec. des Cours* 247 at 288.

independently of States' will. Adopted by the Vienna Convention of 1969,¹¹⁰ *pacta sunt servanda* was created by human rationality and supported in a small or large scale on an ethical imperative.¹¹¹ According to Rezek it is impossible to conceive that even the most rudimentary civilization can survive without the idea that what was freely agreed must be executed.¹¹² The modern idea of *jus cogens* or imperative norms of international law as hierarchically superior to treaties also conflicts with the theory that international law is founded on the will of States.¹¹³ The *pacta sunt servanda* principle is not, therefore, solely established by the will of States and it does not impede the acceptance of individuals as subjects of the law of nations. The adoption of the *pacta sunt servanda* principle as the ultimate source of international law means that its fundament does not emanate necessarily from States, but from a universal principle, which could, therefore, accept other subjects of international law other than States.

The human object theory is also flawed. Peoples cannot be compared to fauna, flora, planes or ships. Humans are living and rational beings, capable of asserting rights and being subjected to duties on the international plane. It is impossible for objects to complain when their rights have been violated and it is also unfeasible to demand that ships or other inanimate or irrational being respect international obligations. This theory presumes that States are supreme and can do whatever they want; individuals, mere properties of States, must accept their determinations. This is inconsistent with the evolution of international law towards the respect of human rights, a goal that can only be achieved if the power of States is limited by international norms and individuals are accepted as subjects of rights and duties on

¹¹⁰ *Vienna Convention*, *supra* note 85 at article 26.

¹¹¹ Rezek, *supra* note 43 at 3.

¹¹² *Ibid.*

¹¹³ *Vienna Convention*, *supra* note 85 at articles 53 and 64.

the international plane. This evolution contemplates that individuals are also addressees of international human rights norms and not only States, which are non-human, legal and political creations. Indeed, international human rights norms are addressed to all subjects of international law - States, international organizations and individuals - taking into consideration the characteristics of each entity within their scope. Moreover, individuals should be considered primary addressees of these norms because they are victims of human rights violations and are the ones seeking international justice.

The third argument to deny the international legal personality of individuals, which affirms that individuals do not have the same attributes as States on the international plane, is also weak. International organizations can have international legal personality even though they do not have the same attributes as States. Their capacity to conclude treaties, as previously explained, depends on the organization's constitutive treaty. Moreover, intergovernmental organizations don't have the same access to international courts as States.¹¹⁴ Individuals, like international organizations, do not have all the characteristics of States; they have different characteristics. Individuals might not have diplomatic relations with States, but they are able to have consular relations.¹¹⁵ Like international organizations, they also have limited access to international courts of human rights protection. While individuals cannot be parties to international treaties, this should not suffice to deprive them of international legal personality. If the opposite were true, individuals should by analogy not be subjects of domestic law as well because they do not formally take part in the elaboration of municipal norms. Municipal norms are created through a prerogative of States, normally by the action of the Legislative Power. In domestic law, therefore, the

¹¹⁴ International organizations, for example, only have limited access to the International Court of Justice and only to ask for advisory opinions. See Silva, *supra* note 70 at 316-317.

¹¹⁵ *Vienna Convention on Consular Relations* (1963) 596 U.N.T.S. Can. T.S. 1974 N° 25.

Legislature as representative of the population of a State, may legislate. The same logic can be applied to international law, where States negotiate and conclude treaties representing their population on an international order. Individuals are thus the indirect parties of treaties (represented by their States of nationality or residency).¹¹⁶ In sum, theories denying individuals international legal personality are not consonant with the evolution of the law of nations. International law is not solely based on the will of States, individuals are not objects of international law and the governmental powers to conclude treaties are delegated by individuals.

Historically, international law could be said to protect individuals indirectly consistent with a State-centered view of international law. States had obligations (established by treaty or customary norms) to protect individuals under their jurisdiction and when there was a breach of obligation, the State was responsible under those norms. However, the procedure of human rights protection is changing and individuals may now directly be held liable or demand their rights under international law systems of protection. Three theories have been proposed to explain this new paradigm of international law that places obligations and rights directly on individuals instead of States: the individualist, indirect subject and the subject theories.¹¹⁷

The individualist theory claims that only individuals are subjects of law. States and international organizations are created by individuals and are formed by individuals who, as a consequence, are the only subjects of international law.¹¹⁸ This theory does not account for the fact that individuals are different than States, have different characteristics and are a different entity. States remain the most important

¹¹⁶ See A. A. Cançado Trindade, “General Course on Public International Law” (2005) 316 Rec. des Cours 21 at 260 [Cançado Trindade, “General Course”].

¹¹⁷ Silva, *supra* note 70 at 422-423.

¹¹⁸ *Ibid.* at 422.

subjects of international law because they are directly connected to the elaboration of the main sources of the law of nation (treaties, customs and general principles of law).

The indirect subject theory affirms that States, as direct subjects, are the main actors of international law and individuals would be indirect subjects.¹¹⁹ This theory, according to Silva, “has no support in the international practice, or even a reason of existence”.¹²⁰ For this theory to be correct, States would be hierarchically superior to individuals, who would be under States’ control. But individuals do not have to be hierarchically inferior to States: they can send complaints to international human rights mechanisms and be held responsible for human rights violations whether or not they were acting as State officials or pursuant to their national law.¹²¹ As will be discussed in chapter 3, individuals also have the right of petition to the Inter-American Commission of Human Rights and the European Court of Human Rights regardless of State consent.¹²²

The subject theory affirms that States, international organizations and individuals are all subjects of international law.¹²³ Individuals, as previously explained, have rights and obligations on the international plane, have access to human rights mechanisms of protection and can be held liable for human rights violations. This theory better reflects the new developments of international law. States effectively participate in treaty-making and in the elaboration of customary norms. It is not reasonable to deny the importance of States in the law of nations, just as it is not possible to reject the status of subjects to individuals. States, international

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* [translated by author].

¹²¹ See especially *The Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF. 183/9 (1998) at articles 27 and 28.

¹²² Antônio Augusto Cançado Trindade, “The Consolidation of the Procedural Capacity of Individuals in the Evolution of International Protection of Human Rights: Present State and Perspectives at the Turn of the Century” (1998) 30 *Colum. H.R.L. Rev.* 1-20 at 7. [Cançado Trindade, “The Consolidation”]

¹²³ Silva, *supra* note 70 at 423.

organizations and individuals have different kinds of international legal personality. Some international organizations need to have personality under the law of nations in order to achieve the goals established explicitly or implicitly in their constitutive treaty¹²⁴ and by the same logic individuals need to have international legal personality to guarantee the effectiveness of norms and principles created with the sole purpose of protecting them.

Cançado Trindade observed that:

Three centuries of international relations, from the treaties of peace of Westphalia (1648) through the coordination of independent nation-states and the juxtaposition of their mutual absolute sovereignty, crystallized into a legal order that excluded the individual as the subject of rights (*titulaire de droits*). At the international level, the state monopolized the status of subject of rights; the protection of individuals was entirely at mercy of the discretionary intervention of their nation-states. The international legal order thus erected, which the excesses of legal positivism attempted in vain to justify, excluded precisely the ultimate subject of juridical norms: the human being¹²⁵ [emphasis in original].

The development of international law placed individuals in a central position which eroded the State-centricity of the law of nations. A positivistic response to this development was to grant individuals the status of objects, like fauna or ships, an approach that accepted individuals' importance in international law, but denied their international legal personality. Individuals are not inanimate structures. They are rational beings capable of asserting their rights and being held liable. Moreover, individuals cannot be regarded as indirect subjects of international law because this would presume the existence of a hierarchy of subjects. Such a notion would be

¹²⁴ See Antônio Augusto Cançado Trindade, *Direito das Organizações Internacionais* (Del Rey, Belo Horizonte, 2003) at 24.

¹²⁵ Cançado Trindade, "The Consolidation", *supra* note 122 at 4.

harmful to the international protection of human rights because it would put into question individuals' ability to emancipate from the tutelage of States and send complaints to international human rights bodies and tribunals against any State, including their State of nationality or residence that violates human rights protected by international law.

In my view, the international legal personality of individuals must be accepted to the fullest by the recognition that they are bearers of rights and duties under international law and can have international capacity. Subjects of international law must be equal in status in order for each subject to police the other. Individuals, for example, can send complaints against States for violations of human rights; international organizations can be held liable for breaching international law and individuals have international criminal responsibility. The realization and protection of human rights, on the international stage, cannot depend solely on States policing themselves.¹²⁶ It requires a recognition that States, international organizations and individuals are subjects of international law without hierarchy, but in a manner that respects the different characteristics of each entity.

1.1 Individuals and the Rescue of *Jus Gentium*

Human rights now reach the core of international law and are the main concern of the United Nations,¹²⁷ the most universal international organization. Under this new paradigm, States cannot be the sole subjects of the law of nations; individuals must be recognized as subjects of international law, have rights and duties

¹²⁶ Manfred Nowak commenting the old Human Rights Commission sustained that "it is evident that the so-called 'peer review' cannot be meant to be an assessment of the human rights situation in States by other States. See Manfred Nowak, "The Need for a World Court of Human Rights" (2007) 7:1 Human Rights Law Review 251 at 251.

¹²⁷ *Charter of United Nations*, *supra* note 31 at articles 1 III, 13 I (b), 55 (c), 62 and 76.

on the international plane and be able to send complaints to international human rights mechanisms and courts when States fail to guarantee to individuals basic international human and civil rights standards. Only then can human rights be part of the law of nations and individuals have international remedies in case of human rights violations committed by States.

Scholars are now trying to counter the positivist view of international law, which places States in a position superior to that of individuals by appealing to a human element of international law present in the writings of the founders of the law of nations:¹²⁸ the idea of *jus gentium*.¹²⁹ *Jus gentium*, *droit de gens*, or *völkerrecht* (“law of people”) and the concept of the law of nations were the common expressions used before the adjective *international* was created in 1780 by Jeremy Bentham to differentiate the area of law that regulates the relations between States (international law) and the internal law of States (national law).¹³⁰ International law, or *droit de gens* or *jus gentium* from the 16th to 17th centuries was connected to the idea of humanity and the need to secure its aspirations and necessities.¹³¹ In order to properly contextualize the debate about the international legal personality of individuals, I now briefly demonstrate how, since the early developments of the law of nations, scholars have accepted or at least admitted the possibility that individuals were subjects of international law.

Jus gentium, for Thomas Aquinas, sought to regulate human relations by the existence of a common logic of all nations based on ethical grounds aimed at

¹²⁸ Antônio Augusto Cançado Trindade, “A *Recta Ratio* nos Fundamentos do *Jus Gentium* como Direito Internacional da Humanidade” in Antônio Augusto Cançado Trindade, *A Humanização do Direito Internacional* (Belo Horizonte: Del Rey, 2006) at 7 [Cançado Trindade, “A *Recta Ratio*].

¹²⁹ Gilda Maciel Corrêa Meyer Russomano, *Direito Internacional Público* (Rio de Janeiro: Forense, 1989) at 7.

¹³⁰ *Jus gentium* was the expression that Isidoro de Seville used in the 7th century to denominate the group of norms from Roman law related to foreigners. See Mazzuoli, *supra* note 7 at 57.

¹³¹ See Cançado Trindade, “A *Recta Ratio*”, *supra* note 128; and Cançado Trindade, “General Course”, *supra* note 116.

achieving the common good.¹³² Francisco de Vitoria,¹³³ following that same idea, observed that *jus gentium* is a law for all - individuals and States. Vitoria affirmed that *jus gentium* applies to all peoples even without their consent because this area of law is established by natural law principles (*lex praeceptiva*).¹³⁴ He argued that the legal order binds everybody (the rulers and the ruled) and the international community (the *totus orbis*) has primacy over the individual will of States¹³⁵ because *jus gentium* was the legal fundament of the *totus orbis* and would seek the common good based on a natural law that is not bound to a will, but to the *recta ratio* (the human reason inherent to humankind).¹³⁶ Following the ideas established by Francisco de Vitoria, Alberico Gentili¹³⁷ advanced that the law of nations is established among all humans and observed by all humankind.¹³⁸ Based on natural law concepts, *jus gentium* limits the sovereignty of States and humans through the existence of the solidarity principle, which is also connected to the concept of common good.¹³⁹ Similarly, Francisco Suárez¹⁴⁰ sustained that the law of nations is the expression of the unity and universalism of humankind.¹⁴¹ He affirmed that the law of nations was part of human law and brought into being through the free will and consent of peoples.¹⁴² *Jus gentium*, to Suárez, is formed by the common usages and customs of all humankind in

¹³² J. P. Rentto, “*Jus Gentium: A Lesson from Aquinas*” (1992) 3 Finnish Yearbook of International Law at 121-122, cited in Cañado Trindade, “*A Recta Ratio*”, *supra* note 128 at 9.

¹³³ In his book *De Indis – Relectio Prior* (1538-1539).

¹³⁴ Paul Guggenheim, “Contribution à L’histoire des Sources du Droit des Gens” (1958) 94 Rec. des Cours 1 at 21-22.

¹³⁵ Francisco de Vitoria, *Relecciones sobre los Indios, y el Derecho de Guerra* (Buenos Aires: Espasa-Calpe, 1946) at 1-167.

¹³⁶ F. de Vitoria, *La Ley (De Lege – Commentarium in Primam Secundae)* (Madrid: Tecnos, 1995) at 5, 23 and 77, cited in Cañado Trindade, “*A Recta Ratio*”, *supra* note 128 at 10.

¹³⁷ In his book *De Jure Belli* from 1598.

¹³⁸ Alberico Gentili, *De Juri Belli Libri Tres* (London: H. Milford, 1933) at 8.

¹³⁹ *Ibid.* at 23 a. See Charles Covell, *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (New York: Palgrave Macmillan, 2009) at 47.

¹⁴⁰ In his book *De Legibus ac Deo Legislatore* (1612).

¹⁴¹ Francisco Suárez, *Selections from Three Works [De Legibus ac Deo Legislatore]* (Oxford: Clarendon Press, 1944) at 326-327 and 241.

¹⁴² Covell, *supra* note 139 at 39.

harmony with natural law (superior to the will of States) and shaped by natural reasoning as a universal law.¹⁴³

Hugo Grotius¹⁴⁴ proposed a *jus gentium* for all humankind binding upon sovereign States, but also upon persons not yet organized in a political society, individuals belonging to different nations and pirates.¹⁴⁵ He defended the “imperative of common good”,¹⁴⁶ which implies that the State cannot demand obedience of its citizens in an unrestricted way. There are two important ideas in Grotius’ work central to the issue of individuals’ international legal personality. First, the individual occupies the central position of the international relations system. Second, States are not above law because the international community cannot exist without the law. Grotius sustained that *jus gentium* was the law of the universal human society primarily derived from natural law which, in turn, derived from human nature, thus placing the individual as the source and ultimate addressee of the law of nations.¹⁴⁷

Similar theories endured in the late 17th and 18th centuries. Samuel Pufendorf’s theory¹⁴⁸ limited sovereignty on moral grounds and rejected the possibility that Sovereigns were entitled to make unjust or intolerable decisions.¹⁴⁹ Christian Wolff¹⁵⁰

¹⁴³ Cançado Trindade, “A *Recta Ratio*”, *supra* note 128 at 10. See Brendan F. Brown, “The Natural Law as the Moral Basis of International Justice” (1956) 8 *Loyola Law Review* 59 at 60.

¹⁴⁴ In his acclaimed *De Jure Belli ac Pacis* (1625).

¹⁴⁵ Edward Dumbauld, *The Life and Legal Writings of Hugo Grotius* (Norman: University of Oklahoma Press, 1969) at 59 and 61.

¹⁴⁶ Cançado Trindade, “General Course”, *supra* note 116 at 254. A State, to Grotius, is “a complete body of free men associated together for the enjoyment of Right and for the common good. See Travers Twiss, *The Law of Nations Considered as Independent Political Communities: on the Rights and Duties of Nations in Time of Peace* (Littleton: F.B. Rothman, 1985) at 4.

¹⁴⁷ Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: Asser Press, 2004) at 47-48.

¹⁴⁸ In his book *De Jure Naturae et Gentium* (1672) claimed that State “is a compound Moral Person, whose will being united and tied together by those covenants which before passed amongst the multitude, is deemed the will of all, to the end that it may use and apply the strength and riches of private persons towards maintaining the common peace and security”. See Samuel Pufendorf, *Law of Nature and of Nations*, Book VIII, c.14, paragraph 13, cited in Travers Twiss, *supra* note 146 at 4-5.

¹⁴⁹ Elisabeth Nijman, *supra* note 147 at 56-57. In Samuel Pufendorf’s view, States and rulers were to “subordinate themselves to institutional authority structures that possessed the coercive power machinery as adequate for the meaningful enforcement of the rights and duties which applied to them”. See Charles Covell, *supra* note 139 at 89.

affirmed that *jus gentium* was not voluntary but necessary.¹⁵¹ Wolff wrote that natural law controls the acts of individuals as well as nations by prescribing duties to themselves and towards each other.¹⁵² Even with the early emergence of legal positivism, Cornelius van Bynkershoek¹⁵³ affirmed that the subjects of *jus gentium* were mainly nations (*gentes*), but also peoples and what he named “people of free will” (*inter volentes*).¹⁵⁴

As demonstrated by this brief description of these early theories of *jus gentium*, “State” was conceptualized as an aggregate of persons that sought a common good for society and was ruled by natural law principles. States and individuals were both part of international law and should respect the law of nations because both had duties and obligations. The modern theory of State in international law (the personification of the State), developed in 1758 by Emmerich de Vattel,¹⁵⁵ departed from this early conception. To Vattel, the law of nations “is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to these rights”¹⁵⁶ and sustains that the “moderns are generally agreed in restricting the appellation of ‘the law of nations’ to that system of right and justice

¹⁵⁰ Author of *Jus Gentium Methodo Scientifica Pertractatum* (1749) defined law of nations as “the science of Right, which Nations or people enjoy in relation to one another, and of the obligations corresponding to it”. See Travers Twiss, *supra* note 146 at 5.

¹⁵¹ He argued that as all individuals are free and equal, all nations must also be by nature equal to one another, adding that “since by nature all nations are equal, since moreover all men are equal in a moral sense whose rights and obligations are the same, the rights and obligations of all nations are also by nature the same”. See Christian Wolff, *Jus Gentium Methodo Scientifica Pertractum*, Vol. II (London: Clarendon Press, 1934) at 15-16.

¹⁵² *Ibid.* at 3.

¹⁵³ In his books *De Foro Legatorum* (1721) and *Questiones Juris Publici – Libri Duo* (1737).

¹⁵⁴ Cançado Trindade, “General Course”, *supra* note 116 at 256 and See generally Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* (Oxford: Clarendon Press, 1930). To Bynkershoek, legal subjectivity “embraced all those who acted in the field of *jus gentium* of his times, and to approach this latter, resort was to some extent still made to *ratio*”. See *ibid.* at 256.

¹⁵⁵ *Ibid.* Vattel developed his theory of international law in his book *Le Droit des Gens ou Principes de la Loi Naturelle Appliquée à la Conduite et aux Affaires des Nations et des Souverains*.

¹⁵⁶ Emmerich Vattel, *The Law of Nations: Applied to the Conduct and Affairs of Nations and Sovereigns* (London: G.G. and J. Robinson, 1797) at 1v.

which ought to prevail between nations or foreign states”.¹⁵⁷ It is the idea that nations are sovereign States (have absolute power over a territory) and, in contrast with individual citizens, each State is absolutely free and independent to all peoples and other nations “as long as it has not voluntarily submitted to them”.¹⁵⁸

Vattel’s idea was developed by Hegel, who affirmed that international law was “State Law” (he called it *Staatsrecht*), applied to “relations between States”¹⁵⁹ and depended of “distinct and sovereign wills”.¹⁶⁰ In Hegel’s view, States had absolute power and, contrary to the doctrines of the “founding fathers” of the law of nations, he established the idea of State superiority over international law: “[t]he relationship between states is a relationship of independent units which make mutual stipulations but at the same time stand above these stipulations”.¹⁶¹

With the ascendancy of Vattel’s concepts and Hegel’s Philosophy of Law, international law lost its moral and natural law elements, its conception of the individual as a subject of the law of nations and the idea of common good or *recta ratio* as a universal goal. The State-centered theory of the law of nations viewed international law as subordinate to States, as a mere group of rules and principles that States had chosen, out of self-interest to subject themselves to. This positivistic concept of international law (known as voluntarist positivism) became the prevailing theory; it denied the international legal personality of individuals envisaging an international law which was not above, but below States.

Cançado Trindade has opined that the theory of an all powerful State harmed the development of international law in the 19th and early 20th centuries and led to

¹⁵⁷ *Ibid.* at v.

¹⁵⁸ Travers Twiss, *supra* note 146 at 7.

¹⁵⁹ G.W.F. Hegel, *Elements of the Philosophy of Right* (New York: Cambridge University Press, 1991) at 366.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.* at 366.

irresponsibility and claimed omnipotence of State:¹⁶² “successive atrocities were committed against human beings, against humankind. The disastrous consequences of this historical distortion are widely known”.¹⁶³

The Hegelian idea of State and international law “was never convincing to all, and it soon became openly challenged by the more lucid doctrine”¹⁶⁴ because it was an obstacle to a universal international law of humankind or *civitas maxima gentium*.¹⁶⁵ As explained in Chapter I, international law’s preoccupation with individuals began after the First World War with the creation of mechanisms such as the Mandate System of the League of Nations. Individuals regained their central place in the law of nations with the subsequent creation of the United Nations, the conclusion of treaties stipulating humanitarian law and human rights norms, and the establishment of international human rights courts. Though the world today has changed since the time of the “founding fathers” of international law, after the Second World War, the law of nations needed a new path that could not be centered solely on States. The establishment of rights and duties for individuals is the foundation of a modern international law¹⁶⁶ based on rules and principles that can surpass the will of States and achieve the protection of individuals on the international plane.

These views were expressed by several international law scholars in the decades following World War. Jean Spiropoulos, in 1928, wrote that States are not only subjected to their own will, but exist to accomplish the aspirations of individuals (who must emancipate from the tutelage of the States as a consequence of the

¹⁶² Cançado Trindade, “A *Recta Ratio*”, *supra* note 128 at 13.

¹⁶³ Cançado Trindade, “General Course”, *supra* note 116 at 257.

¹⁶⁴ *Ibid.*

¹⁶⁵ J. Spiropoulos, “L’individu et le Droit International” (1929) 30 *The Hague Academy of International Law* at 258 and 266, cited in Cançado Trindade, *supra* note 116 at 258.

¹⁶⁶ A modern international law influenced by the theories of its founding fathers regarding the existence of an international community formed by States and individuals (with the inclusion of international organizations) and the existence of an international law that is superior to the will of States.

evolution of international law).¹⁶⁷ That year, Nicolas Politis, criticized the concept of individuals as objects of international law that could not be governed by its rules and principles and could not bring actions against a State on an international level.¹⁶⁸ Breaking with Hegelian theories, he argued that the State is not an end in itself and that international law governs the relations of individuals belonging to various national groups and goes, therefore, beyond the concept of State to focus on individuals.¹⁶⁹ He anticipated, in 1929, that the world would develop to bring people together and international law would no longer be an inter-State law, but a law of individuals.¹⁷⁰ Georges Scelle,¹⁷¹ also criticizing the theory of international law as inter-State law, wrote that individuals are subjects of domestic as well as of international law (a movement of extension of the legal personality of individuals) and affirmed that individuals are direct subjects of the law of nations because they are subjects of the law of national collectivity and of the international global collectivity.¹⁷² International law must reflect global solidarity and serve the needs of global social life.¹⁷³ Since global society is composed of individuals,¹⁷⁴ individuals

¹⁶⁷ Jean Spiropoulos, *L'individu en Droit International* (Paris: LGDJ, 1928) at 66, 33 and 55, cited in Cançado Trindade, *supra* note 116 at 258.

¹⁶⁸ Nicolas Politis, *The New Aspects of International Law* (Washington: Carnegie Endowment for International Peace, 1928) at 18-19. Politis sustained that the possibility of participation of individuals in international law and the existence of treaties and customary norms related to individuals are strong arguments in favor of accepting the international legal personality of individuals. Nicolas Politis affirmed that “[i]t is becoming impossible to maintain that, separately from his country, the individual has, from the legal point of view, no place in international relations”. See *Ibid.* at 20.

¹⁶⁹ *Ibid.* at 25.

¹⁷⁰ *Ibid.* at 30-31.

¹⁷¹ In his book *Précis du Droit des Gens* (1932-1934).

¹⁷² G. Scelle, *Précis de Droit des Gens – Principes et Systématique* (Paris : Livr . Rec. Sirey, 1932) at 42-44, cited in Cançado Trindade, “General Course”, *supra* note 116 at 268. In Scelle words: “[I]es individus sont à la fois sujets de droit des collectivités nationales et de la collectivité internationale globale: ils sont directement sujets de droit des gens”. To Georges Scelle international law is “the translation of the social constraints which the international society and its individual members need in order to survive and develop”. See Elisabeth Nijman, *supra* note 147 at 218.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.* at 220.

are the only subjects of international law.¹⁷⁵ Scelle sought to strengthen the legal position of individuals *vis-à-vis* their governments or rulers.¹⁷⁶

Following the Second World War, attacks on the positivistic concept of international law intensified. Hersch Lauterpacht, in 1950, sustained that the individual is the final subject of all law¹⁷⁷ and there is nothing in international law that could forbid individuals to become subjects of the law of nations and to become parties in proceedings before international tribunals.¹⁷⁸ Lauterpacht affirmed that even if it were accepted that individuals are not subjects of international law, there were numerous exceptions to this rule: individuals have rights and duties created by international law customs and treaties.¹⁷⁹ Lauterpacht sustained that the ultimate source of law was an ethical and moral postulate, the law of nature¹⁸⁰ and, as a consequence, individuals were the ultimate subjects of international law.¹⁸¹ He sustained that States are not like, but composed of individuals and as a consequence all law was ultimately addressed to individual human beings.¹⁸² Similarly, Ian Brownlie opines that “there is no general rule that the individual cannot be a ‘subject of international law’, and in particular contexts he appears as a legal person on the international plane”.¹⁸³ Marek Korowicz, in 1959, affirmed that individuals may or

¹⁷⁵ Antoine Favre, *Principes du Droit de Gens* (Paris: Librairie de Droit et de Jurisprudence, 1974) at 161.

¹⁷⁶ Elisabeth Nijman, *supra* note 147 at 227.

¹⁷⁷ H. Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950) at 61 and 69, cited in Cançado Trindade, “General Course”, *supra* note 116 at 269.

¹⁷⁸ Hersch Lauterpacht, *International Law, in International Law Being the Collected Papers of Hersch Lauterpacht* vol.1 (New York: Cambridge University Press, 1970) at 141-142.

¹⁷⁹ *Ibid.*

¹⁸⁰ Elisabeth Nijman, *supra* note 147 at 298-299.

¹⁸¹ *Ibid.* at 299.

¹⁸² *Ibid.* at 309.

¹⁸³ Brownlie, *supra* note 89 at 65. Ernst Sauer, in 1947, accepted the possibility that individuals (*einzelpersonen*) could also be subjects and not only objects of international law (*Völkerrechts*). See Ernst Friedrich Sauer, *Grundlehre des Völkerrechts* (Köln: B. Pick Verlag, 1948) at 83. Philip Jessup, in 1948, criticized the view that State sovereignty prevailed over international law pondering as inconsistent with the interests of the international community and the idea of individuals as subjects of the law of nations. See Ph. C. Jessup, *A Modern Law of Nations – An Introduction* (New York: MacMillan Co., 1948) at 41, cited in Cançado Trindade, “General Course”, *supra* note 116 at 269.

may not be subjects of international law, but they may never be its objects.¹⁸⁴

Korowicz sustains that individuals are bearers of rights and duties on the international plane and that they have international capacity¹⁸⁵ adding that

It seems paradoxical that the fewest prospects for the recognition of the international capacity of individuals for legal action exist in the field where this capacity would be the most logical, namely in the field of the protection of human rights. Substantive rights without procedural rights to enforce them may be recognized, at best, as potential rights; usually those rights remain on paper, since no means is provided for their implementation by the person concerned.¹⁸⁶

Hans Kelsen, one of the main proponents of legal positivism,¹⁸⁷ maintains¹⁸⁸ that it is to humankind that international law norms apply, it is against them that those norms provide sanctions and it is on the individual that it entrusts the competence of creating norms.¹⁸⁹ He discusses the “traditional theory” that States are the only subjects of international law and individuals its objects as “untenable”.¹⁹⁰

Paul Guggenheim, in 1952, affirmed that individuals are subjects of duties under the law of nations level and have legal personality recognized by customary norms of international law.¹⁹¹ Bernard Victor Röling (in 1960), criticizing the then

¹⁸⁴ Marek St. Korowicz, *Introduction to International Law: Present Conceptions of International Law in Theory and in Practice* (The Hague: Martinus Nijhoff: 1959) at 327.

¹⁸⁵ *Ibid.* at 341-389.

¹⁸⁶ *Ibid.* at 389.

¹⁸⁷ Roberto Lyra Filho, *O Que é Direito* (São Paulo: Brasiliense, 1999) at 37.

¹⁸⁸ In his book *Principles of International Law* from 1952.

¹⁸⁹ Hans Kelsen, *Principles of International Law* (New York: Holt, Rinehart and Winston, Inc., 1966) at 180.

¹⁹⁰ *Ibid.*

¹⁹¹ P. Bugenheim, “Les Principes de Droit International Public” (1952) 80 *Hague Academy of International Law (RCADI)* at 116, cited in Cançado Trindade, “General Course”, *supra* note 116 at 270. Constantin Eustathiades, in the following year, wrote that individuals have rights and duties on the international plane and can be held responsible for breaching those duties, linking the idea of international protection of human rights to the international responsibility and punishment of individuals. See C. Th. Eustathiades, “Les Sujets du Droit International et la Responsabilité Internationale – Nouvelles Tendances” (1953) 84 *The Hague Academy of International Law (RCADI)*

predominant positivist approach to international law, wrote that “[h]umanity... instinctively turns to this natural law, for the function of law is to serve the well-being of man, whereas present positive International Law tends to his destruction.”¹⁹² He suggested that the individual is emancipating from the mercy of States as now bearers of rights and duties on the international plane.¹⁹³

Paul Reuter affirms that individuals have an “important place in modern international law”.¹⁹⁴ He rescues the idea of the founding fathers of the law of nations justifying individuals’ international legal personality as a reflection of the human solidarity.¹⁹⁵ In Reuter’s view, law must be connected to the human being and not to “abstractions”.¹⁹⁶ Theodor Meron admits that there is a growing acceptance of “both the rights and the status of the individual in international law”.¹⁹⁷

It cannot be denied that international law and the contemporary world is different than in the times of the “founding fathers” of *jus gentium*. Though it waned in the 19th century, the will to build an international system applicable to States and individuals seeking a universal justice has survived and is now ascendant.¹⁹⁸

at 402, 412-413, 424, 586-589, 601 and 612, cited in Cançado Trindade, “General Course”, *supra* note 116 at 270.

¹⁹² Bernard Victor Aloisius Röling, *International Law in an Expanded World* (Amsterdam: Djambatan, 1960) at xxii and 1-2.

¹⁹³ *Ibid.* Following Röling’s view, René Cassin, in 1967, sought to not only defend the acceptance of individuals as bearers of rights and duties, but the acceptance of peoples to international protection mechanisms. See René Cassin, “Vingt Ans Après la Déclaration Universelle” (1967) 8 *Revue de la Commission Internationale de Juristes* at 9-10 and 11-17, cited in Cançado Trindade, “General Course”, *supra* note 116 at 271-272.

¹⁹⁴ Paul Reuter, *International Institutions* (London, Allen & Unwin 1958) at 88. J. G. Starke, in 1972, arguing in support of the international legal personality of individuals, noted that the procedural incapacities of individuals before international tribunals were not inconsistent with their status of subjects of the law of nations. See J. G. Starke, *An Introduction to International Law* (London, Butterworths, 1972) at 70.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ Theodor Meron, *supra* note 68 at 318. Commenting about whether individuals are subjects of international law, he argues that “there’s no doubt that he has acquired a status in international law. Nevertheless, despite some progress, remedies available to the individual still lag behind rights and principles”.

¹⁹⁸ Antônio Augusto Cançado Trindade, *O Direito Internacional em um Mundo em Transformação* (Rio de Janeiro: Renovar, 2003) at 539-550 [Cançado Trindade, *Transformação*].

Humanity still aims for a universal community reaching for a common good¹⁹⁹ - to develop international norms and principles that can prevent atrocities, can assure basic rights for individuals, can give certainty to legal relations and make possible the responsibility of States and individuals on the international plane. If it is true that the contemporary world is not the same as during the founding fathers' period, it is also true that international law is not the same as it was when Hegel developed his theory of the State and Vattel his inter-State view of the law of nations. Since the Second World War, international law has drastically changed: the United Nations was created; a great number of treaties related to the protection of the human being were adopted; international human rights and criminal courts were established; and the individual emerged as a central figure of international law. The law of nations has again become a *jus gentium* or *droit des gens* focused on individuals. Extremist theories do not square with the realities of international law. One cannot deny the international legal personality of States; they are members of international organizations, participate in the elaboration of treaties and the formation of customary norms, have access to the International Court of Justice and are effective members of the international community. By that logic, one cannot deny that international organizations as well as individuals have an active role on the international plane, because international law is above the will of States. Individuals and States are different entities under the law of nations, and their legal personalities differ. While individuals have a different role, they have rights and duties under international law and are acquiring international capacity as well. States, international organizations and individuals are all subjects of international law, each one with its particularities.

¹⁹⁹ *Ibid.*

Since international law is not the same as in the time of its “founding fathers” and is not the same law of nations developed by Vattel, some scholars have sought to analyze what international law is in present times and what it will be in the future. It is not possible to affirm with certainty how the concepts of international legal personality and of international law will evolve in the future. However, some international law scholars, taking into consideration the changes to the law of nations since the 19th century, have argued that the law of nations tends to: universalization; regionalization; institutionalization; the functional attribute; objectivity; codification; jurisdiction; and humanization.²⁰⁰

“Universalization” describes the evolution of international law from European-American law to universal law, applied and developed by many different States. “Regionalization”, on the other hand, has occurred through the creation, for economical, social, cultural or political reasons, of regional spaces (*e.g.* the European Union) governed by international law rules. “Institutionalization” reflects the fact that the law of nations is no longer based solely on bilateral and multilateral State relations, but develops through the work of international organizations (*e.g.* the United Nations) and supranational organs (*e.g.* European Union). The “functional attribute” of international law has two different aspects. First, the present law of nations penetrates in areas concerning not only international relations, but also the domestic law of States (*e.g.* health, labor law, economy and politics). Second, international law bodies create specialized agencies in specific areas to complement the systems established by the domestic law of States. International law now tends to

²⁰⁰ Jorge Miranda, “A Incorporação ao Direito Interno de Instrumentos Jurídicos de Direito Internacional Humanitário e de Direito Internacional de Direitos Humanos” (2000) 11 *Revista CEJ* at 23-26, cited in Mazzuoli, *supra* note 7 at 48.

objectivity as it moves away from the old voluntarist approach.²⁰¹ The law of nations tends to “codification”, as illustrated by the U.N. Charter, which provides that the General Assembly shall make recommendations for the purpose of “promoting international co-operation in the political field and encouraging the progressive development of international law and its codification”.²⁰² The law of nations tends to also “jurisdiction” with the creation of international tribunals in order to apply and ensure the effectiveness of international norms and principles.²⁰³ The last of the tendencies is “humanization”.²⁰⁴ After the creation of the United Nations, international law began focusing on the establishment of rules to protect individuals on the international plane (even against their own States) which leads to the argument that individuals are subjects of international law.

1.2 Brief Reflections on International Law in a Pluralistic World

It is impossible to deny the importance and role of States, the main subjects of international law, in the development of the law of nations. States, taking into consideration their political and economic interests and their philosophical inclinations, create foreign policies and engage in relations with other States. International law can serve as a common language for States’ conduct of international relations. The essential elements of this common language are diplomatic notes, treaties and customary practices envisaged as mandatory. Human rights, especially after the First and Second World Wars, became one of the main concerns of States’

²⁰¹ The will of States has diminished in importance after the codification of the *pacta sunt servanda* principle by the Vienna Convention of 1969. See *Vienna Convention on the Law of Treaties*, *supra* note 85 at preamble.

²⁰² *Charter of United Nations*, *supra* note 31 at article 13, §1°, (a). To achieve that purpose, U.N. bodies like (e.g. the International Law Commission) try to codify customary international law regulations.

²⁰³ Jorge Miranda, *supra* note 200 at 48.

²⁰⁴ Valério Mazzuoli, *supra* note 7 at 49-50.

international politics. The development of international law, especially in human rights, brought with it a pluralistic world, where States, though still the main subjects of the law of nations, do not have the sole voice. With the creation of the United Nations and the establishment of international human rights tribunals, States were not alone in the development of the law of nations. The participation of international organizations and individuals – represented by non-governmental organizations, jurists and direct or indirect parties before human rights courts – must also be acknowledged.

The expression “pluralistic world”, therefore, acknowledges that actors other than States comprise the international community. In my view, all these actors are equally important to the development of international law, especially of international human rights, which is an area of the law of nations where norms are directed not only to States, but also to its primary addressees: individuals. This change in international law can be observed by the way international law developed after the First and Second World Wars.

The United Nations Conference on International Organization (the San Francisco Conference of 1945) represented a step towards the formation of a pluralistic international community. This important conference, attended by representatives of several States (the community of States has since been further broadened by the independence of many African and Asian States) reinforced the purposed of creating an international organization and international court to “strengthen the arm of human protection”.²⁰⁵ Achieving such a challenging ideal requires the action of the whole international community comprised of States, international organizations and individuals.

²⁰⁵ United Nations, *Documents of the United Nations Conference on International Organization San Francisco 1945*, vol. IX, at 1, online: <http://www.archive.org/details/documentsoftheun008783mbp> Accessed on 9 September 2010.

In 1946, the former Human Rights Commission was entrusted to create the Universal Declaration of Human Rights and the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.²⁰⁶ Even though the role of States in drafting and accepting the provisions of these international instruments was indispensable, the negotiations occurred within an international organization, which had State representatives, but also working groups and legal advisors in a process that allowed non-governmental organizations and human rights advocates to share their concerns.²⁰⁷ For example, at the Commission's first meeting, in addition to representatives of States²⁰⁸ were present representatives of specialized agencies (International Labor Organization and United Nations Educational, Scientific and Cultural Organization), representatives of non-governmental organizations and the Secretary of the Commission, who, in that meeting, was John Peters Humphrey.²⁰⁹ Consequently, even though States played a predominant role, the Commission (later replaced by the Human Rights Council)²¹⁰ was already a pluralistic organization. The decision to create a declaration and two covenants was that of an international organization²¹¹ and not only of States. While the decision-making for the creation of such important international law instruments as the Universal Declaration and the two 1966 Covenants was in the hands of States, after the two world wars and especially after the establishment of the United Nations, debate in the sphere of human rights began to broaden, and included States and several international law actors.

²⁰⁶ Dominic McGoldric, *The Human Rights Committee: Its Role in the Development of the International Covenant of Civil and Political Rights* (Oxford: Clarendon Press, 1991) at 4-5. The Human Rights Commission, as the author affirms, decided to elaborate two treaties instead of just one comprising civil, political, economical, social and cultural rights.

²⁰⁷ See Godinho, *supra* note 48 at 24-25.

²⁰⁸ There were representatives of the following States: Australia, Belgium, Byelorussian Soviet Socialist Republic, China, Egypt, India, Iran, Lebanon, Philippine Republic, United Kingdom, United States of America, Union of Soviet Socialist Republics and Uruguay. See *Human Rights Commission*, UN ECOSOC, 1st Mtg., UN Doc. E/CN.4/SR.2/Corr. 1 (1947).

²⁰⁹ *Ibid.*

²¹⁰ See Chapter III.

²¹¹ McGoldric, *supra* note 206 at 5.

Consequently, a large number of treaties were concluded under the auspices of international organizations.²¹²

In the case of the Covenant of Civil and Political Rights, in 1949, the Human Rights Commission conducted a detailed article-by-article examination of the draft Covenant and later requested the Secretary-General to prepare a methodical questionnaire for governments on the basis of the proposals put forward.²¹³ The Human Rights Commission was divided on the issue of the right of petition with eight votes for and eight against.²¹⁴ In 1950 the Human Rights Commission decided to implement a permanent body which would consider inter-State complaints.²¹⁵ The draft was submitted to the Economic and Social Council and to the General Assembly. The General Assembly, a body of the United Nations, requested the Human Rights Commission to consider inserting in the draft Covenant or in additional protocols provisions implementing the access of individuals and organizations, a step which was implemented only later.²¹⁶ In 1951, the Human Rights Commission drafted fourteen articles on economic, social and cultural rights and on matters of implementation. In 1954, the Human Rights Commission concluded its work on the two Covenants and in 1966, the General Assembly adopted these treaties and opened them for signature.²¹⁷ The two Covenants illustrate are good examples that after the World Wars international human rights law required a global effort involving different actors - not only States - to better establish and implement human rights at the international level.

²¹² See United Nations, *Office of the United Nations High Commissioner for Human Rights: International Law*, online: <http://www2.ohchr.org/english/law/>. Accessed on 13 September 2010.

²¹³ McGoldric, *supra* note 206 at 5.

²¹⁴ *Ibid.* at 5-6.

²¹⁵ *Ibid.* at 6. This complaint system was later extended to also receive individuals' petitions. See Chapter III.

²¹⁶ *Ibid.*

²¹⁷ McGoldric, *supra* note 206 at 9-10.

Pluralism in international law has increased over the years, especially through the work of international courts and organizations. In my view, the European Court of Human Rights' decision that the European Convention²¹⁸ is a living instrument, which requires a dynamic interpretation²¹⁹ acknowledges that international law is in constant development with the help of different actors, particularly individual petitioners, who participate in the building of a modern international law. In the *Sigurdur A. Sigurjonsson* case, the Court decided that the *travaux préparatoires* relied on in another case were not decisive in interpreting the Convention, but merely provided a working hypothesis.²²⁰ This decision accords with the Vienna Convention on the Law of Treaties, which establishes that preparatory works are only supplementary means of interpretation.²²¹ The logic underlying this provision is that preparatory works are unreliable as a general guide to treaty interpretation.²²² The Vienna Convention, therefore, contemplates the evolution of international law.

A pluralistic approach to international law was also taken by the Inter-American Court of Human Rights.²²³ During the development of its new procedural rules,²²⁴ the Inter-American Court considered the views of States but also of other international law actors. It stated that its new procedural rules were “the result of constructive, participative and transparent communication between the Court and the different actors and users of the inter-American human rights system.”²²⁵ This process of dialogue with different actors was reflected in a “process of consultation

²¹⁸ See Chapter III.

²¹⁹ Jacobs & White, *The European Convention on Human Rights* (New York: Oxford University Press, 2006) at 40-41.

²²⁰ *Sigurdur A. Sigurjonsson v. Iceland* (1993), 16A E.C.H.R. (Ser. A) 462 at 478.

²²¹ *Vienna Convention on the Law of Treaties*, *supra* note 85 at article 32.

²²² Jacobs & White, *supra* note 219 at 41.

²²³ See Chapter III for explanations on the Inter-American Court of Human Rights.

²²⁴ See Chapter III for explanations on the rules of procedure of the Inter-American Court of Human Rights.

²²⁵ OAS, Inter-American Court of Human Rights, *Annual Report of the Inter-American Court of Human Rights*, online: http://www.corteidh.or.cr/docs/informes/eng_2009.pdf at 16. Accessed on 14 September 2010.

implemented by inviting all the Member States and any person or institution that wished to participate, using different media and mechanisms available to all”.²²⁶

These examples demonstrate that international law now operates in a pluralistic world comprised not only of States, but of international organizations and individuals. The Vienna Convention on the Law of Treaties arguably envisaged this change by providing that preparatory works of treaties, that is, debates held primarily by States are supplementary means of interpretation and not fundamental because the international community is under constant development. Acknowledging the changing environment of international law, the United Nations is open to the participation of individuals, other international organizations and States in its work of codification of international law. In 2009, the Inter-American Court expressly recognized the importance of consulting different international actors on human rights matters because human rights norms do not only concern States, but international organizations and individuals. Another example of the effort of the whole international community to strengthen international human rights is the development of the Declaration on the Rights of Indigenous Peoples²²⁷ which required the joint work of international organizations and individuals, especially indigenous peoples, who are “becoming more prominent as individual players on the world stage”.²²⁸

Individuals, as subjects of international law, should be consulted when a new international norm or changes in already existing human rights norms are in process. The establishment of international human rights treaties is arguably a joint effort of States, international organizations and individuals. This pluralistic system will likely be strengthened in the future with a wider acceptance of individuals’ international

²²⁶ *Ibid.*

²²⁷ *Declaration on the Rights of Indigenous Peoples*, GA Res. A/RES/61/295, UN GAOR, 107th Mtg. (2007).

²²⁸ See United Nations, *United Nations Permanent Forum on Indigenous Issues*, online: <http://www.un.org/esa/socdev/unpfi/en/history.html> Accessed on 14 September 2010.

legal personality. In my view, two consequences flow from this stronger participation of individuals in international human rights law. First, individuals, as primary addressees of human rights norms, have a right of access to international courts that deal with human rights matters.²²⁹ Second, the international community develops norms that are above the will of States. I now turn to this second point.

2. Individuals and New Developments of International Law

As canvassed above, the voluntarist theory that subjugates international law to the will of States and diminishes its enforceability is presently under challenge. The law of nations has mechanisms that are superior to the will of States, making it enforceable against the whole international community. This is necessary to be able to assure the legal status of international law and to establish an effective rights protection. In this section, I describe the two most significant doctrines that place international law on a supra-State level: *erga omnes* obligations and *jus cogens*. I argue that, by placing some human rights norms above the will of States, these doctrines break the prevailing positivistic theory that places international law and particularly international human rights law below the will of States and make possible the universal juridical conscience theory that is centered on individuals instead of States.

Without a clear decision from the international community, it is difficult to precisely define *erga omnes* obligations and *jus cogens*. The Vienna Convention of 1969²³⁰ and the International Law Commission do not enumerate the norms or principles that should be considered *erga omnes* or *jus cogens* because, according to

²²⁹ See Chapters III and IV.

²³⁰ *Vienna Convention on the Law of Treaties*, *supra* note 85.

Tavernier, this allows the list of rules that would fit into those categories to be modified and completed.²³¹

Erga omnes obligations could be defined as obligations that guard values of the whole international community and, therefore, must be respected by all international actors.²³² *Erga omnes* obligations imply a right of every member of the international community to demand their respect.²³³ They are international obligations because they establish duties towards the subjects of international law and when they are not respected, can lead to international responsibility. The theory of *erga omnes* obligations was accepted by the International Court of Justice in the *Barcelona Traction* case.²³⁴ The Court stated that all States have a legal interest in the protection of some rights established in international norms because of their importance to the international community.²³⁵ Some international instruments, because of their content, can generate *erga omnes* obligations.²³⁶ The International Court of Justice adopted the understanding that what characterizes *erga omnes* obligations is the content of the international instrument. Significantly, *erga omnes* obligations legitimate the responsibility of a subject of international law even if the subject did not accept or fully agree with that specific obligation. But because of its importance to the whole international community, it is enforced against all.

A *Jus cogens* or peremptory norm of international law was defined by the Vienna Convention of 1969 as “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and

²³¹ Paul Tavernier, “L’identification des Règles Fondamentales, un Problème Résolu?” in Christian Tomuschat & Jean-Marc Thouvenin, eds., *Fundamental Rules of the International Legal Order – Jus Cogens and Obligations Erga Omnes* (Boston: Martinus Nijhoff Publishers, 2006) at 13.

²³² André de Carvalho Ramos, *Processo Internacional de Direitos Humanos* (São Paulo: Renovar, 2002) at 48 [Ramos, *Processo*].

²³³ Theodor Meron, “On a Hierarchy of International Human Rights” (1986) 80 A.J.I.L. 1 at 9.

²³⁴ *The Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain)* [1970] I.C.J. Rep. 3 at 32.

²³⁵ *Ibid.*

²³⁶ Ramos, *Processo*, *supra* note 232 at 50-51.

which can be modified only by a subsequent norm of general international law having the same character".²³⁷ The theory that establishes that the sources of international law, as enumerated at the article 38 of the Statute of the International Court of Justice,²³⁸ are non hierarchical²³⁹ must be adapted because peremptory norms of general international law or *jus cogens* are superior to these other sources. Because the fundamental values reflected in these norms do not exist to satisfy the interest of an individual State, but the whole international community, they must be imperative and cannot be subordinate to the will of States.²⁴⁰ Though the existence of peremptory norms met with some resistance,²⁴¹ this theory developed and was accepted by the Vienna Convention of 1969.²⁴² It can be said that the International Court of Justice, when interpreting the Genocide Convention, recognized the existence of norms that did not exist to serve the interests of a particular State, but to serve the whole international community:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the conventions. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or the maintenance of a perfect contractual balance between rights and duties.²⁴³

²³⁷ *Vienna Convention on the Law of Treaties*, *supra* note 85 at article 53.

²³⁸ *Statute of the International Court of Justice*, annex to the *Charter of United Nations*, 26 June 1945, Can. T.S. N° 7 (entered into force 24 October 1945) at article 38.

²³⁹ *Kindred et al.*, *supra* note 81 at 108.

²⁴⁰ Alfred Verdross, "Forbidden Treaties in International Law" (1937) 31 A.J.I.L. 571 at 571-577.

²⁴¹ Francisco Rezek, former judge of the International Court of Justice, sustained that *jus cogens* breaks the voluntarism as one of the pillars of international law and that would put in danger the sovereignty of States. See Rezek, *supra* note 43 at 112.

²⁴² *Vienna Convention on the Law of Treaties*, *supra* note 85 at article 53, 64 and 71.

²⁴³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] I.C.J. Rep. 15 at 23

According to the definition established by article 53 of the Vienna Convention of 1969,²⁴⁴ to be classified as *jus cogens*, an international norm must satisfy five conditions: it must be a norm of international law connected to the essential principles of the law of nations; it must be accepted and recognized by the whole international community as an imperative norm;²⁴⁵ it cannot be derogated by the will of States; it seeks to protect interests of the whole international community and States have the obligation to respect it.²⁴⁶ Acceptance by the international community²⁴⁷ does not mean that States must express their will to be bound by a *jus cogens* norm; a norm can also be classified as imperative if the international community tacitly accepts its imperative characteristic by acting in conformity with it.²⁴⁸ It is difficult to distinguish between *erga omnes* obligations and *jus cogens*. Stefan Kadelbach teaches that

Jus cogens denominates rules whose effect is to make conflicting treaties void (Articles 53 and 64 VCLT) and, arguably, the prohibition against reservations to *jus cogens* treaty provisions. *Erga omnes* obligations, by contrast have been considered so far, by and large, as a concept of State responsibility. Being defined as obligations *vis-à-vis* the international community of States, they impose especial duties on the offending State which may go beyond the bilateral reparation scheme which applies in reciprocal legal relationships.²⁴⁹

²⁴⁴ *Vienna Convention on the Law of Treaties*, *supra* note 85 at article 53. It stipulates that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

²⁴⁵ Article 53 of the Vienna Convention establishes that the international community is formed by all States as a whole, but it cannot be accepted in present times that the international community is only formed by States for the role in international relations of individuals and international organizations is also very important, even if one does not accept the international legal personality of individuals.

²⁴⁶ Mazzuoli, *Tratados*, *supra* note 49 at 170.

²⁴⁷ *Vienna Convention on the Law of Treaties*, *supra* note 85 at article 53.

²⁴⁸ Mazzuoli, *Tratados*, *supra* note 49 at 171.

²⁴⁹ Stefan Kadelbach, “*Jus Cogens*, Obligations *Erga Omnes* and other Rules – The Identification of Fundamental Norms?” in Christian Tomuschat & Jean-Marc Thouvenin, eds., *Fundamental Rules of*

In other words, *erga omnes* obligations are connected to State responsibilities. They are obligations that, because of their importance to the international community, must be respected by all subjects of international law. If they are breached, the whole international community is a victim, which makes *erga omnes* obligations a procedural norm because it gives rise to a right of action. *Jus cogens*, on the other hand, is a source of international law that is superior to other sources, including treaties, which makes *jus cogens* a substantive norm.²⁵⁰

Significantly, *jus cogens* and *erga omnes* obligations are inconsistent with a purely voluntarist theory of international law. They are norms and obligations set by the entire international community and not by the will of an individual State. Their development confirms that international law is moving away from being an inter-State law. If individuals are accepted as part of the international community and have international capacity they can, as a consequence, have a role in the formation of international norms.²⁵¹ Even though there is a debate about what should be considered *jus cogens* and *erga omnes* obligations, the jurisprudence leans towards accepting human rights norms (or at least some human rights) as *jus cogens* and *erga omnes* obligations, as illustrated in decisions of the International Court of Justice and the Inter-American Court of Human Rights, including: *Barcelona Traction*,²⁵² *Villagrán*

the International Legal Order – Jus Cogens and Obligations Erga Omnes (Boston: Martinus Nijhoff Publishers, 2006) at 26.

²⁵⁰ See Judge A. A. Cançado Trindade, *Jus Cogens in Contemporary International Law*, online: United Nations Audio Visual Library of International Law http://untreaty.un.org/cod/avl/ls/Cancado-Trindade_IL.html Video watched on 24 June 2010.

²⁵¹ An influence of individuals in the formation of international happens, e.g., with access of individuals to international tribunals that can point out *jus cogens* or *erga omnes* obligations taking into consideration cases sent by individuals.

²⁵² *The Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain)*, *supra* note 234 at 32. The Court affirms that are examples of *erga omnes* obligations: genocide, acts of aggression and violations of basic rights connected to the human dignity principle (e.g. racial discrimination and slavery).

Morales,²⁵³ Fermín Ramírez,²⁵⁴ De la Cruz Flores,²⁵⁵ Maritza Urrutia,²⁵⁶ and Tibi.²⁵⁷

International law scholars agree that some human rights norms are *jus cogens*²⁵⁸ and the International Law Commission has argued that some human rights norms (e.g. against genocide, torture) are imperative norms of international law.²⁵⁹ In my view, this growing tendency to recognize diverse types of human rights norms as *jus cogens* could lead, in the future, to the acceptance of human rights norms in general as imperative norms of international law.

²⁵³ *Villagrán Morales and Others (Guatemala)* (1999), Inter-Am. Ct. H.R. (Ser. C) N° 63 at 12. Cançado Trindade, in his vote, sustained that the forced disappearance of people violated human rights norms that cannot be derogated (right to live, liberty, physical and mental integrity) and are, therefore, *jus cogens*.

²⁵⁴ *Fermín Ramírez Case (Guatemala)* (2005), Inter-Am. Ct. H.R. (Ser. C) N° 126 at para. 117. The Inter-American Court decided that “[t]he jurisprudence of this Tribunal, as well as other international courts and authorities, has emphasized that there is a universal prohibition to submit a person to torture or other cruel, inhumane, or degrading treatment or punishment that violates peremptory norms of international law (*ius cogens*)”.

²⁵⁵ *De la Cruz Flores Case (Peru)* (2004), Inter-Am. Ct. H.R. (Ser. C) N° 115 at para. 125. The Court stated that “[t]his Court has indicated that torture and cruel, inhuman, or degrading treatment, or punishment, are strictly prohibited by international human rights law. The prohibition of torture and cruel, inhuman or degrading treatment is absolute and non-derogable, even in the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability or any other public disaster or emergency.”

²⁵⁶ *Maritza Urrutia Case (Guatemala)* (2003), Inter-Am. Ct. H.R. (Ser. C) N° 103 at paras. 89 and 92. In paragraph 89, the Court stated that “[t]he Court has indicated that torture is strictly prohibited by international human rights law. The prohibition of torture is absolute and non-derogable, even in the most difficult circumstances, such as war, the threat of war, the fight against terrorism, and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability, or any other public disaster or emergency”. In paragraph 92 it was decided that “[a]n international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, has been developed and, with regard to the latter, it has been recognized that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered ‘psychological torture’. The absolute prohibition of torture, in all its forms, is now part of international *jus cogens*”.

²⁵⁷ *Tibi Case (Ecuador)* (2004), Inter-Am. Ct. H.R. (Ser. C) N° 114 at para. 143. The Inter-American Court, following the same idea of *Maritza Urrutia*, pointed out that “[t]here is an international legal system that absolutely forbids all forms of torture, both physical and psychological, and this system is now part of *ius cogens*. Prohibition of torture is complete and non-derogable, even under the most difficult circumstances, such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies.”

²⁵⁸ Ian Brownlie (Brownlie, *supra* note 89 at 568); André Ramos (Ramos, *supra* note 6 at 29-30); and Kindred (Kindred *et al.*, *supra* note 81 at 112) are examples of scholars that affirm that some human rights norms are *jus cogens*.

²⁵⁹ International Law Commission, *Projet d'articles sur la Responsabilite de L'état pour Fait Internationalement Illicite et Commentaires y Relatifs*, 53rd Sess., A/CN.4/SER.A/2001/Add.1 (Part 2) (2001) at 305.

This recognition that human rights norms have reached the status of *jus cogens* or *erga omnes* obligations indicates that they fall less under the will of individual States than under the responsibility of the entire international community. They are norms and principles that protect individuals, who are part of the international community (have rights and obligations under the law of nations) and must, therefore, be fully accepted as subjects of international law. This is the logical development of international law: human rights were given the status of international law (not only domestic law) because, to fully protect individuals, these rules needed to escape the sole control of States.

2.1 The Universal Juridical Conscience

In the 21st century, international law continues to adapt to the changes and aspirations of the international community, and the old idea of voluntarist positivism and the unlimited sovereignty of States is being replaced by more humane approaches. This idea is explored by Cançado Trindade, former judge president of the Inter-American Court of Human Rights and now a judge of the International Court of Justice, in his theory of the universal juridical conscience. Cançado Trindade claims that:

The positivist-voluntarist trend, with its obsession with the autonomy of the will of the States, in seeking to crystallize the norms emanating therefrom in a given historical moment, came to the extreme of conceiving (positive) law *independently of time*: hence its manifest incapacity to accompany the constant changes of the social structures (at domestic as well as international levels), for not having foreseen the new factual assumptions, being thereby unable to respond to them; hence its incapacity to explain the historical formation of

customary rules of international law. The very emergence and consolidation of the *corpus juris* of the International Law of Human Rights are due to the reaction of the *universal juridical conscience* to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (*el Derecho*) came to the encounter of the human being, the ultimate addressee of its norms of protection²⁶⁰ [emphasis in original].

This theory of the universal juridical conscience, based on international law's increasing focus on the protection of human rights, affirms a new paradigm that places individuals at the center of international law in order to better face the problems that affect the whole humankind.²⁶¹ Under this theory, international law is based no longer on the will of States, but on the idea of solidarity,²⁶² which hearkens back to the teachings of the founding fathers of the law of nations. The universal juridical conscience is based on natural law concepts. It affirms that the fundament of international law is the *recta ratio* or an international solidarity and requires the full acceptance of individuals as subjects of international law in order to achieve goals and values superior to States and important to the entire international community. This theory aims to give a humane aspect to the law of nations, to build a new *jus gentium* for humankind.²⁶³ To develop this theory, Cançado Trindade analyzes doctrinal, jurisprudential and treaty provisions related to natural law concepts and the existence of a juridical conscience of the international community which leads this community to a common good. Unlike voluntarist positivism or the *pacta sunt servanda* principle, this theory accepts the international legal personality of individuals by highlighting

²⁶⁰ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Mexico)* (1999), Advisory Opinion OC-16/99, Inter-Am. Ct. H.R., concurring vote of Judge A.A. Cançado Trindade at para. 4.

²⁶¹ Cançado Trindade, *Transformação*, *supra* note 198 at 1039-1109.

²⁶² Antônio Augusto Cançado Trindade, "A Formação do Direito Internacional Contemporâneo: Revalidação Crítica da Teoria Clássica de Suas 'Fontes'" in Antônio Augusto Cançado Trindade, *A Humanização do Direito Internacional* (Belo Horizonte: Del Rey, 2006) at 13.

²⁶³ Cançado Trindade, "A *Recta Ratio*", *supra* note 128 at 18-19.

their role and importance in the international community as the basis of international law. It is based on the idea that the positivistic doctrine was not able to elaborate a foundation of international law that would lead to the existence of a true legal order, and that it was necessary to seek the supreme source of international law, which is the common conscience of peoples or the universal conscience.²⁶⁴

Though a detailed exposition of the universal juridical conscience falls outside the scope of this thesis, it is supported by the writings of the Institut de Droit International,²⁶⁵ doctrinal analysis, the jurisprudence of the Inter-American Court of Human Rights and the Martens Clause,²⁶⁶ which influenced the II Hague Convention of 1899,²⁶⁷ the IV Hague Convention of 1907²⁶⁸ and the four Geneva Conventions of 1949²⁶⁹ in the provisions concerning denunciation.²⁷⁰ The expression “universal juridical conscience” was inspired by the notion of *civitas maxima gentium* and refers

²⁶⁴ G. Sperduti, “La Souveraineté, le Droit International et la Sauvegarde des Droits de la Personne” in Y. Dinstein, ed., *International Law at a Time of Perplexity – Essays in Honour of Shabtai Rosenne* (Dordrecht: Nijhoff, 1989) at 884, cited in Cançado Trindade, “A Formação”, *supra* note 262 at 94. The scholar sustained that “la doctrine positiviste n’a pas été en mesure d’élaborer une conception du droit international aboutissant à l’existence d’un véritable ordre juridique (...). Il faut voir dans la conscience commune des peuples, ou conscience universelle, la source des normes supreme du droit international”.

²⁶⁵ The Institut de Droit International on its *Déclaration des Droits Internationaux de l’Homme* considered that the juridical conscience of the civilized world requires the recognition of rights that are protected from State violation. See Institut de Droit International, *Déclaration des Droits Internationaux de l’Homme*, New York Session (1929) at considérant, online: http://www.idi-il.org/idiF/resolutionsF/1929_nyork_03_fr.pdf Accessed on 26 May 2010. It states that “la conscience juridique du monde civilisé exige la reconnaissance à l’individu de droits soustraits à toute atteinte de la part de l’Etat”.

²⁶⁶ Friedrich von Martens presented a clause at the I Hague Peace Conference of 1899 that sought to provide juridical protection to civilians and combatants in all situations, on the basis that the principles of international law are derived from established customs and principles of humanity. See Cançado Trindade, “A Formação”, *supra* note 262 at 94.

²⁶⁷ *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land*, 29 July 1899, 32 Stat. 1803, 187 Consol. T.S. 429 at preamble.

²⁶⁸ *Hague Convention IV - Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277, 205 Consol.T.S. 277 at preamble.

²⁶⁹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31 at article 63; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85 at article 61; *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 at article 142; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 at article 158.

²⁷⁰ Arguably, the Martens clause is a source a very important aspect of humanitarian law which has the status of *jus cogens*. See Cançado Trindade, “General Course”, *supra* note 116 at 192.

to the spirit of solidarity.²⁷¹ As Glaser noted, in the universal conscience is set the main characteristic of international law: the conviction that its norms are indispensable to the common good explains its mandatory character.²⁷²

The universal juridical conscience theory is based on the recent evolution of international law away from its focus on the will of States towards a focus on individuals. It is based on the natural law concepts established by the “founding fathers” of the law of nations. Under this theory, international law moved away from a voluntarist positivistic approach because it recognized that international law is not only created by States for their sole benefit, but by the whole international community which also includes individuals. The universal juridical conscience, its proponents claim, is the fundament of international law. It explains the source of international law’s mandatory force, which does not emanate from treaties or the practice of States, but from the solidarity principle, the *recta ratio*. This principle enables international law to become humane and allows individuals to be its central aspect and subjects of rights and duties with international capacity.

Cançado Trindade claims that the universal juridical conscience makes possible a democratization of international law which can transcend old parameters of classic international law and respond to new challenges and demands with emphasis on international co-operation:²⁷³

The evolution of International Law throughout the twentieth century bears witness of advances due, in my understanding, to their ultimate material “source”, the universal juridical conscience – despite successive abuses committed against human beings

²⁷¹ Cançado Trindade, “General Course”, *supra* note 116 at 184.

²⁷² S. Glaser, *L’arme nucléaire à la Lumière du Droit International* (Paris: Pedone, 1964) at 18, cited in Cançado Trindade, “General Course” at 116. The scholar sustained that “c’est sur cette conscience universelle que repose la principale caractéristique du droit international: la conviction que ses normes sont indispensables pour le bien commun explique leur reconnaissance en tant que règles obligatoires”.

²⁷³ *Ibid.* at 199.

and victimizing humankind as a whole. There are several elements that disclose such advances, whether one dwells upon international case-law, or practice of States and international organizations and of other subjects of International Law, or else the more lucid juridical doctrine. From these elements there ensues – may I insist on this central point – *the awakening of a universal juridical conscience*, to reconstruct, at this beginning of the twenty-first century, International Law on the basis of a new paradigm, no longer State-centric, but rather placing human beings in a central position and bearing in mind the problems which affect the whole of humankind²⁷⁴ [emphasis in original].

The universal juridical conscience is the most recent attempt to give an ethical aspect to international law bringing it closer to natural law. It is difficult to precisely define what this conscience would be.²⁷⁵ Based on philosophical concepts,²⁷⁶ this theory tries to place States under international law and individuals as subjects and its main concern.

As affirmed in the beginning of this chapter, the concept of international law is intimately connected to the idea of its subjects. During the 19th century and the beginning of the 20th century, States were the sole subjects and creators of the law of nations.²⁷⁷ This positivistic and State-centric vision enabled human rights violations and the expulsion of individuals as part of the international community. Sparked by the Second World War, international law developed a new paradigm based on ideas of ethics and justice. International law, therefore, requires the acceptance of individuals as its subjects in order to prevent human rights violations and fully recognize this new paradigm. With the establishment of a new international

²⁷⁴ *Ibid.* at 199-200.

²⁷⁵ Cançado Trindade affirms that it is hard to define the word “conscience” as it is hard to establish a meaning for the word “time”. See *ibid.* at 180.

²⁷⁶ Kant sustained the theory of universal norms. See especially Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Peterborough: Broadview Press, 2005).

²⁷⁷ International law was defined as a group of rules that regulated the relations between States.

community - which includes individuals - and a new goal for the law of nations - the protection of human rights - the old conception of international law has been displaced. International law can now be defined as a group of norms and principles (customary or conventional) that regulate the conduct of the international community (formed by States, international organizations and individuals) seeking to reach common goals of humankind and, essentially, peace, security and stability of international relations.²⁷⁸ Even if one does not accept the natural law basis of international law, it can no longer be doubted that individuals play a central role on its development.

The importance of individuals in the law of nations and their status of subjects of rights and duties have been supported by international law scholars throughout history. This claim is especially strong in present times with the “humanization” of international law that grants a central role to individuals. However, to be “full” subjects of international law, individuals need to have access to international human rights courts in order to claim an effective application and protection of human rights. In chapter three, I will describe how they have achieved this to a limited extent in the European and Inter-American systems.

²⁷⁸ Mazzuoli, *supra* note 7 at 53-57.

CHAPTER III

THE JUS STANDI AND LOCUS STANDI OF INDIVIDUALS BEFORE THE INTER-AMERICAN AND THE EUROPEAN COURTS OF HUMAN RIGHTS

Once defined as an area of law that regulated the relations between sovereign States,²⁷⁹ the law of nations has developed towards the protection of human rights, particularly through the works of the United Nations,²⁸⁰ including the conclusion of many treaties focused on the protection of individuals. As explained in Chapter II, individuals are subjects of international law and have rights under the law of nations. The fact that individuals have direct access to human rights protection mechanisms proves that, at least to some extent, they have procedural remedies under international law.

Individuals also have duties under international law. The development of international criminal law helped to establish the international individual penal responsibility and the principle of universal jurisdiction.²⁸¹ The Rome Statute establishing the International Criminal Court criminalizes grave violations of human rights and humanitarian law:²⁸² individuals can be directly responsible on the international plane for the commission of crimes that affect the whole international community (genocide, crimes against humanity, war crimes, and crimes of aggression)²⁸³.

The acceptance of individuals as direct addressees of international norms that establish rights and duties towards the protection of human rights is a great advance for international law because it represents the emancipation of the human being from

²⁷⁹ Brierly, *supra* note 71 at 1 and Franz von Liszt, *supra* note 70 at 7.

²⁸⁰ *Charter of United Nations*, *supra* note 31 at articles 1, III; 13, I (b); 55 (c); 62; and 76.

²⁸¹ Cançado Trindade, "General Course", *supra* note 116 at 276.

²⁸² *The Rome Statute of the International Criminal Court*, *supra* note 121.

²⁸³ *Ibid.* at article 5.

the tutelage of their States. However, their full acceptance as subjects of international law can be complete only if individuals also have access to international tribunals. Even though some scholars argue that the existence of a full international capacity for individuals is not a necessary precondition to the acceptance of the human person as a subject of international law, in *praxis* it is determinative of a full international protection of human rights.²⁸⁴ Without the individuals' access to international justice, human rights treaties would become "dead letters" because international law would recognize duties and rights toward individuals, but would not grant them the means to seek the proper application of these norms.

A key criterion to assessing individual's international legal personality is thus whether they have international procedural capacity: to what extent can they be parties before international law tribunals and human rights mechanisms. Trindade recognizes the necessity of international *jus standi* for individuals:

The access of individuals to justice at the international level, by means of the exercise of the right of individual petition, has at last given concrete expression to the recognition that the human rights to be protected are inherent in the human person and are not derived from the state. Accordingly, the actions of the state do not, and cannot, exhaust the range of possible action for the protection of these rights.²⁸⁵

The development of international law in both global and regional spheres is consolidating the right of individual petition. This right has developed in stages because it requires changes in domestic laws and can make States responsible for the way they treat individuals on their territory, undermining the claim that States have unlimited power within their jurisdiction.²⁸⁶ The acceptance of individual petitions

²⁸⁴ Emerson Garcia, *supra* note 42 at 56.

²⁸⁵ Cançado Trindade, "The Consolidation", *supra* note 122.at 6.

²⁸⁶ *Ibid.* at 4.

helps to avoid human rights violations, grants full international personality to individuals (who are already bearers of rights and duties under international law) and changes the relations between the subjects of public international law. Whereas inter-State questions under the law of nations are governed horizontally, with equal States entering into relations with others based on will and bound by the *pacta sunt servanda* principle,²⁸⁷ the development of international human rights law and its placement of individuals as central figures of the law of nations has introduced a vertical division: individuals under a State jurisdiction can send complaints to international tribunals that will enforce human rights norms against the concerned State. This shift, therefore, represents a stronger protection of human rights because citizens can send petitions arguing that their States of nationality are not complying with international human rights norms.

This chapter will analyze the access of individuals to the Inter-American and European Courts of Human Rights. With regard to the Inter-American system, it addresses several questions. How do the Inter-American Commission and Court accept individual petitions? What is the procedure before the Inter-American Commission and Court when complaints are sent by individuals? What changes enabled the participation of individuals before the Inter-American Court of Human Rights? I will argue that under the most recent changes to the Court's rules of procedure, individuals have gained a broad right of participation in its proceedings, that is, *locus standi*. This right should be regarded as a human right and, consequently can transcend its regional manifestation and be applied at a global level. The evolution in the Inter-American Court of Human Rights of individuals' right of access could serve as an example for the International Court of Justice, which also deals with

²⁸⁷ Rezek, *supra* note 43 at 1-2.

human rights matters and could grant participation to individuals in contentious cases following the Inter-American model.

This chapter also examines the access of individuals to the European Court of Human Rights, and seeks to answer several questions. How did the old European Commission grant access and participation to individuals? How has the European Court of Human Rights fulfilled this role after the extinction of the European Commission? What is the procedure before the European Court when complaints are sent by individuals? In contrast to the Inter-American Court of Human Rights, the European Court grants direct access or *jus standi* to individuals. The direct access of individuals, I will argue, is a feasible option for international tribunals to deal with human rights matters as long as they have mechanisms to screen individual petitions and avoid excessive caseloads. The European Court like the Inter-American Court, also recognizes the right of individual petition and access to international justice. The European system of human rights protection presents another path of development for the International Court of Justice: the direct access of individuals, which could also be regarded as a fundamental right and expanded to a global level.

Finally, this chapter will briefly analyze the role of the Human Rights Council and the treaty-monitoring bodies. How do individuals gain access to the Human Rights Council and the treaty-monitoring bodies? Should they be the only global systems that grant access to individuals? I will argue that while these non-judicial systems are important for the protection of human rights, they should complement the work of a tribunal that protects human rights to the fullest by accepting the *locus* or *jus standi* of individuals.

1. The Access of Individuals and the Inter-American System of Human Rights Protection

The Organization of American States (OAS)²⁸⁸ was created in 1948 at the Ninth Inter-American Conference in Bogotá (Colombia).²⁸⁹ The purpose of this international organization, set out by the American States, is “to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.”²⁹⁰ The OAS is a regional organization that promotes the respect of human rights principles²⁹¹ and to achieve that goal, the Inter-American Commission on Human Rights was established.²⁹² This Organization, which has a *doublement fonctionnel*²⁹³ because it is at the same time a body of the OAS and also part of the American Convention,²⁹⁴ seeks to promote and protect human rights at the regional level.²⁹⁵ At the same Ninth Inter-American Conference was adopted the American Declaration on Rights and Duties of Man²⁹⁶ which sought to establish the basic human rights principles that should govern the American States. The American Declaration has no enforcement mechanism and works as a charter of guidance rather than a treaty placing real

²⁸⁸ *Charter of the Organization of American States*, 30 April of 1948, 1609 U.N.T.S. 119, O.A.S.T.S. NOS. 1-C and 61.

²⁸⁹ Smith, *supra* note 11 at 109.

²⁹⁰ *Charter of the Organization of American States*, *supra* note 258 at article 1.

²⁹¹ *Ibid.* at article 3 (d), (f), (g), (i), (l) and (n).

²⁹² *The American Convention on Human Rights*, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. n° 36 [American Convention].

²⁹³ Mazzuoli, *supra* note 7 at 602.

²⁹⁴ *American Convention*, *supra* note 292 at article 106.

²⁹⁵ Mazzuoli, *supra* note 7 at 602.

²⁹⁶ OAS, General Assembly, 3rd Sess., *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OR OEA/Ser.L.V/II.82 Doc.6, rev.1 (1992) at 17 [American Declaration].

obligations upon States.²⁹⁷ It is still a very important instrument because it is used as guidance by the Inter-American Commission when it analyzes human rights violations from countries that have not ratified or acceded to the American Convention.

Established in 1969, the American Convention on Human Rights²⁹⁸ only entered into force in 1978.²⁹⁹ In contrast to the American Declaration, the Convention is a treaty and is legally binding upon the member-States.³⁰⁰ The provisions of the American Convention spell out extensive civil and political rights³⁰¹ and include one article about economic, social and cultural rights.³⁰² To assure a stronger protection of those rights, the OAS General Assembly adopted the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.³⁰³

1.1 The Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights³⁰⁴ was created in 1959 by the Fifth Meeting of Consultation of Ministers of Foreign Affairs³⁰⁵. An autonomous body of the Organization of American States³⁰⁶ created to promote human rights as a

²⁹⁷ Smith, *supra* note 11 at 109.

²⁹⁸ *American Convention*, *supra* note 292.

²⁹⁹ Mazzuoli, *supra* note 7 at 808.

³⁰⁰ *Vienna Convention on the Law of Treaties*, *supra* note 85 at article 26.

³⁰¹ *American Convention*, *supra* note 292 at chapter two.

³⁰² *Ibid.* at article 26.

³⁰³ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, "Protocol of San Salvador", 69 O.A.S.T.S. 1988, OR OEA/Ser.L.V/II.82 Doc.6, rev.1 at 67 (1992).

³⁰⁴ OAS, General Assembly, *Statute of the Inter-American Commission on Human Rights*, O.A.S. Res. 447 (IX-0/79), OR OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/11.50 Doc.13, rev. 1 at 10 (1980).

³⁰⁵ OAS, General Secretariat of the Organization of American States, *Fifth Meeting of Consultation of Ministers of Foreign Affairs*, OR OEA/Ser.C/II.5 (1959).

³⁰⁶ Buergenthal *et al.*, *supra* note 24 at 228.

sui generis organization of the OAS system, the Commission became its main organ with the Buenos Aires Protocol of 1967.³⁰⁷

As a body of the Organization of American States, the Inter-American Commission's competence extends to all member-States of the OAS Charter.³⁰⁸ As an organization of the American Convention, its functions apply to the States that are parties of the Convention.³⁰⁹ As an OAS body, the Inter-American Commission helps to draft human rights treaties, supports the General Assembly or the OAS Permanent Council in a consultative role on human rights problems, sponsors conferences and publishes human rights documents.³¹⁰ One of its most important functions is to prepare studies on the human rights situation of a specific State. It normally does so when it receives a communication (usually from non-governmental organizations) alleging large-scale human rights violations.³¹¹ It gathers evidence and information about the human rights situation in that specific State, and after representations from the concerned government, decides whether it will publish the study.³¹² When the Inter-American Commission on Human Rights receives a complaint that a State which is not a party of the American Convention is violating human rights, it analyzes if the conditions for acceptance of the complaint are present. If it admits the complaint, the Commission tries to reach a friendly settlement, failing which it adopts a final resolution that includes a conclusion about the case, recommendations for the State and a deadline for the fulfillment of those requirements. If the State does not

³⁰⁷ Cançado Trindade, *supra* note 124 at 460-461.

³⁰⁸ *American Convention*, *supra* note 292 at article 41 (a), (e) and (g).

³⁰⁹ *Ibid.* at articles 41 (f), 44-51.

³¹⁰ Buergenthal *et al.*, *supra* note 24 at 233.

³¹¹ *Ibid.* at 234.

³¹² OAS, Inter-American Commission on Human Rights, 137th Sess., *Rules of Procedure of the Inter-American Commission on Human Rights* (2009) at article 58, online: <http://www.cidh.org/basicos/english/Basic18.RulesOfProcedureIACHR.htm> Accessed on 11 June 2010.

attend to these requirements, it can publish the report³¹³ and send it to the OAS General Assembly³¹⁴ which can adopt a resolution compelling the violating State to adopt the necessary measures required by the Commission. General Assembly resolutions are not legally binding, but have strong moral and political force.³¹⁵

The Second Special Inter-American Conference (in 1965)³¹⁶ authorized the Commission to analyze individual petitions against member-States of the OAS that violate some, but not all, rights established by the American Declaration.³¹⁷ This limited system of individual petition was modified by the Inter-American Statute that stipulated that

In accordance with the provisions of Articles 44 to 51 of the American Convention on Human Rights, the Regulations of the Commission shall determine the procedure to be followed in cases of petitions or communications alleging violation of *any of the rights guaranteed by the Convention*, and imputing such violation to any State party to the Convention [emphasis added].³¹⁸

That was a significant development, because it granted individuals a right to send complaints to the Inter-American Commission that was not limited to only some of the guarantees crystallized by the American Convention. Individuals could send complaints alleging violations of any right of the Convention and American Declaration (for States that had not ratified the Convention).

The main function of the Inter-American Commission as an American Convention organ is “to take action on petitions and other communications” pursuant

³¹³ *Ibid.* at articles 36, 37, 40, 43 and 47 para. 1.

³¹⁴ *Ibid.* at article 47.

³¹⁵ Godinho, *supra* note 48 at 104-106.

³¹⁶ OAS, *Second Especial Inter-American Conference*, OR OEA/Ser.C/I.13 (1965).

³¹⁷ Those preferred rights were: the right to life, liberty and security of person, equality before the law, freedom of religion, freedom of expression, freedom from arbitrary arrest, and the right to due process of law. See Buergethal *et al.*, *supra* note 24 at 229.

³¹⁸ *Statute of the Inter-American Commission on Human Rights*, *supra* note 304 at article 23 para. 1.

to its authority under articles 44-51 of the Convention.³¹⁹ The Commission can analyze and take actions in both inter-State and individual petitions.³²⁰ However, the Commission may only accept and examine a State's communication against another State party if both States recognize the inter-State jurisdiction of the Commission.³²¹ In contrast, and of great significance to the enforcement of human rights, the Commission can analyze admissible individual petitions regardless of previous recognition of its competence and without any need for the State concerned to be a party to the American Convention.³²²

The Inter-American Commission on Human Rights can analyze petitions complaining of human rights violations from any person, group or person or nongovernmental organization (if they are recognized by one or more member States of the Organization of American States).³²³ The Commission's Rules of Procedure do not impose on petitioners any nationality limitation or "victim condition".³²⁴ Accordingly, individuals an unlimited petition right to the Inter-American Commission on Human Rights: any person, of any nationality, resident in any country, on their behalf or the behalf of third parties, can send complaints to the Commission, as long as the State which is allegedly violating human rights is a member of the Organization of American States.

There are nonetheless admissibility requirements for the consideration of petitions by the Inter-American Commission. Those requirements, which include the exhaustion of local remedies in accordance with the principles of international law,³²⁵

³¹⁹ *American Convention*, *supra* note 292 at article 41, (f).

³²⁰ *Ibid.* at article 44.

³²¹ *Ibid* at article 45 paras. 1 and 2.

³²² As previously mentioned, the Commission can apply the provisions of the American Declaration.

³²³ *American Convention*, *supra* note 292 at article 44.

³²⁴ *Rules of Procedure of the Inter-American Commission on Human Rights*, *supra* note 312 at article 23.

³²⁵ The other requirements are: the petition must be sent to the Commission within six months from the day the party was notified of the final decision under domestic law jurisdiction; the subject of the

are important to maintain juridical certainty in the international and domestic orders;³²⁶ otherwise, international law would excessively interfere with State sovereignty. The requirement that petitions be admitted only after exhaustion of local remedies, although important, must not be inflexible; justice cannot be sacrificed for the sake of formalities.³²⁷ Accordingly, the American Convention provides that the exhaustion requirement does not apply when: the State cannot afford the protection of human rights that were allegedly violated; the party was prevented from accessing domestic law remedies or has been obstructed from exhausting them; and there is an unjustified delay in rendering a final domestic law judgment.³²⁸ It is not the petitioner's duty to prove the exhaustion of local remedies; the respondent must prove non-exhaustion.³²⁹ The Inter-American Court of Human Rights, analyzing the requirement of exhaustion of local remedies and its exceptions, held:

[I]f legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee. That is to say, if it is impossible for an indigent to deposit such a fee, he cannot be required

petition must not be pending settlement in another international organization; and the petition must contain the name, nationality, profession, domicile and signature of the person or persons. See *American Convention*, *supra* note 292 at article 46 para. 1 (a), (b), (c), and (d).

³²⁶ Dinah Shelton, *Regional Protection of Human Rights* (New York: Oxford University Press, 2008) at 524.

³²⁷ *Cayara Case (Peru)* (1993), Preliminary Objections, Inter-Am. Ct. H.R. (Ser.C) n°14, at para. 42. The court sustained that “[i]t is generally accepted that the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved.”

³²⁸ *American Convention*, *supra* note 292 at article 46, (a), (b) and (c).

³²⁹ *Rules of Procedure of the Inter-American Commission on Human Rights*, *supra* note 312 at article 31 para. 3. That rule is followed by the jurisprudence of the Inter-American Court of Human Rights when it sustained, *e.g.*, in the *Fairén Garbi and Solís Corrales* case that “the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective”. See *Fairén Garbi and Solís Corrales Case (Honduras)* (1994), Preliminary Objections, Inter-Am. Ct. H.R. (Ser. D) N° 2 at para. 87.

to exhaust domestic remedies unless the state provides some alternative mechanism.³³⁰

These exceptions indicate that the Inter-American system seeks to reach justice, even if some procedural formalities are not respected. This reinforces the importance of the individual petition mechanism – as the main means of human rights protection in the American system – and helps to establish human persons as full subjects of international law. The Inter-American Commission must, as a result of the Convention provisions, be aware that some States do not have the level of organization necessary to guarantee due process of law and that some States might be unwilling to help the victims of human rights violations and may indeed be responsible for breaches of human rights provisions. Procedural formalities must not obstruct the evaluation of a petition by the Commission and as a consequence, it must not impede the achievement of goals spelled out in the preamble of the Convention.³³¹ This is evidence of the development of individuals' access to international tribunals and the importance of acceptance of individuals as subjects of international law. Without recognition of individuals' international legal personality, international law would lack the mechanisms to fully protect human rights.

The procedure adopted by the Inter-American Commission when admitting a petition has several steps. First, it requests information from the government of the State alleged to be responsible for human rights violations and provides it with a transcript of the necessary portions of the petition. After receiving this information or following a prescribed time period, the Commission evaluates if grounds exist for the petition. If the petition is accepted and not declared inadmissible, the Commission

³³⁰ *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights)*, Advisory Opinion OC -11/90 (1990), Inter-Am. Ct. H.R. (Ser.A), N°11, at para. 30.

³³¹ *American Convention*, *supra* note 292 at preamble.

might examine the matter in order to verify its facts (with acknowledgment of the parties) and carry out an investigation. The Commission can also request the impugned States to furnish pertinent information and hear oral statements or receive written declarations from the parties. It must be at the disposal of the parties for a friendly settlement.³³² In serious and urgent cases “only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed”.³³³

If a friendly settlement is reached, the Commission makes a report,³³⁴ transmits it to the petitioner and the member-States and communicates it to the Secretary General of the Organization of American States for publication.³³⁵ If a settlement is not reached, the Commission prepares a report (with the facts and conclusions) to be transmitted to the States concerned, and may make recommendations.³³⁶ The States concerned then have three months to comply or to respond to the recommendations.³³⁷ If they do not follow the Commission’s recommendations, the consequences differ depending on whether the States have ratified the American Convention and agreed with the contentious jurisdiction of the Inter-American Court of Human Rights. If the problem was not settled and the issue was not submitted to the Inter-American Court,³³⁸ the Commission can issue, if approved by an absolute majority of votes, a second report that contains its opinion,

³³² *Ibid.* at article 48 (a), (b), (c), (d), (e) and (f).

³³³ *Ibid.* at article 48 para. 2.

³³⁴ Buergenthal *et al.*, *supra* note 24 at 251.

³³⁵ *American Convention*, *supra* note 292 at article 49.

³³⁶ *Ibid.* at article 50 paras. 1, 2 and 3.

³³⁷ Buergenthal *et al.*, *supra* note 24 at 251.

³³⁸ After the publication of the first report the Commission can end its work by referring the case to the Inter-American Court of Human Rights, but it can also continue and make a second report if the States are not parties of the American Convention or if they have not accepted the contentious competence of this Court.

recommendations and conclusions.³³⁹ The Commission can also establish a period for the concerned States to take the necessary measures to solve the problem and, following this deadline, by the vote of its absolute majority, can decide whether the State has taken adequate measures and whether to publish the report.³⁴⁰

The Commission is not a judicial organ and lacks enforcement mechanisms. If the States fail to take the measures set out by the Commission, it can send the report to the OAS General Assembly,³⁴¹ which can take measures that have moral and political force.³⁴² However, the OAS General Assembly “shows little interest in taking action on individual cases”.³⁴³ In contrast, judgments of the Inter-American Court exert not only moral and political persuasion, but juridical force. It is important, therefore, for member-States of the OAS to ratify the American Convention and recognize the contentious competence of the Inter-American Court of Human Rights. When such is the case, after the first report is transmitted to the concerned States, the matter can be sent to the Court either by a State or the Commission.³⁴⁴

1.2 The Inter-American Court of Human Rights

The Inter-American Court of Human Rights was established by the American Convention.³⁴⁵ Formally created in 1979 in San Jose, Costa Rica,³⁴⁶ the Court is a juridical organ of the OAS.³⁴⁷ It consists of seven judges (nationals of the member-

³³⁹ *Rules of Procedure of the Inter-American Commission on Human Rights*, *supra* note 312 at article 47 para. 1.

³⁴⁰ *American Convention*, *supra* note 292 at article 51 paras. 1 and 2.

³⁴¹ Mazzuoli, *supra* note 7 at 814.

³⁴² Godinho, *supra* note 48 at 106.

³⁴³ Buergenthal *et al.*, *supra* note 24 at 253.

³⁴⁴ Smith, *supra* note 11 at 121.

³⁴⁵ *American Convention*, *supra* note 292 at chapter VII. [Hereinafter “Inter-American Court” or the “Court”].

³⁴⁶ Scott Davidson, *The Inter-American Court of Human Rights* (Brookfield: Dartmouth, 1992) at 1.

³⁴⁷ *Ibid.* at 2.

States of the OAS)³⁴⁸ elected for a period of six years.³⁴⁹ The Court's contentious or adjudicatory jurisdiction empowers it to decide disputes involving alleged human rights violations by a member-State of the American Convention. Its advisory jurisdiction enables the Court to interpret not only the American Convention, but also other human rights instruments at the request of any member-State of the Organization of American States (the State does not need to be a party of the American Convention) and other OAS organs.³⁵⁰

The Contentious jurisdiction of the Inter-American Court is not accepted by mere ratification of the American Convention; member-States need to declare the recognition of the Court's binding contentious jurisdiction. This declaration may be made unconditionally or under the circumstance of reciprocity for a specified period or for specific cases.³⁵¹ States can thus ratify the Convention without fear of appearing before the Inter-American Court in any contentious case, but can be later convinced to accept its adjudicatory competence.

The Inter-American Court, in its contentious jurisdiction, can judge specific cases when a State party to the American Convention has allegedly failed to comply with its provisions. The Court's adjudicatory jurisdiction is employed only when certain conditions are met. First, only States that have ratified and accepted this jurisdiction can be parties before the Court and only member-States and the Inter-

³⁴⁸ *American Convention*, *supra* note 292 at article 52 para. 1.

³⁴⁹ *Ibid.* at article 54, para. 1. The judges can be reelected.

³⁵⁰ Thomas Buergenthal, "The Inter-American Court of Human Rights" (1982) 76 A.J.I.L. 231 at 235.

³⁵¹ *American Convention*, *supra* note 292 at article 62 paras. 1, 2, and 3. Countries that have accepted the Court's jurisdiction are: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela. See The Inter-American Court of Human Rights, *Information and History*, online: <http://www.corteidh.or.cr/historia.cfm>. Accessed on 7 June 2010. There is no requirement that States accept the advisory jurisdiction. Its more extensive scope allows non member-States of the American Convention to request advisory opinions. See Thomas Buergenthal, *supra* note 350 at 242.

American Commission can submit cases to the Court.³⁵² This means that individuals do not have direct access to the Inter-American Court, but must first submit a petition to the Commission which can, following its Rules of Procedure, refer the case to the Court. A State can also refer a case to the Court but that normally does not happen.³⁵³

In the *Viviana Gallardo* case,³⁵⁴ the Inter-American Court revealed that the government of Costa Rica could not bypass the Commission proceedings and take the matter directly to the Court:

[P]rocedures before the Commission have not been created for the sole benefit of the States, but also in order to allow for the exercise of important individual rights, especially those of the victims. Without questioning the good intentions of the Government in submitting this matter to the Court, it follows from the above that the procedures before the Commission cannot be dispensed with in this kind of case without impairing the institutional integrity of the protective system guaranteed by the Convention. These procedures may therefore not be waived or excused unless it were to be clearly established that their omission, in a specific case, would not impair the functions that the Convention assigns to the Commission, as might be the case when a matter is initially presented by a State against another State and not by an individual against a State. In the instant case, the existence of such an exceptional situation is far from having been shown. The Government's waiver of the rule contained in Article 61(2) consequently lacks the force necessary to dispense with the procedures before the Commission. This conclusion, in and of itself, suffices not to admit the instant application.³⁵⁵

³⁵² *American Convention*, *supra* note 292 at articles 62 and 61.

³⁵³ Mazzuoli, *supra* note 7 at 817.

³⁵⁴ The government of Costa Rica had allegedly violated the human rights guaranteed by the American Convention on Human Rights in the cases of the death in prison of Viviana Gallardo and the wounding of Alejandra Maria Bonilla Leiva and Magaly Salazar Nassar. Costa Rica had requested the Court to waive the requirements of the prior exhaustion of the domestic legal remedies and of the prior procedures before the Inter-American Commission on Human Rights set forth in Articles 48 to 50 of the Convention. See *In the matter of Viviana Gallardo et al. (Costa Rica)* (1984), Inter-Am. Ct. H.R. (Ser. A) No. G 101/81, at paras. 1 of “whereas” and 1 of “considering that”.

³⁵⁵ *Ibid.* at para. 25.

Proceedings before the Inter-American Commission, therefore, are a necessary step that individuals must take before their case can be heard by the Inter-American Court. The Commission works as a gatekeeper to restrict individuals' access to the Court. While the American system's acceptance of petitions sent by persons strengthened the status of individuals as subjects of international law and constitutes an advance for human rights protection, the Commission's gatekeeping function weakens this protection. In my view, the American Convention should be adapted to provide direct access of individuals to the Court. Cançado Trindade, the former judge president of the Inter-American Court of Human Rights, supports this position. In presenting a project for a new protocol to the American Convention,³⁵⁶ he advocated the *locus standi* of individuals in every proceeding before the Court; the necessity for the Court to grant *locus standi* to alleged victims, their families and their legal representatives; the necessity of evolution from *locus standi* to *jus standi* of individuals before the Inter-American Court; the need to change the Court's Rules of Procedure to grant participation to individuals; and that the Inter-American Court hear "three parties" - individuals, the States concerned and the independent and impartial Commission.³⁵⁷

The decisions of the Court must be carried out by the State parties.³⁵⁸ Before 2010, the Inter-American Court lacked mechanisms to enforce its decisions. If States did not comply with a decision, the Court could submit a report to the General

³⁵⁶ Antônio Augusto Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer su Mecanismo de Protección* (Imprenta San José, C.R.: Corte Interamericana de Derechos Humanos, 2003), online: Biblioteca Conjunta Corte Interamericana de Derechos Humanos/Instituto Interamericano de Derechos Humanos <http://www.corteidh.or.cr/tablas/a11694.pdf> at paras. 115, 117, 125, 130, 131, 133, 134, 145, 154 and 158. Accessed on 7 June 2010 [Cançado Trindade, *Informe*]

³⁵⁷ Cançado Trindade, *Informe*, *supra* note 356 at paras. 115, 125, 130, 131, 133, 134, 145, 146, 154 and 158. Accessed on 7 June 2010.

³⁵⁸ *American Convention*, *supra* note 292 at article 68 para. 1.

Assembly of the Organization of American States,³⁵⁹ which could discuss the matter and take political measures³⁶⁰ in order to enforce the Court's judgments. 2009 changes to the Rules of Procedure of the Inter-American Court of Human Rights³⁶¹ established a stronger participation of individuals in the Court's procedures and strengthened the monitoring of the enforcement of the Court's judgments. A monitoring mechanism now requires States to submit reports to the Court which can be scrutinized by the victims or their legal representatives and the Commission.³⁶² The Inter-American Commission's role in the monitoring system is to make observations on the reports of States and the observations of the victims.³⁶³ In order to evaluate States' compliance with its decisions, in addition to submitting reports monitoring such compliance,³⁶⁴ the Inter-American Court has additional powers. It can require from other sources of information relevant data regarding the case and request expert opinions or reports.³⁶⁵ It may also "convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions".³⁶⁶

The new Rules of Procedure also establish the *locus standi* of individuals. By granting individuals a role as parties before the Court, instead of restricting party status to the Commission, the reform conceded "greater prominence to litigation between respondent States and the representatives of victims or alleged victims".³⁶⁷

Victims and their representatives are given many participatory rights in contentious

³⁵⁹ *American Convention*, *supra* note 292 at article 65.

³⁶⁰ Buergenthal *et al.*, *supra* note 24 at 264.

³⁶¹ OAS, Inter-American Court of Human Rights, *Rules of Procedure of the Inter-American Court of Human Rights*, Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28 (2009), online: <http://www.corteidh.or.cr/reglamento.cfm> at article 78. Accessed on 11 June 2010 [*Rules of Procedure of the Inter-American Court of Human Rights*]. These changes entered into force in January 2010.

³⁶² *Ibid.* at article 69 para. 1.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.* at article 69 para. 4.

³⁶⁵ *Ibid.* at article 69 para. 2.

³⁶⁶ *Ibid.* at article 69 para. 3.

³⁶⁷ Inter-American Court of Human Rights, Instruments, *Statement of Motives for the Reform of the Rules of Procedure* at page 2, online: <http://www.corteidh.or.cr/reglamento.cfm>. Accessed on 11 June 2010.

cases before the Court. They can submit a request for provisional measures, which must be related to the subject matter of the case.³⁶⁸ They may be represented by a defender of the Court if they cannot afford legal representation.³⁶⁹ They may request an *amicus curiae* if they want.³⁷⁰ They have the duty/right to “submit definitive lists of declarants” indicating “to the Court their position as to which of the declarants offered should be summoned to the hearing, where applicable, and which declarants can render their statements through affidavits”.³⁷¹ They can formulate questions to the declarants of the opposing party³⁷² and present their oral arguments to the Court.³⁷³ Alleged victims, witnesses, expert witnesses, and other persons the Court decides to hear may be interrogated by the alleged victims or their representatives, the respondent State, and, if applicable, the petitioning State.³⁷⁴ Alleged victims or their representatives may present final written arguments.³⁷⁵ The Court can request *ex officio* information or explanations from victims or alleged victims and their representatives.³⁷⁶ The Court notifies the victims, alleged victims or their representatives of its judgment.³⁷⁷ Finally, individuals play an important role in monitoring State parties’ compliance with the Court’s decisions and can be also convened by the tribunal for a hearing.³⁷⁸

Those reforms have given individuals a central role in proceedings before the Inter-American Court and the Commission’s role is now that of a Convention body

³⁶⁸ *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 331 at article 27 para. 3.

³⁶⁹ *Ibid.* at article 37.

³⁷⁰ *Ibid.* at article 44 paras. 1, 2 and 3.

³⁷¹ *Ibid.* at article 46.

³⁷² *Ibid.* at article 50 para. 5.

³⁷³ *Ibid.* at article 51 para. 7.

³⁷⁴ *Ibid.* at article 52 para. 2.

³⁷⁵ *Ibid.* at article 56 para. 1.

³⁷⁶ *Ibid.* at article 58, (b). The victims or alleged victims can also communicate the Court the existence of a friendly settlement or of other occurrence that led to a settlement of the dispute. See *Ibid.* at article 63.

³⁷⁷ *Ibid.* at article 67.

³⁷⁸ *Ibid.* at article 67 paras. 1 and 3.

rather than an actual party. Although individuals still do not have direct access to the Court, they have international capacity in the Inter-American system of human rights protection. Their participation in the Court's proceedings marks the acceptance by the OAS of the importance of the participation of individuals in human rights matters. The Inter-American example shows that an international tribunal can be adapted to accept the participation of individuals without abandoning its character of inter-State or international organization-State court. Changes in a court's rules of procedures can, without amending the Court's statute, completely modify the conduct of the court's proceedings by providing for an active role for individuals. Consequently, when they render a decision, judges must take into account the arguments presented by individuals as direct addressees of human rights norms and principles. Analogous changes, allowing judges to require the views of individuals directly concerned in the case, could be applied to the International Court of Justice. These would not radically change its State-centric nature, but would accord with individuals' status of subjects of international law and allow the International Court of Justice to more effectively protect human rights.

Henceforth, individuals directly assist the Inter-American Court to enforce the American Convention and the Additional Protocol of San Salvador. The Court's procedural reforms have crystallized the Commission's role as a guardian that ensures the application of the Convention and of individuals as subjects of international law and as parties to the Court's proceedings.

1.2.1 The Right of Individual Petition and the Inter-American Court of Human Rights

The recent reforms to the Inter-American Court's Rules of Procedure have gradually enhanced the participation of individuals, including alleged victims or their legal representatives,³⁷⁹ in the American system of human rights protection. Though they cannot directly submit cases to the Court, they have access to it. This right confers on individuals in the American system, the status of subjects of international law; they have rights and duties under the law of nations and may participate in the Inter-American Court's proceedings directly rather than through the Commission. This right of individual access to the Commission and participation in the Court's proceedings cannot be unilaterally limited by the individual will of States.

What of the right of individuals to submit complaints to the Inter-American system of human rights protection? If this right is not regarded as fundamental, it could be limited by States or by further reforms to regional treaties which could prevent individuals' access to international tribunals. Guaranteeing the right of individual petition could restore the *jus gentium* element developed by the founding fathers of international law which placed the human person in a central position in international law, but adapt this element to its modern requirements and developments. Indeed, the Inter-American Court is gradually recognizing the right of individual petition as a human right which cannot be limited or restrained. Cançado Trindade notes that

The right of individual petition – as I have been upholding for years – is a *fundamental clause* (*cláusula pétrea*) of the human rights treaties that

³⁷⁹ The *locus standi in judicio*.

provide for it, upon which is erected the *juridical mechanism of the emancipation of the human being vis-à-vis his own State* for the protection of his rights in the ambit of the International Law of Human Rights [emphasis in original].³⁸⁰

The right of individual petition, as proclaimed by article 44 of the American Convention, is mandatory and unlimited: “any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party”.³⁸¹ This right is vital for the protection of human rights and therefore, must be seen as a fundamental clause that cannot be modified by any member State.

In the *Castillo Petruzzi case*³⁸² the Commission affirmed that Peru had violated the right of nationality of several non-Peruvians by trying and convicting them of the crime of “treason against the fatherland” and also asserted that these persons were tried by a “faceless” tribunal under military jurisdiction - judges that were not independent, impartial or competent.³⁸³ The Inter-American Court, analyzing the Peruvian government’s claims that this case could not be admitted because the petitioner (the *Fundación de Ayuda Social de las Iglesias Cristianas - FASIC*) was an organization that could not file a petition with the Commission, held that article 44 of the American Convention allows any group of persons to lodge petitions or complaints of violations of the rights set forth in the Convention and added that

This broad authority to make a complaint is a characteristic feature of the system for the international protection of human rights. In the present case, the petitioners are a “group of

³⁸⁰ Cançado Trindade, “General Course”, *supra* note 116 at 296.

³⁸¹ *American Convention*, *supra* note 292 at article 44.

³⁸² *Castillo Petruzzi case (Peru)* (1998), Preliminary Objections, Inter-Am. Ct. H.R. (Ser. C) N° 41.

³⁸³ *Ibid.* at 2.

persons”, and therefore, for the purpose of legitimacy, they satisfy one of the possibilities set forth in the aforementioned Article 44. The evident authority in this instance makes it unnecessary to examine the registration of FASIC, and the relationship that said foundation has or is said to have with those who act as its representatives. This consideration is strengthened if it is remembered that, as the Court has stated on other occasions, the formalities that characterize certain branches of domestic law do not apply to international human rights law, whose principal and determining concern is the just and complete protection of those rights.³⁸⁴

In the *Castillo Páez* case³⁸⁵ judge Cançado Trindade in a separate opinion³⁸⁶ commenting the Peruvian allegation of non exhaustion of local remedies held that the Commission’s decision to admit an individual petition should be definitive because reopening an admissibility discussion would lead to a breach of the principle of procedural equality since individuals do not have capacity to discuss an inadmissibility decision by the Commission before the Court.³⁸⁷ He added that

[T]he spectre of the persistent denial of the procedural capacity of the individual petitioner before the Inter-American Court, a true *capitis diminutio*, arose from dogmatic considerations, belonging to another historical era, which tended to avoid his direct access to the international judicial organ. Such considerations, in my view, in our time lack support or meaning, even more so when

³⁸⁴ *Ibid.* at 22-23.

³⁸⁵ *Castillo Páez case (Peru)* (1996), Judgment on the Preliminary Objections, Inter-Am. Ct. H.R. (Ser. C) N° 24. According to the application Mr. Páez was a university student and teacher that was detained by the Peruvian police, handcuffed, beaten and was taken to an unknown destination and his family was unaware of his whereabouts. See *Ibid.* at paragraphs 14 and 18.

³⁸⁶ The judges, apart from judgments, can issue a separate, dissenting or concurring opinion. A separate opinion can be issued when the judge does not agree with the reasoning of the judgment. A dissenting opinion can be issued when the judge does not agree with the reasoning and the conclusion. A concurring opinion is issued when the judge agrees with the reasoning and the conclusion, but wants to add some more elements to them. See Lauri R. Tanner, “Interview with Judge Antônio A. Cançado Trindade, Inter-American Court of Human Rights” (2009) 31 *Human Rights Quarterly* 985 at 1003, online: http://muse.jhu.edu/journals/human_rights_quarterly/v031/31.4.tanner.pdf Accessed on 8 July 2010.

³⁸⁷ *Castillo Páez case*, *supra* note 385 at separate opinion of Judge A.A. Cançado Trindade paras. 7, 8 and 15.

referring to an international tribunal of *human rights*.

In the inter-American system of protection, *de lege ferenda* one gradually ought to overcome the paternalistic and anachronistic conception of the total intermediation of the Commission between the individual (the true complaining party) and the Court, according to clear and precise criteria and rules, previously and carefully defined. In the present domain of protection, every international jurist, faithful to the historical origins of his discipline, will know to contribute to the rescue of the position of the human being as a subject of international law (*droit des gens*), endowed with international legal personality and full capacity [emphasis in original].³⁸⁸

In the *Five Pensioners* case, Judge Cançado Trindade in a separate opinion further defended the right of individual petition:

In fact, the assertion of those juridical personality and capacity constitutes the truly revolutionary legacy of the evolution of the international legal doctrine in the second half of the XXth century. The time has come to overcome the classic limitations of the *legitimatío ad causam* in International Law, which have so much hindered its progressive development towards the construction of a new *jus gentium*. An important role is here being exercised by the impact of the proclamation of human rights in the international legal order, in the sense of humanizing this latter: those rights were proclaimed as *inherent* to every human being, irrespectively of any circumstances. The individual is subject *jure suo* of International Law, and to the recognition of the rights which are inherent to him corresponds ineluctably the procedural capacity to vindicate them, at national as well as international levels [emphasis in original].³⁸⁹

Cançado Trindade's opinions are evidence of movement towards the recognition of the right of individual petition as a fundamental clause and that no

³⁸⁸ *Ibid.* at separate opinion of Judge A.A. Cançado Trindade paras 16 and 17.

³⁸⁹ *Five Pensioners case (Peru)* (2003), Inter-Am. Ct. H.R. (Ser. C) N°98 at separate opinion of Judge A.A. Cançado Trindade para. 24.

State party of the American Convention can limit the access of individuals to international justice beyond the limitations established in international treaties. Even those international limitations can be mitigated if they impede the main objective of international law, which is the search for justice. The reform of the Rules of Procedure is a rational and needed step towards a more effective protection of human rights and adherence to a modern international law that grants international legal personality to individuals. Arguably, the natural evolution of the American system would be to concede full international capacity to individuals by providing them the possibility of lodging a petition directly with the Court.

The Inter-American system of human rights protection is consolidating the right of individual petition and the participation of individuals in the procedures before the Court. These measures are consistent with a conception of international law that places individuals as central actors in human rights enforcement and grants them not only rights and duties on the international plane, but also procedural capacity freeing them from the limitations of their State's protection system and allowing them to reach international tribunals when their States are not respecting human rights treaties.

The Inter-American Court of Human Rights increased the protection and participation of individuals by changing its rules of procedure and through the development of its jurisprudence, which points out the characteristic of individuals as bearers of rights and duties under international law.³⁹⁰ Two important elements of these developments can be extended to a global level of judicial human rights protection: the right of individual petition as a fundamental aspect of an international law treaty established to protect human rights and the participation of individuals in

³⁹⁰ See Antônio Augusto Cançado Trindade, "Hacia la Consolidación de la Capacidad Jurídica Internacional de los Peticionarios en el Sistema Interamericano de Protección Derechos Humanos: Su Relevancia para la Protección Internacional de los Refugiados" (2003) 37 *Revista IIDH* 13 at 15-44.

the Court's proceedings. The access of individuals to international mechanisms of human rights protection is what enables the existence of an area of international law related to the protection of the human person. The premise of international human rights law was that, in respect of rights fundamental to their human dignity, individuals should not be solely under the tutelage of their States, but also under the protection of international law. Unless individuals have access to international mechanisms, States would still be the only ones responsible for the protection of human rights and individuals would not be able to emancipate from their own States. Because of its importance, the access of individuals, whether direct or indirect, should be recognized as a fundamental right, secure from unilateral restrictions by any State besides the limitations already established in the treaty. Indeed, the right of access is arguably *jus cogens* and could have global application for its fundamental character. Individuals need to have access, directly or indirectly, to all international tribunals that deal with human rights cases, including, as will be discussed in Chapter four, the International Court of Justice.

The reform of the Rules of Procedure of the Inter-American Court can be seen as an effort to diminish the paternalistic protection of international law in the American system that required the Commission to intermedicate any case between individuals and the Court. While it does not establish direct access, a *jus standi* of individuals, it does grant them full participation in the proceedings, strengthening human rights protection on the American continent. Individuals, as addressees of human rights norms, have the opportunity to play an active role in the Court's proceedings. Under this framework, the Commission is not a party before the Court anymore, but a guardian of the American Convention and a filtering organization that selects which cases will be heard by the Court. This is a compromise solution that

recognizes the importance of individuals as bearers of rights and duties under international law, but, on the other hand, does not grant them direct access. It is not an ideal situation because individuals, as subjects of the law of nations and as the primary concern of human rights cannot initiate proceedings before the Court. *Locus standi* nonetheless represents an evolution of modern international law that shows that it is possible to recognize, although not to a full extent, the international capacity of individuals by changing only the procedural rules of international tribunals. The Inter-American Court of Human Rights offers a model that could be applied to the International Court of Justice. The International Court of Justice could, in certain cases, grant participation to individuals when a case directly concerns them. As discussed in Chapter IV, this would involve only a procedural change in the International Court of Justice's Rules of Court and could effectively recognize the international legal personality of individuals before that tribunal without changing its inter-State nature.

The right of individual petition to international tribunals that deal with human rights cases and individuals' participation in these courts' proceedings are complementary and inseparable rights. To grant participation to individuals in a court's proceedings is to allow them access, though limited, to international mechanisms. If the right of individual petition is a fundamental clause of a treaty, it could be regarded as *jus cogens* for its importance to human rights protection. If the access of individuals were regarded as *jus cogens*, their participation in the court's proceedings would also be a peremptory norm of international law that must be

followed by the entire international community, and, in particular, in any reforms to the International Court of Justice.³⁹¹

The European human rights regime offers an alternate model that recognizes the “full” international legal personality of individuals by granting them *jus standi* before the European Court of Human Rights. This system and the repercussions on individuals’ access to international justice are described in the following section.

2. The Access of Individuals and the European System of Human Rights Protection

The European continent was the main stage for the First and Second World Wars. As a result, the establishment of human rights and international law became one of its post-war priorities. The European system started in 1949 with the creation of the Council of Europe³⁹² which, among other objectives sought to ensure respect for the rule of law and the protection of human rights and fundamental freedoms.³⁹³ In order to achieve that goal it adopted the Convention for the Protection of Human Rights and Fundamental Freedoms³⁹⁴ in 1950.³⁹⁵ The European Convention, which predates the American Convention, crystallizes human rights principles and norms that must be respected by all members of the Council of Europe. The original treaty,

³⁹¹ Accepting the existence of a right of individual petition or even recognizing its *jus cogens* status would not oust States’ role in debating about this access or States’ choice in ratifying (or not) a human rights treaty. The right of individual access means that States cannot unilaterally restrict the right once they have accepted to be bound by it nor can they ratify/accede to a treaty without accepting the provision that grants individuals’ access to an international court.

³⁹² *Statute of the Council of Europe*, 5 May 1949, Eur. T.S. 1/6/7/8/11.

³⁹³ *Ibid.* at article 3.

³⁹⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [Hereinafter “the European Convention” or “ECHR”].

³⁹⁵ The European Convention though only entered into force in 1953. See Godinho, *supra* note 47 at 47.

which guaranteed civil and political rights,³⁹⁶ was strengthened and completed by additional protocols.³⁹⁷

All the rights established by the European Convention and its additional Protocols, according to article 1, are directed to individuals that are under the jurisdiction of the member States.³⁹⁸ This article sets two important rules for the European system of human rights protection. First, all the rights are aimed towards individuals and not States in accordance with the theory that the human person is a subject of rights and duties under international law and not only their State of nationality. Second, those rights apply to any person including nationals and foreigners under the jurisdiction of one of the member-States. The European Court of Human Rights has decided that the scope of article 1 is primarily territorial, but can exceptionally be expanded to extraterritorial acts as well.³⁹⁹

The European Convention established two institutions to ensure that member-States comply with the treaty provisions: the European Commission on Human Rights and the European Court of Human Rights. It also conferred on the Committee of Ministers, an organ of the European Community, supervisory functions related to the enforcement of the European Court of Human Rights' decisions.⁴⁰⁰

³⁹⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11*, *supra* note 363 at articles 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

³⁹⁷ *Protocol N° 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, March 20 1952, 213 U.N.T.S.62, Eur. T.S. 9 at articles 1, 2 and 3; *Protocol N° 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, September 16 1963, Eur. T.S. 46 (entered into force in 2 May 1968) at articles 1, 2, 3, and 4; *Protocol N° 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 28 April 1983, Eur. T.S. 114 (entered into force in 1 March 1985) at articles 1 and 2; *Protocol N° 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 3 May 2002, Eur. T.S. 187 (entered into force in 7 January 2003) at article 1; *Protocol N° 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, Eur. T.S. 117 (entered into force in 1 November 1988) at articles 1, 2, 3, 4 and 5; and *Protocol N° 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 2000, Eur. T.S. 177 (entered into force in 1 April 2005) at articles 1, paragraphs 1 and 2.

³⁹⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11*, *supra* note 363 at article 1.

³⁹⁹ *Bankovic and others v. Belgium and others*, n° 52207/99, [2001] XII E.C.H.R. at para. 60.

⁴⁰⁰ *Buergenthal et al.*, *supra* note 24 at 140.

2.1 The European Commission on Human Rights

The European Commission on Human Rights, created by the original European Convention,⁴⁰¹ mainly worked as a filter, selecting which petitions should be sent to the European Court of Human Rights.⁴⁰² Its main function therefore was to receive petitions as stated in article 25:

The Commission may receive petitions ... from any person, non-governmental organisation 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 this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.⁴⁰³

The European Commission accepted petitions from individuals or groups of people, but only if they were victims, a more limited access of individuals to international courts than in the Inter-American regime. As stated in article 25, a further limitation on the access of individuals to the European Commission and, therefore, the European Court of Human Rights was that the Commission could only receive individual complaints against member-States that had expressly accepted the competence of the Commission.

⁴⁰¹ *Original Version of the Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 at article 19.

⁴⁰² Smith, *supra* note 11 at 96.

⁴⁰³ *Original Version of the Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 401 at article 25 para. 1.

The European Commission, therefore, selected which individual petitions would be sent to the European Court of Human Rights.⁴⁰⁴ Some observers criticized the Commission's role as a filter of individual petitions and advocated a stronger system of human rights protection.⁴⁰⁵ To enjoy their rights and duties under international law and to complete their international legal personality, individuals needed to have full international capacity which could be gained only through direct access to the European Court of Human Rights. This occurred in 1998, with the entering into force of Protocol number eleven,⁴⁰⁶ which ended the European Commission and established the European Court of Human Rights as the permanent and main institution of the European Convention.⁴⁰⁷ The elimination of the gatekeeper Commission underlines the importance of individuals in modern international law. The new European Court of Human Rights can now evaluate the admissibility requirements of individual petitions, try to reach a friendly settlement and failing this, judge the matter.⁴⁰⁸ The Committee of Ministers retained the function of supervising the execution of the European Court of Human Rights' decisions.⁴⁰⁹ The most important aspects of this Protocol for the development of human rights and for international law generally were the compulsory jurisdiction of the European Court of Human Rights over all member-States of the European Convention and its conferral of the right of individual petition directly to the European Court of Human Rights.⁴¹⁰

⁴⁰⁴ The member-States had direct access to the Court. See *Ibid.* at article 48.

⁴⁰⁵ Godinho, *supra* note 48 at 56-57.

⁴⁰⁶ *Protocol N° 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 11 May 1994, Eur. T.S. 155.

⁴⁰⁷ *Ibid.* at articles 19 and 21.

⁴⁰⁸ *Ibid.* articles 27- 46.

⁴⁰⁹ *Ibid.* at article 46 para. 2.

⁴¹⁰ *Ibid.* at articles 34 and 46.

2.2 The European Court of Human Rights

The European Court of Human Rights was created by the European Convention⁴¹¹ to ensure the observance by all member-States of the provisions of the Convention and its Protocols.⁴¹² The European Court is divided in Committees (composed of three judges), Chambers (formed by seven judges, which must include a judge elected by the State party concerned) and Grand Chamber (of seventeen judges, which must include the President of the Court, the Vice-President, the Presidents of the Chambers and a judge elected by the State party concerned).⁴¹³

The right of individuals to lodge petitions is spelled out by article 34:

The Court may receive applications from any person, non-governmental organisation 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 Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.⁴¹⁴

This article represented an advance in international law because it recognized the international legal personality of individuals and their right of *jus standi* before the European Court. Protocol n° 11 removed the requirement that States make a special declaration accepting the right of individual petition, establishing a wide and enforceable right of individual petition intrinsic to the work of the European system of human rights protection.

⁴¹¹ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11*, *supra* note 394 at Section II [Hereinafter “European Court of Human Rights” or “European Court”].

⁴¹² *Ibid.* at article 19.

⁴¹³ *Ibid.* at article 27 paras 1, 2 and 3.

⁴¹⁴ *Ibid.* at article 34.

Contrary to the American Convention, the European Convention dictates that in order to file a petition, individuals must be victims. The European Court, interpreting this article, has held that article 34 “requires that an individual applicant should claim to have been actually affected by the violation he alleges”⁴¹⁵ The European Court does not establish the right of petition only to direct victims; indirect victims can also submit complaints.⁴¹⁶ A person may submit a complaint if he or she runs the risk of being directly prejudiced by the measures adopted by a State, which would remove the abstract aspect of the complaint.⁴¹⁷ The right of individual petition contemplates natural and legal persons.⁴¹⁸ The relatives of individuals prejudiced by State measures may also be recognized as “victims”.⁴¹⁹

The European Court⁴²⁰ advanced the international law system by granting *jus standi* to individuals who after Protocol eleven, can not only participate in the European Court’s procedures, but have direct access to this tribunal. While only victims may bring complaints, article 36 of the European Convention allows any concerned person to submit written comments or take part in the Court’s hearings by request of the President of the Court.⁴²¹ As discussed in more detail in Chapter four, if

⁴¹⁵ The European Court further added that article 34 “does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment. Nevertheless, as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation”. See *Case of Klass and Others v. Germany* (1978), 2 E.C.R.H. (Ser. A) 214 at para. 33.

⁴¹⁶ Buergenthal *et al.*, *supra* note 24 at 150.

⁴¹⁷ *Case of Open Door and Dublin Well Woman v. Ireland* (1993), 15 E.C.H.R. (Ser. A) 244 at para. 44.

⁴¹⁸ See *The Sunday Times Case v. United Kingdom* (1992) 14 E.C.R.H. (Ser. A) 229 and *The Observer and the Guardian Case v. United Kingdom* (1992) 14 E.C.R.H. (Ser. A) 153.

⁴¹⁹ *Case of Cyprus v. Turkey* (2002) 35 E.C.H.R. (Ser. A) at H1 and H2 paras. 7 and 8.

⁴²⁰ Even though article 34 has been broadly interpreted, accepting petitions from direct and indirect victims and natural or legal persons, it could, like the Inter-American counterpart, be broadened further to accept petitions from any person without the requirement that they be victims.

⁴²¹ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11*, *supra* note 394 at article 36 para. 2.

the International Court of Justice were modified to provide for the direct access of individuals, it also would be necessary to require of petitioners that they be victims. The International Court of Justice is a truly universal tribunal and could arguably not allow any person, from anywhere in the world, other than a victim's legal representative, to send complaints in the name of other individuals from anywhere that were allegedly victims of human rights violations. If the "victim" requirement is not established, the workload of the International Court of Justice could increase drastically and jeopardize the Court's ability to deal with individual petitions effectively and in a timely manner.

Individuals who meet the requirements of article 34 of the European Convention can send petitions directly to the European Court. First, the European Court analyzes whether the petition meets the admissibility criteria set out in article 35: local remedies must be exhausted; the case must be submitted within six months from the date of the final decision taken by the domestic law courts; and the petition cannot be anonymous and the matter must not be examined by the European Court if it has been sent to another international dispute settlement organization.⁴²² The European Court can also declare inadmissible a petition that is incompatible with the provisions of the Convention or its additional protocols, is manifestly ill-founded or constitutes an abuse of the right of application.⁴²³ The Rules of the European Court provide that individual petitions can go to a Committee and a Chamber.⁴²⁴ The Committee will analyze the admissibility aspect of the petition and can declare it

⁴²² *Ibid.* at article 35 para. 1 and para. 2 (a) and (b).

⁴²³ *Ibid.* at article 35 para. 3. Buergenthal lists some examples of abuse of the right of application which could be "knowingly making false or groundless allegations, repeatedly using abusive and defamatory language about the Respondent Government, or intentionally breaching the rule of confidentiality applicable to the proceedings". See Buergenthal *et al.*, *supra* note 24 at 156.

⁴²⁴ European Court of Human Rights, *Rules of Court 2010*, online: http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/RulesOfCourt_June2010.pdf at rules 53 and 54. Accessed on 12 June 2010.

inadmissible without the possibility of appeal.⁴²⁵ If the Committee does not declare the complaint inadmissible, it goes to the Chamber for an examination of admissibility and of the merits of the case.⁴²⁶ If the case raises serious questions about the interpretation of the European Convention or its protocols or appears to call for a result inconsistent with the European Court's established case law, the Chamber may, at any time before it has delivered its judgment, send the case to the Grand Chamber.⁴²⁷ The Grand Chamber can analyze a case when the Chamber relinquishes jurisdiction, but can also function as an appeal court. After the judgment of the Chamber, any party, in exceptional cases and within a period of three months from the date of decision, can request that the case be submitted to the Grand Chamber for a final judgment.⁴²⁸ The Grand Chamber will accept the appeal if the case raises serious issues affecting the European Convention and its protocols or is of general importance.⁴²⁹

The amendments to the Rules of Court have granted to individuals a right of effective participation in their cases before the European Court. They can submit factual information to the Chambers;⁴³⁰ they may present further evidence and written observations after the petition is admitted;⁴³¹ they can try to reach a friendly settlement;⁴³² the party and any person may appear before the European Court during the hearings;⁴³³ individuals might present applications themselves or through

⁴²⁵ *Ibid.* at rule 53; *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11*, *supra* note 394 at article 28.

⁴²⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11*, *supra* note 394 at article 29, para. 1.

⁴²⁷ *Ibid.* at article 30.

⁴²⁸ *Ibid.* at article 44 para. 1.

⁴²⁹ *Ibid.* at article 43 paras. 1 and 2.

⁴³⁰ *Rules of Court*, *supra* note 424 at rule 54.

⁴³¹ *Ibid.* at rule 59 para. 1.

⁴³² *Ibid.* at rule 62 para. 1.

⁴³³ *Ibid.* at Chapter VI, rules 64 and 65.

representatives;⁴³⁴ and the applicant must be represented at any hearing, although the President of the Chamber can grant leave for the applicant to present his or her own case.⁴³⁵ The decision of the European Court is binding on the parties and the Committee of Ministers must supervise the execution of the judgments.⁴³⁶ The Committee of Ministers is thus a body connected directly to the Council of Europe and also with the European Convention. Because of the new Protocol n° 14,⁴³⁷ the procedural rules of the European Court were recently altered and new Rules of Court entered in force in June 2010.⁴³⁸ However, individuals still have direct access to the Court and a right to participate in the proceedings.⁴³⁹

2.2.1 The Right of Individual Petition and Protocol 14

The case law of the European Court of Human Rights, like that of the American Court, is establishing the right of individual petition and full access of individuals to all stages of those Court proceedings as one of the most important rights⁴⁴⁰ because without it, all the provisions enshrined in the European Convention would be “dead letters” - words without legal effect.

In *Loizidou v. Turkey*, the European Court rejected Turkey’s restrictions to the right of individual petition and the acceptance of the Court’s compulsory jurisdiction

⁴³⁴ *Ibid.* at rule 36 para. 1.

⁴³⁵ *Ibid.* at rule 36 para. 3.

⁴³⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11*, *supra* note 394 at article 46 paras. 1 and 2.

⁴³⁷ *Protocol N° 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 13 May 2004, Eur. T.S. 194.

⁴³⁸ European Court of Human Rights, *Basic Texts: Rules of Court*, online: <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Rules+of+Court/> Accessed on 12 June 2010.

⁴³⁹ See *Rules of Court*, *supra* note 424.

⁴⁴⁰ Arguably, a treaty provision establishing the right of individual petition is a fundamental clause which cannot be unilaterally limited by any State because it enables the protection of human rights on the international plane.

in contentious cases, holding that, if accepted, such restrictions “would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)”.⁴⁴¹ In *Loizidou*, therefore, the European Court established the right of individual petition as a fundamental provision which could not be restricted by any State. It also emphasized the European Court’s role as Europe’s constitutional court. This is consistent with its approach in *Lawless v. Ireland*, its first decision, where, rather than recognizing the Commission as a party, the Court held that the Commission’s main function was to assist the European Court with the proceedings.⁴⁴² Given this view of the Commission’s role as subordinate to that of the Court, it is unsurprising that the Commission was later dispensed with and individuals given direct access to the European Court.

The European Court of Human Rights also contributed to the emancipation of individuals from their own States by establishing that the international right of individual petition was not governed by domestic rules of standing, which may serve different purposes.⁴⁴³ It concluded that the right of individual petition did not need to be connected to domestic law regulations because it “entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it”.⁴⁴⁴ There is, therefore, an international law rule establishing the right of individual petition, that is, the right of individuals to have access to international mechanisms of human rights protection. If this is a general rule concerning human rights, it includes the global

⁴⁴¹ *Loizidou v. Turkey* (1995) 20 E.C.H.R. (Ser. A) 99 at paras. 75 and 70 [*Loizidou*].

⁴⁴² *Lawless v. Ireland* (1979) 1 E.C.H.R. (Ser. A) 1 at 8.

⁴⁴³ *Norris v. Ireland* (1991) 13 E.C.H.R. (Ser. A) 186 at para. 31

⁴⁴⁴ *Ibid.*

system of protection. Consequently, if the International Court of Justice modifies its Statute to accept petitions from individuals this would constitute a fundamental right of international law and it could not be limited unilaterally by any State. Thus, if the International Court of Justice grants direct access to individuals, States would not be able to unilaterally forbid individuals' access to that tribunal.

After Protocol n° 11 eliminated the Commission, the European Court of Human Rights faced an increase in its workload.⁴⁴⁵ Protocol n° 14 was elaborated mainly to reduce the number of cases analyzed by the Court (by the Committee and Chamber). Judges are now elected for a period of nine years without the possibility of re-election⁴⁴⁶ and individual applications can be considered by a single judge, Committee, Chamber and Grand Chamber.⁴⁴⁷

When an individual application is, according to the new Protocol, sent to a single-judge formation, assisted by rapporteurs that are part of the registry, the judge may declare a petition inadmissible or strike it from the Court's list of cases in a final decision.⁴⁴⁸ If the judge accepts the application, it is forwarded to a Committee or to a Chamber.⁴⁴⁹ The Committee can, by unanimous vote, declare the petition inadmissible, strike it out of the list of cases, or declare it admissible and render a final judgment on the merits (if the matter concerns interpretation or the question is already the subject of well-established case law of the Court).⁴⁵⁰ If the case is submitted to the Chamber by the single-judge or if the Committee does not decide on the merits, the Chamber will decide both the admissibility and merits of the case.⁴⁵¹

⁴⁴⁵ *Protocol N° 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 437.

⁴⁴⁶ *Ibid.* at article 2.

⁴⁴⁷ *Ibid.* at article 6.

⁴⁴⁸ *Ibid.* at articles 4 para. 2 and article 7 para. 1.

⁴⁴⁹ *Ibid.* at article 7 para. 3.

⁴⁵⁰ *Ibid.* at article 8 para. 1 (a) and (b), and para. 2.

⁴⁵¹ *Ibid.* at article 9 para. 1.

The functions of the Grand Chamber remain the same with the exception that it now decides on “issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4”.⁴⁵² The Committee of Ministers supervises the execution of the European Court’s decisions, but if a party fails to abide by a decision, the Committee can refer the question to the European Court, which on finding a violation will refer the case back to the Committee for consideration of the measures to be adopted.⁴⁵³

The biggest change of Protocol n° 14 regards the right of individual petition. Article 12 introduces a new admissibility requirement for individual petitions: to prove that the applicant has suffered a significant disadvantage. Article 12 reads, in part, as follows:

The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

- a. the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
- b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

The effects of this limitation to the right of individual petition are still unclear because Protocol n° 14 just entered in force.⁴⁵⁴ The Council of Europe has declared

⁴⁵² *Ibid.* at article 10 para. 2.

⁴⁵³ *Ibid.* at article 16 paras. 1, 2, 3, 4 and 5.

⁴⁵⁴ Protocol n° 14 entered in force in 1 June of 2010. See Council of Europe, *List of Treaties Coming from Subject-Matter: Human Rights*, online: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG> Accessed on 8 June 2010.

that this criterion is “open to interpretation”.⁴⁵⁵ There are two safeguard clauses to this new requirement established to protect the right of individual petition: “the application will not be declared inadmissible if respect for human rights as defined in the Convention or the protocols thereto requires an examination on the merits”⁴⁵⁶ and “it will never be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal”.⁴⁵⁷ The Council of Europe’s objective is to decrease the number of cases of a trivial nature, allowing the European Court to accept them only if they “raise serious questions affecting the application or interpretation of the Convention or important questions concerning national law”.⁴⁵⁸

Protocol n° 14 marks an attempt to decrease the workload of the European Court. In my view, it represents a step back in the evolution of the right of individual petition, by narrowing rather than broadening the right. The Council of Europe, therefore, is moving along a different path than the European Court’s case law; while the latter has tended to broaden the interpretation of the right of petition, the Council of Europe has tried to filter individuals’ access to the European Court. Only when the European Court develops jurisprudence interpreting Protocol n° 14 will it be possible to measure the effects of this change on the acceptance of individuals as subjects of international law and their emancipation from their own State.

Perhaps because of the unclear effects of this new criterion, few member-States at first ratified Protocol n° 14. In 2009, the Council of Europe intervened to decrease the caseload of the European Court and elaborated Protocol n° 14bis with the

⁴⁵⁵ *Explanatory Report to the Protocol N° 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, at para. 80, online: European Court of Human Rights <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm> Accessed on 15 March 2010.

⁴⁵⁶ *Ibid.* at para. 81.

⁴⁵⁷ *Ibid.* at para. 82. This safeguard tries to ensure that every case will receive a judicial examination whether at the national level or at the international level.

⁴⁵⁸ *Ibid.* at para. 83.

same provisions as Protocol n° 14 regarding the single-judge and committees competence, but without the new admissibility criterion.⁴⁵⁹ This new Protocol only required the ratification of three High Contracting Parties⁴⁶⁰ and had a specific expiration date (1 June 2010)⁴⁶¹ indicating that the Council of Europe intended to pressure the member-States to ratify Protocol n° 14. Protocol n° 14bis terminated in June when Protocol n° 14 entered in force.⁴⁶²

The European system of human rights protection recognized the full international legal personality of individuals by granting them direct access to the European Court. The European Court's workload increased when the Council of Europe discontinued the Commission without creating a system for the Court to select individual petitions and avoid an overload of cases. Protocols n° 14 and 14bis are attempts to create new criteria maintaining the direct access of individuals to the Court. The European Court of Human Rights shows that it is possible, in practice, to recognize the international capacity of individuals if the Court has mechanisms to select individual petitions. This right of direct access or *jus standi* could be applied to the Inter-American Court and to the International Court of Justice. The Council of Europe's struggle to establish criteria to select individual petitions should be instructive for any international tribunal to which individuals are given direct access. The European Court of Human Rights recognized the right of individual petition to the fullest; individuals, if they meet the requirements, can have the right to direct access to the Court, which cannot be limited unilaterally by any State. This could be, in my view, a universal rule of international law and possibly be applied to tribunals

⁴⁵⁹ *Protocol N° 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 27 May 2009 Eur. T.S. 204 at articles 3 and 4.

⁴⁶⁰ *Ibid.* at article 9.

⁴⁶¹ *Ibid.* at title.

⁴⁶² Protocol n° 14 entered in force in 1 June of 2010. See *List of Treaties Coming from Subject-Matter: Human Rights*, *supra* note 454.

such as the International Court of Justice. The direct access of individuals to international tribunals when dealing with a human rights case could be regarded as a *jus cogens* rule and be applied to the International Court of Justice.⁴⁶³ *Jus standi* is a fundamental right because it enables the protection of human rights by individuals, the addressees of human rights norms, without the need for the tutelage of States. This characteristic places the right of individual access in a hierarchy above the State-centric conception of international law.

3. Reflections on the Access of Individuals to Global Systems of Human Rights Protection

The treaty-monitoring bodies created to supervise the implementation of treaty provisions and the Human Rights Council are the main global mechanisms of human rights protection that grant access to individuals. Human rights, humanitarian law and criminal law are subareas of international law that directly concern individuals on a regional and also a global scale. The development of the law of nations is forcing international mechanisms related to those areas to adapt in order to provide full participation of persons in their systems.

The Human Rights Council, which replaced the old Human Rights Commission, is a subsidiary organ of the United Nations' General Assembly responsible for the promotion of human rights and fundamental freedoms and also addresses situations of violations of human rights by making recommendations

⁴⁶³ If certain human rights norms are *jus cogens*, as pointed out by the jurisprudence of the Inter-American and European Courts of Human Rights, the provisions that allow the access of individuals to international tribunals that seek the effectiveness of such *jus cogens* norms could also be regarded as *jus cogens*.

thereon.⁴⁶⁴ The Council consists of forty-seven member-States elected directly and individually by secret ballot chosen based on equitable geographical distribution by the majority of the members of the General Assembly.⁴⁶⁵

In June 2007, the Council adopted its Institution Building instrument which, following the resolution established by the General Assembly,⁴⁶⁶ replaced the old Human Rights Commission's procedures and implemented a new complaint mechanism to address human rights violations.⁴⁶⁷ The Institution Building instrument was approved by the General Assembly⁴⁶⁸ on 28 February 2008.⁴⁶⁹ This new instrument states that the Council's work is based on the Charter of the United Nations, the Universal Declaration of Human Rights, the treaty instruments to which the State accused of human rights violation is a party and applicable humanitarian law treaties.⁴⁷⁰

The Council only analyses gross violations of human rights;⁴⁷¹ it does not provide for a general right of individual petition as established by the American and European human rights tribunals. The Council's Institution-Building instrument states that complaints can be submitted

[B]y a person or a group of persons claiming to be the victims of violations of human rights and fundamental freedoms, or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with the

⁴⁶⁴ *Human Rights Council*, GA Res. 60/251, UN GAOR, 60th Sess., UN Doc. A/RES/60/251 at paras. 1, 2, 3 and 5 (g) [hereinafter "the Council" or "Human Rights Council"].

⁴⁶⁵ *Ibid.* at para.7.

⁴⁶⁶ *Ibid.* at para. 6, which states that "the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session".

⁴⁶⁷ *Institution Building*, UN HRCOR, 9th Mtg., UN Res. 5/1.

⁴⁶⁸ *Ibid.* at 2.

⁴⁶⁹ *Report of the Human Rights Council*, GA Res.62/219, UN GAOR, 62 Sess., UN Doc. A/RES/62/219.

⁴⁷⁰ *Institution Building*, UN HRCOR, *supra* note 467 at articles 1 and 2.

⁴⁷¹ *Ibid.* at article 85.

principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and claiming to have direct and reliable knowledge of the violations concerned. Nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence.⁴⁷²

Individual complaints may not be manifestly politically motivated, must give a factual description of the alleged violations, cannot be framed in abusive language (although this requirement can be waived), cannot be solely based on mass media reports, should already be subjected to analysis by a “special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights”, and will be examined only when possible domestic remedies have been exhausted.⁴⁷³

The communications are analyzed by two distinct working groups: the working group on communications and the working group on situations.⁴⁷⁴ The initial screening on admissibility of individual petitions is carried out by the Chairperson of the Working Group on Communications. If admitted, the State concerned is informed and called to provide its view of the matter. The members of the Working Group on Communications decide on the admissibility of a communication and consider the merits of the allegations of violations (including if they reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms) and then provide the Working Group on Situations with a file containing all admissible communications and recommendations thereon.⁴⁷⁵ The Working Group on Situations presents the Council with a report on consistent patterns of gross and reliably attested

⁴⁷² *Ibid.* at article 87 (d).

⁴⁷³ *Ibid.* at article 87 (a), (b), (c), (e), (f) and (g).

⁴⁷⁴ *Ibid.* at C.

⁴⁷⁵ *Ibid.* at articles 94 and 95.

violations of human rights and fundamental freedoms and makes recommendations to the Council on the course of action to take.⁴⁷⁶ The Council can take the following measures: stop considering a situation when additional consideration or action is not warranted; ask the State concerned to provide more information while keeping the situation under review; appoint an independent expert to monitor the situation and report to the Council; review the matter under public procedure; and recommend the Office of the High Commissioner for Human Rights to provide cooperation to the State concerned.⁴⁷⁷

Many United Nations treaties, including the Optional Protocol to the International Covenant on Civil and Political Rights,⁴⁷⁸ have non judicial monitoring bodies that accept individual complaints.⁴⁷⁹ These monitoring bodies, like the Human Rights Committee under the ICCPR, are only able to analyze the petition if the State is a party to the Convention and has accepted that specific complaint mechanism or has ratified the additional protocol which establishes the right of individual petition.

All of these convention mechanisms (the non-judicial treaty-monitoring bodies) basically have the same individual complaint system. Committees first consider admissibility and then the merits of the petition. To be admissible, domestic

⁴⁷⁶ *Ibid.* at article 98.

⁴⁷⁷ *Ibid.* at article 109 (a), (b), (c), (d) and (e).

⁴⁷⁸ *Optional Protocol to the International Covenant on Civil and Political Rights*, *supra* note 57 at article 1.

⁴⁷⁹ See also: the Convention on the Elimination of All Forms of Racial Discrimination (*International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195 at article 14, para. 1); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 at article 22); the Convention on the Elimination of All Forms of Discrimination against Women (*Optional Protocol to the Convention on the Elimination of Discrimination against Women*, 6 October 1999, 2131 U.N.T.S. 83 at article 2); the Convention on the Rights of Persons with Disabilities (*Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res. A/RES/61/106, 61st Sess., UN Doc. Doc. A/61/611 at article 1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (*International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res. 45/1581, UN GAOR, 46th Sess., UN Doc. Doc. A/RES/45/158 at article 77); and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (*Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *supra* note 63 at article 2).

remedies must have been exhausted, the petition must not be anonymous, must be in writing, must not have been previously examined by the treaty-body to which it has been sent or by any other international settlement or investigation organization, and must not be manifestly ill-founded.⁴⁸⁰ If it admits a petition, the monitoring-body will analyze its merits (without oral hearings between the concerned State and individuals) and decide if the member-State has violated the treaty's provisions. The conclusions are sent to the State concerned and the complainant (and eventually also to the General Assembly).⁴⁸¹

Those treaty bodies and the Human Rights Council make recommendations and write reports about the human rights situation in their member-States. They do not establish, in my view, a wide right of individual petition. They do not have judicial character, that is, they do not have judges and do not require the presence of lawyers. They do not render judgments, but make recommendations. Commenting on the implementation system of the treaty bodies, Mark Freeman and Gibran Ert conclude that the recommendations have only “the power to shame” and add that “[u]nless domestic law provides otherwise, the views of treaty bodies are not enforceable as judgments before domestic courts”.⁴⁸² Manfred Nowak observes that the decisions of the treaty-monitoring bodies are non-binding and that no political body of the United Nations takes the responsibility to supervise the implementation of the treaty bodies' decisions. As a result, in his view, it is not surprising that many State Parties simply ignore the decisions of the treaty bodies, and even Western States argue that they are not bound by the decisions of the Human Rights Committee.⁴⁸³

⁴⁸⁰ Mark Freeman & Gibran van Ert, *supra* note 10 at 394 and 395.

⁴⁸¹ *Ibid.* at 395.

⁴⁸² *Ibid.* at 396.

⁴⁸³ Nowak, *supra* note 126 at 254. He affirms that the “Petitions Team in the Office of the UN High Commissioner for Human Rights in Geneva is a small and grossly understaffed unit which cannot be compared to the Registry of the European Court of Human Rights in Strasbourg”. See *Ibid.*

The development of international law after the Second World War placed individuals as central figures with rights and duties emancipated from their domestic law and sheltered by international norms and principles.⁴⁸⁴ It is, therefore, impossible to deny the increasing role of individuals on the international plane (as bearers of rights and duties) or to dissociate this status from international capacity.⁴⁸⁵ The non-judicial treaty-monitoring bodies and the Human Rights Council represent part of this change of modern international law and contribute to the effectiveness of human rights rules. Those mechanisms should complement a strong global juridical body that deals with human rights and accepts individual petitions. The decisions of non judicial treaty-monitoring bodies and the Human Rights Council are generally non-binding because they render recommendations.⁴⁸⁶ The treaty-monitoring bodies are not staffed by judges, but by experts who decide according to the treaty which they monitor. The Human Rights Council is formed by representatives of States, making this system less legal and more political because governments may try to follow their foreign policies and interests.

Although petitioners to the Human Rights Committee have *locus standi* in written proceedings,⁴⁸⁷ they or their legal representatives do not have access to

⁴⁸⁴ See Antônio Augusto Cançado Trindade, *A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional* (San Salvador: Instituto Hispano-Luso-Americano, 2002).

⁴⁸⁵ See Antônio Augusto Cançado Trindade, “La Persona Humana como Sujeito del Derecho Internacional: Avances de su Capacidad Jurídica Internacional en la Primeira Década del Siglo XXI” (2007) 46 IIDH 273 at 293-317.

⁴⁸⁶ For an example of the relation between the ICCPR and the Canadian jurisprudence, see Gerald P. Heckman, “International Human Rights Law Norms and Discretionary Powers: Recent Developments” 16 *Can. J. Adm. L. & Prac.* 31 at 57-58.

⁴⁸⁷ The new Rules of Procedure of the Human Rights Committee, for example, in the regulations for communications received under the Optional Protocol, provides a strong participation of individuals in their written proceedings: the Committee, a working group or a special rapporteur can request the author of the communication to submit additional relevant observations or information; the author must be informed that the communication was decided admissible by the Committee or a working group in cases in which the issue of admissibility is decided before receiving the reply of the State concerned on the merits; the author of the communication can submit additional written information regarding the explanations or statements submitted by the concerned State; the Committee must consider the communication in the light of all written information made available to it by the individual

hearings with representatives of the concerned States.⁴⁸⁸ The treaty-monitoring bodies regulate specific matters, situations or persons: civil and political rights, the protection of women, or protection against racial discrimination. These treaty-monitoring bodies, therefore, do not have a universal nature; they do not individually cover a wide range of human rights.

The human Rights Council and the non judicial treaty-monitoring bodies should function on a complementary basis when a complaint cannot be sent to a juridical body such as a reformed International Court of Justice. There is no doubt of the importance of non juridical global systems of human rights protection. However, given that individuals are bearers of rights and duties under international law and the importance of the access to international tribunals as a necessary measure for the proper protection of human rights, such systems are no substitute for an international tribunal that can judge human rights violations.

The Inter-American Court of Human Rights and the European Court of Human Rights respectively offer individuals *locus standi* and *jus standi* in their proceedings in order to confer on them “full” international legal personality making possible the effective protection of human rights at regional levels. This right of access is being recognized as a fundamental right because it allows individuals as addressees of human rights norms to demand the proper application of such norms. In the next chapter, I argue that to fully recognize the international personality of individuals and make possible an effective human rights protection at the global level,

and the State party concerned and must formulate its Views thereon; and the Views of the Committee is communicated to the individual and to the State party concerned. See International Covenant on Civil and Political Rights, *Rules of Procedure of the Human Rights Committee*, UNCCPR, UN Doc. CCPR/C/3/Rev.8 (2005) at rule 97 para. 4, rule 99 para. 1, rule 99 para. 3, rule 100 para. 1 and rule 100 para. 3.

⁴⁸⁸ Individuals, therefore, cannot participate in oral proceedings.

the International Court of Justice, much like the American and European Courts of Human Rights, should be reformed to grant *locus standi* or *jus standi* to individuals.

CHAPTER IV
THE ACCESS OF INDIVIDUALS AND THE INTERNATIONAL COURT OF
JUSTICE

In this chapter I argue that the State-centric jurisdiction of the International Court of Justice is not compatible with the developments in international law that have placed individuals as one of its subjects. The ICJ Statute and Rules of Court could be altered to provide access to individuals in two ways: the Statute of the Court could be surgically amended to allow direct access of individuals – a politically challenging but achievable route – or more simply, procedural reforms in the Rules of Court could grant participation to individuals in the Court’s proceedings. Reforming the International Court of Justice to grant access to individuals would obviate the need to create a world human rights court and would not contribute to the fragmentation of international law and the overlap of workload because the ICJ would keep its voluntary basis of jurisdiction and the court is already the primary tribunal of the United Nations.

In the first section, I examine the jurisdiction of the ICJ, and point out that it is basically the same as the former Permanent Court of International Justice. The ICJ has a State-centric jurisdiction; only States can be parties before the Court and individuals may not participate in the Court’s proceedings. Although this reflected the prevailing position of international law scholars when the Court was created, was not unanimous. As I will show by reference to the discussions for the implementation of the Permanent Court of International Justice, scholars and representatives of States advocated the possibility of granting direct access to individuals. Although the possibility of *jus standi* of individuals did not prevail, these discussions reveal that at

the beginning of the 20th century, scholars and States were advocating the access of individuals before international tribunals, an idea that has gained even more prominence today.

In the second section of this Chapter, I briefly discuss the fragmentation of international law focusing on human rights. After reviewing the arguments for and against the existence of a multiplicity of international tribunals, I conclude that it is yet not possible to establish whether the fragmentation of international law would be harmful to the development of international law. In any event, I claim that the creation of international courts and the possibility of conflicts of jurisprudence could be avoided by the adaptation of existing international tribunals to respond to the demands of the international community. I briefly note that the creation of a global human rights court, as recently proposed by academics, would not impede, but in fact complement an expanded human rights jurisdiction for the International Court of Justice by increasing the protection of human rights and individuals' access to human rights tribunals. However, unlike a global human rights court, reforming the ICJ would not contribute to the fragmentation of international law.

In the final section of this Chapter, using the Inter-American and European Courts of Human Rights as models, I set out a modest proposal to provide individuals complaining of human rights violations access to the International Court of Justice. As described in the previous section, the European and Inter-American Courts developed in different ways regarding the access of individuals. The European Court grants direct access to individuals, while the Inter-American Court requires that the Inter-American Commission participate as the individuals' representative, but without revoking their right to full participation in the Court's proceedings. In the context of reforms to the ICJ, I explain that those developments do not conflict; the ICJ could

first grant individuals *locus standi*, followed by *jus standi*. Granting *locus standi* to individuals, following the steps of the Inter-American Court, would require changes only to the International Court of Justice's Rules of Court, not its Statute. Granting *jus standi* to individuals would be more complicated, though not impossible, because this would require changes to the ICJ's Statute. I explore both pathways to development of the jurisdiction of the International Court of Justice and I point out which provisions of the ICJ's Rules of Court and Statute could be modified in order to grant *locus standi* and *jus standi* to individuals. I also examine how the procedure before the ICJ could accommodate direct access of individuals, taking into consideration the recent changes to the European Court of Human Rights described in Chapter three.

1. The International Court of Justice and its Jurisdiction

The Second World War marked the end of the League of Nations and its Permanent Court of International Justice and the creation of the United Nations and the new International Court of Justice (ICJ).⁴⁸⁹ This new Court is a continuation of Permanent Court of International Justice (with virtually the same statute and jurisdiction)⁴⁹⁰ and it is also the main judicial organ of the United Nations.⁴⁹¹

Situated at The Hague, it is composed of fifteen judges (elected regardless of their nationality)⁴⁹² who possess the qualification in their countries to exercise the highest judicial positions or are jurisconsults of recognized knowledge in international

⁴⁸⁹ See Shabtai Rosenne, *The World Court* (Dordrecht: Martinus Nijhoff Publishers) at 3-25 [Rosenne, *The World Court*]. *Charter of United Nations*, *supra* note 31 at Chapter XIV. Hereafter "International Court of Justice" or "International Court" or "ICJ" or "World Court".

⁴⁹⁰ Shaw, *supra* note 47 at 1058.

⁴⁹¹ *Charter of United Nations*, *supra* note 31 at article 92. It states that "[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter".

⁴⁹² Two judges might be nationals of the same State.

law.⁴⁹³ The procedure to select a judge combines legal and political elements;⁴⁹⁴ they are elected by the absolute majority of votes of the General Assembly and the Security Council, voting separately, from a list of individuals indicated by the national groups in the Permanent Court of Arbitration.⁴⁹⁵ The judges are elected for a period of nine years (with the possibility of re-election). To ensure continuity on the International Court, elections to replace five judges take place every three years.⁴⁹⁶ In contrast to the Human Rights Council, the International Court of Justice aims to have a judicial body of independent judges rather than State representatives.⁴⁹⁷ Nonetheless, *ad hoc* judges may be chosen by the parties if there is no judge of their nationalities in the case.⁴⁹⁸

The ICJ has three main tasks. First, it mainly exists to settle disputes between States members of the United Nations, although non-State members can also have access to the International Court.⁴⁹⁹ Second, it provides juridical guidance and support (rendering advisory opinions) for the work of other United Nations organs and for autonomous specialized agencies. Third, it appoints umpires and presidents of arbitral commissions and other tribunals or offices.⁵⁰⁰ Even though the International Court of Justice is the principal judicial organ of the United Nations, it does not work as a constitutional tribunal because it has no power to review the actions or decisions of

Statute of the International Court of Justice, *supra* note 238 at articles 2 and 3 para. 1.

⁴⁹⁴ Shaw, *supra* note 47 at 1058.

⁴⁹⁵ *Statute of the International Court of Justice*, *supra* note 238 at article 4, para. 1 and article 10 para. 1. If the member of the United Nations is not represented in the Permanent Court of Arbitration, the candidates are nominated by national groups specially appointed for this purpose by their governments. See *Ibid.* at article 4 para. 2.

⁴⁹⁶ *Ibid.* at article 13 para. 1.

⁴⁹⁷ Shaw, *supra* note 47 at 1060.

⁴⁹⁸ *Statute of the International Court of Justice*, *supra* note 238 at article 31, paras. 2 and 3.

⁴⁹⁹ *Charter of United Nations*, *supra* note 31 at article 93, which states that “[a] state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on to be determined in each case by the General Assembly upon the recommendation of the Security Council”.

⁵⁰⁰ Rosenne, *The World Court*, *supra* note 489 at 31-32 and 22.

other U.N. bodies.⁵⁰¹ The Court's advisory opinions and judgments are clearly significant to the interpretation and development of international law, and might influence the work of other international bodies including those making up the United Nations' system.

The International Court of Justice decides the existing law on legal matters⁵⁰² brought before it, without legislating.⁵⁰³ Its jurisdiction is divided between advisory opinions requested by qualified entities and decisions in contentious cases between States on the basis of consent of the parties.⁵⁰⁴ In contrast with the Inter-American and the European Courts of Human Rights, the ICJ's jurisdiction is an important question of debate; cases can go through three different proceedings, which are: preliminary objections to jurisdiction, preliminary objections to admissibility and the decision of merits.⁵⁰⁵ The International Court of Justice has jurisdiction in all cases referred to it by States⁵⁰⁶ regarding all matters of international law, especially provided for in the Charter of the United Nations and in treaties in force.⁵⁰⁷ This jurisdiction is based on the consent of the parties,⁵⁰⁸ which need not be in a specific form. Since the ICJ has jurisdiction over States that have clearly accepted it,⁵⁰⁹ the Court will not decide on matters that interfere with third parties without their consent.⁵¹⁰

⁵⁰¹ *Ibid.* at 37.

⁵⁰² *Statute of the International Court of Justice*, *supra* note 238 at article 36 para. 2.

⁵⁰³ Shaw, *supra* note 47 at 1064-1065.

⁵⁰⁴ Brownlie, *supra* note 89 at 680 and 690.

⁵⁰⁵ *Ibid.* at 681.

⁵⁰⁶ The members of the United Nations and also non-members as previously explained can be parties in contentious cases, but they have to be States. International organizations and individuals (which include non-governmental organizations) are not allowed to be parties.

⁵⁰⁷ Shaw, *supra* note 47 at 1075.

⁵⁰⁸ *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, [1985] I.C.J. Rep. 192 at 216.

⁵⁰⁹ See e.g. *Libya v. Malta Case* [1984] I.C.J. Rep. 3 at 24-25.

⁵¹⁰ See e.g. *Case of Monetary Gold (Italy v. France, the United Kingdom and the United States of America)* [1954] I.C.J. Rep. 3 at 24-25. The non-participation of a third party though does not preclude the Court from adjudicating upon a claim provided that the legal interests of the third state do not form the very subject matter of the decision that is applied for. See *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)* [1992] I.C.J. Rep. 240 at 261.

Besides the rule allowing consenting States to freely agree to send the matter of a dispute to the International Court of Justice,⁵¹¹ disagreements about the application or interpretation of a treaty containing a compromissory clause granting jurisdiction to the International Court may also be adjudicated by the Court.⁵¹² A large number of human rights treaties grant jurisdiction to the ICJ for the interpretation and application of their provisions.⁵¹³ The most important of these would include the Convention on the Prevention and Punishment of the Crime of Genocide;⁵¹⁴ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;⁵¹⁵ and the International Convention of the Elimination of all Forms of Racial Discrimination.⁵¹⁶ While many of the treaties directly concerning individuals or international organizations (especially human rights and environmental law treaties) establish the International Court of Justice as the tribunal with jurisdiction to decide on matters of interpretation and application, individuals, who are the main addressees of these provisions, do not have any kind of access to the International Court.⁵¹⁷ Thus, though the Court can decide on matters directly related to individuals,

⁵¹¹ When a consent is given to the International Court of Justice it cannot be withdrawn, “at least if another State has acted on the basis thereof and has instituted proceedings before the Court” and “[t]he inability of a State to withdraw consent once it has been acted upon assumes importance in connexion with the doctrine of *forum prorogatum* [emphasis in original]. See Shabtai Rosenne, *The Law and Practice of the International Court* (Dordrecht: Martinus Nijhoff Publishers, 1985) at 322-323 [Rosenne, *The Law and Practice*].

⁵¹² *Statute of the International Court of Justice*, *supra* note 238 at article 40 para 1.

⁵¹³ Almost 300 treaties (296) of the International Court’s database have provisions awarding jurisdiction to the International Court of Justice. See The International Court of Justice, *Jurisdiction: Treaties*, online: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4> Accessed on 1 April 2010.

⁵¹⁴ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948 78 U.N.T.S. 277 at article IX.

⁵¹⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 479 at article 30 para. 1.

⁵¹⁶ *International Convention of the Elimination of all Forms of Racial Discrimination*, *supra* note 479 at article 22.

⁵¹⁷ The following human rights treaties also grant jurisdiction to the ICJ: *Supplementary Convention on the Abolition of Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 226 U.N.T.S. 3 at article 10; *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, 96 U.N.T.S. 271 at article 22; *Convention Relating to the Status of Refugees*, 14 December 1950, 189 U.N.T.S. 150 at article 38; *Convention on the Political Rights of Women*, 31 March 1953, 193 U.N.T.S. 135 at article 9; *Convention Relating to*

they may not participate in the Court's proceedings. The Statute's narrow definition of which entities can access the Court ("[o]nly States may apply to and appear before the International Court of Justice")⁵¹⁸ also disqualifies treaty monitoring bodies, such as the Committee on the Elimination of Racial Discrimination,⁵¹⁹ from sending complaints or gaining access to the International Court of Justice in contentious cases when States fail to comply with their recommendations. This approach differs clearly from that animating the Inter-American Court of Human Rights, which grants individuals indirect access through representation by the Inter-American Commission.

A third type of jurisdiction, the transferred jurisdiction, is described in article 37 of the Statute, which states that "[w]henver a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."⁵²⁰ This provision establishes continuity between the former International Court of Permanent Justice and the International Court of Justice.⁵²¹ A treaty concluded before 1945 must still be in force for article 37 of the Statute to be applied and if a States party to such a treaty is not a party to the Statute, the Court has no jurisdiction⁵²² and the clause referring to the Court loses its effect. In other words, article 37 can only be applied to States that are now members of the United Nations

the Status of Stateless Persons, 28 September 1954, 360 U.N.T.S. 117 at article 34; *Convention against Discrimination in Education*, 14 December 1960, 429 U.N.T.S. 93 at article 8; *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 10 December 1962, 521 U.N.T.S. 231 at article 8; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 at article 29; and *International Convention against Apartheid in Sports*, 10 December 1985, 1500 U.N.T.S. 161 at article 19.

⁵¹⁸ The International Court of Justice, *Jurisdiction: contentious jurisdiction*, online: The International Court of Justice <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> Accessed on 1 April 2010.

⁵¹⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 479.

⁵²⁰ *Statute of the International Court of Justice*, *supra* note 238 at article 37.

⁵²¹ Shaw, *supra* note 47 at 1080-1081. See, e.g., *Ambatielos Case (Greece v. United Kingdom)* [1952] I.C.J. Rep. 7 at 18.

⁵²² Rosenne, *The Law and Practice*, *supra* note 511 at 336.

when it speaks of “parties of the present Statute”. The jurisdiction of the ICJ is asserted based on article 37 of the Court’s Statute if the treaty which established the jurisdiction of the Permanent Court has been in force continuously and both States are parties of the ICJ Statute and to the treaty when the proceedings were instituted.⁵²³

Article 36, paragraph 5, of the Statute establishes a connection between the Permanent Court and the International Court regarding compulsory jurisdiction in a way that

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.⁵²⁴

The International Court of Justice has interpreted the scope of this provision in two leading cases. In the *Case Concerning the Aerial Incident* the ICJ held that article 36, paragraph 5, of the Statute transferred the legal effect of declarations accepting the compulsory jurisdiction of the Permanent Court to the International Court of Justice only in respect of declarations made by original members of the United Nations represented at the San Francisco Conference.⁵²⁵ In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua had accepted the compulsory jurisdiction of the Permanent Court of Justice, but failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court and therefore was not a party to the treaty.⁵²⁶ The Court decided that

⁵²³ Rosenne, *The World Court*, *supra* note 489 at 94.

⁵²⁴ *Statute of the International Court of Justice*, *supra* note 238 at article 36, para. 5.

⁵²⁵ *Case Concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, [1959] I.C.J. Rep. 127 at 136.

⁵²⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of Admissibility, [1984] I.C.J. Rep. 392 at 404.

Nicaragua's "unconditional" declaration accepting the jurisdiction of the Permanent Court of International Justice had a potential effect that could be maintained "indefinitely":

In sum, Nicaragua's 1929 Declaration was valid at the moment when Nicaragua became a party to the Statute of the new Court; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly refrained from doing so.⁵²⁷

Such a declaration even if it were not ratified, could take effect as an acceptance of the jurisdiction of the International Court through the ratification of the Charter, of which the State is an integral part (as long as the States concerned were original members of the United Nations present at the San Francisco Conference).⁵²⁸

In addition to the consensual, compromissory and transferred jurisdictions, the Statute of the ICJ also enables States to adopt the "compulsory jurisdiction" defined in article 36, paragraph 2:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation [emphasis in original].⁵²⁹

⁵²⁷ *Ibid.*

⁵²⁸ Rosenne, *The World Court*, *supra* note 489 at 94.

⁵²⁹ *Statute of the International Court of Justice*, *supra* note 238 at article 36 para. 2.

This provision provides a mechanism to increase the jurisdiction of the International Court of Justice by enabling States to depose a unilateral declaration with the Secretary-General of the United Nations by which it accepts the Court's jurisdiction *vis-à-vis* any other State which has conferred the same type of jurisdiction to the ICJ.⁵³⁰ At present, sixty-six States have declared the compulsory jurisdiction of the International Court.⁵³¹ There was an identical provision in the Statute of the former Permanent Court.⁵³² The ICJ decided that declarations made by the parties in accordance with article 36, paragraph 2, of the Statute require reciprocity and "since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it".⁵³³

The International Court of Justice might have jurisdiction to decide a dispute *ex aequo et bono*.⁵³⁴ The parties may agree to decide the dispute according to a criterion that is not international law, but retaining the essential features of the

⁵³⁰ Brownlie, *supra* note 89 at 686.

⁵³¹ The International Court of Justice, *Jurisdiction: declarations recognizing the jurisdiction of the court as compulsory*, online: The International Court of Justice <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> Accessed on 7 April 2010.

⁵³² Article 36 of the Permanent Court of International Justice states that: The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force. The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. See *Statute of the Permanent Court of International Justice*, 16 December 1920, LoN Treaty Series 170 at article 36.

⁵³³ *Case of Certain Norwegian Loans (France v. Norway)*, [1957] I.C.J. Rep. 9 at 18.

⁵³⁴ *Statute of the International Court of Justice*, *supra* note 238 at article 38, para. 2.

international judicial technique, which does not mean that if the parties agree to seek a decision *ex aequo et bono* the Court will be bound to decide according to it.⁵³⁵

In sum, the jurisdiction of the International Court of Justice is State-centric. It is based on a free declaration by the concerned States to confer jurisdiction to the ICJ on a specific dispute or matter. Although a large number of human rights treaties grant jurisdiction to the ICJ, the Court does not allow access to individuals. They cannot initiate any proceeding before the Court, nor can they participate in the Court's proceedings.⁵³⁶ The ICJ's jurisdiction does not accord with developments in international law, which, as outlined in Chapters one and two, has recognized individuals as the primary addressees of human rights norms and subjects of international law and has acknowledged their international legal personality, which grants them the possibility to initiate or participate in proceedings before international human rights courts. The ICJ, although a general international law tribunal, is also a human rights court because it deals with human rights matters and has judges with international human rights backgrounds.⁵³⁷ The contentious jurisdiction of the ICJ cannot be based on a 19th century vision of international law; it must be adapted to better respond to the challenge of an effective enforcement of international human rights. The Inter-American and European Courts of Human Rights could be a model for changes in the ICJ jurisdiction.

⁵³⁵ Rosenne, *The Law and Practice*, *supra* note 511 at 324 and 326.

⁵³⁶ Individuals have no participation in the ICJ's proceedings. A proceedings before the ICJ starts when a State files an application to the ICJ seeking a declaratory judgment affirming that the other party has breached international law (a declaration which may be extended to future conduct as well as for past ones) and the State might also seek reparation for losses suffered as a consequence of illegal activities or damages caused by the respondent State. The decision of the ICJ is final and without appeal. See Shaw, *supra* note 47 at 1101; and *Statute of the International Court of Justice*, *supra* note 238 at article 60.

⁵³⁷ See International Court of Justice, *Current Members*, online: <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> Accessed on 16 July 2010.

2. The Fragmentation of International Law and the Role of the ICJ

The debate about the access of individuals to the International Court of Justice leads to the question of whether it would be better to create a new global human rights court or to adapt the ICJ to allow direct access or participation of individuals? In order to answer this question, it is necessary to address the problem of the fragmentation of international law and, in particular, the prospect of a possible divergence of the jurisprudence of the ICJ and the other international law tribunals. Accordingly, this section defines the problem of fragmentation, addresses whether fragmentation could be harmful to the development of the law of nations and asks whether international human rights law can be clearly separated from general international law.

The recent development of various rules, principles and institutions of international law has led to a debate about the fragmentation of international law into multiple, specialized areas, such as “international human rights law”, “international environmental law”, “international trade law”, “international refugee law”, “law of the sea” and “international organizations law”. Some suggest that the core of the subject of international law will not be able to hold and predict that it may dissolve into a series of autonomous subjects with different systems, leading to conflicts of rules and jurisprudence. There is a fear that fragmentation might threaten a coherent system of international law empowered to coordinate the external relations of sovereign States.⁵³⁸

The International Law Commission pointed out that some scholars see fragmentation as the erosion of general international law with the emergence of conflicting jurisprudence and the loss of legal security, while others see it as a

⁵³⁸ Martti Koskenniemi & Päivi Leino, “Fragmentation of International Law? Postmodern Anxieties” (2002) 15 *Leiden J. Int'l L.* 553 at 556.

technical problem which flows naturally from the increase of international legal activity and which can be controlled through appropriate reforms and coordination.⁵³⁹

Former ICJ judge Gilbert Guillaume, for example, warned the General Assembly about the danger of fragmentation of international law, which could lead to proliferation of courts and an overlapping of jurisdiction, possibly leading to “forum shopping”, whereby States could seek the Court that would be more amenable to their arguments.⁵⁴⁰

The main function of the law of nations developed in the 19th and beginning of the 20th centuries was to try to administer a system of sovereign States based on consent. After the Second World War, many treaties were concluded to better protect human rights. These led to the establishment of international customs relating to human rights and the creation of international tribunals to apply human rights, humanitarian and criminal norms that were not or could not be satisfactorily implemented by States.⁵⁴¹ The creation of specialized tribunals became necessary because the International Court of Justice, although the main juridical body of the United Nations, was restricted by its Statute to only accepting States as parties in contentious cases. The proliferation of international tribunals raises the possibility of conflicting decisions which could breach the unity of international law. Arguably, such a conflict of jurisprudence occurred between the ICJ and the International

⁵³⁹ *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UNGAOR, 58th Sess., UN Doc. A/CN.4/L.682 (2006) at 12.

⁵⁴⁰ The International Court of Justice, *Address to the United Nations General Assembly by Judge Gilbert Guillaume, President of the International Court of Justice*, 26 October 2000, Press Release 2000/36 at 2, online: The International Court of Justice <http://www.icj-cij.org/presscom/files/9/3069.pdf> Accessed on 16 April 2010.

⁵⁴¹ This was accompanied by the significant development of other areas of international law, including international trade with the establishment of the GATT treaty and of international regional trade and economical blocks as NAFTA, each with their own regulations and systems of conflict resolution. See *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 N° 27 (entered into force 1 January 1948); and *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 N° 2, 32 I.L.M. 289 (entered into force 1 January 1994).

Tribunal for the Former Yugoslavia (ICTY)⁵⁴² when the ICJ considered, in its advisory opinion for the *Legality of the Threat or Use of Nuclear Weapons*, that armed reprisals in an armed conflict should be governed by the proportionality principle,⁵⁴³ while the ICTY, in the case of *Martić*, decided that armed reprisals were prohibited.⁵⁴⁴ The ICTY also appears to have possibly overruled the ICJ's decision in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, that even though the United States financed, organized, trained and equipped a paramilitary group the "contras", it should not be held responsible for the acts committed by the contras in Nicaragua:

All the forms of United States participation... and even the general control by the respondent State over a force with a high degree of dependency on it, would not in

⁵⁴² *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UNSC, U.N. Doc. S/RES/827 (1993).

⁵⁴³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226 at 246. The Court stated that "[c]ertain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defense, be governed *inter alia* by the principle of proportionality" [emphasis in original].

⁵⁴⁴ *The Prosecutor v. Milan Martić*, IT-95-11-R61, Decision of the Trial Chamber (8 March 1996) at para. 17 (International Tribunal for the Former Yugoslavia), online: ICTY <http://www.icty.org/x/cases/martic/tdec/en/960308.pdf> The ICTY stated that "[t]herefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts."

The Court on its final decision about the case maybe tried to adequate its view with the ICJ jurisprudence (although kept the decision that armed reprisals are prohibited when civilians are targeted) when the tribunal decided that "[r]eprisals may be used only as a last resort and only when all other means have proven to be ineffective. This limitation entails that reprisals may be exercised only after a prior and formal warning has been given, which has failed to put an end to the violations committed by the adversary. In addition, reprisals may only be taken after a decision to this effect has been made at the highest political or military level. A further requirement is that the measures taken must be proportionate to the initial violation of the law of armed conflict of the opposite party. According to this condition, the reprisals must cease as soon as they have achieved their purpose of putting an end to the breach which provoked them. Finally, acts of reprisal must respect the 'laws of humanity and dictates of public conscience'. The Trial Chamber interprets this condition to mean that reprisals must be exercised, to the extent possible, in keeping with the principle of the protection of the civilian population in armed conflict and the general prohibition of targeting civilians." See *The Prosecutor v. Milan Martić*, IT-95-11-T, Judgment of the Trial Chamber (12 June 2007) at paras. 446-447 (International Tribunal for the Former Yugoslavia), online: ICTY <http://www.icty.org/x/cases/martic/tjug/en/070612.pdf>

themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁵⁴⁵

In *Tadić* case, the ICTY decided differently, holding that the international law of State responsibility was based on a “realistic concept of accountability” and disregarded legal formalities in order to ensure that States entrusting some tasks to individuals or a group of individuals could answer for their actions.⁵⁴⁶ The ICTY further added that

[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs

⁵⁴⁵ *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of Merits, [1986] I.C.J. Rep. 14 at 64.

⁵⁴⁶ *The Prosecutor v. Duško Tadić (Prijeđor)* IT-94-1-A, Judgment of Appeals Chamber (15 July 1999) at para. 121 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>

regardless of any specific instruction by the controlling State concerning the commission of each of those acts. [Emphasis in original]⁵⁴⁷

In another example of a possible conflict of jurisprudence, the ICJ on an advisory opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pointed out that each party to the Convention is able to appraise the validity of a reservation and it exercises this right individually and from its own standpoint.⁵⁴⁸ By contrast, the European Court of Human Rights held, in the *Loizidou v. Turkey*, that contrary to the ICJ, the ECHR could not accept limitations to its jurisdiction and reservations were permitted by the European Convention only in specific provisions.⁵⁴⁹ One could say that in *Loizidou*, the European Court of Human Rights simply adhered to the rules of general international law regarding treaty interpretation and reservation, and that the ICTY in *Tadić* Case actually agreed with the ICJ, as both sustained that some degree of direction or control was necessary to held a State responsible under international law. In other words, conflict of judgments might be a hypothetical problem.⁵⁵⁰ However, these examples raise several important questions. To what extent can one court diverge from another? Is it really necessary to create many tribunals to deal with subareas of international law or specific treaties? Which tribunal has competence to say that another tribunal has not followed the general rules of international law in reaching a

⁵⁴⁷ *Ibid.* at para. 137. The ICTY nonetheless tried to create less conflict with the ICJ jurisprudence by stating, in para. 138, that “[o]f course, if, as in Nicaragua, the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.”

⁵⁴⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Case*, Advisory Opinion, [1951] I.C.J. Rep. 15 at 26

⁵⁴⁹ *Loizidou v. Turkey*, *supra* note 441 at paras. 72, 76 and 83-85.

⁵⁵⁰ Mario Prost & Paul Kingsley Clark, “Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?” (2006) 5 Chinese Journal of International Law 341 at 345.

decision? Could the International Court of Justice, as the primary judicial organ of the United Nations, ensure that other tribunals follow the general rules of international law? How could courts so different from the ICJ, such as the Inter-American Court of Human Rights and the European Court of Human Rights follow the ICJ's jurisprudence when it does not allow for the participation and access of individuals?⁵⁵¹ Even if one accepts that there is not a conflict of jurisprudence, that there is not a danger of fragmentation and that the creation of different international tribunals is not necessarily harmful to international law, these many questions remain unanswered, in a system that is arguably over-specialized and without any central tribunal to judge or at least to try to hold the various subdivisions of international law together as one whole.

In a report on the fragmentation of international law, the International Law Commission noted that normative conflicts might be solved by applying the principle that a special law (*lex specialis*) derogates a general law (*lex generalis*) and that a newer law (*lex posterior*) derogates an older one (*lex prior*) when both have the same substantive rule.⁵⁵² The Commission concluded that although the Latin maxims (*lex specialis*, *lex posterior* and *lex superior*) could be relevant to resolving problems of conflict, "Public International Law does not contain rules in which a global society's problems are, as it were, already resolved. Developing these is a political task".⁵⁵³ The Commission also did not focus on the proliferation of tribunals and the possibility of *forum shopping* (what they called the institutional aspect of the fragmentation of international law), but focused on its substantive aspect (the emergence of special

⁵⁵¹ Participation (directly or indirectly) of individuals is important for both human rights courts, which have already accepted the individual right to seek for international justice. The ICJ, on the other hand, has not even considered granting *locus* or *jus standi* to individuals.

⁵⁵² International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *supra* note 539 at 30-64 and 115-127.

⁵⁵³ *Ibid.* at 247

laws, treaty-regimes, special branches and clusters of rules).⁵⁵⁴ The Commission, therefore, remained neutral regarding the creation of new tribunals and the possibility of *forum shopping*. It did not provide an answer to the question whether it would be better, from the perspective of minimizing fragmentation, to create a new global human rights court or to reform the ICJ.

The study of the substantive aspect of the fragmentation of international law raises another question of relevance to this dissertation: is international human rights law a self-contained system within the law of nations? In other words, do the responsibility of the human person and the international legal personality of individuals apply only to this area and not to general international law? This question is relevant because while the ICJ is a general court of international law and could have jurisdiction in all matters and ramifications of international human rights law, a global tribunal specifically created to settle disputes on human rights issues might have to delimit and restrict itself to the interpretation and application of a class of universal human rights norms.

The term “self-contained regimes”, according to the International Law Commission, has three possible meanings. First, it may designate a special set of secondary rules under the law of State responsibility that asserts for primacy over general rules concerning consequences of a violation.⁵⁵⁵ Second, it may, more broadly, refer to “systems” or “subsystems” of rules that cover a specific problem differently than general law.⁵⁵⁶ Third, “self-contained regime” could refer not only to some rules, but to “whole fields of functional specialization, of diplomatic and academic expertise” which can modify or even exclude the general rules of

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.* at 68.

⁵⁵⁶ One example such of such system is the regime of judicial cooperation between the International Criminal Court and State parties under the Rome Statute. See *Ibid.* at 68.

international law. Would international human rights law belong to this last category? The International Law Commission only points out that the question whether international human rights designates a special branch of international law within which other interpretative principles apply or whether it is merely an aggregate of treaty and customary rules dealing with human rights “may perhaps seem altogether too abstract to be of much relevance”.⁵⁵⁷

Ian Brownlie criticizes the view that international human rights law is a self-contained regime:

Many lawyers in academic life refer to an entity described as ‘International Human Rights Law’ which is assumed to be a separate body of norms. While this is a convenient category of reference, it is also a source of confusion. Human Rights problems occur in specific legal contexts. The issues may arise in domestic law, or within the framework of a standard-setting convention, or within general international law. But there must be reference to the specific and relevant applicable law. There is thus the law of a particular State, *or* the principles of the European Convention on Human Rights, *or* the relevant principles of general international law. In the real world of practice and procedure, there is no such entity as “International Human Rights Law” and, when this concept is imposed on students, it can only be a source of confusion. [Emphasis in original]⁵⁵⁸

The development of international law in the 20th century is deeply connected to human rights. As previously explained, the creation of the United Nations and many international tribunals and the conclusion of many international treaties occurred after and largely because of the Second World War.⁵⁵⁹ It is difficult (if not

⁵⁵⁷ *Ibid.* at 70.

⁵⁵⁸ Brownlie, *supra* note 89 at 529-530.

⁵⁵⁹ See chapter one above.

impossible) to separate human rights from general norms of international law.⁵⁶⁰ Even international trade and European union law are infused with human rights norms and principles.⁵⁶¹ Although didactical, it is difficult to clearly separate what is, or what could have effects on the sphere of human rights. The word international human rights law can be used to refer to international rules that protect individuals, but in practice, the division is not clear. In the light of these definitional difficulties, the option of reforming the ICJ, which deals with all aspects of international law, including human rights, may be preferable to the creation of a global human rights court, which could raise the problem of the delimitation of human rights norms. The judges of a reformed International Court of Justice could request the participation of the concerned individuals in any dispute when the case affects human rights norms regardless if the nature of the dispute is about a human rights treaty or customary norm.

The question whether international human rights law is a self-contained regime is also important when it comes to procedural law because any rule can affect individual rights by restricting individuals' the access to justice. But can a procedural rule be categorized as a human rights rule and not a general rule of international law? Arguably, the access of individuals to international tribunals and their participation in those tribunals' proceedings are procedural rules, not substantive.⁵⁶² In my view, they are not located in a self-contained system of international human rights and such rules regarding the participation of individuals in a court's proceedings and their access to tribunals should be addressed as a procedural aspect of international law. As bearers

⁵⁶⁰ Human rights influence new theories that explain the fundament of international law (the universal juridical conscience); *jus cogens*; *erga omnes* obligations, the goal of the United Nations; and the work of international tribunals which is deeply influenced by human rights norms and principles (the tribunals, *e.g.*, must respect the due process of law).

⁵⁶¹ For the study about the relationship between the European Union and the Mercosul with human rights rules See Ramos, *supra* note 6.

⁵⁶² They have, as explained, human rights elements because are norms that enable the access to justice as, *e.g.*, the due process of law.

of rights and duties under international law, individuals should be able to participate effectively in a court's proceedings and even have direct access to it, regardless of whether the court is or not classified as a human right court. The ICJ, although not only a human rights court, is a general international law court whose jurisdiction includes human rights. It can thus benefit from the procedural evolution regarding the access of individuals to the European and Inter-American Courts of Human Rights.

As Buergenthal notes, the International Court of Justice and the other international tribunals are all part of the same system, and it is incumbent on them to accept and walk towards the methodological and doctrinal unity of the international legal system.⁵⁶³ At present time, in his view, there are not "too many" regional human rights courts:

There certainly is a need for additional human rights courts in other regions of the world. In short, I do not see the problem as one of mere numbers, although I believe that there may come a time when the creation of too many specialized courts will gradually diminish the relevance of the ICJ and, with it, its capacity to contribute to the development of universal international law. This problem could of course be avoided if a way were found to relate such courts to the ICJ in a hierarchical relationship that would give the ICJ the final word on the subject, but this is not likely to happen soon. In the meantime, though, I do not believe that we have too many international courts and that they pose a serious threat to the international system.⁵⁶⁴

The ICJ's increase of caseload, according to Buergenthal, suggests that States are more willing to resort to the International Court of Justice instead of creating

⁵⁶³ Thomas Buergenthal, "Proliferation of International Courts and Tribunals: Is it Good or Bad?" (2001) *Leiden J. Int'l L.* 267 at 274. Buergenthal further added that "each tribunal has an obligation to respect the general and special competence of the other judicial and quasi-judicial institutions which comprise the system, to recognize that it has an obligation, when rendering judgments, to take account of the case-law of other judicial institutions that have pronounced on the same subject and, most importantly, to promote and be open to jurisprudential interaction or cross-fertilization".

⁵⁶⁴ *Ibid.* at 275.

specialized tribunals. To take full advantage of this trend, the ICJ may have to reform or restructure its procedure and judicial *modus operandi*.⁵⁶⁵ Malcolm Shaw, commenting this fragmentation, opines that the essential normative and structural nature of international law remains,⁵⁶⁶ but notes that it is unclear how the proliferation of tribunals may impinge with the work of the International Court of Justice in the long run.⁵⁶⁷ Gilbert Guillaume suggests that, before creating a new court, the legislator should ask if its functions could be fulfilled by an existing court.⁵⁶⁸ Sir Robert Jennings laments the fact that those parts of international law that directly concern individuals (human rights and environmental law) have been directed to other bodies and not to the International Court of Justice, cutting that Court off from a growing and important part of international law.⁵⁶⁹ In his view, just as there is normally only one Supreme Court in any legally ordered community, there is only one principal judicial organ of the United Nations: the International Court of Justice.⁵⁷⁰

In my view, the International Court of Justice, as the primary judicial organ of the United Nations, should not be isolated from new developments in international law. The possible fragmentation of international law, the resulting conflict of jurisprudence, and the undesirability of cutting the ICJ off from developments in international human rights weigh in favor of a reform of the International Court of Justice rather than the creation of a global human rights court. There might be no need for a global human rights court when one truly universal already exists and could deal not only with international human rights law, but also with international humanitarian

⁵⁶⁵ *Ibid.* at 275.

⁵⁶⁶ Malcolm Shaw, *supra* note 47 at 67.

⁵⁶⁷ *Ibid.* at 1115.

⁵⁶⁸ The International Court of Justice, *Address to the United Nations General Assembly by Judge Gilbert Guillaume, President of the International Court of Justice*, *supra* note 540 at 2.

⁵⁶⁹ Sir R. Jennings, "The Role of the International Court of Justice" (1997) 68 *Brit. Y.B. Int'l L.* 58 at 59-60, cited in Martti Koskenniemi & Päivi Leino, *supra* note 538 at 555-556.

⁵⁷⁰ Robert Jennings, "Speech by Sir Robert Jennings, President of the International Court of Justice, to the UN General Assembly" (1994) 88 *A.J.I.L.* 421 at 424.

law, international refugee law and the human rights aspects of other branches of international law. The ICJ already deals with human rights cases; many of its decisions directly affect the rights of individuals; and a number of human rights treaties have clauses that establish the ICJ as the tribunal to settle disputes. As I will argue later in this Chapter, principles and rules such as the *locus standi* and the *jus standi* of individuals that were developed by the human rights courts can and should be implemented in the International Court of Justice.

Martin Scheinin's and Manfred Nowak's proposal of a global human rights court, stands, notwithstanding possible problems of fragmentation, as an alternative to a reformed ICJ.⁵⁷¹ Manfred Nowak affirms that the most effective method to implement the right to an effective remedy at international law is to allow direct access of "right holders" to an independent international human rights court with the power to render binding judgments and to grant adequate reparation to victims.⁵⁷² He argues that States would be free to accept the jurisdiction of the world human rights court and could, upon ratification of this tribunal's Statute, indicate the treaties which the tribunal would be able to apply in cases brought against them.⁵⁷³ The human rights court could also accept non-State actors (inter-governmental organizations and transnational corporations) as parties to its Statute. The proposed court would apparently work very much like the European and the American Courts of Human Rights, although it is still unclear whether individuals would have direct or indirect

⁵⁷¹ Is a research project part of the Swiss Initiative to Commemorate the 60th Anniversary of the UDHR - Protecting Dignity: An Agenda for Human Rights, online: <http://www.udhr60.ch/index.html> Accessed on 29 June 2010.

⁵⁷² Nowak, *supra* note 126 at 254.

⁵⁷³ *Ibid.* at 255.

access to the Court. The Court's Statute would not contain new substantive human rights norms.⁵⁷⁴

The global human rights court project is a welcome and thoughtful proposal to enhance the effective enforcement of international human rights norms. However, creating a global human rights court does not obviate the need to revise and modify the rules and function of the International Court of Justice with respect to human rights issues. Indeed, Manfred Nowak and Martin Scheinin recognize that the International Court of Justice already deals with human rights matters and that several treaties confer jurisdiction on the ICJ in case of disputes concerning the interpretation or application of human rights conventions.⁵⁷⁵ The International Court of Justice can still be adapted to new developments of the law of nations and the requirements of the international community, and in particular to ensure the participation of individuals, as the primary addressees of human rights norms, in human rights cases before the ICJ. Even though the creation of a global human rights court would not preclude procedural changes in the rules of the International Court of Justice, reforming the ICJ is the best option to protect human rights at a global level, as it would not raise concerns of fragmentation of international law, while a new global human rights court might contribute to conflicting jurisprudence and "forum shopping". Moreover, the ratification of a global human rights court treaty by a considerable number of States and the implementation of the Court would likely take a significant period of time. The International Court of Justice is already in place. It is a World Court and deals with human rights issues. Reforming this Court would be a better choice than creating a global human rights court. As a general court of international law, the ICJ may deal

⁵⁷⁴ Martin Scheinin, "Towards a World Human Rights Court", Interim Research Paper submitted within the framework of the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights, online: http://www.udhr60.ch/report/hrCourt_scheinin.pdf Accessed on 29 June 2010 at 6-8.

⁵⁷⁵ *Ibid.*

with the human rights aspects of any dispute without the need to create a “self-contained” human rights court system.

3. Individuals and the International Court of Justice

A proper understanding of the history of the International Court of Justice is essential to assess my proposed changes to the access of individuals to the ICJ. It is noteworthy that scholars discussed the possibility of granting access to individuals to the Permanent Court of International Justice during the elaboration of this Court’s Statute. The first part of this section, therefore, reviews the deliberations that preceded the elaboration of the Permanent Court of International Justice’s narrow State-centric jurisdiction and which establish that the access of individuals to global tribunals has long been discussed as an option. I then focus on how the International Court of Justice would grant *locus* or *jus standi* to individuals, taking into consideration the systems of access developed by the Inter-American and European Courts of Human Rights.

3.1 Access of Individuals to the PCIJ and the ICJ

The first permanent court with mandatory competence was the Central American Court of Justice which was created in 1908 and functioned until 1918.⁵⁷⁶ It was first established in Cartago, but was relocated to San Jose, Costa Rica.⁵⁷⁷ Created at the beginning of the 20th century when States were seen as the only subjects of

⁵⁷⁶ Corte Centroamericana de Justicia, *Historia*, online: <http://portal.ccej.org.ni/ccj2/Historia/tabid/57/Default.aspx> Accessed on 29 April 2010.

⁵⁷⁷ *Ibid.*

international law, the Court nevertheless granted direct access to individuals.⁵⁷⁸ In its years of existence, of the ten cases that came before it, five were brought by individuals.⁵⁷⁹

In 1920, the League of Nations entrusted an Advisory Committee of Jurists with the preparation of a scheme to establish a Permanent Court of International Justice (PCIJ). Members of the League of Nations sent their tentative drafts of the Statute of the PCIJ.⁵⁸⁰ Significantly, the Committee of Jurists discussed the question of granting direct access to individuals in contentious cases before the Permanent Court. Albert Geouffre de Lapradelle, the French member of the Committee, argued that the Court should deal essentially with disputes between States, but that individuals could have access to the Court in cases of denial of justice.⁵⁸¹ B.C.J. Loder, representing the Netherlands, sustained that he saw no reason “for limiting the competence of the Court by stipulating that private individuals must be represented by their Governments in order to have access to the Court”.⁵⁸² In his view, the sovereignty of States had been used to prevent private individuals from taking actions against them – a state of affairs that should be rectified with the creation of the

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Manley O. Hudson, “The Central American Court of International Justice” (1932) *Am. J. Int’l L.* 759 at 768. The Court was recreated by the Protocol of Tegucigalpa (for the Central American System established by Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) in order to decide on interpretation and application of this protocol and its instrument. See XI Cumbre de Presidentes Centroamericanos, *Protocolo de Tegucigalpa a la Carta de la Organizacion de Estados Centroamericanos* (ODECA), online: <http://portal.ccej.org.ni/Ccj2/LinkClick.aspx?fileticket=2TS9swC2jrE%3d&tabid=102&mid=580> Accessed on 9 August 2010.

⁵⁸⁰ Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (1920) at preface, online: http://www.icj-cij.org/pcij/serie_D/D_documents_to_comm_existing_plans.pdf [Advisory Committee of Jurists, *Documents*] Accessed on 9 August 2010.

⁵⁸¹ Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, 16 June to 24 July 1920 at 205-206, online: http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf [Advisory Committee of Jurists, *Procès-Verbaux*]. Accessed on 8 August 2010.

⁵⁸² *Ibid.* at 206.

Permanent Court of International Justice.⁵⁸³ Elihu Root, representing the United States, doubted that a claim from individuals would have enough weight before an international court.⁵⁸⁴ Four other members (Lord Phillimore, Ricci-Busatti, Raul Fernandes and Baron Descamps) argued that individuals were not subjects of international law.⁵⁸⁵

Committees appointed by member States of the League of Nations also dealt with the question whether individuals should have access to this new tribunal. The draft from the government of Netherlands submitted that the court should be opened to suits in which one of the parties is a private individual and detailed the procedure that would be adopted in such suits.⁵⁸⁶ Germany proposed that besides its jurisdiction over disputes between States, the Permanent Court of International Justice should be entitled to decide on complaints of private persons against foreign States and heads of States which State courts have dismissed and could also hear disputes between subjects of different League of Nations States about the interpretation of treaties.⁵⁸⁷ France (the Paris Committee) proposed that the international court could decide on all disputes affecting a Nation, including disputes between Nations, between a Nation and a State, or between a private individual and a Nation, with the exception of private law between a State and its citizens.⁵⁸⁸ The proposal from the League to Enforce Peace was to create a “Court of Claims” out of the Permanent Court of International Justice which would be able to analyze suits of private individuals.⁵⁸⁹ In a report submitted for the Special Commission of the Interparliamentary Union, Henri

⁵⁸³ *Ibid.*

⁵⁸⁴ *Ibid.* at 208.

⁵⁸⁵ *Ibid.* 205-221.

⁵⁸⁶ Advisory Committee of Jurists, *Documents, supra* note 580 at 29. The draft of Netherlands was the “Projet de règlement de la Cour permanente de justice internationale, visé à l’article 14 du Pacte de la société des Nations”.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.* The project was from the Paris Committee of “La Ligue internationale de la Paix et de la Liberté”.

⁵⁸⁹ *Ibid.*

La Fontaine sustained that the International Court of Justice should deal with: conflicts between private persons regarding intellectual rights (patents, trademarks and designs and works of art), commercial law and maritime law; conflicts between private persons and foreign States; conflicts relating to administrative matters, conflicts regarding the movement of persons; and other conflicts that may be brought before the Court by virtue of a general stipulation or agreement.⁵⁹⁰

The Committee of Jurists decided that only States would have access to the Permanent Court of International Justice.⁵⁹¹ The final version, therefore, stipulated that “[o]nly States or Members of the League of Nations can be parties in cases before the Court”.⁵⁹² Marek St. Korowicz complained about this State-centric system of the Permanent Court of International Justice and affirmed that individuals are indeed subjects of international law and could have access to this Court. In his view, one could not deny the international legal personality of judges of the PCIJ (and now the ICJ) because their power and official situation were governed by international law (without interference of municipal law), an international organization elected them, paid their salaries and endowed them with immunities and privileges under international law. Moreover, there was no superior authority to them but the law of nations (their personal status did not fall under municipal law).⁵⁹³ According to Korowicz, this example of the status of international law judges, which does not only apply to former judges of the PCIJ, shows that individuals are subjects of international law.

⁵⁹⁰ *Ibid.* at 335-337.

⁵⁹¹ *Ibid.* at 331.

⁵⁹² *Statute of the Permanent Court of International Justice*, *supra* note 532 at article 34.

⁵⁹³ Korowicz, *supra* note 184 at 352.

In June 1945, at the United Nations Conference on International Organization (the San Francisco Conference), the representatives of the 50 participating States⁵⁹⁴ did not modify the statute of the Permanent Court of International Justice in order to grant access to individuals.⁵⁹⁵ The International Court of Justice, with its Statute annexed to the United Nations Charter, retained an identical article 34 providing that “[o]nly states may be parties in cases before the Court”.⁵⁹⁶ The rules concerning the jurisdiction of the ICJ are also identical to these for the PCIJ (the same articles with basically the same words) with the exception of the provisions that were created to establish continuity between the International Court of Justice and the Permanent Court of International Justice.⁵⁹⁷

Since the ICJ’s Statute did not grant individuals access to the ICJ and did not allow their participation in the tribunal’s proceedings,⁵⁹⁸ could the International Court of Justice now grant access (*locus standi* or *jus standi*) to individuals? Rosenne argues that even in cases concerning individuals, their State of nationality might represent them and take their claim to the ICJ, but they would have no *locus standi* in the Court itself.⁵⁹⁹ He claims that individuals’ lack of access to the ICJ is a “matter of deliberate choice”.⁶⁰⁰ Individuals are not only denied access to the ICJ, but cannot participate in the Court’s proceedings by naming legal representatives, receiving copies of pleadings, appearing before the Court, being heard in a case or cross

⁵⁹⁴ United Nations, *About the United Nations: History*, online: United Nations website <http://www.un.org/aboutun/history.htm> Accessed on 30 April 2010.

⁵⁹⁵ See International Court of Justice, *The Court: History*, online: <http://www.icj-cij.org/court/index.php?p1=1&p2=1#International> Accessed on 22 July 2010.

⁵⁹⁶ *Statute of the International Court of Justice*, *supra* note 238 at article 34 para. 1.

⁵⁹⁷ *Ibid.* at articles 34-37; *Statute of the Permanent Court of International Justice*, *supra* note 532 at articles 34-37.

⁵⁹⁸ For an overview of the San Francisco Conference: See Rosenne, *The Law and Practice*, *supra* note 511 at 31-36.

⁵⁹⁹ Rosenne, *The World Court*, *supra* note 489 at 83.

⁶⁰⁰ *Ibid.*

examining witnesses.⁶⁰¹ That said, Rosenne suggested that the direct representation of individuals before the ICJ might be beneficial, as it “would have the effect, not only of stimulating public interest in the work of the Court, but also, and this may be more important, of enhancing its prestige and public confidence in the reality of international justice”.⁶⁰²

In my view, the decision not to grant access to individuals to the International Court of Justice by States representatives was a political choice. As Rosalyn Higgins, former judge president of the International Court of Justice, observed there is nothing “in the nature” of international law that indicates that individuals are its objects. While it is within sovereign States’ power “for the moment to block the access of the individual to certain international tribunals and to continue to assert the old rule of nationality claims”, the notion of international law “is not predicated on this assumption”.⁶⁰³ Higgins suggests that the Statute of the International Court of Justice could be revised to grant individuals access to the whole Court or to a special Chamber of that tribunal.⁶⁰⁴ The former ICJ judge noted the likely need for a filtering system such as the Commission in the European system of human rights protection.⁶⁰⁵

There has been considerable academic support for direct access of individuals to the International Court of Justice. Francisco Orrego, for example, supports direct access of individuals in contentious cases (with the creation of a system to select complaints in order to avoid misconceived and frivolous claims) and for advisory

⁶⁰¹ See International Court of Justice, *Rules of Court* (adopted on 14 April 1978 and entered into force on 1 July 1978), online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0> Accessed on 3 May 2010; and Rosenne, *The Law and Practice*, *supra* note 511 at 291.

⁶⁰² Rosenne, *The Law and Practice*, *supra* note 511 at 291.

⁶⁰³ Rosalyn Higgins, “Conceptual Thinking about the Individual in International Law” (1978) 4 *British Journal of International Studies* 1 at 4.

⁶⁰⁴ *Ibid.* at 7.

⁶⁰⁵ *Ibid.* at 8. When Higgins wrote this sentence the European Commission was still in function.

opinions.⁶⁰⁶ In 1955, Sir Hersch Lauterpacht, a former judge of the International Court of Justice, prepared a draft of a new Statute for the ICJ. Though this draft was approved by the Court in June 1955 a final report was never submitted.⁶⁰⁷ Sir Hersch Lauterpacht commented that apart from article 34, there was no provision of the Statute which expressly prohibits private persons from being parties before the Court.⁶⁰⁸ Acknowledging the theories that deny the international legal personality of individuals and the view that to accept individuals as parties would change the purpose of the Court, Lauterpacht nevertheless concluded that such a change to the Court's Statute would be in accordance with the fundamental principles of international law.⁶⁰⁹ He gave the following recommendation in his report:

[R]egardless of doctrinal controversies and existing limitations of the Statute, to examine the question of the possible extension of the existing Article 34 with the view to making it possible for private persons, natural or corporate, to appear as parties before the Court in cases in which the other party, being State or an organization of States, initiates or consents to the proceedings and in which the case involves the determination of issues which the Court is competent to decide by virtue of the existing (or modified) paragraph 2 of Article 36 enumerating the categories of disputes suitable for determination by the Court.⁶¹⁰

As Lauterpacht observes, it is thus relatively straight forward to draft an amendment to the Statute of the International Court of Justice granting direct access to individuals as only one article stipulates that only States can be parties. But: is there

⁶⁰⁶ Francisco Orrego Vicuña, "Individuals and Non-State Entities before International Courts and Tribunals" (2001) 5 Max Planck Yearbook of United Nations Law 53 at 57. He suggests that it may not be viable in the near future to grant individuals and non-governmental organizations the right to request advisory opinions, absent strict requirements, because of the risk that international law issues will be heavily politicized.

⁶⁰⁷ Hersch Lauterpacht, "The Revision of the Statute of the International Court of Justice" (2002) Law & Prac. Int'l Courts & Trib. 1 55 at 55-56.

⁶⁰⁸ *Ibid.* at 108.

⁶⁰⁹ *Ibid.* 108-110.

⁶¹⁰ *Ibid.* at 111.

a need for the ICJ to change? If so, could individuals participate in proceedings before the ICJ without an amendment to the Court's Statute?

Individuals, as previously explained,⁶¹¹ have rights and duties under international law and are arguably subjects and not objects of the law of nations. This is particularly important where human rights are engaged because those norms are aimed at and directly affect individuals. The International Court of Justice has dealt and still deals with numerous cases that directly affect individuals. Cases presently pending before the Court that directly concern individuals include: *Ahmadou Sadio Diallo* (Guinea v. Congo);⁶¹² the case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia);⁶¹³ *Case Concerning Certain Criminal Proceedings in France* (Republic of the Congo v. France);⁶¹⁴ *Aerial Herbicide Spraying* (Ecuador v. Colombia);⁶¹⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*

⁶¹¹ See chapter 2 above.

⁶¹² International Court of Justice, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, [2007], online: <http://www.icj-cij.org/docket/files/103/13856.pdf> Accessed on 6 May 2010. A Guinean citizen, Mr. Diallo, was arrested, detained and expelled of Zaire on the ground that his presence and conduct breached public order in Zaire. One of the Guinea's arguments is that Zaire did not respect Mr. Diallo's personal and individual rights. See *Ibid.* at 5-7.

⁶¹³ International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, [2008], online: <http://www.icj-cij.org/docket/files/118/14891.pdf> Accessed on 6 May 2010. In this case Croatia filed an application against the Government of Yugoslavia for breaching the Convention on the Prevention and Punishment of the Crime of Genocide and asked for the Court to recognize the latter responsible for committing genocide on the territory of Croatia (including against members of the Croat national or ethnic group on that territory). See *ibid.* at 7.

⁶¹⁴ International Court of Justice, *Case Concerning Certain Criminal Proceedings in France* (Republic of the Congo v. France), Preliminary Objections, [2003], online: <http://www.icj-cij.org/docket/files/129/8206.pdf> Accessed on 6 May 2010. Congo filed in application against France affirming that the latter had breached international law by unilaterally attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try Congo's Minister of the Interior for human rights and humanitarian law violations. See *ibid.* at 1-3.

⁶¹⁵ International Court of Justice, *Aerial Herbicide Spraying* (Ecuador v. Colombia), Application, [2008], online: <http://www.icj-cij.org/docket/files/138/14474.pdf> Accessed on 6 May 2010. Ecuador filed an application to the ICJ affirming that Colombia's aerial spraying of toxic herbicides at locations near, at and across its border with Ecuador "has caused serious damage to people, to crops, to animals, and to the natural environment on the Ecuadorian side of the frontier, and poses a grave risk of further damage over time". See *Ibid.* at 4.

(Georgia v. Russian Federation);⁶¹⁶ *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal);⁶¹⁷ *Case Concerning Armed Activities in the Territory of the Congo* (Democratic Republic of Congo v. Uganda);⁶¹⁸ and the *Case Concerning Jurisdictional Immunities* (Germany v. Italy).⁶¹⁹ The ICJ has also dealt with numerous contentious cases where the participation of individuals or their legal representatives, allowing them to express points of view different from those of their States or to file applications themselves, could have enriched the Court's proceedings and assisted its search for just decisions. Examples of such cases include: the *Nottebohm Case*;⁶²⁰ *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*;⁶²¹ *Trial of Pakistani Prisoners of War*;⁶²²

⁶¹⁶ International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Application, [2008], online: <http://www.icj-cij.org/docket/files/140/14657.pdf> Accessed on 6 May 2010. Georgia filed an application against Russia stating that the latter had breached the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) for widespread and systematic discrimination and Georgia wanted to ensure that the individual rights under CERD of all persons on the territory of Georgia are fully respected and protected. See *Ibid.* at 4-12.

⁶¹⁷ International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Application, [2009], online: <http://www.icj-cij.org/docket/files/144/15054.pdf> Accessed on 7 May 2010. A Belgian national of Chadian origin and Chadian nationals filed criminal complaints against the former President of Chad, Mr. Hissène Habré, for crimes under international humanitarian law. Belgium, based on universal jurisdiction, filed an Application requesting that Senegal (State were Mr. Habré is) to extradite him to Belgium or prosecute Mr. H. Habré directly for those acts. See *Ibid.* at 1-4.

⁶¹⁸ International Court of Justice, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, [2005], online: <http://www.icj-cij.org/docket/files/116/10455.pdf> Accessed on 10 May 2010. Democratic Republic of the Congo filed an application instituting proceedings against the Republic of Uganda sustaining that the latter perpetrated acts of armed aggression on the territory of the Democratic Republic of the Congo breaching International human rights and humanitarian law rules. See *Ibid.* at 1-13.

⁶¹⁹ International Court of Justice, *Case Concerning Jurisdictional Immunities (Germany v. Italy)*, Application, [2008], online: <http://www.icj-cij.org/docket/files/143/14923.pdf> Accessed on 7 May 2010. Italy declared that it had jurisdiction with regard to a claim brought by an individual who during the Second World War was deported to Germany to perform forced labor in the armaments industry and, as a consequence, numerous other proceedings were instituted against Germany before Italian courts by peoples that had also suffered injuries because of the armed conflict. Germany filed an Application against Italy affirming that the latter lacks jurisdiction in respect of acts *jure imperii* performed by authorities of the Third Reich. See *ibid.* at 2.

⁶²⁰ *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 4. A case about double nationality.

⁶²¹ *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)* [1958] I.C.J. Rep. 55. "The Application alleges that the Swedish authorities acted contrary to the provisions of the Convention of 1902 governing the guardianship of infants, which provisions are based on the principle that the national law of the infant is applicable and the national authorities are competent." See *ibid.* at 57.

Case Concerning United States Diplomatic and Consular Staff in Tehran;⁶²³ *Case Concerning East Timor*;⁶²⁴ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*;⁶²⁵ *Case Concerning the Vienna Convention on Consular Relations*;⁶²⁶ *LaGrand Case*;⁶²⁷ and the *Case Concerning Avena and Other Mexican Nationals*.⁶²⁸

The International Court of Justice, therefore, hears cases including violations of human rights, but the exclusive inter-State element of the Court forbids the individuals involved from expressing their views or participate in any way in its proceedings. The ICJ can only reflect on the facts brought to it by the State that is sponsoring the claims of their citizens. But what if the individual whose rights are

⁶²² *Trial of Pakistani Prisoners of War (Pakistan v. India)*, Order of 15 December 1973, [1973] I.C.J. Rep. 347. The case was removed from the ICJ's list because of the discontinuance by Pakistan of the proceedings instituted by an Application filed on 11 May 1973. See *ibid.* at 348.

⁶²³ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Tehran)*, [1980] I.C.J. Rep. 3. In this case, United States filed an application instituting proceedings against Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals. See *ibid.* at 4.

⁶²⁴ *Case Concerning East Timor (Portugal v. Australia)* [1995] I.C.J. Rep. 90. Portugal filed an application against Australia affirming that the latter failed to observe the obligation to respect the duties and powers of Portugal as the administrator Power of East Timor and the right of the people of East Timor to self-determination and the related rights. See *ibid.* at 92.

⁶²⁵ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina and Yugoslavia)*, Preliminary Objections, [1996] I.C.J. Rep. 596. Bosnia and Herzegovina filed an application sustaining that Yugoslavia had breached the Convention on the Prevention and Punishment of the Crime of Genocide by violating humanitarian and human rights law. See *ibid.* at 597-599.

⁶²⁶ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Order of 18 November 1998, [1998] I.C.J. Rep. 426. The case was removed from the list because of the discontinuance by Paraguay of the proceedings. See *ibid.* at 427. Paraguay though had filed the application affirming that a Paraguayan citizen was detained by the authorities of the Commonwealth of Virginia who did not advise Mr. Breard of his right to consular assistance, or notified the Paraguayan consular officers of his detention (as required by the Vienna Convention) and such authorities tried and sentenced Mr. Breard to death. See International Court of Justice, *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Application, [1998] at para. 3, online: <http://www.icj-cij.org/docket/files/99/7183.pdf> Accessed on 7 May 2010.

⁶²⁷ *LaGrand Case (Germany v. United States of America)*, [2001] I.C.J. Rep. 466. Germany sustained that the United States by arresting, detaining, trying, convicting and executing the German citizens Karl and Walter LaGrand violated their rights under Article 36 subparagraph 1 (h) of the Vienna Convention on Consular Relations and by depriving Germany of the possibility of rendering consular assistance. See *Ibid.* at 470-472.

⁶²⁸ *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] I.C.J. Rep. 12. Mexico filed an application sustaining that the United States had violated international law obligations by arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row without granting them their right of consular protection as provided by Articles 5 and 36, respectively of the Vienna Convention on Consular Relations. See *ibid.* at 19.

violated is Stateless? What if the State is not interested in granting its citizen diplomatic protection? There is no international global tribunal where such individuals may seek justice because the ICJ does not accept individual petitions. Considering that not every American State has accepted the contentious jurisdiction of the Inter-American Court on Human Rights,⁶²⁹ the African Court on Human and People's Rights⁶³⁰ is struggling to be implemented,⁶³¹ and there is no regional human rights court in Asia, many individuals might not have access to any international human rights court. To fill this gap in human rights protection, the International Court of Justice could change in two different ways: it could grant individual participation in its proceedings (*locus standi*) as did the Inter-American Court of Human Rights;⁶³² or it could grant them the status of parties, that is, direct access to the Court (*jus standi*) like the European Court of Human Rights.⁶³³

Four arguments support reforms to the structure or the procedural rules of the ICJ. First, some of the international law scholars designated to draft the Statute of the PCIJ, whose Statute was a model for that of the ICJ, considered granting individuals access to that Court. Second, the ICJ deals and has dealt with several human rights issues and could benefit from the participation or access of individuals. Third, an ICJ reformed to grant *locus* or *jus standi* to individuals would fill existing gaps in regional protection mechanisms by providing a strong human rights protection at a global level. Fourth, the ICJ should change to adapt to new developments of international law which have already granted the international legal personality to individuals. The

⁶²⁹ See Chapter III above.

⁶³⁰ African Commission on Human and Peoples' Rights, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, online: http://www.achpr.org/english/info/court_en.html at article 5 para. 3. Accessed on 11 May 2010.

⁶³¹ The Court is new. The draft of its procedural rules was adopted in 2008. The Court rendered one judgment in 2008. See African Court on Human and Peoples' Rights, *The Court*, online: <http://www.african-court.org/en/court/history/>; African Court on Human and Peoples' Rights, *Pending Cases*, online: <http://www.african-court.org/en/cases/pending-cases/> Accessed on 23 July 2010.

⁶³² See Chapter III above.

⁶³³ *Ibid.*

International Court of Justice is very limited and not able to provide an answer to the needs of the international community. A challenge of humanity is to reform the ICJ to allow the Court to better solve the litigations of modern international law.⁶³⁴

There is evidence of support within the International Court of Justice for recognition of the changing role of individuals in international law and in particular, for changes to the role of individuals in its proceedings. Previous judges of the Court, like Hersch Lauterpacht, have recognized the international legal personality of individuals and the need to reform the Statute of the ICJ. Cançado Trindade, the newest judge on the Court, also advocates these changes.⁶³⁵ In *Questions relating to the Obligation to Prosecute or Extradite*, a case ongoing before the Court, Belgium argued that provisional measures were necessary to require Senegal to take all the steps within its power to keep Mr. H. Habré, accused of crimes of torture and crimes against humanity, under the control and surveillance of its judicial authorities.⁶³⁶ The ICJ denied Belgium's request for provisional measures.⁶³⁷ In a dissenting opinion, Cançado Trindade held that the Court should have granted the provisional measures because, as the case requires, individuals should be at the center of the discussion because individuals, in his view, are at the core of provisional measures granted by the ICJ when facing a human rights case.⁶³⁸ Cançado Trindade observed that

⁶³⁴ Sidney Guerra, "ONU e Justiça Global em Matéria de Direitos Humanos" in Aramita Mercadante & José Carlos de Magalhães, eds., *Reflexões sobre os 60 Anos da ONU* (Ijuí: Unijuí, 2005) 350 at 358-359.

⁶³⁵ See chapters II and III above.

⁶³⁶ International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Request for the Indication of Provisional Measures, [2009], online: <http://www.icj-cij.org/docket/files/144/15149.pdf> at 3 and 4. Accessed on 10 May 2010.

⁶³⁷ *Ibid.* at 16. The Court stated that "does not exist, in the circumstances of the present case, any urgency to justify the indication of provisional measures by the Court".

⁶³⁸ International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Dissenting Opinion of Judge Cançado Trindade, [2009], online: <http://www.icj-cij.org/docket/files/144/15154.pdf> at paras. 48-64. Cançado Trindade, commenting the idea of urgency, sustained that "In ascertaining urgency, it may further reasonably be asked: urgent to whom? To the 'administrators' or 'operators' of justice, anywhere? Most likely not, as, in all latitudes, they are used to the time of human justice, which is not the time of human beings. To the victims? Certainly yes, as their time (*vita brevis*) is not the time of human justice. If abstraction is made of the time of human

[T]he ICJ has gradually overcome the strictly inter-State outlook in the acknowledgment of the rights to be preserved by means of its orders of provisional measures of protection. Nostalgics of the past, clung to their own dogmatism, can hardly deny that, nowadays, States litigating before this Court, despite its inter-State contentious procedure, have conceded that they have no longer the monopoly of the rights to be preserved, and, much to their credit, they recognize so, in pleading before this Court on behalf also of individuals, their nationals, or even in a larger framework, its inhabitants.⁶³⁹

In other words, the ICJ, in provisional measures, should transcend the artificial inter-State dimension of the past, and seek to preserve rights whose ultimate subjects (*titulaires*) are human beings.⁶⁴⁰ The ICJ, in its latest advisory opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, concluded that the declaration of independence of Kosovo did not violate general international law.⁶⁴¹ Cançado Trindade, in his separate opinion, recollects the basic ideas of the “founding fathers” of international law by affirming the importance of the human person in *jus gentium* (*droit de gens*). He asserted that:

[I]n the conception of the “founding fathers” of the *jus gentium* inspired by the principle of humanity *lato sensu* (which seems somewhat forgotten in our days), the legal order binds everyone (the ones ruled as well as the rulers); the *droit des gens* regulates an international community constituted by human beings socially organized in States and co-extensive with humankind (F. Vitoria); thus conceived, it is solely Law which regulates the relations among members of the universal *societas gentium* (A. Gentili). This latter (*totus orbis*) prevails over the individual will of each State (F. Vitoria). There is thus a necessary law of nations, and

beings, and of the human drama underlying a situation such as that of the present case, justice is bound to fail”. See *ibid* at para. 53 [emphasis in original].

⁶³⁹ *Ibid.* at para. 21.

⁶⁴⁰ *Ibid.* at para. 25.

⁶⁴¹ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] General List No. 141, online: <http://www.icj-cij.org/docket/files/141/15987.pdf> at para. 122. Accessed on 23 July 2010.

the *droit des gens* reveals the unity and universality of humankind (F. Suárez). The *raison d'État* has limits, and the State is not an end in itself, but a means to secure the social order pursuant to the right reason, so as to perfect the *societas gentium* which comprises the whole of humankind (H. Grotius). The legislator is subject to the natural law of human reason (S. Pufendorf), and individuals, in their association in the State, ought to promote together the common good (C. Wolff).⁶⁴²

Cançado Trindade explains, in his dissenting opinion, why the ICJ must consider the aspirations of all individuals when dealing with a case that concerns them, including the ICJ's advisory opinion on the declaration of independence of Kosovo. In his view, the human person should be in a central position when the discussion is about territory or Statehood because States are not permanent and final repositories of human aspirations and human freedom.⁶⁴³ In order to break the chains of inter-State monopoly, the ICJ must fully recognize the international legal personality of individuals and take this important factor in consideration in every case, not only provisional matters or dissenting opinions, where a human person is directly concerned. This can be done in two ways: by allowing for the participation of individuals in the proceedings of the Court (*locus standi*), or by amending the Statute of the ICJ to grant *jus standi* to individuals.

3.2 *Locus Standi* and *Jus Standi* before the ICJ

Nothing in the Charter of the United Nations or the Statute of the ICJ impedes the *locus standi* of individuals, which could be achieved by a simple reformulation of

⁶⁴² International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Dissenting Opinion of Judge Cançado Trindade, [2010] General List No. 141, online: <http://www.icj-cij.org/docket/files/141/16003.pdf> Accessed on 26 July 2010.

⁶⁴³ *Ibid.* at 24.

the Rules of Court, which relate to the internal organization of the Court.⁶⁴⁴ The International Court of Justice's Rules of Court could be reformulated in specific articles to grant participation to individuals in contentious proceedings. Such procedural changes would not require, as previously stated, changes in the ICJ Statute. These changes would include the possibility for individuals or their legal representatives, when requested by the Court, to submit their views with regard to questions of procedure or substantive matters that directly concern these individuals. The Court could communicate with concerned individuals about the status of the case being heard before the ICJ. The President of the Court could allow the concerned individuals or their legal representatives to present oral statements during the hearing. The individuals concerned, upon authorization of the ICJ, could respond to the documents presented by the parties. The Court could put questions to individuals or their legal representatives when the president or any judge member deems necessary. Last, the Rules of Court could be reformed to allow the ICJ to grant individuals or their legal representative the right to questions experts or any other person heard by the Court.

These changes would grant *locus standi* to individuals before the International Court of Justice. They would be able to participate in a Court's proceedings when the case being heard before the Court is a human rights matter, that is, when it directly concerns individuals. Since the ICJ is a universal tribunal of general international law, the participation of individuals would be conditioned on a decision of a judge of the Court allowing such participation. Such reforms to the Rules of Court have already

⁶⁴⁴ International Court of Justice, *Rules of Court*, *supra* note 601. These procedural rules, as internal rules of an international organization establishing its functionality, are not created by States. By ratifying or acceding to a constitutive treaty, member States give to the international organization prior authorization to create its own internal rules. See Mazzuoli, *supra* note 7 at 548.

been implemented to grant a certain degree of *locus standi* to international organizations. Article 43, paragraph 2, provides that:

Whenever the construction of a convention to which a public international organization is a party may be in question in a case before the Court, the Court shall consider whether the Registrar shall so notify the public international organization concerned. Every public international organization notified by the Registrar may submit its observations on the particular provisions of the convention the construction of which is in question in the case.⁶⁴⁵

Article 69, paragraph 2, also provides *locus standi* to international organizations by establishing that:

When a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it shall do so in the form of a Memorial to be filed in the Registry before the closure of the written proceedings. The Court shall retain the right to require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also to authorize the parties to comment, either orally or in writing, on the information thus furnished.⁶⁴⁶

The same logic of changing specific articles of the Rules of Court already implemented to grant *locus standi* to international organizations could be applied to individuals. For example, Subsection 3 of the Rules of Court could be modified to provide that if the case so requires and the Court decides it is suitable, individuals or their legal representatives could be allowed to present oral statements during the hearing.⁶⁴⁷ Other articles of the Rules of Court could be slightly modified to grant

⁶⁴⁵ *Ibid.* at article 43 para. 2.

⁶⁴⁶ *Ibid.* at article 69 para. 2.

⁶⁴⁷ *Ibid.* at Subsection 3: Oral Proceedings.

concerned individuals participation by the request of the Court or one of the parties in contentious cases involving human rights issues.⁶⁴⁸

The International Court of Justice could thus ensure the effective participation of individuals (*locus standi*) to a similar degree as before the Inter-American Court of Human Rights. Although affected individuals would not have the status of parties and could not file an application to the ICJ to start a case or play a leading role in the procedure, their participation would allow the Court to address human rights violations from the perspective of the victims and not only of the States bringing the case to the Court. While individuals would still rely on the tutelage of their States, which would be the real parties in the case, this imperfect system would nevertheless constitute a step towards a full recognition of the international legal personality of individuals and more importantly, human persons, as addressees of international law norms and principles, would be able to be heard before the main judicial body of the United Nations and directly influence the Court's decisions. Adapting the Court's proceedings to achieve conformity with the requirements of modern international law is possible; it requires only changes to the ICJ's Rules of Court, not to the Charter of the United Nations or the ICJ's Statute.

While changes in the ICJ's procedures to grant *locus standi* to individuals, would represent recognition of the status of individuals as bearers of rights and duties under the law of nations and thus constitute an important development in international law, it would not fully recognize the international legal personality of individuals because they would not have direct access to the Court: human beings would not have

⁶⁴⁸ The following articles of the Rules of Court could be reformed to grant *locus standi* to individuals: article 31; article 40 paras. 1, 2 and 3; article 43 paras. 1 and 2; article 56 para. 3; article 61 paras. 2 and 4; article 62 para. 1; article 65; article 69 para. 1; article 72; article 78; and Section E. See International Court of Justice, *Rules of Court*, *supra* note 601. Changing specific articles of the Rules of Court would grant individuals, e.g., the possibility: to be given notice of cases being heard by the Court, to present oral statements during the hearing, to respond to the documents presented by the parties, and to ask questions to experts or any other person heard by the Court.

full international capacity. As previously mentioned, there is nothing in international law and even in the United Nations Charter that forbids the *jus standi* of individuals. States made a political choice to create and keep a universal juridical body that only accepts States as parties. Developments in international law after the World Wars, particularly with the establishment of the Inter-American and the European Courts of Human Rights, placed individuals as central figures of the law of nations who could and should have access to international tribunals when norms and principles that are directly addressed to them are breached by States. Adapting the ICJ to conform with these developments would represent an advance of the law of nations that would fully recognize individuals as subjects of international law and might establish the right of individual petition not only as a fundamental clause of a treaty, but as *jus cogens*. The International Court of Justice would be better able to protect human rights as it would be a universal tribunal (composed by judges with different nationalities) that accepts petitions from individuals, with a broader reach than the Inter-American and European Courts of Human Rights and the new African Court on Human and Peoples' Rights.⁶⁴⁹

In order to guarantee the direct access of individuals to the ICJ, the Statute of the Court would have to be changed. Paragraph one of article 34⁶⁵⁰ could stipulate that States may be parties in cases before the Court and a new paragraph could establish, as does the European Convention,⁶⁵¹ that the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the rights established in any instrument binding to the

⁶⁴⁹ *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, *supra* note 630 at article 5 para. 3.

⁶⁵⁰ *Statute of the International Court of Justice*, *supra* note 238 at article 34 para. 1. It states that “[o]nly states may be parties in cases before the Court”.

⁶⁵¹ European Court of Human Rights, *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol N° 11 and N° 14*, online: <http://conventions.coe.int/treaty/en/treaties/html/005.htm> at article 34. Accessed on 10 August 2010.

concerned State by any member of the United Nations or any State that accepts the jurisdiction of the ICJ.

Following the examples of the Inter-American and European Courts of Human Rights, the ICJ would guarantee the right of individual petition and as a consequence States would still be able to accept the jurisdiction of the ICJ based on consent or compulsory jurisdiction, but they would not be able to limit under their municipal laws the right of individuals to access the ICJ. States could still argue that individuals fall outside the scope of the ICJ's jurisdiction because their applications do not fulfill the admissibility requirements. This would not change the consent element of the ICJ: the parties would still need to agree to send the case to the Court.

The ICJ should require, as does the European Convention, that individuals seeking to be parties in contentious cases be victims in order to keep its caseload to a manageable level. Direct access of individuals to the International Court of Justice could significantly increase its caseload, a problem faced by the European Court of Human Rights when it abolished its Commission but failed to implement a filtering mechanism for applications to the Court.⁶⁵² At the ICJ, filtering could be carried out by the Court registry, which would decide which individual petitions should be accepted based on the legal requirements established in the Statute and the Rules of Court.⁶⁵³ The registry could be assisted by special rapporteurs functioning under the authority of the President of the Court who would analyze individual petitions with the registry and declare them admissible or not. The admissibility requirements for individual petitions could include: the exhaustion of local remedies; that the

⁶⁵² See chapter 3 above.

⁶⁵³ The ICJ registry would have a function to some extent similar to the Inter-American Commission after the 2010 changes of its Rules of Procedure that placed the Commission as a filtering organization that selects individual petitions (a guarding of the Convention) instead of a party before the Inter-American Court.

application be made within six months after the final decision under domestic law;⁶⁵⁴ a declaration by the applicants that they are victims of human rights violations; that the individual petition not be manifestly ill-founded; and that it not be an abuse of the right of application. If the individual petition is approved by the registry, it could be sent to a special Chamber formed by the President of the ICJ following the rules of article 26 of the ICJ Statute.⁶⁵⁵ The Chamber could decide on the merits of the case or revisit the issue of admissibility or could refer the case to the plenary if it decides that the matter under dispute is complex and requires a decision of the plenary. The decisions of the registry (on admissibility), the Chamber (on admissibility and merits) and plenary (on merits) should all be final. This example of *jus standi* is influenced by the developments of the European Court of Human Rights.⁶⁵⁶

Besides changes in the ICJ's Statute, a *jus standi* system would require modifications in the Rules of Court to specify the procedural rights of individual applicants. Part III of the Rules of Court⁶⁵⁷ could be modified by adding a new Section about applications sent by individuals, which would spell out the requirements of applications, the work of the Chambers and the plenary related to proceedings initiated by individuals and about the admission of written arguments by individuals or the concerned States. In this respect, the inter-State rules of contentious cases could apply to the individual-State disputes to the extent possible. Subsection 4 of Section D of the Rules of Court could also be modified⁶⁵⁸ to stipulate that

⁶⁵⁴The concerned individuals or their legal representative could nonetheless prove that the exhaustion of local remedies is not possible because the State is unable or unwilling to judge the matter.

⁶⁵⁵ *Statute of the International Court of Justice*, *supra* note 238 at article 26. The Chamber should be composed of three or more judges as the Court may determine.

⁶⁵⁶ See Chapter III above.

⁶⁵⁷ *International Court of Justice, Rules of Court*, *supra* note 601 at Part III.

⁶⁵⁸ *Ibid.* at Subsection 4 of Section D. The articles 81, 82 and 85 of that subsection would need to be modified to end the exclusive inter-State aspect of intervention and stipulate that individuals could sent an application to intervene if they meet the requirements spelled out by this subsection. The Court would decide whether an application for permission to intervene by individuals should be granted.

individuals could intervene in the Court's proceedings if they have an interest of a legal nature and consider that they may be affected by the decision in the case.

The Statute of the ICJ, therefore, could be modified in order to grant *jus standi* to individuals and respect the right of individual petition. These modifications would build on the experience of the Inter-American and European Courts of Human Rights and incorporate, at the outset, a screening function to ensure a reasonable caseload. The main obstacle is that to granting *jus standi* to individuals is that Statute of the ICJ would need to be modified, requiring support of member States. States might not agree with this change because it would make international law less horizontal; individuals as subjects would be able to bring claims against States and they would be legally or morally obliged to comply with the ICJ's pronouncements.

In 2006, the ABILA Committee on Intergovernmental Settlement of Disputes proposed reforms to the ICJ that would have extended party status to intergovernmental organizations in contentious cases before the Court.⁶⁵⁹ To amend the Statute of the ICJ, the "rather burdensome"⁶⁶⁰ procedure established to amend the Charter of the United Nations must be followed.⁶⁶¹ The new provision must be approved by a two-thirds majority of the 192 members of the General Assembly⁶⁶² and must then be ratified by two thirds of the Members of the United Nations, including all permanent members of the Security Council.⁶⁶³ Thus, the greatest challenge in changing the Statute of the ICJ and granting direct access to individuals

⁶⁵⁹ ABILA Committee on Intergovernmental Settlement of Disputes, "Reforming the United Nations: What about the International Court of Justice?" (2006) 5 Chinese Journal of International Law 39 at 53-59.

⁶⁶⁰ *Ibid.* at 45.

⁶⁶¹ *Statute of the International Court of Justice*, *supra* note 238 at article 69.

⁶⁶² United Nations, *United Nations Member States: Growth in United Nations Membership*, online: <http://www.un.org/en/members/growth.shtml> Accessed on 12 May 2010.

⁶⁶³ *Charter of United Nations*, *supra* note 31 at article 108.

lies not in legal or drafting niceties, but in securing the support of States and members of the United Nations.

The decision to restrict the Permanent Court of International Justice's jurisdiction to inter-State claims was criticized by some of the jurists appointed to create its Statute and by international law scholars. When the International Court of Justice was established, its Statute, a mere copy of the Statute establishing the PCIJ, preserved the same jurisdictional limitations. However, international law has continued to develop towards a more humane legal system since the Second World War, particularly with the creation of the United Nations, the elaboration of international instruments conferring rights and duties on individuals and the consolidation of the right of individual petition by the Inter-American and European Courts of Human Rights. The International Court of Justice should be adapted to this new international law by becoming a universal court that would receive complaints filed by individuals against States that allegedly violated their previously established treaty or customary rights. In some aspects, this would not be a radical change: the ICJ would not lose its consensual character; States would still need to accept the Court's jurisdiction case by case, or by the compromissory clause or the compulsory jurisdiction. However, it would mark the acceptance of the full international legal personality of individuals, who would not only have rights and duties under the law of nations, but would also have direct access to the principal juridical organ of the United Nations and not only to regional tribunals. The consent element of the Court itself would work as a filter mechanism because even if an individual petition had all the requirements necessary to be admitted, the concerned State might not accept the ICJ's jurisdiction or might not have agreed to the compulsory jurisdiction of the Court, or the treaty under dispute does not have a provision establishing the ICJ as the

court to settle any dispute arising from the interpretation or application of the treaty. Individuals' access to the ICJ would not be without limits. They could participate only in cases against a State (not another individual) when their rights are directly affected. They would need to fulfill the admissibility and procedural requirements established by the ICJ Statute and its Rules of Court. Finally, as mentioned, the International Court would not lose its basis of consent; States would still need to accept the ICJ's jurisdiction.

Short of granting individuals *jus standi*, it would not be difficult for the ICJ to grant *locus standi* to individuals, as other international tribunals have. Only the Court's Rules would be reformed. Though the inter-State nature of the Court proceedings would remain, individuals directly interested in the case would be able to send written or oral comments and influence the Court's decisions. The participation of individuals is a necessary element of modern international law because individuals are bearers of rights and duties under the law of nations and such status requires that they, as addressees of international instruments, be heard in cases that directly concern them. Granting *locus standi* would mark the recognition of the *de facto* international legal personality of individuals, which would only be fully achieved through direct access of the human person to the ICJ. The Court, in granting *jus standi* to individuals, would not function as a constitutional tribunal, but as a juridical organization empowered to settle international disputes between individuals and States when the latter breach fundamental human rights obligations and are unwilling or unable to resolve the dispute under domestic law rules.

In 2009, Cançado Trindade, whose liberal views on the role of individuals in international law were well known from his tenure as a judge of the Inter-American

Court of Human Rights, was elected a judge of the International Court of Justice.⁶⁶⁴ This achievement might indicate that the members of the United Nations (of the General Assembly and the Security Council) are open to changes in the ICJ's role and that, as Trindade might put it, the Court should develop in accordance with a more humane *jus gentium* by accepting that individuals are addressees of international norms. Whether the election of Cançado Trindade means that the United Nations is ready to accept a more meaningful change in the Court's function which would grant *locus standi* or *jus standi* to individuals is uncertain. It is clear, however, that Trindade brings with him an intimate knowledge of the jurisprudence of the Inter-American Court of Human Rights,⁶⁶⁵ where the concerns of individuals play a significant role in the Court's decisions, including provisional measures. Such concerns may thus become more prominent in the work of the International Court of Justice.

⁶⁶⁴ International Court of Justice, *Current Members*, *supra* note 537.

⁶⁶⁵ See chapter 3 above. Thomas Buergenthal is another ICJ member that was a judge and president of the Inter-American Court of Human Rights and has, therefore, intimate knowledge of the jurisprudence of the Inter-American Court of Human Rights. See *ibid.* Accessed on 13 May 2010.

CONCLUSION

After the First and Second World Wars, international law evolved towards a paradigm premised on the understanding that the vindication of some fundamental human rights was too important to be solely the business of States; it needed to be an international concern. The United Nations was created to “reaffirm 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”⁶⁶⁶ and many treaties were concluded to spell out these rights and secure the commitment of the international community to respect them. But if individuals are considered to be objects of international law, they remain under the control of their States. States alone retain the power to vindicate the human rights stipulated by those treaties or customary norms of international law. Individuals, as objects, would not have no voice at the international level. The doctrine of diplomatic protection, as a reflection of this extreme positivistic approach, cannot protect human rights to the fullest because it requires that the individual’s State of nationality take the claim to an international tribunal. This is unlikely or impossible if the State of nationality is the one breaching international law; it has no interest in taking that claim as its own or if the individual is stateless.

The developments of international law in the 20th century led it to a path of rupture with positivistic theories. The theory of an all powerful State, with absolute sovereignty, acting above international rules (being at once the only subject and creator of international law), could no longer be applied in the face of the massive human rights abuses of the World Wars and the regime put in place to protect human

⁶⁶⁶ *Charter of United Nations*, *supra* note 31 at preamble.

rights. The recognition of international organizations as subjects of the law of nations, the further development of international treaties granting rights to individuals, the establishment of *jus cogens* norms and *erga omnes* obligations and the possibility that individuals could be held criminally responsible for breaching international norms, called for a change of theory. It is no longer possible to deny that individuals are addressees of rights and duties under international law. A new theory of universal juridical conscience brings back the natural law aspect to a new *jus gentium* centered on individuals. Under this theory, international law is not founded on the will of States or exclusively on the principle of *pacta sunt servanda*, but on the imperative of the common good of the whole international community comprised of States, international organizations and individuals, each with its own characteristics, rights, duties and limitations.

International legal personality is based on three different aspects: rights, duties and capacity. Individuals, therefore, as subjects of the law of nations need to have international capacity to send complaints to international tribunals when States do not respect international rules regarding them. A human rights violation reaches an international level when a State fails to respect international rules regarding the prevention of that breach or the proper conduct of investigations or is not able or willing to render legal judgments following the rule of law established by international law. When there is such breach, the individuals concerned have the right to access an international tribunal to demand reparations.

The international capacity of individuals made its greatest strides with the Inter-American and European Courts of Human Rights. With its Protocol n° 11, the European Court granted *jus standi* to individuals, finally allowing them to file complaints against States directly with the European Court. The *jus standi* of

individuals and the mechanisms later adopted by the European regional system to cope with the Court's increased workload are of great importance to international law because they show that individuals can have access to international tribunals but that such courts must have the power to filter complaints in order to function properly. The Inter-American system, on the other hand, influenced by the evolution of international law, granted *locus standi* to individuals in 2010. The Inter-American Commission still exists and selects which individual petitions need to be sent to the Inter-American Court, but its role before the Court is no longer that of a party but of an observer and a guardian of the provisions set out by the American Convention. The Inter-American regional system, though it does not allow direct access of individuals to the Inter-American Court, grants to individuals full participation in the Court's proceedings and even a role in helping the Court monitor the compliance of the concerned States with its decisions. The Inter-American and European Courts of Human Rights, which established the right of individual petition, have been joined by the African Court on Human and Peoples' Rights which also grants *jus standi* to individuals.

At present, no global international tribunal accepts the *locus standi* or *jus standi* of individuals. Regional systems do not extend human rights protection to all the States that comprise the international community. The International Court of Justice, the main judicial organ of the United Nations, has a Statute based on 19th century State-centric theories which provides for a contentious jurisdiction restricted to inter-State disputes. Creating a global international human rights tribunal to fill the protection gaps would raise the specter of the fragmentation of international law: international tribunals deciding similar questions and reaching different conclusions, leading to a possible conflict of jurisprudence and *forum shopping* by the parties, who

could choose the court that better suits their expectations. The creation of a new global tribunal would also raise practical problems, including securing funding for its implementation, difficulties in delimiting what specifically constitutes international human rights law, delays involved in States ratifying and accepting the tribunal's jurisdiction and the difficulty in developing a proper screening system for individual petitions. In contrast, the International Court of Justice can be modified to accept *locus* or *jus standi* of individuals. It is already a world court. It deals with cases that directly concern individuals. There is nothing in the Charter of the United Nations and in its Statute, besides its article 34,⁶⁶⁷ which impedes the participation of individuals in the Court's proceedings or their direct access to the Court. Consequently, reforming the ICJ is a preferable option to the creation of a new international human rights court.

The access of individuals to the International Court of Justice has been proposed by different scholars,⁶⁶⁸ but the question can be approached from two different angles: direct access or *jus standi* and *locus standi*. Under the latter approach, individuals may participate in the Court's proceedings. If the Court agrees that this measure is necessary because the case is of a human rights nature that directly concerns individuals, it can grant them written and oral participation in the proceedings, and allow individuals to send their observations about the case and their questions and concerns. The Court would take the individuals' views into consideration when rendering the final judgment. This would be closer to the approach of the Inter-American system. The ICJ would retain its inter-State characteristic; only its Rules of Court would need to change in order to allow *locus standi*. Individuals would not be parties and could not file applications to start a case,

⁶⁶⁷ *Statute of the International Court of Justice*, *supra* note 238 at article 34 para. 1.

⁶⁶⁸ See chapter 4 above.

but would send written comments, ask the Court to address some problems, send their views about the case and possibly give oral statements. The Court would not be bound to grant *locus standi* to individuals. This would be a discretionary decision, in which the Court would consider the nature of the case under dispute. Accordingly, the ICJ would work differently than the Inter-American Court because in the latter the participation of individuals is mandatory. However, since the ICJ's Statute provides that the Court works on the basis of consent of the parties and deals with a wide range of areas of international law, the Court's decision to grant *locus standi* would have to be discretionary. This would nevertheless represent a significant change in the ICJ proceedings because although the decision to grant participation to individuals could be a choice of the Court, once granted, it would need to consider, in deciding the case, the arguments and points presented by individuals.

The Statute of the ICJ could also be modified to grant *jus standi* to individuals, and allow the human person to be a party in the Court's proceedings. In this scenario, the ICJ would have a system resembling that of the European Court of Human Rights. The Court would need to have a specific procedure for receiving and judging individual petitions as well as a filtering mechanism. Compared with the European Court of Human Rights, the ICJ already has a powerful filter in its consensual basis. States need to accept the jurisdiction of the Court and even if an individual files an application, the State might not accept⁶⁶⁹ the competence of the Court. Besides the consensual element, the ICJ might also require elements such as the exhaustion of local remedies, a declaration by the individuals to be victims of human rights violations, that the individual application must not be manifestly ill-founded and that it must not constitute an abuse of the right of application. The International Court of

⁶⁶⁹ The concerned State might also not have previously accepted, by reservation, a compromissory clause of a treaty granting jurisdiction to the ICJ or it might not have agreed to the compulsory jurisdiction of the Court.

Justice would also need to emulate the rules of the Inter-American and European Courts of Human Rights and only allow individual complaints against States, since allowing individual complaints against individuals would lead to an unmanageable caseload. Moreover, there is already a global Criminal Law Court that can hold individuals responsible for certain breaches of criminal and humanitarian law.

These are, therefore, two paths that the ICJ might take although one does not exclude the other. Granting *locus standi* to individuals should be the first step towards granting direct access to individuals. By changing its Rules of Court, the ICJ would show the United Nations that it can be reformed to grant *jus standi* to individuals. The challenge is not of a legal or theoretical nature. There are theories that accept the international legal personality of individuals. There are international courts that grant *locus standi* and *jus standi* to individuals. The ICJ's Rules of Court and its Statute could be modified to provide for the participation of individuals or their direct access to the Court as parties, and former and current ICJ judges have advocated the legal feasibility of conferring direct access to individuals. What is now needed is the political will of States and of the United Nations to recognize, by reforming the ICJ, what is now clear: individuals are subjects of international law. Their access to the International Court of Justice is necessary for the Court to adapt to the developments of the law of nations and to judge cases taking into full consideration individuals' status as addressees of international norms.

Law more than just a group of norms created to regulate society; allows individuals to live with dignity and to reach their capabilities and is thus key to the future of humanity. International law is no different. It exists to allow society – the international community comprised of States, international organizations and individuals – to achieve its capabilities and to secure human dignity. The International

Court of Justice, as an important body of the United Nations responsible for the application and interpretation of international law plays a key role in this enterprise. Individuals, as subjects of international law, need to have access to the International Court of Justice to allow law and, in particular, international law, to achieve its goal: the promotion of human dignity and the common good.

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