# INDIVIDUALS IN INTERNATIONAL LAW: A HISTORICAL SHIFT TOWARDS AGENCY

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**Abstract:** With the end of the Second World War, the deficiencies of the traditional State-centred approach, grounded on the principle of sovereignty, became evident. Elaborating on the limitations of the State-*solo* legal doctrine, this article provides insights into the evolution of the individual's legal personality in international law, highlighting the decline of State-centrism and the rise of new actors and principles. To address this research goal, the article first explores the concept of legal personality and foundational views on individual subjectivity, then traces the progressive recognition of individuals' autonomy, and finally assesses how the human rights paradigm has strengthened individual empowerment.

**Keywords:** Legal subjectivity, Agency, Human rights, International accountability.



## 1. Introduction

The traditional conception of international law was characterised by an inter-State structure that perceived the nation-state as the *solo* subject of the global legal framework. Founded on the so-called Westphalian model and the European System of States (Díaz Barrado, 2016, p. 18.), classic international law was grounded on the principle of sovereignty. The Treaty of Westphalia brought to an end the religious confrontation that it was fought during the 17th century, and overcame the Middle Age legacy by breaking with the universal religious principles. This peace treaty constituted a paradigm shift from a universal moral conception to a national interest approach, which was based on the *raison d'etat* and the balance of power doctrine. Along with Adam Smith, Montesquieu and Madison, the balance of power postulation argued in favour of powers operating out of their free will and advocated for States acting in their own nationalistic interest as a means to obtain a global common good (Rojas, 2004, pp. 155-156). This discourse granted to the nation-state the status of central and unique actor in the international community. Relying on the principle of national sovereignty, the State was holder of unlimited power and no international or national forces could hinder this dominion (Held, 1997, p. 21).

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After two world wars, the classical understanding of public international law was, however, openly questioned by the doctrine of the 20th century. Humanitarian values were gaining ground and the principle of 'primacy' of international law was gradually imposing itself to domestic law as a response to an evolving international community. This reality resulted in the development of an international *corpus juris* aimed at directly regulating individual's rights and duties, coupled with the consequent recognition of human being's emancipation from the State (Orakhelashvili, 2001, p. 244).

Upon this comprehensive reconfiguration of the global structure, the distribution of power units and the consolidation of the individual as a subject of law are readily observable in the matters discussed today within judicial chambers. From technology-related issues, such as *'DPC v. Facebook Ireland and Schrems'* (CJEU, 2020) to climate change action, exemplified by '*Verein Klimaseniorinnen Schweiz and Others v. Switzerland'* (ECtHR, 2024), individuals have seized the courts and invoked international law in the quest for voice and justice.

Acknowledging individual's increasing role in courts as a catalyst for change, this article aims to analyse how, and to what extent, has the individual evolved from being a mere object, utterly neglected and overlooked by international law, to becoming not only a subject, but an active participant in a long State monopolised global law-making, capable of litigating emerging pivotal issues such as technology and climate change. In meeting this research goal, this article begins by conceptualising the notion of legal personality and examining the initial approaches to individual's international subjectivity. From Vitoria to Bentham and Austin, this first section addresses the principal features of both natural law, as well as legal positivism, in relation to the human being's legal personhood. This is followed by an analysis that delves into the gradual emancipation of the individual, in light with Lautherpatch's legal philosophy. Finally, this article concludes by examining the profound influence that the human rights regime exercised on the international acknowledgment of the individual's legal subjectivity.

## 2. The conceptualisation and early discussion on the international legal subjectivity of the individual

A natural first step to begin this analysis is to properly delimitate the definition of legal personality. This quality argued to be the primary feature of international subjectivity (Nyssanbekova et al., 2016, p. 1462) takes shape by the power to be "the bearer of legal rights and obligations" (Brölmann and Nijman, 2017, p. 1). An alternative line of reasoning exists, however, arguing that being holder of rights and recipient of international duties is not enough to acquire the alleged subjectivity. For theorists within this segment of the doctrine, this legal capacity must be complemented with an active or passive entitlement: whereas the first prerogative enables the subject of international law to protect its rights by lodging international complaints against other subjects, the latter opens up the possibility of these same entities being hold responsible under international law and, hence, makes them susceptible to be brought before international courts and committees (Carrillo Santarelli, 2008, p. 3).

Based on this conceptualisation of legal personality, this 'abstraction' that is often defined as the capacity for legal relations (Smith, 1928, p. 283) can either be conferred by a general norm that endorses the compliance of an actor with the necessary requirements, or it can be attributed by virtue of a specific rule that grants rights and obligations, as well as competences or responsibilities, in particular cases (Casanova and Rodrigo, 2019, p. 171). In order to analyse whether this international subjectivity has already been attributed to individuals and if it has, how, a general overview of the doctrinal discussions in the field is required.

### 2.1. Natural law and the foundations of the international legal personhood

This dominant position of the State in the international community is the product of a prevailing legal orthodoxy that favours a purely inter-State outlook; in Bartram S. Brown's (1992, p. 204) words, "international law was a law by and for States, in which the rights of individuals had no place". This State-centric approach was openly challenged in the second half of the 20th century with the development of international humanitarian law and the increasing participation of non-state actors in international dynamics (Zellweger and Koller 2007, pp. 1619-1620). Nevertheless, it should not pass unnoticed that State-centrism was already questioned prior to the post-Second World War era by prominent academics such as the Spanish author Francisco de Vitoria. This jurist of the 16th century agreed on the leading role of nations in the universal scheme, yet, he argued that individuals subjected to those nations do also constitute the universal legal order and, as such, their rights cannot be monopolised by domestic law. According to Vitoria's (2007, p. 41) line of thought, individual's rights are a matter that reaches far beyond national jurisdiction, and these cannot fall in the arbitrary treatment of the State.

Drawing upon this rationale, the Spanish jurist and philosopher advanced the idea of universal natural rights and set the basis of today's human rights doctrine (Fernández Ruiz-Gálvez, 2017, p. 20). Vitoria (2007, pp. 50-51) insisted on the equality of every human being and advocated for the political freedom of every State and organised political group that make up the universal community, also referred as *orbe*. Concerning this, Vitoria's iusnaturalist theory argues that different populations are politically organised and united by the human nature (Rojano Esquivel, 2013, p. 168). This community (*totus orbis*) is governed by natural law as well as by the so-called *jus gentium*, a universal law to which everyone is subjected and none can escape (Fernández Ruiz-Gálvez, 2017, p. 27). Accordingly, this society, formed prior to the division of nations, is superior to the will of States, i.e. *Jus naturalis societatis et communicationis* (Rojano Esquivel, 2013, p. 168). Building on Vitoria's work, Francisco de Suarez (2015, pp. 258-259) developed an international society that was aimed at the greater good of humankind and, relying on the previously referred *jus gentium*, sought to avoid actors forcing their will on others.

In a similar line, Hugo Grotius' (2005, p. 40) legal thinking remained centred on the *jus gentium* system instead of resorting to the theory of *jus inter gentes*. In other words, Grotius' theory ties in with the belief that the law of nations was an inter-individual law applied on a universal basis rather than an inter-State legal order (Salako, 2019, p. 133). Advancing this premise, the Dutch juris asserts that the '*societas gentium'* embraces

the humanity as a whole, and, thus, the international community cannot be grounded in the will of each State alone. By extension, sovereign States are not entitled to command a total and an unconditional obedience from its nationals as the *raison d'état* is not absolute but rather limited (Cançado Trindade, 2007, p. 277). In short, Hugo Grotius believed that law of nature targets both, States and individuals, and, on this basis, developed the idea of a 'proto-contractarian system of rules', which compels inter-State relations on the grounds of natural law principles, including sovereign independence, mutual toleration, peaceful commercial relations, humanitarian intervention, and the principle of the freedom of the seas (Pavel, 2021, p. 221).

Influenced by the Grocian line of thought, Emer de Vattel (1758, p. xxi) contributed to the international doctrine by arguing that, as a direct result to the absence of an international authority capable of compelling other actors of the global community, States were subjected by a body of rules adopted under the natural society and upon the interdependence of human beings. Vattel held the view that human beings, by their very nature, were incapable of self-sufficiency. The author argued that there was an inevitable need for the protection and interaction among individuals, so that they could collectively defend themselves against external violence under the umbrella of natural law. Ultimately, the individual requires the framework of society for proper perfection, being incapable of achieving development in isolation (Peces-Barba Martínez and Dorado Porras, 2001, p. 120).

Unfortunately, in later authors, the universal outlook of the founding fathers of the discipline was overshadowed by the increasingly nationalistic positivist philosophy of law (Cançado Trindade, 2013, p. 216). With the emergence of legal positivism and the development of the State-centric law of nations, the object of analysis shifted from individuals to sovereign States. The individual was gradually excluded from the international legal construction pictured by the analysed pioneers, while the nation-state was propelled towards a new era where it was granted the status of *solo* subject of international law (Salako, 2019, p. 133).

### 2.2. Transcending legal positivism to embrace individual agency: A struggle for recognition

Founded on the ideas of fraternity and equality of the mankind, the construct of natural law reached its summum in the 18th century. Nonetheless, along with prosperity, this philosophy of law attracted criticism and scepticism. Among the critical voices was one of the main figures of the historical school of jurisprudence, Friedrich Karl von Savigny (1831). Reflecting on the German jurist's words, Reginald Parker (1956, p. 32) noted that as with language and customs, the domestic legal system differs in each nation, hence, a norm that is believed to be right or good for one States may not be perceived as correct by other States. These criticisms evidenced a transition that had already begun with the adoption of the Peace of Westphalia in 1648 and that had, overall, culminated in the 19th century. The iusnaturalist theory morphed towards modernity with natural law being gradually replaced by positive international law (Brown, 1992, pp. 204-205).

*2.2.1. Legal positivism and the erosion of individual autonomy*

This legal perspective is built on the premise that positive law, understood as the set of norms adopted under the authority of the State, is the only law possible (Parker, 1956, p. 31). Following this legal discipline, the nation-state, with its corresponding rights and obligations, is the *solo* subject of international law, while the individual is a mere subject of domestic law (Pérez-León, 2008, p. 601). The State is, consequently, granted unrestricted freedom as regards its nationals by virtue of its sovereignty (Orakhelashvili, 2001, p. 243).

This philosophical legal approach finds its roots in Jeremy Bentham's utilitarian line of thought and John Austin's theory of law. Their view holds that appeals to natural law are, from start to finish, merely a veil for one's personal opinion. Quoting Bentham words, Postema (2019, p. 284) claims that "a thing ought not to be done because there is a law of nature against it's being done, is an obscure and roundabout way of saying", in most cases, "it ought not to be done, because I say it ought not"; *ipse dixit*, since I determine that it is, it is. Bentham argued form this reasoning that the ambiguous character, and chaotic nature of the unwritten common law, called for a reliable legal code that would contribute to lead and determine behaviours, while reducing judges' margin of interpretation. Austin (2012, p. 267) goes a step further and suggested that only those rules adopted by a sovereign capable of imposing a sanction are legally valid. In his (2012, p. 278) view "the existence of a law is one thing: its merits or demerits are another thing (…) Although it disagrees with a given or assumed test, a law set by the State, (…) is a law which the State has set."

These two theorists' philosophies align with the doctrine of sovereignty developed by Thomas Hobbes. The British scholar was also of the opinion that law was dependent on the sovereign's will. A relevant commentator of Hobbes' theory, Jean Hampton (1986, p. 107), stated that according to the English philosopher "no matter what a law's content, no matter how unjust it seems, if it has been commanded by the sovereign, then and only then is it law." Elaborating on this thought, Hobbes (1885, p. 11) pointed out that a power superior to Leviathan, a metaphor employed by the author to refer to the sovereign State, was not possible. This had to do with the fact that such dominion would go against the idea of 'absolute power'; which was constituted as a key element of the State to protect itself from other counterparts (Benavides-Casals, 2016, p. 16).

In a similar vein, David Hume and Georg Wilhelm Friedrich Hegel were sceptical of the constitution of an international order. Hume (1751, p. 4) argued that the "human nature cannot, by any means, subsist, without the association of individuals (…) but nations can subsist without intercourse." Likewise, Hegel (2022, p. 252) insisted on the impossibility for States to build on a superior structure to which they could subject their will to. The German philosopher grounded its line of thought on the idea that subjectivity rests on the State. All in all, the understanding of Hegel (2022, p. 258) and the aforementioned authors enables the State to displace God, "since the State is objective spirit, it is only though being a member of the State that the individual himself has objectivity, truth and ethical life."

This brief doctrinal analysis evidences the emphasis that classical legal tradition placed on the State's personality, rooted in its inherent self-governing character. States were the only subjects to which international law was applied leading to the concept of *jus gentium* being replaced by *just inter gentes*. As of the end of the 19th century, the narrow inter-State scheme conceived by positivist theorists granted States the authority to determine which rights were to be attributed to their nationals according to the State's will (Cançado Trindade, 2013, p. 217). By assessing these States' *voluntas*, the legal tradition denied the legal international personality of the individual on the ground of a lack of direct contact between individuals, as recipients of rights and duties, and international law (Farinella, 2013, p. 195).

Despite the reluctance expressed by the dominant positivist theory, the emerging doctrine called into question the strict inter-State defective conception of international law, as the upcoming paragraphs will clarify. It was, therefore, not long before the individual freed himself/herself from the long-standing absolute control of the State. This emancipation of the individual from the will of the State implied a gradual recognition of the human being as a subject of international law and, thereupon, as a holder and enforcer of international rights and obligations (Cançado Trindade, 2013, p. 217).

#### *2.2.2. Fading paradigms: Shortcomings of the traditional conception of the individual under international law*

With the interwar period witnessing a dramatic process of industrialisation and unfolding, with it, a social crisis, the shortcomings of positivisms were brought to light. As a response to this classical trend's inability to meet modern society's demands, an anti-positivist movement arose among the European theorists. The industrial revolution posed challenges, such as the employment standards, that were not foreseen in the so-called jurists' 'sacred text', the Napoleonic Civil Code of 1804; this new reality pointed to the need of a more comprehensive *corpus juris*. Up to the 19th century, every legal matter was presumed to be addressed by following a methodology grounded on the *'École de l'exégèse'*, which consisted in the strict application of the French Civil Code, without regard of the historical, moral or sociological perspectives (Portmann, 2010, p. 147). This philosophical approach aligned with Hans Kelsen's (2000, p. 1) 'pure theory of law', which advocated "freeing the science of law from alien elements" including political, moral or sociological aspects. On account of this positivist thinking, law (*lex*) should not be understood in direct correlation with justice (*ius*). Since law and mortality are to be interpretated separately, 'what it is' must not be confused with what 'ought to be' (Yang, 2012, p. 246).

Positivist scholars' inability and reluctancy to adequately analyse the contemporary insights, gave rise to important criticisms levelled against the anachronic State-only outlook. George Scelle (1932, p. 298) minimised the role of the State to a 'vain task' in the law-making process by arguing that these subjects' duty is not to create law as such but rather to identify and express "pre-existing rules of objective law, which are thus translated into normative or constructive rules of positive law." Scelle reflected upon the non-scientific foundation of natural law and delved into the legal approach of 'objective

law', which opposed to the static character of natural law, is distinguished by its dynamism, and grounded on the changing needs of the society (Thierry, 1990, pp. 197-199). As a result, despite both, objective and natural law, agree on their prevailing character over the State's will, unlike naturalism, objectivism shifts the focus from God and other abstract concepts, including *recta ratio* and justice, to the evolving nature of the society. In this light, the dichotomy between natural and positive law was replaced with the dilemma between objective and positive law (Tzevelekos and Berkes, 2021, pp. 446-447).

It is in this context that Edward A. Purcell, Jr., (2014, p. 1481) joined to the growing chorus of critical voices and referred to the positivist conception as "nihilistic, antidemocratic, and ultimately totalitarian." The purely State-centred philosophy of law, along with the strict attempts to pursue a logical and objective analysis of the legal order, perceived the State as the 'universal reality' on which the human freedom and subjectivity relied on (Prewitt-Davis, 2015, pp. 237-238). The positivist legal understanding led to a misconception of the State-individual relations under international law and called for an individualistic notion of the international personality, emphasising the status of the State as the primary and *solo* subject of international law (Portmann, 2010, p. 129). Opposite to what was upheld by the State-subjected line of though, Jean Spiropoulos (1928, p. 66) contended that in order to morph to the new reality, the State could not be understood as the maximum subject of international law, only compelled to its own *voluntas*. Breaking with the conventional doctrine, the State needs to be assessed as a means for fulfilling the core aspirations and fundamental needs of individuals.

A further line of critique against the omnipotence of the State was raised by the judicial power. This positivists' failure to accommodate new realities, or simply acknowledge the advancements in the field, was evidenced in significant judgments (Duran Bächler, 1992, p. 68) such as the *Republica v. De Longchamps* (US Supreme Court, 1784). In this decision, the Supreme Court of the United States charged the defendant for threatening and assaulting the Consul General of France to the United States of America. The domestic court (US Supreme Court, 1784, p. 114) ruled that "the person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world." From this reasoning becomes apparent that despite the positivist trend was still in full swing when the decision was ruled, the American court had little trouble recognising international subjectivity to individuals despite doctrinal reluctancies among the academia (Janis, 1984, p. 64).

At odds with the traditional conception, case law and legal theory seemed to be coming to understand already that the global community did not emerge from the interactions among States only. Retrieving to Scelle's (1948, p. 18) work, the international community responds to the "interpenetration of peoples through international intercourse". In other words, individuals' bonds extend beyond national frontiers and governments are aimed to facilitate individuals to interact with one another both, at national and international levels (Cassese, 1990, p. 211). Accordingly, a progressively popular line of thought came to regard the individual as the real subject of international law (von Bernstorff, 2010, p. 149).

## 3. From objects to subjects: the legal recognition of individuals under international law

Over the course of the 20th century, the international community embedded in a broad structural transformation and gradually left behind the features that had defined the classical legal order. The consolidation of the notion of subjective rights and the affirmation of the autonomy of the will marked the culmination of the individualistic trend in modern culture, a process that had already begun in the 16th and 17th centuries with the thought of Suárez, Grotius, Doneau, Althusius, Hobbes, and Locke (Peces-Barba Martínez and Dorado Porras, 2001, p. 120).

After the First World War, international law underwent a process of institutionalisation, socialisation and humanisation on an attempt to adapt to the new reality. Juan Antonio Carrillo Salcedo (2000, pp. 72-73) developed this threefold approach and noted first, the expanding leverage capacity of both, regional and international organisations; second, a growing complexity of social dynamics and, finally, the inclusion and participation of non-state actors as subjects of international law. In this regard, the International Court of Justice (ICJ) stated in the Advisory Opinion on Reparation for Injuries suffered in the Service of the UN (ICJ, 1949, p. 8) how "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."

From this quote becomes clear that the classical overlook of international law was founded on a highly criticised State-only approach. Modern scholars interpret this traditional perception of law as anachronic, and despite agreeing on the primary and supreme role of the State and other subjects alike, these theorists advocate for a secondary group of international law subjects that includes international intergovernmental organisations, as well as specific public establishments (Bull, 2005, pp. 123-124). Still, as regards to individuals, this well-defined insight relevant to international organisations does not find equivalent application to human beings. The overarching tone of the academia seems to agree on endowing individuals with international rights and duties, due to their growing performance in today's global community, nonetheless, this line of thought is not unanimous (Nyssanbekova et al., 2016, p. 1462).

### 3.1. Rising to the fore: Reconceiving individual's international legal personality

As the 20th century went by, the State-only legal approach was proven to be naïve. Sir John Fischer Williams (1939, p. 18) asserted, in this matter, that it was "obvious" that international relations transcended interactions between States. Building on this self-evident premise, Philip C. Jessup (1956, p. 1) developed the term 'Transnational law' to refer to "the law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching on up to the so-called 'family of nations' or 'society of States'." Besides States, Jessup's (1956, p. 1) understanding of 'Transnational law' consisted of individuals, corporations, organisations of States, or other groups. On that account, the term encompasses every set of norms that rules on actions that go beyond national borders, that is, "both public and private international

law are included, as are other rules which do not wholly fit into such standard categories" (Jessup, 1956, p. 2).

In line with Jessup and Fischer's view, the post-Second World War era granted the status of subjects of international law to new actors such as international organisations and even belligerent communities. However, individuals remained excluded as their juridical personality was denied. Such international subjectivity rested on the *jus tratatum,* the *jus legationen* and the *locus standi* capacity that States granted to emerging international actors by virtue of their will (Rivero Godoy, 2010, p. 37). In accordance with the terms set forth, States were argued to be able by agreement to "stipulate that international law shall apply 'directly' to individuals without the necessity for municipal implementation;" and, exceptionally, to acknowledge the individual as subject of international law (St. Korowicz, 1956, p. 537).

In effect, States, as sovereigns and representatives of nations' interests rather than of individuals', contribute to the setting of international norms and standards via treaties to which individuals are subjected (Rivero Godoy, 2010, p. 39). On the basis of this traditional legal picture, States are understood as subjects of international law whereas individuals are only recognised as objects (Giorgetti, 2019, p. 1088). Yet, the fact that individuals are, as a rule, object of international law does not necessarily deny that they are, at times, direct subjects of the global legal structure (Orakhelashvili, 2001, p. 245). From the preceding, it can be concluded that "the individual is the final subject of all law", hence, there is no well-founded reason whatsoever that justifies the exclusion of the individual from the subjectivity that would entitle him/her to pursue legal proceedings before international courts as a party (Cançado Trindade, 2006, p. 18).

Looking at these decades of change, Hersch Lauterpacht developed an individualistic conception of international law, and advocated the human being's stance at the center of the legal global understanding, as holder of international rights and actor obliged by international duties. Roland Portmann (2010, p. 130) identified in Lauterpacht's work four main elements which are key to the proper understanding of the individualistic approach. First, international standards concurred on by States are in principle aimed at reinforcing individual's well-being. Therefore, the boundaries between States and individuals' interests, as well as the distinction between the branches of public and private law, water down. On this matter, Lauterpacht (1950, p. 4) stated the following:

> "To assert that duties prescribed by international law are binding upon the impersonal entity of States as distinguished from the individuals who compose them and who act on their behalf is to open the door wide for the acceptance, in relation to States, of standards of morality different from those applying among individuals. Experience has shown that 'different' standards mean, in this connection, standards which are lower and less exacting".

Second, individuals might not endow the State the defence of their interests, thereupon, they will pursue their participation in the international arena to guarantee their

welfare. In other words, if the individuals do not trust the State as guarantor of their rights, they will find the means to ensure them (Portmann, 2010, p. 130). Elaborating on this idea, Jean Spiropoulos (1928, pp. 50-51) was of the firm view that individuals should be capable of standing for their rights before international courts single-handed, i.e. without the wardship of the State. This author argued that individuals' rights will remain insufficiently guarded unless a direct channel of complaint is provided to these non-state actors in an international level.

Third, since individuals are the ones performing States' actions, not only States but individuals can also be held accountable when acting as a representative of the State (Portmann, 2010, pp. 130-131). This conception of 'direct obligation' of international law and enforcement upon individual was also risen by Lauterpacht's professor, Hans Kelsen (2000, p. 75), who argued that since "there are norms of general international law by which the person against whom a sanction is to be directed is individually determined as the person who, by his own conduct, has violated international law. These norms establish international responsibility."

Forth, the State is not an end in itself but rather the guarantor of individuals' well-being, accordingly, nor the State neither individuals can meddle with a given set of fundamental rights (Portmann, 2010, p. 131). In Lauterpacht's (2013, p. 48) words, as paradoxical as it may seem, "the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State." Indeed, to date, the core of human rights and international crimes, as well as the effective protection of fundamental rights and freedoms in an international level, is enforceable with a firm independence from the will of the State (Farinella, 2013, p. 188).

In short, 20th century onwards, the Westphalian framework underwent significant changes to respond to increasing social demands and opened the way up to other actors than traditional nations. Relevant authors in the discipline placed into question the notion of the State as a 'supreme ideal' and called for a greater participation of the individual in international law-making. In light of this, the modern doctrine contributed to a paradigm shift, grounded on a weak boundary between international and domestic realms, and advocated for the direct nature of international rights, as well as duties and responsibilities, upon individuals. Nevertheless, it is important to bear in mind that despite the significant progress made towards the recognition of the individual's international subjectivity, human being's legal personality remains rather limited in the global sphere (Friedmann, 1964, p. 234).

### 3.2. Breaking free from the bonds of the State

From its classical State-centred conception to the increasing acceptance of individual legal subjectivity, different reflections have been brought forth by theorists to explain the evolution that the international legal scheme has undergone; considerations of which include the development of international law and its dynamic nature, the predominant character of international legal order upon national legal scheme, the direct stipulation of individual rights and obligations at an international level and a growing relevance of humanitarian values as well as principles (Orakhelashvili, 2001, pp. 242-244).

Given the above, it may be maintained that the individual has taken centre stage as a result of a social and historical evolution. Fundamental rights and freedoms have eventually been placed in the core of the contemporary international legal scheme, by being granted *jus cogens* status. Such a progress has urged the Westphalian model to eventually acknowledge what it was clearly inevitable: individuals have been conferred the functional capabilities required to effectively report violations of international law outside the scope of national jurisdiction (Farinella, 2013, p. 193). Given this, there are those who could cast doubt on the term 'international' itself since global dynamics are not limited, to this day, to inter-State or inter-nation relations. Mark Weston Janis (1984, pp. 74-75), however, suggests that "we continue using the word international but understand 'nation' to mean not only the national State but also the individuals who are the nationals of the State."

#### *3.2.1. International rights as a direct voice for the individual*

Consistent with the traditional understanding that fitted the time, the ICJ, in line with the former Permanent Court of International Justice (PCIJ), discussed in its constitution the capacity of individuals to appear in court as parties. The Committee appointed by the League of Nations to consider individuals' *legitimatio ad causam* upheld that only States, as *solo* subjects of international law, were entitled to be a party in the ICJ legal proceedings. Notwithstanding criticisms coming from the doctrine, this orthodox insight was expressed in Article 34.1 of the Statute of the ICJ (Cançado Trindade, 2007, pp. 283-284).

Framed within the analysed inter-State conception, the PCIJ's Advisory Opinion in Jurisdiction of the Courts of Danzig revolutionised the international legal scene, by recognising an exception to the general norm that rejects the individual's status as subject of international law. After the First World War, the Free City of Danzig and Poland reached an agreement on the administration of the Danzig railways and signed the 'Definitive Agreement Regarding Officials' (endgültiges Beamtenabkommen), which was aimed at regulating railway workers' terms and conditions of employment. Danzig railway officials who had passed from the service of the Free City into Polish service brought actions in relation to pecuniary claims on the basis of the Beamtenabkommen. Initially, the Council of the League of Nations ruled against the possibility of individuals grounding their claims on the Beamtenabkommen (Portmann, 2010, pp. 68-69). Yet, after this decision was appealed by the Free City of Danzig, the Council of the League of Nations formulated an advisory opinion before the PCIJ (1928, pp. 17-18), which stated that "the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts."

From this quote the literature has inferred that international treaties can be directly applied to individuals, if the parties that concluded this agreement had the purpose to create rights as well as obligations for human beings. In this regard, it is important to note that this purpose cannot be deduced but rather clearly expressed in a 'self-executing' treaty, as it stands as an exception to an international norm and is directly applicable by municipal courts. The ICJ went a step further in the *LaGrand (Germany v. United States of America)*

case (2001) and contended that the rights of individuals emanate from every international treaty signed by States, and not only from the aforementioned 'self-executing' treaties or traditional human rights agreements. This judgment (2001, p. 515) dealt with LaGrand brothers, two German nationals living in the United States that were sentenced to death without being previously informed of the rights conferred by the Vienna Convention on Consular Relations (UN, 1963).

To conclude, it is worth noting that the ICJ took a similar stance in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (2004, p. 36). By recalling the *LaGrand* case, the ICJ argued in the same direction and recognised that "Article 36, paragraph 1 (of the Vienna Convention), creates individual rights (for the national concerned), which... may be invoked in this Court by the national State or the detained person". In both decisions, *LaGrand* and *Avena*, it was provided that the ICJ sought to go further the simple preservation of State's national interests and aimed to safeguard individual rights (Milano, 2004, p. 134).

#### *3.2.2. Legal imperatives of the individual under international law*

The recognition of the international subjectivity brings not only the direct application of international rights on individuals but also the imposition of international obligations as well as responsibilities. In the inter-war period, the treaty of Versailles opened up the path for individual liability being directly drawn from international law. Nevertheless, the stipulations foreseen in the peace treaty were not implemented if not through internal courts (Parlett, 2011, p. 68). Hence, despite provisions of the treaty enabled nationals of the Allied and Associated Powers bringing cases against Germany, it did not improve individual's position within the international legal scheme (Wallace et al., 2016, p. 96).

The first international court acknowledging that individuals have obligations under international law was the tribunal in charge of holding accountable Nazi officials: The International Military Tribunal (from now on IMT) of Nuremberg (Kaczorowska, 2010, p. 209). At the expense of classical sovereignty, the IMT (1947, p. 223) determined that "the very essence of the Charter (of the IMT), is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."

Judges sitting in this IMT refused to grant individuals any attempt to take refuge in allegations regarding the State sovereignty. The Nuremberg tribunal determined that the criteria to establish the 'state of defence' and, accordingly, justify the decisions adopted by National Socialist Party members were not met. By virtue of personal liability, Nazi officials were found guilty of the planning, preparation, and execution of war of conquest. Nazis' programme being legal within national jurisdiction did not alter the fact that it was not lawful under a 'higher law', i.e. international law. In sum, the IMT contended that those officials that were being held accountable were obligated not to organise and execute wars of conquest, regardless of the authorisation granted by German office-holders (King, Jr., 1996, p. 135). As stated by the IMT (1947, p. 223) "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

Nuremberg trials set the groundwork for the constitution of subsequent international courts. During the 1990s, two *ad hoc* international tribunals were established by the UN Security Council: in 1993 the International Criminal Tribunal for the Former Yugoslavia emerged in response to the crimes committed in the Balkans war (UNSC, 1993); a year later, the International Tribunal for Rwanda was created on a global effort to prosecute the acts of genocide occurred in Rwanda (UNSC, 1994). The establishment of these two *ad hoc* international tribunals laid the foundations and pointed to the need of creating an international criminal court (Caianiello and Illuminati, 2001, pp. 422-423). Finally, in 1998 the International Criminal Court was established on an attempt, as per the Rome Statute (ICC, 1998, preamble), "to put an end to impunity for the perpetrators of these (serious international) crimes and thus to contribute to the prevention of such crimes."

From all the aforesaid becomes clear that the traditional conception of international law experienced a significant evolution in the post-Second World War era: the passive legal personhood of the individual was acknowledged and, with it, the possibility to hold individual heads of States accountable for the commission of international crimes on behalf of the State (Tedesco, 2017, p. 218). Such advancements in the field of the individual's subjectivity was reinforced with the revaluation of the human nature and humanitarianism as general values. The international community reached a consensus with regards to democracy and human rights, and granted to the later a special status by acknowledging them as inherent to its holders and opposable to every sovereign nation, including the State of which the individual is national (Carrillo Salcedo, 2000, p. 74).

Certainly, individual's legal personhood in the international realm responds to an inevitable development of the contemporary global scheme (Cançado Trindade, 2013, p. 218). Individual's emancipation from the State has been gradual, but is now irrevocable. As a matter of fact, the individual has been bestowed with juridical-procedural competences and is emerging as the ultimate subject of not only domestic law but of the international legal framework as well (Cançado Trindade, 2013, p. 306). On this matter, McDougal and Reisman (1965, p. 826) recall Professor Wolfgang Friedmann's words and uphold "that all law is a law made by human beings for human beings, and that the respect for the human being, as an individual rather than an object to be disposed of at will, is a foundation of all social, and therefore of legal, relations."

This final conscience and faith in the worth of the human being has enable the individual to free itself from a classical State dominating conception of international law. As evidence of this, human rights have come to be recognised as *jus cogens* norms under article 53 of the Vienna Convention on the Law of Treaties (Bianchi, 2008, p. 491). Such acknowledgment has facilitated individuals to attain their emancipation and to act as the driving force behind the creation, among others, of the Commission of Human Rights in 1946. This international entity is responsible of enforcing individual rights as well as drafting and developing significant documents including the Universal Declaration of Human Rights (UNGA, 1948); the Covenant on Economic, Social and Cultural Rights (UNGA, 1966a); as well as the Covenant on Civil and Political Rights (UNGA, 1966b). These legal commitments were central in the global endorsement of the individual as a recipient of international rights and contributed to establish the personhood of the human

being through customary law. Upon full consideration, individuals are not anymore dependent on the 'philanthropy' of its own State to achieve justice (Cassidy, 2004, p. 557).

## 4. Human rights as driving forces behind the paradigm shift of the individual's international subjectivity

The increasing relevance and presence of human rights in the global scheme has compelled the international community to grant them a non-derogable nature and an imperative character as per the international *corpus juris*. On this account, the principle of human rights protection is today ratified as a constitutional maxim of international law. These features of the contemporary legal regime confirm an erosion of the mantle of sovereignty and establish limitations to States' exercise of power. Human rights are no longer understood as sole business of States. Opposite, rights that inhere in every human being constitute a common interest of the global society as a whole (Casanova and Rodrigo, 2019, p. 472).

Leveraging such universal understanding of the protection of human rights, new international non-state actors have emerged very dispose to engage in the protection of these fundamental rights. In the course of this century, the international community has welcomed a great heterogeneity of actors that are called for a greater role in the international legal affairs in general, and the human rights regime in particular. These advancements made in the global commitment to the protection of fundamental rights, along with an increasing relevance of non-state actors' legal assertion, provide a unique opportunity for the individual's international legal subjectivity being fully and effectively acknowledged (Díaz Barrado, 2016, pp. 24-25).

### 4.1. Redefining sovereignty in the age of human rights

As discussed in the preceding sections, prior to 1945, international law was solely perceived as a set of rules aimed at governing purely inter-State relations. Within this classical outlook only States were conceived as subjects of international law and it was not until the emergence of the League of Nations in the post-First World War era, that the narrow understanding of international personality expanded to recognise international organisations as global subjects. Yet, as regards the individuals, the human being remained, for a while longer, as a mere object subjected to the will of its national State, therefore, the international community was unable to intervene in the event that State abuses came to light (Gómez Isa, 2006, p. 20). Quoting professor Pradier-Fodere, Judge T. Modibo Ocran (2002, p. 11) built on the principle of sovereignty and stated that "the acts of inhumanity however condemnable they may be, as long as they did not affect nor threaten the right of other States, do not provide the latter with a basis for lawful intervention as no State can stand up in judgment of the conduct of others". Upon this traditional reflection, unless a State violates other powers' rights, the international community is not legitimated to intervene in the infringements occurred within domestic jurisdiction.

As human rights were gaining momentum, international jurists such as the aforementioned Georges Scelle criticised the shielding that the classic legal view was

endowing to governments when committing human rights violations by virtue of 'State sovereignty'. Thierry (1990, p. 202) brings forward Scelle's words stating that

> "One might say about States what Aesop said about verbs: that they are the best and the worst of things. They are the best if it is admitted that hitherto man has found society governed by the State to be the most satisfactory milieu for the realisation of his genius. They are the worst if one thinks of the fearsome accumulation of individual crimes and collective blunders which have given birth by the deification of the State, leading to government actions escaping the check of law."

All this rhetoric revigorated with the end of the Cold War, conflicts in Somalia, Bosnia-Herzegovina, Sudan and Iraqi Kurdistan pointed to the pressing need for a greater interference of the international community in domestic affairs. The gradual erosion of the principle of sovereignty resulted in an exception to the mantle of 'non-interference': humanitarian intervention (Arnison, 1993, p. 200). The international community agreed to grant basic rights a fundamental status and, with it, legitimated other States to intervene in case of a breach of these rights was committed. In essence, humanitarian intervention implied a limitation to the absolute character of the national sovereignty (Gómez Isa, 2006, p. 20).

Drawing upon this logic, States are responsible of guaranteeing the welfare of its nationals, nevertheless, whether domestic authorities fail or refuse to protect their citizens, the international community assumes responsibility, employing diplomatic, humanitarian, and other measures to uphold the rights of civilians (UN Secretary General, 2005, p. 35). This amounts to saying that the individual is holder of rights that are usually exercised together with the State in the international realm, since this latter classical representative of the individual is not empowered but rather urged and obliged to provide such protection. That said, the State's inability to guarantee the safeguarding of basic rights triggers the international liability of that State due to its omission to act (Farinella, 2013, p. 182).

This reality highlights that the international community is unwavering in its commitment to promoting and protecting human rights, acknowledging them as a matter of urgent and pressing concern (The World Conference on Human Rights, 1993, section I. 4). States can be held into account for severe infringements of individual rights, since fundamental rights are not understood anymore as an unintended consequence of inter-State dynamics, that can be either embraced or rejected by virtue of the will of each State. Indeed, human rights are at the heart of contemporary global legal system and play a central role by providing guidance not only to States but also to international organisations (Tomuschat, 2014, p. 3).

Building on human rights as structural foundations, the first general instrument adopted by the UN General Assembly was the aforementioned Universal Declaration of Human Rights on December 10, 1948. The Declaration codified the respect for human rights and fundamental freedoms stipulated in article 1 of the UN Charter, and further explained in articles 55 and 56 of the very same Charter. The relevance of this Declaration lies, consequently, in the rights it grants individuals to hold the State accountable for its

actions, as well as in the status of active international legal personality that the conferral of these rights implies (Cortés Rodas, 2011, pp. 124-125). Despite the alleged universal nature of the Declaration, most of the still colonised Asian and African countries were left out of the drafting of the Declaration. Moreover, on an attempt to reach greater consensus, this international commitment was adopted without a binding character. It cannot, however, be said that the global pledge has no value, opposite, it has a high moral and political weight, which has led into rules of customary international law (Salvioli and Quesada, 1994, p. 3).

Along with the Universal Declaration of Human Rights, other international agreements as well as conventions and declarations were adopted over the next years in order to develop the binding character of fundamental rights, including the prohibition of war of aggression and crimes of genocide, the protection of refugees and other minority groups and the creation of humanitarian international law. Gradually, the State lost its classical ground and new actors emerged as legal subjects of international order. Ever since, individuals and other non-state actors are legitimated to resort to mechanisms available outside the State as a means to assert their rights at an international level (Cortés Rodas, 2011, pp. 124-125).

### 4.2. The intersection of NGO action and the international self of the individual

As detailed in preceding paragraphs, the global community is embracing a transition towards an intersubjective international law while gradually casting the State-centric legal order aside. This paradigm shift contributed to reformulate significant traditional concepts such as the international subjectivity. On this matter, fundamental rights and liberties played a critical role as they established the theoretical framework required for non-state actors exercising their active legitimacy as legal subjects (Farinella, 2013, p. 197). Previous sections have provided an overview of individuals' increasing global presence and eventual recognition of their personality within international legal scene, yet little has been said about non-governmental organisations' (hereinafter NGOs) participation in such achievement.

The acknowledgment of the individual as a subject of international law responds to a process of historical humanisation in which human rights constituted a crucial pillar of the global regime. Concerning this, it is worth noting the significant impact that non-state actors in general, and NGOs in particular, have had in the advocacy and implementation of fundamental rights via research, report and establishment of legal grounds. In Philip Alston and Ryan Goodman's (2013, p. 1504) words "it is inconceivable that these State of human rights in the world, whatever its shortcomings, could have progressed as much since the Second World War without the spur and inventiveness of NGOs."

In the midst of what has been referred as a "global association revolution", NGOs are of rising importance in the international legal scene. These organisations' presence has significantly increased in the last decades, thus, their growth as global players may seem rather recent; their emergence, nonetheless, dates back to the 19th century in a national level and to the 20th century in the international realm (Szazi, 2012, p. 28). As the Cold War was coming to an end, a human rights-centred governmental system emerged to power. During the 90s the legitimacy of repressive regimes in Eastern Europe and Latin America eroded,

paving the way for a process of democratisation and opening a window of hope for human rights advocates. Mindful of this major upheaval, NGOs played a relevant role in efforts to urge new independent administrations to remain consistent with the international human rights *corpus juris*, and to rectify previous rights breaches (Nelson and Dorsey, 2008, p. 48). Over time, NGOs assumed greater competences and contributed to the international legal regime by incentivising treaties, driving new international organisation and lobbying to build up on international norms (Charnovitz, 2006, p. 1).

Despite the undisputable relevance of NGOs, there is broad consensus on the fact that these organisations are not subjects of public international law, but rather international actors. This latter legal category implies that, from a sociological perspective, non-profit organisations hold the status of key players in international relations; conversely, from a legal approach, no rights or obligations derive directly from international law for NGOs (Núñez Peguero, 2012, pp. 327-330). Such a lack of international personality should not lead to the downplay of these actors, since they greatly contribute to channel public concerns and tailor governmental policies (Casanova and Rodrigo, 2019, p. 271). In the absence of legal authority, it is safe to argue that NGOs enjoy a moral authority grounded on the wilful and free commitment of individuals to the objective for which they are constituted. Hence, these organisations legitimacy builds on the appealing nature of their propose and the values that govern their activity (Charnovitz, 2006, p. 1).

On account of the aforementioned moral authority, it could be maintained that NGOs' perform a fundamental function on the contemporary scheme, by stepping into domains that inter-State dynamics are unable or unwilling to address, on behalf of the civil society. This labour performed by NGOs often leads to frictions between States and organisations. That said, as time went by, cooperation between the two international actors has resulted in very enriching outcomes for both parties, but specially for the civil society (Clark, 1992, pp. 151-152). NGOs have worked their way through a legal scheme greatly influenced by State reluctancies and have managed to secure an observer status in relevant international bodies along with States. These organisations work on meeting their purpose as watchdogs, getting to influence policy making procedures and supervising both, the use made of financial resources as well as the results obtained from the implementation of the decisions adopted. By allowing the participation of these independent organisations in the international course of action, the inter-State scheme is endowed with transparency and legitimacy. A further capacity of NGOs is their work as 'lobbyists'. Besides their advancements in the upper spheres tailoring the global agenda, at a more immediate level, these non-profit entities pursue campaigns aimed at reinforcing participative democracy by shaping policies that belong, in the abstract, only to the State. In other words, these organisations offer to those private individuals that have, traditionally, been excluded from classical political processes the chance to join forces and put pressure on public administrations to achieve objectives that a human being alone cannot meet (Lage and Brant, 2008, pp. 80-81).

An example that illustrates the remarkable results that have been obtained from the cooperation between States and NGOs is the UN Convention on the Rights of the Child (UNGA, 1989). There are many good reasons to raise this child's rights centred treaty, nevertheless, in the particular case of this article, the relevance of this

legal instrument lies with the strong involvement of the NGOs in the codification and adoption of the Convention on the Rights of the Child, as well as the Optional Protocol on the Involvement of Children in Armed Conflicts (UNGA, 2001a); the Optional Protocol on the sale of children, child prostitution and child pornography (UNGA, 2001b); and the Optional Protocol on a Communications Procedure (UNHRC, 2011). Prior and throughout the negotiation and drafting of the Convention on the Rights of the Child and its Optional Protocols, NGOs were granted a consultative status (Giorgi, 2019, p. 154). Leveraging the role entrusted to NGOs by States, the Ad Hoc Group on the Drafting of the Convention on the Rights of the Child emerged. Composed by a wide network of NGOs, this group was responsible of discussing governments' proposals as well as writing their own contributions. The involvement of these NGOs, which to date carry on working via a network of alike organisations, constitutes a key precedent in the history of the UN and serves to uphold the rights and interests of individuals, as acknowledged by the OHCHR (2007, pp. 936-937).

A further matter that is worth noticing in relation to both, the Convention on the Rights of the Child and the main topic object of analysis in this article, individual's subjectivity under international law, is the fact that article 5 of the aforementioned Optional Protocol on a Communications Procedure foresees the submission of individual communications, in case of a breach of the rights stipulated in the Convention or any of the other three Optional Protocols occurs. This legal provision brings together the underlying idea that has been developed throughout the last paragraphs: NGOs' contribution to the advocacy and implementation of human rights places fundamental rights and, with it, the human being, at the centre of the international legal scheme, which has eventually translated in the conferral of the active legal legitimation to the individual under international law.

Along with the Committee on the Rights of the Child, the international system has provided for other universal (Pillay, 2012, p. 16) and regional (Hansungule, 2009, p. 684) complaint mechanisms that allow individuals to bring claims against the State, upon exhaustion of domestic remedies and ratification of legal instruments that allow for such complaints mechanisms to take action. These legal procedures are undoubtedly important advances for individuals' *legitimatio ad causam*. Having said that, these are not without limitations and should not be perceived as a panacea (Callejón, Kemileva and Kirchmeier, 2019, p. 31). They often come with high costs, complexity, and barriers for those lacking legal expertise. In this context, NGOs step in to fill this void and ensure greater accessibility by spreading awareness, offering financial aid, and providing free legal assistance (UNODC and UNDP, 2016, p. 49).

## 5. Concluding thoughts on the individual as a legal subject under international law

The 20th century provided a legacy of codification and expansion of human rights, catalysing the empowerment of the individual and its emancipation from the State as an international legal subject. Upon a process of humanisation, the natural law long advocated by Vitoria and Grotious emerged once again, reclaiming its place, yet moving from a theological basis to one centered on international commitments. After the inadequacies

of Hobbes' Leviathan and Kelsen's pure theory of law revealed their inability to address the deeper truths of justice and human dignity, the *jus inter gentes* paradigm allowed the *jus gentium* doctrine to return. This gave rise to a conceptual change that redefined the State as primarily a mechanism for the realisation of individual needs and interests. From the preceding, it stands to reason that the individual has won recognition of legal rights and been granted the capacity to vindicate them at an international level. In point of fact, the global legal scheme has, eventually, acknowledged individuals the international subjectivity that were denied ever since the adoption of the Westphalian Treaty and the conception of the modern State.

As the traditional authority of the State diminishes, the individual's role as the central subject in international law has gained prominence, surpassing the sovereign entity and its territorial limits. Indeed, along with globalisation, the individual's concerns rise above national borders over the long-standing positivist perception of the State *solo* approach, to encompass other actors beyond the State. This relates to the fact that, although the term 'transnational' literally denotes a reality that relates the nation-state, it extends to include various other subjects that shape the dynamics and impact the global structure. In this context, the new *corpus juris* resulting from the endorsement of the individual's centrality brings human rights to the forefront over State sovereignty and, in a bid to secure such a shift from *raison d'Éta* to *raison de l'humanité*, a *locus standi* is granted to the individual.

As a result of the foregoing and in light of the research inquiry raised by the article as to whether the individual has acquired subjectivity resulting in effective legal standing, it is possible to conclude that the answer is affirmative. Individuals are today holders of rights and obligations and have been vested with the capacity to exercise and invoke them directly before several judicial and quasi-judicial bodies vis-a-vis the States of which they are nationals. That being said, it is worth noting that despite a comprehensive realignment of the classical doctrine, States remain predominant in the international scheme and the enforcement of international treaties, as well as judgments, is contingent, to a large extent, on the willingness of States to comply with such international commitments.

Accepting this limitation, while refraining from letting it define the path forward, it is important to recall and enhance the major and meaningful progress that the individual has accomplished in the past few decades. Individuals, empowered by the support of NGOs and civil-society networks, have steadily called into question a *status quo* that favours the State, asserting their autonomy and reclaiming their agency. Earlier reflections on lawsuits litigated on topics such as technology and climate change highlight the individual's evolution from a passive object to an active subject of international law. In fact, individuals' engagement in international courts demonstrates their capacity to set legal precedents and define global norms in addressing the demands of a rapidly evolving *orbe*.

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