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Basic Course in Public International Law

**The status of individuals
under international law –
are they subjects or just objects?**

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1. Introduction

STATES HAVE long been the main actors on the international scene, firmly embedded in the Westphalia peace treaty in 1648. It was then the notion of the 'nation-state' as the main player emerged¹ and coincided with Hobbes theory of the sovereign state.² Likewise, public international laws have revolved about states, which were considered, e.g. by scholars as late as early 20th century, to be the sole subjects of international law.³ It must, however, be emphasised that in the classical phase of the subjective positivism in the late 17th and 18th century, the individual was neither claimed to be subject nor object of international law, rather a 'possessor of a status intermediate between these positions',⁴ and Grotius, in the 17th century, in fact recognised the status of individuals as entities having rights and duties in the 'society of all mankind', while states were in his model still the primary actors.⁵ This historical annotation notwithstanding, the states were at the forefront as subjects in international law by the end of the 19th century and onwards, and it was only later that the individual was generally recognised as a subject.

This paper looks into the question of the status of individuals under international law and whether they are to be considered subjects or only objects. In order to doing so, I will first explain the scope and limitations of this short paper; secondly I will address the notions of *object* and *subject*; thirdly, in the paper's main part, I will discuss the status of *individuals* and their *personality*, as well addressing briefly *groups* of individuals. Lastly I make some concluding remarks. I will argue that individuals and groups of individuals have become increasingly important actors under international law, and that they now enjoy both the status as objects *and* subjects. Further, I will maintain that this trend will only continue in years to come, because of the increased role of non-state actors on the international arena, and the growing amount of treaties and conventions on various human rights.

¹ Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 1.

² *Ibid.*, 26.

³ Rebecca M.M. & Olga Martin-Ortega Wallace, *International Law* (London: Sweet & Maxwell, 2013), 62-63.

⁴ George Manner, "The Object Theory of the Individual in International Law," *American Journal of International Law* 46, no. 3 (1952): 445.

⁵ "Leading Figures in International Law," *International Judicial Monitor* 2, no. 3 (Oct/Nov 2007), http://www.judicialmonitor.org/archive_1007/leadingfigures.html.

2. Scope of the paper – limitations

THE INTERNATIONAL legal system defines the individual in various ways. It is therefore important, at the outset, to define the notion of *individuals* as understood in this paper. There should be no disagreement that the notion will include each human being. Also, that states and inter-governmental organisations (such as the UN) are excluded. The question arises how to deal with non-governmental organisations (e.g. Amnesty International), corporations, and groups of individuals when acting collectively. McCorquodale maintains that all these types of legal persons, whether natural or non-natural, could be included in the notion of 'individuals'.⁶

However, for the purpose of this short paper, I shall only include natural persons, acting alone or together in their own cause; hence corporations and non-governmental organisations fall beyond the confines of this paper. I will concentrate the main discussion on individuals, and then briefly discuss groups of individuals. Further, I will in short explicate the development of the individuals as subjects under international law, and elaborate on the likely future trends.

3. Individuals under international law

IN CONTEMPORARY international law it is increasingly recognised that individuals can possess international rights as well as duties. This is not least due to developments in human rights law and international criminal law.⁷ Although this is a relatively new trend, it is not to say that the issue of individuals were never addressed earlier on. As we shall see, the individuals have gained stronger position, particularly in the latter half of the 20th century, a trend that is likely to continue.

3.1. Historical development

THE CLASSICAL and medieval concepts of natural law provided individuals with certain natural or human rights.⁸ Traditionally, the individuals were considered to be under the exclusive control of states, i.e. they were mere objects, and it was primarily regarding piracy that individuals were dealt with under international law, although being

⁶ Robert McCorquodale, "The Individual and the International Legal System," in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2010), 285.

⁷ Wallace, *International Law*, 94-97.

⁸ PK Menon, "The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine," *Journal of Transnational Law & Policy* 1 (1992): 154.

controversial.⁹ (Interestingly, this type of international crime has again become a problem). This positivist approach is 'grounded on a subject-based differentiation between international and municipal rules',¹⁰ which has changed dramatically in recent times. However, on several occasions in the early 20th century, courts came to the conclusions that it was within their jurisdiction to hear cases where individuals were involved.¹¹ Also, the creation of inter-governmental organisations, e.g. the *International Labour Organisation* in 1919, which objectives were directly fighting in the cause of particular rights, was of great significance. The establishment of the *Nuremberg Tribunal* and the *International Criminal Tribunals for Yugoslavia and Rwanda*, added further to the development of international criminal law. However, the *Universal Declaration of Human Rights* (1948) and the *European Convention on Human Rights and Fundamental Freedoms* (1953) must be considered as turning points in affording protection to individuals against violations of human rights, accountability of which culminated when the *International Criminal Court* was established (2002).¹² Hence, it is safe to say that the august term of *sovereignty* has become to mean the "people's sovereignty rather than the sovereign's sovereignty".¹³

3.2. Subjects – objects

ARE INDIVIDUALS necessarily either subjects or objects in international law? The research question in this paper assumes that that is the case. This subject-object dichotomy has though been called into question by some scholars. Higgins, who was President of the ICJ, has in an eloquently way, described the different positions of individuals as objects respective subjects, although she is critical to such a distinction; rather she argues that individuals, similarly to states and other actors, should all be defined as *participants*.¹⁴ As for this paper, however, I will deal with the question, whether individuals are to be considered subjects or only objects.

⁹ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), 143-44.

¹⁰ Mark Janis, "Individuals as Subjects of International Law," *Cornell International Law Journal* 17, no. 61 (1984): 61.

¹¹ Here, I refer e.g. to The Permanent Court of International Justice, The Central American Court of Justice, and The Treaty of Versailles, see Wallace, *International Law*, 94-95; Shaw, *International Law*, 258-59.

¹² Wallace, *International Law*, 239; Cassese, *International Law*, 380-82.

¹³ W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84, no. 4 (1990): 869.

¹⁴ „The argument, reduced to its crudest elements, runs as follows: under a legal system there exists only objects and subjects. In international law "subjects" is the term used to describe those elements bearing, without the need for municipal intervention, rights and responsibilities. Under the existing rules of international law there is no evidence that individuals are permitted to be the bearers of duties and responsibilities. They must, therefore, be objects: that is to say, they are like "boundaries" or "rivers" or "territory" or any of the other chapter headings found in the traditional textbooks." See Rosalyn Higgins, "Conceptual Thinking About the Individual in International Law," *British Journal of International Studies* 4, no. 1 (1978): 3-5.

3.3. *The status of individuals*

NON-STATE ACTORS play an every growing role in international politics and the same applies for international law, as law and policy can hardly be separated.¹⁵ The idea that only states or international organisations are subjects of the law renders the individuals as just objects,¹⁶ which means that they constitute a source of a dispute between states.¹⁷ This was the prevailing opinion in the early 20th century, unconditionally formulated by the leading scholar, Lassa Oppenheim: ‘States solely and exclusively are the subjects of international law.’¹⁸

The concept of *personality* is unequivocally linked to the subjects of international law and is to be understood as ‘a body or entity recognised or accepted as being capable, of exercising international rights and duties.’¹⁹ This means, that if an entity is said to have international legal personality, that entity is provided with rights and duties derived from international law,²⁰ and I will argue this case by providing evidence from international criminal law and international human rights law.

Significantly, the International Court of Justice, in the so-called *Reparation for Injuries Opinion* (1949), has linked the subjects of international law directly to the international legal personality and made it clear that there may be other subjects than states.²¹ It is debatable, however, how to interpret the court’s opinion, but as McCorquodale points out, the court recognises that ‘while the State is the primary subject of the international legal system, the subjects of that system can change and expand depending on the “needs of the [international] community” and “the requirements of international life”.’²²

By virtue of the fact that individuals are provided with both rights and duties under international law, they are to be considered subjects. Individuals can be held responsible for their acts, even if they act under their superiors’ instructions. The international crimes that are relevant are genocide, crimes against humanity, war crimes and aggression. Although some scholars have added terrorism and torture under this category there is insufficient

¹⁵ Shaw, *International Law*, 11.

¹⁶ *Ibid.*, 258.

¹⁷ Giovanni Distefano, "The Position of Individuals in Public International Law through the Lens of Diplomatic Protection: The Principle and Its Transfiguration," in *Research Handbook on Human Rights and Humanitarian Law*, ed. Robert Kolb and Gloria Gaggioli (Cheltenham 2012), 65.

¹⁸ Cited in: John O'Brien, *International Law* (London: Routledge-Cavendish, 2001), 153.

¹⁹ Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2007), 112.

²⁰ Dapo Akande, "International Organizations," in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2010), 256.

²¹ David John Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004), 131-32.

²² McCorquodale, "The Individual and the International Legal System," 287.

practice to do so.²³ In the wake of the WWII the governments of the allies decided to establish an International Military Tribunal for the trial of war criminals in Nuremberg.²⁴ It is a prevailing opinion that the trials 'brought about a great expansion of the principle that individuals may be held liable under international law'.²⁵ Cassese points out that the Nuremberg definition of crimes against humanity marked a great advance, quoting the British Chief Prosecutor who spoke about the individual human being as 'the ultimate unit of all law'.²⁶ In spite of some flaws, the judgment is reckoned to be a 'seminal document in international criminal law', as Cryer puts it.²⁷ Importantly, the Nuremberg Charter introduced *crimes against peace* and *crimes against humanity* into international law, but the definition of *war crimes* was in conformity with already existing customary and treaty law.²⁸ The accused claimed that only states were liable under international law and that the individuals had no obligations, but this was rejected.²⁹ The establishment of the interim International Criminal Tribunals for Yugoslavia and Rwanda, and eventually the establishment of the International Criminal Court have further sustained that individuals can be held liable for their criminal acts, and thus they are subjects of international law.

The rights, with which individuals can be provided under international law, are of different character. They might be claim-rights, a privilege, a power, or immunity.³⁰ The fact that individuals are provided with rights under international law, makes them subjects in their own right. The human rights sphere is incontestably the area, in which individual rights under international law is most developed. This is true also for groups of individuals. Higgins asks why obligations should be owed directly to individuals. In her view that is because they have human rights, 'simply by virtue of being a human person'.³¹ The International Covenant on Civil and Political Rights (1976), provides individuals with protection against discrimination, arbitrary governmental actions, and acts by private citizens, and also includes the freedoms of thought, conscience, expression, assembly, and

²³ Robert Cryer, "International Criminal Law," *ibid.*, 753.

²⁴ The Nuremberg Tribunal came to the conclusion that "Crimes against international law are committed by men, not by abstract entities [of States], and only by punishing individuals who commit such crimes can the provisions of international law be enforced." Cited in Robert McCorquodale, "The Individual and the International Legal System," *ibid.*, 291.

²⁵ Gary Komarow, "Individual Responsibility under International Law: The Nuremberg Principles in Domestic Legal Systems," *International and Comparative Law Quarterly* 29, no. 1 (1980): 24.

²⁶ Cassese, *International Law*, 440.

²⁷ Cryer, "International Criminal Law," 771.

²⁸ Alina Kaczorowska, *Public International Law* (London: Routledge, 2010), 212.

²⁹ *Ibid.*, 211.

³⁰ McCorquodale, "The Individual and the International Legal System," 289.

³¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), 96.

association, and the rights to participate in public affairs.³² In the International Covenant on Economic, Social and Cultural Rights (1976), individuals are supposed to be granted the right to work and social security, health and education, but the rights under this covenant are 'subject to progressive realization'.³³ However, the vast amount of treaties and covenants on various human rights issues, underpins the core role of individuals as subjects in international law.

As early as in the 1920s the Permanent Court of International Justice, held that individuals could have rights created by treaties and that these rights could in some cases be enforced domestically. Also, individuals are guaranteed the right to claim alleging breaches of the European Convention on Human Rights.³⁴ The Vienna Declaration on Human Rights (1993) states that all 'human rights are universal, indivisible and interdependent and interrelated'.³⁵ This was a further development of the Universal Declaration and a number of other conventions and treaties have been signed, providing individuals with tools to make claims in the case of violations of their rights. Some conventions are of general character, whereas others are aimed at certain groups. Some scholars also maintain that the right to e.g. environment, health and medication, and economic rights constitute an important part of human rights, referring *inter alia* to the fact that international human rights law and international environmental law have experienced a prolific growth during the last decades.³⁶ Although an interesting angle, I shall not go further into these types of (possible) human rights, but in all cases the individuals would ultimately be considered subjects of international law.

³² Louis B Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States," *American University Law Review* 32 (1982): 24-32.

³³ *Ibid.*, 45.

³⁴ Wallace, *International Law*, 94-95.

³⁵ *Ibid.*, 239.

³⁶ This is e.g. dealt with by Rodriguez-Rivera, who argues that to ignore the expansive right to environment would amount to ignoring the evolution of international law during the last half-century: Luis E Rodriguez-Rivera, "Is the Human Right to Environment Recognized under International Law-It Depends on the Source," *Colorado Journal of International Environmental Law & Policy* 12 (2001). Chinkin links the development of the international economic law with e.g. the decolonisation and the international claims for just allocation of natural resources, and thus with the human rights movement: Christine M Chinkin, "The Challenge of Soft Law: Development and Change in International Law," *International and Comparative Law Quarterly* 38, no. 04 (1989). In her writings, Atapattu addresses the rights of generations to come to sustainable future and argues that it is merely a matter of time before it achieves normative status: Sumudu Atapattu, "Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law, The," *Tulane Environmental Law Journal* 16 (2002). With the focus on developing countries, Yamin views the access to medication as a matter of fundamental human rights and maintains that this is grounded in specific international legal norms: Alicia Ely Yamin, "Not Just a Tragedy: Access to Medications as a Right under International Law," *Boston University International Law Journal* 21 (2003).

3.4. Groups of individuals

AS STATED above, groups of individuals can collectively claim rights under international law in the same vein as individuals. Reflecting the fact, that human beings are social creatures, Sohn notes that most individuals belong to various groups, and as such are provided with collective rights. **The main categories, identified by Sohn, are the right of self-determination, the right of development, and the right to peace.**³⁷ Some of these areas are dealt with in the covenants mentioned above.

There are a number of groups than can be subsumed into the group of individuals as subjects of international law. I shall here only mention few of them.

The right of self-determination is an important area, and one of which that have challenged the states. Here, individuals have collectively been engaged 'in the creation, development, and enforcement of international law'. The covenants on Economic, Social and Cultural Rights and on Civil and Political Rights are important in this regard.³⁸ The right of self-determination has not least been realised by decolonisation. Indigenous peoples constitute a group of individuals, position of which have attracted increased attention in the international legal system, in particular in the late 20th century.³⁹ Anaya identifies self-determination as 'a universe of human rights precepts concerned broadly with peoples, including indigenous peoples'. **According to Anaya, self-determination has become a *jus cogens* in international law and in light of recent developments this has significance for indigenous peoples.**⁴⁰

Stateless persons and refugees are groups of individuals which have been addresses by the international system. The Universal Declaration as well as specific conventions⁴¹ deal with the fundamental rights of these groups, providing them with certain rights, and consequently render them the status as subjects of international law. The plights of these groups are becoming increasingly important issue today, particularly by virtue of the currents of people fleeing their countries in a desperate hope of better life.

³⁷ Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States," 48-59.

³⁸ These covenants provide 'that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". This right is a collective right, that is, a right of a group of individuals as a group.' Cited in: McCorquodale, "The Individual and the International Legal System," 299-300.

³⁹ Ibid., 301.

⁴⁰ S. James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004), 75.

⁴¹ E.g. the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the 1951 Convention on the Status of Refugees, and other conventions addressing in particular women and children. They are also a subject in the aforementioned Covenant on Civil and Political Rights.

4. Conclusions

I HAVE in this paper primarily discussed the status of individuals under international law and briefly touched upon groups of individuals. My intention has first and foremost been to shed a light on the developments of the status of individuals, from the traditional view on individuals as mere objects to the contemporary one, where individuals play a more active role and have become subjects of international law. This change follows largely from the development in international treaties and conventions, particularly in the spheres of human rights and international criminal law.

The role of individuals is decisively and intrinsically embedded in the United Nations Charter's Preamble, which states that '*We the Peoples of the United Nations Determined...*'⁴² This emphasis on the people, I argue, is a clear indication of the firm belief that the individuals are at the core of all operations by states and must therefore be afforded the status of subjects on the international scene, because states acquire their mandate from the people.⁴³ Although states still are the predominant actors on the international arena, individuals are becoming increasingly important and they are in the centre of numerous international treaties. There are vast array of international claims available to individuals, which might *de jure* be within the exclusive control of states but not *de facto*.⁴⁴

Judged by the developments in recent decades in international law, the 21st century is only likely to bring about further developments in this regard, and broaden the issue areas where individuals or groups of individuals will enjoy the status as subjects under international law. Grounded on the discussion above, I argue that individuals have long ago ceased to be mere objects (if they ever were!) and have obtained the status of subjects in many respects, thus enabling 'every individual to live a life of dignity and security and so to ensure human flourishing'.⁴⁵

⁴² *Charter of the United Nations and Statute of the International Court of Justice*.

⁴³ This thought is also wittily formulated in James Madison's (the 4th President of the U.S.) maxim: '*The people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived*'.

⁴⁴ McCorquodale, "The Individual and the International Legal System," 306.

⁴⁵ *Ibid.*

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