

## ARTICLES

### RETHINKING THE INDIVIDUAL IN INTERNATIONAL LAW

by  
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*The acceptance of the individual as a subject of international law has been gradual and asymmetrical. Individuals have become international law subjects in their own rights in some international legal areas, including human rights and international criminal law. This affords individuals substantive rights and obligations, as well as procedural rights. In most legal areas, however, individuals acquired substantive rights, but not direct procedural rights. In those instances, individuals need the filter of a nationality to enforce their claim and remedy in international proceedings. This Article criticizes the nationality-based approach and argues that there are better and alternative ways to provide procedural rights for claims arising from individual substantive rights under international law. A new approach could address some of the asymmetries of the present system and reconcile the difference between theory and practice in how international law approaches the individual.*

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## INTRODUCTION

Westphalian sovereignty created a world based on co-existing sovereign States. In terms of legal theory, State sovereignty was based on independence and equality between States: by and large, each State was sovereign within its own territory, and other States could not interfere in another State's domestic affairs. International law was the space of States, not individuals. The idea of sovereignty "carried extraordinary power within the shared consciousness of society."<sup>1</sup> Functionally, this view re-

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<sup>1</sup> Stéphane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTL. J. LEGAL HIST. 181, 186, 210–11 (2004) ("the orthodoxy according to which the *Peace of Westphalia* recognised and applied for the first time the idea of sovereignty and hence constitutes a paradigm shift in the development of the present state system is historically unfounded and, in effect, is a myth. It was argued that 1648 constitutes no more than one instance where distinct separate

sulted in a system set up for States as the sole subjects of international law, while individuals were the subjects of the State and its internal laws.<sup>2</sup> As explained in this Article, for a variety of reasons and in a variety of ways, the doctrinal thinking of the position of the individual has substantially evolved and, especially since World War II, there has been a progressive recognition of the role played by the individual in international law. Functionally, however, international law is still set up as an inter-State system, where the individual has a limited place to exercise her rights.

While the individual's position in specific areas of international law has been the subject of study before, this Article focuses on something different: it explores the discrepancy and asynchronous development of international law, and the effect this has had on the capacity of the individual to act in international law. The approach is rooted in a historical analysis of the progressive emancipation of the individual in the international legal system. This Article also has a larger goal: it offers a systematic approach to the role of the individual in international law and explains why it is time to free the individual in international law and allow her to access the international legal system in a more expansive and creative manner.

Part I of this Article explains the individual's position in international law and how this position has evolved in the post-World War II era. Part II focuses on how the link between the State and the individual, expressed through nationality, has become constrictive, fallacious, and inefficient. Part III builds on the first two and develops alternatives to using nationality to access international law claims. These alternatives are based on a functional approach and on providing multiple bases for jurisdiction for an individual's international claim.<sup>3</sup> To conclude, the application of these alternatives is analyzed in practice to demonstrate how individuals will benefit, especially for claims related to common goods, such as those arising from climate change, and other environmental-related

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polities pursued their continuing quest for more authority over their territory through greater autonomy.”).

<sup>2</sup> Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 20–28 (1948) (stating that “the importance and dignity of being the first of several attempts to establish something resembling world unity on the basis of states exercising untrammelled sovereignty over certain territories and subordinated to no earthly authority” is traditionally attributed to the Peace of Westphalia. “Westphalia, for better or worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world.”). Anzilotti remarks that Westphalia is considered as the starting point of historical development of international law. DIONISIO ANZILOTTI, *COURS DE DROIT INTERNATIONAL* 5 (1st ed. 1929) (in French in the original, Westphalia “considérés avec raison comme le point de départ du développement historique du droit international actuel.”).

<sup>3</sup> William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL'Y 21, 21 (1998).

damages. This proposal is also responsive to the increasing public and political demand for new approaches in Investor-State dispute settlement (ISDS) procedures.

### I. THE INDIVIDUAL IN INTERNATIONAL LAW: AN EVOLVING STORY

International law is, as all legal systems are, based on a agreement, whereupon a group of individuals coalesce to create a recognized entity—the State—that represents their interests, creates and enforces a legal system, and acts on their behalf vis-à-vis other States.<sup>4</sup> Individuals are a necessary component of States. States are created by, and are made up of, individuals.<sup>5</sup> However, States went on to become the main subjects of international law. Traditionally, there has been little space for individuals in international law, yet actions by individuals are increasingly percolating into the empty spaces left in the structure of the international community. Indeed, the individual has pierced the veil that has kept her separate from the State and has acquired rights and obligations by herself. This Section explores and explains this evolution.

The increasing recognition of the individual as a subject of international law represents an important development in the post-World War II era. Prior to this development, the State was the main subject of international law; individuals were not recognized as independent subjects in international law. Individuals were only recognized vicariously as international subjects, as nationals of a State. Historically, individuals had no rights and obligations under international law; they were subjects of domestic law. States were subjects of international law. Thus, individual representation in international adjudication was done through diplomatic means whereby a State espoused the claims of one of its nationals in inter-State proceedings. The individual had no direct standing in international proceedings.<sup>6</sup>

The post-World War II period brought about significant developments in the recognition of individuals in the international legal system. Doctrinally, international law has adopted a more flexible approach to accommodate different international legal subjects with different rights

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<sup>4</sup> Louis Henkin, *International Law: Politics and Values*, in INTERNATIONAL LAW: CASES AND MATERIALS 2 (Lori Damrosch & Sean Murphy eds., 6th ed. 2014) (“The ‘persons’ constituting international society are not individual human beings but political entities, ‘states,’ and the society is an inter-state system, a system of states.”).

<sup>5</sup> The Montevideo Convention requires a permanent population as one of the four necessary elements that constitutes a State. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

<sup>6</sup> See I LASSA F. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 362 (2d ed. 1912) (“Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.”).

and obligations.<sup>7</sup> The individual has become an increasingly recognized subject of international law in many areas. She has acquired many human rights, and has the obligation to respect international criminal law. This does not mean that the individual is on par with the State as a subject of international law, however.

The increasing relevance of the individual in the international legal system has not been uniform. A clear example in which this difference has manifested is the divide between substantive and procedural rights for individuals in international law.<sup>8</sup> The ability to enforce substantive rights procedurally gives the individual immediate access to remedies under international law. But being recognized as a subject of international law gives the individual both substantive and procedural international legal rights in only a few instances. For example, this is sometimes the case in human rights proceedings.

In many other instances, procedural rights have not followed substantive rights. At times, rights are vested to the State, and the State has the right to require other States to grant rights to individuals.<sup>9</sup> In some areas, States may still exercise their diplomatic powers to represent an individual's claims against a State. In these situations, the claim becomes the State's, and any remedies are awarded to the State. In other areas, the individual must possess a certain nationality to access certain international courts and tribunals. In matters of international investment law, for example, the individual rights of the investor cannot be directly exercised without an overarching treaty binding the individual to a State. The individual can only bring a claim if she possesses a certain nationality. This is because most rights are enshrined in Bilateral Investment Treaties, whereby individuals' rights are framed as rights deriving from the State.<sup>10</sup> Hence, because the link between the individual and international law is established through nationality, an individual must hold the correct nationality to access international law remedies; this also means that individuals who do not possess the right nationality lack access to international protection. This is the case for stateless people, but nationality has

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<sup>7</sup> Simone Gorski, *Individuals in International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 15 (2013) ("Doctrinally, this change in State practice was legally accommodated by showing a more flexible approach towards the concept of subjects of international law.").

<sup>8</sup> ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 44 (Jonathan Huston trans., 2016) (calling this a "Decoupling [of] Substantive and Procedural Individual Rights").

<sup>9</sup> Christian Walter, *Subjects of International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 18 (2007) (the individual "has internationally been granted rights and is made subject to obligations . . .").

<sup>10</sup> Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, INT'L INST. FOR SUSTAINABLE DEV. 8–9 (Apr. 2003), [https://www.iisd.org/pdf/2003/investment\\_int\\_human\\_rights\\_bits.pdf](https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf).

received renewed attention also because of dual-nationals and individuals whose States have not ratified the specific international treaty.<sup>11</sup> In these instances, nationality has become an obstacle that impedes the individual's direct access to international law remedies.

This Article highlights this fallacy and argues that the individual should be recognized as such in international law. Certainly, this would result in a radical change of certain features of international law. Indeed, rejecting nationality as a base for international claims may seem like a bold proposition. Yet, doing so would reflect an updated doctrinal understanding and an appreciation of a post-Westphalian world—one in which the individual is not inevitably subordinated to the State, and one that would also result in a more consistent understanding of individuals' substantive and procedural rights.

Appreciating the fundamental shift that occurred after World War II in the position of the individual in international law is key to understanding the argument of this Article, which suggests alternative bases for individual claims based in international law and separated from claims of the State. Indeed, at its core, this Article challenges the existing rationale that subordinates the individual to the State in international law. Individuals need not be filtered by States when accessing international law. States and individuals can have widely different interests, and a State may not always have an interest in pursuing what is best for the individual. Freeing individuals from States when accessing international law, and accepting the argument advanced in this Article, would be more than a mere academic exercise, indeed it could have repercussions in many areas of international law—we could envisage a completely different system of international subjects.

As an initial step in pursuance of this goal, the section below explains the aforementioned historical shift and its significance. It then focuses on two important areas in which recognizing individuals as subjects of international law is particularly advanced: human rights and international criminal law. Finally, it explores other areas of international law in which the transformation of the role of the individual is still transitional and not “completed,” so that the individual enjoys some rights, but can seldom exercise them directly in the international sphere.

#### A. *The Individual in International Law: From Objects to Legal Personality*

The classic view of international law provides that international law is the law that applies between nations—it was, literally, inter-national. Only States had rights and duties under international law.<sup>12</sup> Indeed,

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<sup>11</sup> Ruth Donner, *Dual Nationality in International Law*, 47 HUNG. J. LEGAL STUD. 15, 16 (2006).

<sup>12</sup> Walter, *supra* note 9, ¶ 15 (stating that before it changed in the last 50 years, “[u]nder traditional international law, individuals were under the exclusive control of

Under the Westphalian System, it was the States that were the dominant players in the international system and the doctrine of State sovereignty as developed by Bodin and Hobbes made it impossible for the international system to perceive the individuals of which the State was composed as actors and right-holders within the system.<sup>13</sup>

In the Westphalian system, individuals were not subjects of international law and had no international legal rights. It was left to domestic law to regulate individuals and groups.<sup>14</sup>

Writing in 1912, Lassa Oppenheim, one of the recognized fathers of international law, treated individuals as “objects of international law”<sup>15</sup> whose importance was “just as great as that of territory.”<sup>16</sup> He claimed that individuals are never subjects of international law because “the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.”<sup>17</sup> Rights and duties that individuals may have in conformity with international law derive from domestic law only.<sup>18</sup>

The application of this exclusive sovereignty principle is clearly reflected in practice and in a seminal decision by the Permanent Court of International Justice (PCIJ), the precursor of the International Court of Justice (ICJ). In the now classic *SS Lotus* Case, the PCIJ asserts:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing inde-

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States.”). See also Gorski, *supra* note 7, ¶ 11 (“A theory linked to the influence of natural law was that individuals bear rights and duties. This theory, however, fell into disuse with the growing importance of the State. . . . To say it with Hobbes’ Leviathan, the *bellum omnium contra omnes*—the war of all against all—was supposed to be the natural state that could only be averted by a strong centre.”).

<sup>13</sup> Gorski, *supra* note 7, ¶ 11.

<sup>14</sup> Citing the first (1905) edition of Oppenheim’s *Treatise*, Parlett explains “[s]ubjects of rights and duties under international law were states ‘solely and exclusively.’ International law was a law ‘for the international conduct of States, and not of their citizens.’ Individuals and groups were not subjects of international law and had no rights as such under international law.” KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* 14 (2010).

<sup>15</sup> OPPENHEIM, *supra* note 6, § 290 (“But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are *objects* of the Law of Nations.”).

<sup>16</sup> *Id.* § 288 (noting that this chapter follows the chapter on territory, in the section dedicated to objects of international law).

<sup>17</sup> *Id.* § 289.

<sup>18</sup> *Id.*

pendent communities or with a view to the achievement of common aims.<sup>19</sup>

A major and fundamental shift occurred in the post-World War II period: while States continued to play a preeminent role in international law, individuals also became increasingly more relevant in international law.<sup>20</sup>

Thus, by the time the most recent edition of Oppenheim's treatise (edited by Sir Robert Jennings and Arthur Watts) was published in 1992,<sup>21</sup> the individual had acquired importance in international law and enjoyed certain rights. The authors write:

[T]he quality of individuals (and private companies and other legal persons) as subjects of international law is apparent from the fact that, in certain spheres, they enter into direct legal relationships on an international plane with states and have, as such, rights and duties flowing directly from international law. It is no longer possible, as a matter of positive law, to regard states as the only subjects of international law, and there is an increasing disposition to treat individuals, within a limited sphere, as subjects of international law.<sup>22</sup>

The 8th edition of another classic treatise by Ian Brownlie—edited by now-ICJ Judge James Crawford in 2012—sees the individual purely as a subject of international law.<sup>23</sup> Malcolm Shaw also writes that “modern practice does demonstrate that individuals have become increasingly recognised as participants and subjects of international law.”<sup>24</sup>

In the post-World War II world, States continue to be the major and leading actors in international law.<sup>25</sup> They continue to be the principal subjects of international law. International law is primarily made up of

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<sup>19</sup> Case of the S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 at 18 (Sept. 7).

<sup>20</sup> Walter, *supra* note 9, ¶¶ 15–18 (stating that “[t]he position of international law with respect to individuals changed considerably in the last 50 years” and “the individual today has acquired a legally relevant position in international law.”). Note that individuals are not the only new subjects of international law: international organizations and to a different extent non-governmental organizations and multinational corporations also play new and different roles. This article focuses on individuals only.

<sup>21</sup> 1 OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 2008) (noting that the section pertaining to the individual is still in Part 2, dedicated to the objects of international law).

<sup>22</sup> *Id.* § 375.

<sup>23</sup> JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 121 (8th ed. 2012).

<sup>24</sup> MALCOLM N. SHAW, INTERNATIONAL LAW 204 (8th ed. 2017).

<sup>25</sup> Walter, *supra* note 9, ¶ 18 (“[M]any norms of international law are, for reasons of their content, only applicable to States.”).



rules that are based on the express or tacit consent of the States.<sup>26</sup> However, while States remain the primary subjects of international law, they are not the only subjects. Individuals have gradually become subjects of international law in their own rights. They enjoy certain rights, and are beginning to have certain obligations under international law.<sup>27</sup>

This shift in thinking about the individual is well reflected in the jurisprudence of the PCIJ and the ICJ. The PCIJ case *Jurisdiction of the Courts of Danzig* exemplifies the tension brought about by this doctrinal shift in thinking.<sup>28</sup> The 1928 case related to an agreement between Poland and the then-Free City of Danzig in regard to railway employees. The Court concluded that the officials had a right of action against the Polish Railways Administration in domestic courts, as opposed to international courts, for the recovery of pecuniary claims.<sup>29</sup> In an oft-cited passage, the PCIJ held that it could:

[B]e readily admitted that, according to a well established principle of international law, . . . an international agreement, cannot, as such, create direct rights and obligations for private individuals.<sup>30</sup>

*Jurisdiction of the Courts of Danzig* is often cited as a paramount example of the inability of individuals to hold international rights.

However, a more recent and accurate reading, well-supported by Kate Parlett's work, highlights the tension and ambiguity of the wording of the PCIJ's decision. Her work points out that, in fact, the Court may have authored the first authoritative statement that an individual could acquire direct rights by treaty.<sup>31</sup> Indeed, PCIJ President Dionisio Anzilotti held that the Court had not concluded that international agreements could contain rights for individuals, but only that treaty parties could create individual rights by implementing legislation.<sup>32</sup> Others disagreed.

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<sup>26</sup> Statute of the International Court of Justice, art. 38, 59, <https://www.icj-cij.org/en/statute>.

<sup>27</sup> Walter, *supra* note 9, ¶ 16 ("International law has undergone an evolutionary development in this respect. It is undisputed that international treaties may create individual rights and obligations.").

<sup>28</sup> Beaulac, *supra* note 1, at 210–11 ("[T]he orthodoxy according to which the *Peace of Westphalia* recognised and applied for the first time the idea of sovereignty and hence constitutes a paradigm shift in the development of the present state system is historically unfounded and, in effect, is a myth. It was argued that 1648 constitutes no more than one instance where distinct separate polities pursued their continuing quest for more authority over their territory through greater autonomy.").

<sup>29</sup> *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, ¶ 48 (Mar. 3, 1928).

<sup>30</sup> *Id.* ¶ 37.

<sup>31</sup> Kate Parlett, *The PCIJ's Opinion in Jurisdiction of the Courts of Danzig: Individual Rights under Treaties*, 10 J. HIST. INT'L L. 119, 119 (2008).

<sup>32</sup> *See id.* at 121; *see also* PETERS, *supra* note 8, at 44.

Hersch Lauterpacht, for example, reasoned that if treaty parties so intended, and the treaty provisions were clear enough, then treaties could create individual rights which were immediately applicable.<sup>33</sup> Lauterpacht called the PCIJ's judgment a "revolutionary pronouncement."<sup>34</sup> In 1928, when the decision was issued, however, the world was not ready to embrace such a revolution in doctrine. Many years had to pass before that extent of the PCIJ's pronouncement was fully understood.<sup>35</sup>

Sensibilities had changed by the end of World War II. In 1949, the ICJ was asked to advise whether the United Nations, as an international organization, had the capacity to bring an international claim against a government for injury suffered by a UN agent in the performance of his duties, with the goal of "obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him."<sup>36</sup> The resulting ICJ opinion, *Reparation for Injuries Suffered in the Service of the United Nations (Reparation)* is momentous.<sup>37</sup> It recognizes that the UN does indeed have the capacity to bring an international claim against a State for damages resulting from a breach by that State of its international obligation. The ICJ also held that the UN has the capacity to exercise "functional protection in respect of its agents" regardless of the nationality of the agent.<sup>38</sup>

In the doctrinal development of the individual's position in international law, *Reparation* is important for many reasons. First, the decision recognized that international organizations, namely the UN, have separate legal personalities. The Court also recognized that:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.<sup>39</sup>

The Court likewise recognized the possibility of varied international subjects and held that "[t]hroughout its history, the development of international law has been influenced by the requirements of international life

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<sup>33</sup> 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 288 (Elihu Lauterpacht ed., 1970) ("The decision amounts to a clear denial of the view that individuals can acquire rights only through the instrumentality of municipal legislation; it denies the exclusiveness of States as beneficiaries of international rights."); HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 174-75 (Grotius Pub. Ltd. rev. ed. 1982) (1958).

<sup>34</sup> See LAUTERPACHT, DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 33, at 174.

<sup>35</sup> Parlett, *supra* note 31, at 141-45.

<sup>36</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, at 175 (Apr. 9).

<sup>37</sup> See *id.*

<sup>38</sup> *Id.* at 184-85.

<sup>39</sup> *Id.* at 178.

. . . .”<sup>40</sup> Thus, the ICJ also recognized the responsiveness of the international legal system to the system’s needs. Importantly, *Reparations* recognizes that international law has space for other subjects of the international system that may have different rights and obligations than States. Being subjects of international law entails the possession of international rights and obligations, and the capacity to bring international claims. Significantly, this capacity is based on functional necessity, and it is not constrained by any nationality requirement.<sup>41</sup>

More recently, the ICJ articulated this principle, and explicitly recognized the existence of individual rights created in international law. In *LaGrand*, the Court found that Vienna Convention on Consular Relations created international individual rights alongside those of States. In this contentious decision, which Germany brought against the US, the ICJ confirmed that the rights created by the Vienna Convention are rights created by treaty, and that they belong to the individual.<sup>42</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 183–86. The ICJ is very clear that the claims arose from a breach of a duty owned to the UN where the nationality of the individual did not play a role.

Having regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. . . . For the same reason, the injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection. . . . It must be noted that the effective working of the Organization—the accomplishment of its task, and the independence and effectiveness of the work of its agents—require that these undertakings should be strictly observed. For that purpose, it is necessary that, when an infringement occurs, the Organization should be able to call upon the responsible State to remedy its default, and, in particular, to obtain from the State reparation for the damage that the default may have caused to its agent. In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be) . . . . The action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

*Id.*

<sup>42</sup> *LaGrand Case (Ger. v. U.S.)*, Judgment, 2001 I.C.J. Rep 466, 494, 497 (June 27) (“Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person.

Having discussed in the previous paragraphs the extraordinary doctrinal changes that occurred in recognizing individuals as subjects of international law, it is important to consider why those changes occurred. What are the reasons that made the change possible—and what made them permanent? What explains the doctrinal shift in relation to the individual that led to *LaGrand*?

World War II certainly played a major role. World War II was a devastating war that involved many countries and resulted in a very large number of casualties.<sup>43</sup> The vulnerable position of the individual in international society was very evident—proven by the enormous number of civilian casualties suffered on all sides.<sup>44</sup> Many cities were destroyed in devastating bombing raids, and World War II only ended after the use of the first atomic bombs, in Hiroshima and Nagasaki, which by themselves killed over 100,000 civilians.<sup>45</sup>

The war was not only an international war, but was in many ways a war characterized by competing ideologies, particularly the theorization of an especially callous ideology.<sup>46</sup> Nazi Germany was not only at war with other countries in Europe, but also at war with parts of its population. This internal war targeted religious and ethnic minorities. It clearly demonstrated that the State could become an enemy of the individual, and even of its own nationals. Nazi Germany's war against its own population proved that the individual needed—as a consequence—to be able to be protected from the State itself.<sup>47</sup> The individual needed to be emancipated by the State's supervision, and conquer her own space in international discourse in order to obtain effective protection.<sup>48</sup>

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These rights were violated in the present case. . . . The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual").

<sup>43</sup> *Battle Deaths Dataset Version 1.0*, PEACE RES. INST. OSLO (2017), <https://www.prio.org/Data/Armed-Conflict/Battle-Deaths/Old-versions/10/>.

<sup>44</sup> ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW* 22 (2015).

<sup>45</sup> ROBERT PAPE, *BOMBING TO WIN: AIRPOWER AND COERCION IN WAR* 105–06 (1996).

<sup>46</sup> KANTER, *supra* note 44, at 22.

<sup>47</sup> See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 291–92 (1958) (“[I]t turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.”).

<sup>48</sup> See, e.g., JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTION, PROCESS* 17 (2d ed. 2006) (“[T]he human tragedy of World War II led governments . . . to devote significant resources to the creation of a corpus of law aimed at protecting individuals from their own governments.”).

War and even genocides are not, unfortunately, unique to World War II, however.<sup>49</sup> So why was the legacy of World War II so meaningful for the individual's position in international law? One additional explanation is that the war created a large number of refugees who fled their homes and resettled in other countries.<sup>50</sup> This is consequential for two reasons. First, refugee resettlements became very visible, and this visibility influenced the political discourse in their new countries. Refugees were able to keep issues linked to the war and resettlement visible and discussed. Second, and possibly even more consequentially, refugees are the epitome of a State failing an individual.<sup>51</sup> Refugees must flee their home country because that country persecutes them instead of protecting them. Hence, the individual's vulnerability vis-à-vis the State became apparent in the refugee crisis World War II produced. Significantly, in *Reparation*, the Court reassured States that recognizing new subjects of international law did not diminish the State's importance.<sup>52</sup> International law is still essentially state-centric; new subjects of international law can exist parallel to States without diminishing the States' standing.

Another reason that may explain why World War II had a lasting effect on how the individual is perceived in international law is that World War II was a very visible war. Evidence of human suffering was clearly visible in newspapers and cinemas.<sup>53</sup> Photos of troops entering concentration camps circulated worldwide and the U.S. army had journalists and photographers who followed the troops and provided immediate and tangible evidence of the horror of war and the extent of human suffering. These public images helped consolidate the view that individuals were not sufficiently protected by their country of origin, and that more had to be done to guarantee basic rights directly to the individual. That outrage and call for action translated to an important policy shift. In the post-World War II period, States assigned duties and rights to individuals without necessarily going through domestic law. They also used interna-

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<sup>49</sup> Scott Lamb, *Genocide Since 1945: Never Again?*, DER SPIEGEL ONLINE (Jan. 26, 2005), <http://www.spiegel.de/international/genocide-since-1945-never-again-a-338612.html>.

<sup>50</sup> The 1951 Convention and its 1967 Protocol, UNHCR 1 (2002), <http://www.unhcr.org/4ec262df9.pdf>.

<sup>51</sup> Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 137, 152 (the 1951 Convention Relating to the Status of Refugees defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . .").

<sup>52</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *supra* note 36, at 186.

<sup>53</sup> Ben Cosgrove, *The Photo That Won World War II: 'Dead Americans at Buna Beach,' 1943*, TIME MAGAZINE (Oct. 31, 2014), <http://time.com/3524493/the-photo-that-won-world-war-ii-dead-americans-at-buna-beach-1943/>.

tional law.<sup>54</sup> What can be seen is that individuals acquired rights, had obligations, and were offered redress.<sup>55</sup> This was a change toward recognizing the individual as having an increasingly relevant personality in international law.

But the occurrence of the war and its effects by themselves do not fully explain why the revolution of individual rights in international law lasted after the war. It is important then to consider the particular historical period in which World War II was fought. On one hand, it occurred not long after another deadly world conflict, World War I, which had also resulted in a massive loss of civilian and military lives.<sup>56</sup> The end of the First World War also coincided with the Russian Revolution, which produced a massive wave of refugees seeking asylum in Europe. The protection of minorities and the war's refugee crises highlighted the need to separate the interests of the individual from those of the State. Minority rights and refugees became issues discussed at Versailles Peace Conference and resulted in many policy decisions about the international protection of certain vulnerable individuals.<sup>57</sup>

On the other hand, World War II also gave rise to a very different world. The international movement that led to the creation of the United Nations also resulted in an internalization of some of the war's main themes. Anti-colonial movements flourished, demanding the independence and self-determination of people living in European colonies.<sup>58</sup> The U.S. witnessed the civil rights movement, which firmly acknowledged the equality of all Americans and pushed for an end to discrimination.<sup>59</sup> Europe saw the establishment of the European Economic Community and the Council of Europe. These movements were all conducive to a re-

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<sup>54</sup> This occurred in concurrence with the acceptance of other subjects in international law—notably international organizations. See SEAN MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 388 (Lori Damrosh & Sean Murphy eds., 6th ed. 2014) (“[I]nternational organizations . . . flourished following World War II, with the creation of the United Nations, the World Bank, the International Monetary Fund, and many other institutions.”).

<sup>55</sup> Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241, 255 (2000).

<sup>56</sup> *World War I Casualties*, WORLD HERITAGE ENCYCLOPEDIA, [http://self.gutenberg.org/articles/eng/World\\_War\\_I\\_casualties](http://self.gutenberg.org/articles/eng/World_War_I_casualties) (last visited Aug. 26, 2018) (“The total number of military and civilian casualties in World War I was over 37 million: over 16 million deaths and 20 million wounded, ranking it among the deadliest conflicts in human history.”).

<sup>57</sup> Antonija Petričušić, *The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations*, CROATIAN INT'L REL. REV., 1, 2 (2005).

<sup>58</sup> Penny Von Eschen, *Civil Rights and World War II in a Global Frame*, in FOG OF WAR: THE SECOND WORLD WAR AND THE CIVIL RIGHTS MOVEMENT 171 (Kevin M. Kruse & Stephen Tuck eds., 2012).

<sup>59</sup> See *id.* at 178–79.

thinking of what the individual's position in the international arena should be vis-à-vis the State.

Taken together, these issues help explain why the changes in the individual's position vis-à-vis the State occurred, and how they initiated a re-examination for a rationale of the State-centered system. The emancipation of the individual in international law started with gradual changes brought about by World War II. It is still going on, and this Article argues it could change entire areas of international law.

Having discussed doctrinal changes in general, the sections below now specifically review the individual's rights and obligations in some of the most significant areas of international law. This will show the extent to which the individual's position in international law has already evolved. It will also acknowledge the space in which it can further evolve.

### *B. International Human Rights: The Individual Acquires Rights*

The development of human rights law and the creation of enforcing instruments open to individuals played an essential and transformative role in acknowledging the individual as a subject of international law with a distinctive legal personality.<sup>60</sup> This Section reviews this development. First, it shows the evolution of the human rights system and how it ultimately grants international rights directly to the individual. Second, it briefly explains how the individual can directly enforce her human rights under international law. Third, it explains this development in a more theoretical aspect.

Starting mostly after World War II, members of the international community adopted a series of instruments that recognized that individuals have certain basic universal rights under international law, which are common to all, which States had the obligation to respect.<sup>61</sup> This development can certainly be seen as a reaction to the atrocities committed during World War II, though the seeds were already visible in the inter-war period.<sup>62</sup> These international instruments included declarations and binding instruments that built up incrementally. The process started with political and inspirational commitments and culminated in the creation

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<sup>60</sup> ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 95 (1994) (noting that international human rights law provides direct rights to individuals and increasingly access to tribunals and forums to guarantee such rights).

<sup>61</sup> W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 871 (1990) (arguing that the international law of human rights rendered much of the pre-existing international law anachronistic).

<sup>62</sup> PARLETT, *supra* note 14, at 279 (tracing the history of human rights protection to the movement for the abolition of slavery and the provision protecting minorities included in the peace treaties and declarations signed after World War I); LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY 200* (2007); PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 104 (2d ed. 2003).

of international legal obligations which created, in certain instances, enforceable individual rights under international law.<sup>63</sup>

The United Nations Charter itself, which established the UN, contains in its very preamble a powerful reference to the importance of human rights.<sup>64</sup> The Charter includes several direct mentions to human rights<sup>65</sup>, including in the fundamental Article 1(3), which affirms that one of the purposes of the United Nations is to promote and encourage respect for human rights and fundamental freedoms “for all” and “without distinction as to race, sex, language, or religion.”<sup>66</sup> As articulated in the Charter, the provisions are more inspirational than prescriptive.<sup>67</sup> Yet, they also definitely underline the centrality of individuals’ human rights in post-World War II political and legal systems.

An equally important, and more specific, declaration—the Universal Declaration of Human Rights—was proclaimed in 1948 by the General Assembly.<sup>68</sup> In it, the General Assembly proclaimed “a common standard

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<sup>63</sup> LAUREN, *supra* note 62, at 109.

<sup>64</sup> U.N. Charter preamble, June 26, 1945, 1 U.N.T.S. XVI (stating that the people of the United Nations were determined “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”); *see generally* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma, et al. eds., 3d ed. 2012).

<sup>65</sup> U.N. Charter art. 1(3), 13(1), 55, 56 (in reference to art. 55), 62(2), 68, 76.

<sup>66</sup> U.N. Charter, *supra* note 65, at art. 1(3) (in its entirety, the beautiful Article 1 states that “The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.”).

<sup>67</sup> *See id.* at 5, 12. For example, art. 13 asserts that the General Assembly “shall initiate studies and make recommendations for the purpose of . . . promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” and art. 55 states the UN should promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

<sup>68</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III) (Dec. 10, 1948), <http://www.un-documents.net/a3r217a.htm> [hereinafter UDHR]; *see generally* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (Asbjørn Eide et al. eds.,



of achievement for all people and all nations” to promote the respect for human rights and “secure their universal and effective recognition and observance.”<sup>69</sup> The Declaration is a momentous document because it enumerated for the first time specific individual rights to which everyone is entitled, “without distinction of any kind,” including the “right to life, liberty and security of person,” the prohibition of slavery and torture, the right to recognition as a person, equality under the law, the right to effective remedy and to a fair and public hearing by an impartial tribunal, the prohibition of arbitrary arrest and detention, and arbitrary interference with privacy and a family.<sup>70</sup>

After these post-World War II developments, many years had to pass for the next comprehensive and general treaty. The first universal and general human rights conventions containing binding legal obligations for States were approved several years later in 1966. Other, more specific, binding legal instruments also followed. The Covenant on Civil and Political Rights (ICCPR)<sup>71</sup> and the Covenant on Economic, Social and Cultural Rights (ICESCR) were both adopted in December 1966 and were entered into force in 1976.<sup>72</sup> Individual rights can also be found in several specific subject-matter conventions adopted in the same period and later. By adopting these conventions, State Parties were obligated to give effect to certain rights, impose obligations to prevent and suppress acts that contravene those rights, and also detail specific individual rights.<sup>73</sup> The

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1993).

<sup>69</sup> UDHR, *supra* note 68, at pmbl.

<sup>70</sup> *Id.* at arts. 13–21. Other recognized rights include freedom of movement, right to seek asylum, the right to a nationality, right to marry and form a family, the right to property, freedom of thought, conscience and religion, freedom of peaceful assembly and association and right to take part in government.

<sup>71</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 173 [hereinafter ICCPR]. There are presently 169 parties to the ICCPR. The ICCPR is a multilateral convention that binds each State Party to respect and ensure “to all individuals within its territory and subject to its jurisdiction” certain rights, including the right to life, family, religion, liberty and security of person, and of equality before the law. The direct reference to the fact that rights belong to the individual and that they are given and owed to all individuals is clear.

<sup>72</sup> *See infra* note 80, at arts. 1, 2, 3, 7, 8, 13, 15. The ICESCR commits Member States to “take steps” with a view of progressively achieving certain economic, social and cultural rights, such as the right to health, education, social security and adequate standards of living. It also contains some specific binding undertakings, including ensuring equality between men and women in the enjoyment of economic, social and cultural rights, ensuring the right to form and join unions, the recognition of the rights of everyone to the enjoyment of just and favorable conditions of work, the right to free primary education and the right to take part in cultural life.

<sup>73</sup> *See, e.g.*, Convention on the Rights of the Child (CRC), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination Against Women, Dec.

first was the 1965 Convention on the Elimination of Racial Discrimination (CERD) which entered into force in 1969 and contains both State obligations and individual rights.<sup>74</sup>

Similar key developments occurred both faster and sooner at the regional level, especially in Europe. The European Convention on Human Rights (ECHR) was approved by the European Council and opened for signatures in Rome in 1950.<sup>75</sup> It requires signatories to secure “to everyone within their jurisdiction” certain rights and freedoms enumerated in the Charter.<sup>76</sup> Today, many of the rights enumerated in the ECHR are enjoyed specifically by the individual. For example, Art. 4 states that “[n]o one shall be held in slavery or servitude” and Art. 5 provides that “[e]veryone has the right to liberty and security of person.”<sup>77</sup> A similar development occurred in the Americas with the American Convention on Human Rights, which clearly states in its preamble that:

essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.<sup>78</sup>

The African Charter on Human and Peoples’ Rights followed a few years later and contains similar language recognizing direct rights to the individual.<sup>79</sup>

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18, 1979, 1249 U.N.T.S. 13.

<sup>74</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]. States Parties to CERD undertake in Art. 5 “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.” Parties also specifically undertake to ensure the enjoyment of the several rights, including: the right to equal treatment before tribunals and other organs administering justice, the right to security of person, political rights, the right to freedom of movement and residence, the right to leave any country, the right to marriage, the right to own property, freedom of thought, conscience and religion.

<sup>75</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, 213 U.N.T.S. 262 [hereinafter ECHR].

<sup>76</sup> *Id.* at art. 1.

<sup>77</sup> *Id.* at arts 4 and 5.

<sup>78</sup> American Convention on Human Rights, Pact of San Jose, Nov. 22, 1969, 1144 U.N.T.S. 123.

<sup>79</sup> African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217 (note in the preamble the Charter recognized “that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection”).

The overview above shows a steady development towards the recognition of individual human rights. Yet this development is neither linear nor uniform: it shows substantive regional variations, with significant moments of pauses between bouts of action. After a burst of activity in the period immediately following World War II, the evolution then stalled because of the political entrenchment that characterized the Cold War. Human rights became political, and two groups formed on the issue. One championed primarily civil and political rights, and the other primarily supported economic, cultural and social rights.<sup>80</sup> A third wave of human rights, including the right to development, health, and a clean environment, also created new constituencies and reaffirmed the notion that the issue of human rights is continually evolving.<sup>81</sup>

The numerous instruments analyzed above—from the universal and general to the regional and specific—all point to two significant developments in the gradual recognition of the individual as a legal entity in international law. First, these instruments recognize that human rights are rights of the individual under international law. Second, legal texts assert that States are bound to provide rights to all persons under the State's jurisdiction, regardless of their nationality.<sup>82</sup> For example, ECHR provides in no uncertain terms that parties must secure “to everyone in their jurisdiction” the rights and freedoms provided in the charter. No reference is made to nationality or citizenship. These are human rights,

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<sup>80</sup> The U.S. has signed, but not ratified the ICESCR. See, e.g., *International Covenant on Economic, Social and Cultural Rights*, UN TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en) (the U.S. has signed, but not ratified the ICESCR); *International Covenant on Civil and Political Rights*, UN TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en) (Russia ratified the ICCPR on Oct. 16, 1973).

<sup>81</sup> Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, 30 UNESCO COURIER 29, 29 (1977).

<sup>82</sup> CRC, *supra* note 73, at art. 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”); CERD, *supra* note 74, at art. 6 (“States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”) (though note Art. 1(2) “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”); ECHR, *supra* note 75, at art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”).

available to all. In the word of former ICJ President Rosalyn Higgins, “[o]nce it is recognized that obligations are owed to individuals (because they have rights) then there is no reason of logic why the obligation should be owed only to foreign individuals, and not to nationals.”<sup>83</sup>

A third development is also important: the direct enforceability of these individual rights under international law in the international legal system. The strongest direct enforceability instrument is found in the ECHR Protocol 11, which entered into force on November 1, 1998.<sup>84</sup> This allows for the right for direct individual access to the Court and imposes compulsory jurisdiction of the Court for all the State Parties. This form of direct enforceability remains, to be sure, unique.<sup>85</sup> Alternatively, universal instruments contain periodical reporting duties. The ICCPR, for example, has established a Human Rights Committee to review periodical reports by State Parties on the measures they have adopted “which give effect” to the rights recognized in the ICCPR and on the “progress made in the enjoyment of those rights.”<sup>86</sup> Similarly, State Parties to ICESCR must also agree to submit periodical reports to the UN Secretary General, who will transmit these reports to the Economic and Social Council.<sup>87</sup> Finally, certain human rights instruments, for example the ICCPR, include the possibility of bringing individual complaints and special communication to the body in charge of reviewing the implementation of the treaty provisions.<sup>88</sup>

In sum, the acquisition of personal human rights by the individual has been an extraordinary development, and includes a variety of different rights. Individuals have rights recognized by numerous international treaties. These rights belong to individuals, and States are under an obligation to provide them.

This extraordinary development in which the individual acquired rights enforceable under international law occurred in parallel to another equally significant development—the acquisition by the individual of obligations under international law to not commit certain crimes. The section below explains this development and its significance in the grad-

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<sup>83</sup> HIGGINS, *supra* note 60, at 95–96.

<sup>84</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155 [hereinafter Protocol No. 11].

<sup>85</sup> AA Conçado Trindade, *The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments*, in LES DROITS DE L’HOMME À L’AUBE DU XXIE SIÈCLE 521, 540, 543 (K Vasak ed., Bruylant Brussels 1999).

<sup>86</sup> ICCPR, *supra* note 71, at art. 40(1).

<sup>87</sup> ICESCR, *supra* note 72, at art. 16(2) (a).

<sup>88</sup> See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; see also *Human Rights Bodies – Complaints Procedures*, UN HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/TBPEtitions/Pages/HRTBPetitions.aspx#individualcomm> (last visited Aug. 26, 2018) (listing all human rights treaties with individual complaint mechanisms).

ual recognition of the individual as having legal personality under international law.

*C. International Criminal Law: The Individual Assumes Obligations*

In the section above, I discussed how the individual has acquired a certain degree of international legal personality, and now enjoys individual human rights under international law that are, to a certain extent, enforceable by the individual. The section below makes a similar substantive argument, but from the prospective of the individual acquiring obligations stemming directly from international law.

The acquisition of individual criminal responsibility under international law is a significant step towards the recognition of the international legal personality of the individual. This important development largely occurred in the immediate aftermath of the Second World War. In August 1945, the U.S., UK, Russia, and France signed the London Agreement, in which the parties agreed to create an International Military Tribunal (IMT) to try war criminals.<sup>89</sup> The Charter of the IMT provides that it has “the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations” committed crimes against peace, war crimes and crimes against humanity.<sup>90</sup> The Charter specifically recognized that crimes within its jurisdiction were based on “individual responsibility.”<sup>91</sup>

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<sup>89</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 1, Aug. 8, 1945, 82 U.N.T.S. 279 (“There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.”).

<sup>90</sup> London Agreement, Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 279, 288 (The crimes are defined, respectively: “(a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”).

<sup>91</sup> *Id.* at 288.

This was a momentous recognition. Though (similarly to what we have seen in the development of human rights) the seeds for this development were already planted prior to the war, it was the atrocities committed during the conflict, and the Allied Powers' resolve to address them and construct a new world order, that truly made the development of international criminal law possible.<sup>92</sup>

Recognition of individual criminal responsibility for international crimes was not without criticism. In its final judgment, the IMT specifically addressed some of those and noted that:

It was submitted [by defense counsel] that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized.<sup>93</sup>

The Tribunal continued its analysis and clearly articulated the reasons behind its conclusion in a famous and seminal passage:

enough has been said to show that individuals can be punished for violations of international law. 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.<sup>94</sup>

By referring directly to the fact that crimes are committed by people, the Tribunal highlighted the reason why recognizing individual criminal responsibility is necessary in international law. The individual is not only part of the State, but also acts independently from the State. The Tribunal made this point again when it tackled the argument of immunity claimed by certain defendants who maintained that they were acting on behalf of the State. The Tribunal concluded that the:

essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the au-

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<sup>92</sup> PARLETT, *supra* note 14, at 308–09.

<sup>93</sup> Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Judgment, Sept. 30 and Oct 1, 1946, 6 F.R.D. 69, 110 (citing *Ex Parte Quirin*, 317 U.S. 1 (1942)).

<sup>94</sup> *Id.*

thority of the state if the state in authorizing action moves outside its competence under International Law.<sup>95</sup>

The significance of the Tribunal's conclusion, and the clarity in which it was expressed, was readily acknowledged. In December 1946, the UN General Assembly, upon suggestion by the Secretary General, directed the International Law Commission—a body of experts tasked with codifying international law—to “[f]ormulate the principles of international law recognized by the Charter of the Nürnberg Tribunal, and in the judgment of the Tribunal” and “[p]repare a draft code of offences against the peace and security of mankind.”<sup>96</sup> The ILC presented an approved draft to the General Assembly in 1950. It included provisions recognizing individual responsibility for certain crimes under international law.<sup>97</sup> The General Assembly acknowledged these principles, but took no further action.<sup>98</sup> Indeed, many years had to pass until the issue was taken up again. But when it was ready to be discussed again, individual criminal responsibility for international crimes was resurrected with renewed strength, first by the creation of two *ad hoc* tribunals charged with prosecuting individuals under international criminal law, and then by the creation of an international court with the mandate to do the same on a more permanent and universal level. These advances are explained next.

In the early 1990s, at the end of the Cold War, the international community was confronted with two events that resulted in serious and protracted violations of international criminal law being committed: the dissolution of the Republic of Yugoslavia starting in 1991—the first major conflict in Europe since the end of World War II—and the 1994 killing of an estimated 800,000 people in a horrific genocidal rampage in Rwanda. Among the more successful actions taken by the Security Council, acting under the mandatory powers of Chapter VII to address these situations were the establishment of two *ad hoc* international criminal tribunals: the

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<sup>95</sup> *Id.*

<sup>96</sup> *Summary Records and Documents of the First Session including the Report of the Commission to the General Assembly, Formulation of the Nürnberg Principles and Preparation of a Draft Code of Offences Against the Peace and Security of Mankind*, [1949] 1 Y.B. Int'l L. Comm'n 4, U.N. Doc. A/925.

<sup>97</sup> *Report of the International Law Commission On Its Second Session, 5 June - 29 July 1950*, 2 Y.B. Int'l L. Comm'n 374, part III, ¶ 97–99, U.N. Doc. A/CN.4/34. Principle I states “Any person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment” and Principle II provides that “[t]he fact that international law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”

<sup>98</sup> *See, e.g.*, S.C. Res. 955, Annex art. 1 (November 8, 1994); S.C. Res. 827 (May 25, 1993).

International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>99</sup>

These were significant and momentous developments, which were also the product of unique historical circumstances. The early 1990s was a period of renewed activity in international law. The Cold War had just ended. Russia and the U.S. had a brief period in which their interests aligned. Neither used their veto power at the Security Council to stop each other's actions.<sup>100</sup> Additionally, the genocide in Rwanda and the Civil War in the former Yugoslavia were the subject of many televised broadcasts. Thus, both crises were very visible and generated a public outcry, which called for action (which many nonetheless considered to have occurred too late and delivered too little).<sup>101</sup> The events in the former Yugoslavia were also the first large-scale violations of humanitarian law to have occurred on European soil since the Holocaust, and some of the atrocities perpetrated there were a terrible reminder of atrocities committed during the Second World War.<sup>102</sup> Similarly, the genocide in Rwanda was such an atrocious and visible violation of humanitarian law that it struck a chord in the human collective.<sup>103</sup> UN Peacekeepers were present in Rwanda at the time and were unable to respond. The world initially failed Rwanda and did not respond to its request for assistance. But when the realities of what had happened sank in, the call for a punishment for the perpetrators grew stronger. Though realists would say that the creation of these *ad hoc* tribunals were a low-cost political action, the significance in international law was profound, reckoning immediately back to the Nuremberg trials and the advances in international criminal responsibility of the individual that developed there.<sup>104</sup> The reaffirmation of Nu-

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<sup>99</sup> See Santiago Villalpando, *The International Criminal Tribunal for the Former Yugoslavia*, in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 233, 234 (Chiara Giorgetti ed., 2012); see also Robert D. Sloane, *The International Criminal Tribunal for Rwanda*, in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 261, 262 (Chiara Giorgetti ed., 2012).

<sup>100</sup> See UNITED NATIONS, *Security Council—Veto List*, [http://www.un.org/depts/dhl/resguide/scact\\_veto\\_table\\_en.htm](http://www.un.org/depts/dhl/resguide/scact_veto_table_en.htm) (last visited Sept. 26, 2018).

<sup>101</sup> See, e.g., MAX HILLAIRE, *WAGING PEACE: THE UNITED NATIONS SECURITY COUNCIL AND TRANSNATIONAL ARMED CONFLICTS* 80 (2015).

<sup>102</sup> See *Omarška: A Vision of Hell*, BBC NEWS (Nov. 2, 2001), <http://news.bbc.co.uk/2/hi/europe/1634250.stm> (“Not since World War II had the faces of half-starved, semi-naked prisoners stared out from behind barbed wire in Europe.”).

<sup>103</sup> John Eriksson et. al., *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience*, ORG. FOR ECON. DEV. COOPERATION (March 2006), <http://www.oecd.org/derec/sweden/50189495.pdf>.

<sup>104</sup> See, e.g., Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 *BUFF. HUM. RTS. L. REV.* 77, 90 (2000) (“From a distance, it is possible to see the Rwanda Tribunal as different from the Yugoslav Tribunal and as an approximation of Nuremberg. The temptation to equate the military defeat of the Hutu regime by the Tutsi RPF and their removal from office with the Nazis is incorrect. Such analogy would only make sense if the targets of the Holocaust—



remberg's principles forty years later was important and mobilized substantial momentum for the creation of a permanent court.<sup>105</sup>

Both the ICTY and the ICTR explicitly recognize individual criminal responsibility under international law. Art. 1 of the Statute of the ICTY, for example, gives the Tribunal the "power to prosecute persons responsible for serious violations of international humanitarian law."<sup>106</sup> The principle of individual criminal responsibility is clearly articulated in Art. 7, which states that a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning" of grave breaches of the Geneva Conventions, war crimes, genocide or crimes against humanity "shall be individually responsible for the crime."<sup>107</sup> The Statute of the ICTR also includes the principle of individual criminal responsibility, in essentially the same terms as ICTY.<sup>108</sup> Art. 1 gives the ICTR the power "to prosecute persons responsible for serious violations of international humanitarian law committed."<sup>109</sup> Art. 6 specifically provides for individual criminal responsibility.<sup>110</sup>

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Jews—had themselves defeated the Germans and taken control of the state. The war in Rwanda is unfinished."). *See also* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 554 (describing the history of international criminal law from Nuremberg to modern times).

<sup>105</sup> *See* Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 1, 4–5 (2005) ("In 1993 and 1995 the Security Council formed two ad hoc tribunals for trial of serious violations of humanitarian law in Yugoslavia (ICTY) and Rwanda (ICTR). . . . [t]hese tribunals are new expressions of previously accepted principles of the inalienability of human rights and the individual accountability of violators who commit atrocities.").

<sup>106</sup> U.N. Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, art. 1, U.N. Doc. S/25704 (May 3, 1993) (stating, in its entirety "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.").

<sup>107</sup> *Id.* at art. 7; *see generally* Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT'L L. 347 (1998).

<sup>108</sup> S.C. Res. 955, Statute of the International Criminal Tribunal for Rwanda (as last amended on Oct. 13, 2006), <http://www.refworld.org/docid/3ae6b3952c.html>.

<sup>109</sup> S.C. Res. 955, Annex art. 1 (November 8, 1994) (reading, in its entirety "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.").

<sup>110</sup> *Id.* at art. 6(1); *id.* at art. 8(1). "The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."

Defendants in both ICTY and ICTR proceedings brought actions to object to the Tribunals' jurisdiction.<sup>111</sup> The ICTR jurisdictional decision in *Kanyabashi* is particularly interesting for analyzing the evolution of individual criminal responsibility. In it, the ICTR Trial Chamber responded directly to an objection to jurisdiction by the defense, which challenged the tribunal's jurisdiction over individuals directly under international law. In its decision rejecting the challenge, the Trial Chamber cited the Prosecution's argument that the Nuremberg Trials had already "established that individuals who have committed crimes under international law can be held criminally responsible directly under international law."<sup>112</sup> The Chamber specifically recalled that the question of direct individual responsibility under international law had been a controversial issue in many legal systems, and that even the Nuremberg trials had been interpreted differently in relation to its conclusion regarding the position of the individual as a subject under international law.<sup>113</sup> Yet, the Chamber found the creation of the *ad hoc* tribunals to be resolute of the question and concluded that:

By establishing the two International Criminal Tribunals for the Former Yugoslavia and Rwanda . . . the Security Council explicitly extended international legal obligations and criminal responsibilities directly to individuals for violations of international humanitarian law.<sup>114</sup>

The ICTR made clear that the individual responsibility for international crimes exists, and the creation of the ICTY and ICTR by the Security Council are sufficient proof of that.

Significantly, the creation of the ICTY and ICTR also reignited a long-standing debate about the creation of a permanent court for international crimes. The ILC was tasked to prepare a code articulating the legal and procedural framework for such a court after Nuremberg, but the process stalled. The creation of the ICTY and ICTR provided renewed interest, public pressure, and theoretical backbone.

A final and essential validation of the principle of individual criminal responsibility under international law was the creation of the International Criminal Court (ICC).<sup>115</sup> The ICC, which was established through the 1998 Rome Statute and become operational in 2002, is a permanent

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<sup>111</sup> Prosecutor v. Tadić, Case No. IT-94-I-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>112</sup> Prosecutor v. Kanyabashi, Case No. ICTR 96-15-T, Decision on The Defence Motion on Jurisdiction ¶ 34, (Int'l Crim. Trib. For Rwanda June 18, 1997).

<sup>113</sup> *Id.* ¶ 35.

<sup>114</sup> *Id.*

<sup>115</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

international court with general prospective international criminal law jurisdiction.<sup>116</sup> In the Court's Statute, individual responsibility became a general principle of criminal responsibility. Art. 25 provides that "[a] person who commits a crime within the jurisdiction of the Court [genocide, crimes against humanity, and war crimes] shall be individually responsible and liable for punishment in accordance with this Statute."<sup>117</sup>

As a result of this important development, it is now recognized that international criminal law imposes individual criminal responsibility.<sup>118</sup> These individual obligations are found in international criminal law. Genocide, crimes against humanity, and war crimes are both individual and international crimes.

The doctrinal development that resulted in the acquisition of international rights and responsibilities by the individual is particularly visible in the international human rights law and criminal law explored so far. A similar but less uniform development exists in other areas of international law, which are explored in the next section.

#### *D. Individual Rights in Other Fields of International Law*

The acceptance that individuals may, under certain circumstances, be subjects of international law is an "important shift in the structure of international law," which "reduces the traditional State-centrism."<sup>119</sup> With this shift, individuals have altered their positions and standing in international law, in the same way shareholders changed their positions when piercing the corporate veil.<sup>120</sup> And in the same way that shareholders' rights are not the same as corporation's rights, the rights of individuals are not the same as States'. These rights are different and unique. As the ICJ explained in *Reparation* "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."<sup>121</sup>

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<sup>116</sup> See generally Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 145 (1999).

<sup>117</sup> Rome Statute, *supra* note 115, art. 25(2).

<sup>118</sup> PARLETT, *supra* note 14, at 229 ("It is now widely acknowledged that individual criminal responsibility is imposed on individuals though international criminal law").

<sup>119</sup> Walter, *supra* note 9, ¶18 ("[T]he general acceptance of individuals as—partial—subjects of international law marks an important shift in the structure of international law").

<sup>120</sup> Jonathan Macey and Joshua Mitts, *Finding Order in the Morass: Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 105 (2014); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1041 (1991). For an international law approach, see, e.g., *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 45, ¶ 81, 50, ¶ 101 (Feb. 5, 1970) (holding that only the State in which the corporation was incorporated (Canada) can sue, and not the State of nationality of the stockholders (Belgium)).

<sup>121</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory

The sections above highlighted developments in two specific areas of international law. In addition to human rights and international criminal obligations, the individual has acquired, in the last few decades, a considerable array of diverse international rights. Professor Anne Peters notes the increasing frequency in which “international legal norms directly address and engage individuals”<sup>122</sup> and observes that individual rights under international law arise:

from extradition treaties, treaties of friendship and establishment, double taxation agreements, transport treaties, intellectual property treaties, investment protection treaties, treaties on the legal status of foreigners, and the Vienna Convention on Consular Relations.<sup>123</sup>

Individuals also enjoy other rights under international law. For example, several international humanitarian law provisions include references to rights and entitlements of the individuals in addition to those applicable to States.<sup>124</sup> These include Articles 7 and 8 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>125</sup>, and Articles 14, 78, 84 and 105 of the Geneva Convention on Prisoners of War.<sup>126</sup>

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Opinion, *supra* note 36, at 178.; *see also id.* at 179 (“[T]he Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is ‘a super-State’, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane.”).

<sup>122</sup> PETERS, *supra* note 8, at 1.

<sup>123</sup> *Id.* (noting that “individual rights under international law appear to arise from extradition treaties, treaties of friendship and establishment, double taxation agreements, transport treaties, intellectual property treaties, investment protection treaties, treaties on the legal status of foreigners, and the Vienna Convention on Consular Relations”). On issues of intellectual property, for example the 2012 Beijing Treaty on Audiovisual Performances grants performers certain economic rights for their audiovisual and live performances (including the right of reproduction, the right of distribution, the right of rental, the right of broadcasting) as well as moral rights. The rights guarantee economic development and improve the status of audiovisual performers. The terms of the treaty provide that each contracting party needs to adopt measures necessary to ensure the application of the Treaty and ensure that enforcement procedures are available.

<sup>124</sup> *See* Gorski, *supra* note 7, ¶ 23.

<sup>125</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 7, Aug. 12, 1949, 75 U.N.T.S. 287 (“No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them. Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.”); *id.* art. 8 (“Protected

A relatively prolific area of international law providing direct rights to individuals is international economic law. These rights come mostly from international bilateral treaties (BITs) relating to foreign investments. BITs typically grant foreign investors several rights in the investment host country, including the right of fair and equitable treatment, a protection against illegal expropriations and arbitrary treatment, a certain number of basic rights based on best practice vis-à-vis other foreign and domestic investors.<sup>127</sup>

A subset of individual rights are those individuals enjoy when representing and acting on behalf of the State, such as when they serve as Presidents, Ministers and Ambassadors. These rights include diplomatic immunity, which grants certain individuals safe passage, and immunity from lawsuit or prosecution.<sup>128</sup> Similarly, certain individuals are also protected when living as a foreigner abroad, for example, by the Vienna Convention on Consular Relations.<sup>129</sup>

The ICJ has recognized that individuals enjoy specific individual rights under international law. In the 2001 *LaGrand Case*, brought by Germany against the US, the Court confirmed that “Article 36, paragraph 1 [of the Vienna Convention], creates individual rights.”<sup>130</sup> Similarly, in

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persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.”).

<sup>126</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 14, Aug. 12, 1949, 75 U.N.T.S. 137; *id.* art. 78; *id.* art. 84 (“In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.”); *id.* art. 105. *See also Treaties, States Parties and Commentaries: Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949: Commentary of 1960*, INT’L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=63FED80AE19E8E88C12563CD00427AA6> (last visited Sep. 27, 2018) (stating, in reference to art. 78 “[t]he present chapter refers to one of the fundamental rights which the Convention provides for prisoners of war: the right of each of them to make comments on the conditions of captivity.”).

<sup>127</sup> *See International Investment Agreements Navigator*, U.N. CONF. ON TRADE & DEV., <http://investmentpolicyhub.unctad.org/IIA> (last visited Aug. 26, 2018).

<sup>128</sup> 1961 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

<sup>129</sup> 1963 Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

<sup>130</sup> *LaGrand Case*, *supra* note 42, at 494, ¶ 77; *see also* Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, 35 (Mar. 31) (“The Court would first observe that the individual rights of Mexican nationals under paragraph I (b) of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the

the subsequent *Diallo Case*, which Guinea brought against The Democratic Republic of Congo, the ICJ noted the “substantive development of international law over recent decades in respect of the rights it accords to individuals”<sup>131</sup> and declared Guinea’s application to be admissible in “so far as it concerns protection of Mr. Diallo’s rights as an individual.”<sup>132</sup>

Importantly, the sources of the individual’s international rights are also varied.<sup>133</sup> While it is safe to say that most come from bilateral or multilateral treaties, many other rights derive from international customary law. Several human rights are considered part of international customary law. These “would certainly include the prohibition of torture, genocide and slavery”<sup>134</sup> as well as the principle of non-discrimination.<sup>135</sup> More recently, resolutions of the UN Security Council have created obligations directly for individuals.<sup>136</sup> This is especially true for resolutions related to terrorism. For example, in Res. 2178, the Security Council “demand[ed] that all foreign terrorist fighters disarm and cease all terrorist acts and participation in conflict.”<sup>137</sup> Several Security Council Resolutions also impose economic sanctions and travel bans directly to individuals.<sup>138</sup>

The progressive recognition of individual rights has not been a linear process, but rather a complex development that included reconsideration and reassessment of other essential principles in international law.<sup>139</sup> To understand this tension, it is important to remember that in addition to the recognition of human rights, the UN Charter also enshrines the core principle of sovereignty: the idea that States are sovereigns within their borders, and other States cannot intervene in the internal affairs of a State.<sup>140</sup> This provision mirrors those found in Article 15 (8) of the Cov-

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procedure of diplomatic protection.”).

<sup>131</sup> Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections Judgment, 2007 I.C.J. 582, 599 (May 24).

<sup>132</sup> *Id.* at 617.

<sup>133</sup> PETERS, *supra* note 8, at 408–31.

<sup>134</sup> SHAW, *supra* note 24, at 217.

<sup>135</sup> See generally Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L. 1, 3 (1996).

<sup>136</sup> PETERS, *supra* note 8, at 507 (“Security Council resolutions may impose obligations on individuals directly under international law.”).

<sup>137</sup> S.C. Res. 2178 ¶ 1. (Sept. 24, 2014).

<sup>138</sup> *E.g.*, S.C. Res. 2136 (2014) (applying financial and travel sanctions to certain individuals in the DRC that recruit or use children in armed conflict); see generally PETERS, *supra* note 8, at 93-5, 508-9.

<sup>139</sup> Michael Wood, *Non-Intervention (Non-Interference in Domestic Affairs)*, ENCYCLOPEDIA PRINCETONEINSIS, <http://pesd.princeton.edu/?q=node/258> (last visited Aug. 24, 2018).

<sup>140</sup> U.N. Charter, *supra* note 65, at art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle

enant of the League of Nations and the Montevideo Convention on Rights and Duties of States of 1933, which prohibited “interference with the freedom, the sovereignty or other internal affairs, or the processes of the Governments of other nations.” During the Cold War, this principle was supported by both socialist and capitalist powers. This tension still exists, as recent events demonstrate. In 2011 and 2012, for example, China and Russia vetoed Security Council resolutions on Syria on the basis that they would unduly interfere with Syrian sovereignty. The resolutions were based on documented war crimes and crimes against humanity committed by the Syrian Armed Forces, and were limited to calling for Syria to put an end to all human rights violations.<sup>141</sup>

The struggle that exists between the principle of sovereignty and the protection of human rights in the Charter mirrors the struggle between recognizing the State as the sole actor in international law and the slow recognition of the individual as an actor and subject of international law.<sup>142</sup> Adding the individual as a subject of international law has proven to be easier said in theory than done in practice, however. Indeed, when international rights are given to the individual, the State had to relinquish a certain amount of sovereignty it possessed over the individual. In the Westphalian world, the State began with full sovereignty over the individual; in the post-Westphalian world that recognizes the individual as a subject of international law, the State has had to give up some of its power in favor of the individual. As such, the relative balance of power changed. In addition, it is also important to note that the interest of the State and the individual are not always aligned. In some situations, conflicts of interest exist between the interest of the State and the interest of the individual.<sup>143</sup> These conflicts may derive from divergent strategic, political, and financial interests.<sup>144</sup>

Anne Peters notes a “paradigm shift”<sup>145</sup> in the recognition of the legal status of the individual in international law, and other international law scholars “have around the turn of the millennium noted a transfor-

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shall not prejudice the application of enforcement measures under Chapter VII.”)

<sup>141</sup> S.C. Res. 538, ¶¶ 4, 5, 8, 9 (July 19, 2012); S.C. Res. 612, ¶¶ 1, 4, 5, 12 (Oct. 4, 2011).

<sup>142</sup> William Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT’L L.J. 1, 77 (2015) (“[R]eassertion of the centrality of the State conflicts with the individualization of international law . . .”).

<sup>143</sup> See LEA BRILMAYER ET AL., INTERNATIONAL CLAIMS COMMISSIONS: RIGHTING WRONGS AFTER CONFLICT 62–63 (2017) (explaining the inherent conflicts of interest present when monetary compensations are awarded for individual violations and can be paid either directly to the State or to the individual).

<sup>144</sup> See, e.g., Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation*, 104 AM. J. INT’L L. 179, 182–96 (2010).

<sup>145</sup> PETERS, *supra* note 8, at 1.

mation of the international system.”<sup>146</sup> This emancipation is, however, incomplete.<sup>147</sup> The asymmetric progress of recognizing the individual as a subject in international law is particularly evident in the discrepancy that exists between the doctrinal approach, which largely recognizes the increasing rights of individuals in international law, and the slow acceptance of this evolution in practice. As explained above, doctrinal changes in the role of individuals are evident both in terms of the variety of substantive international rights that the individual enjoys, and the sources of law of these individual rights (which include international customary law, Security Council resolutions, and treaties). Procedurally, however, these changes have been slow.

One visible roadblock to the path of recognizing the individual in international law is the fact that under most circumstances, individual international rights can only be exercised through *diplomatic protection* or through the link to an international claim provided by nationality. In practice, therefore, while the individual now enjoys multiple international rights, the venues open to directly exercising those rights are few. The recognition of a new legal order that includes individuals as subjects distinct from States will have to include the recognition of procedural rights that individuals may exercise directly in international law, irrespective of nationality relations.

The section below explains why.

## II. INTERNATIONAL SUBJECTIVITY AND NATIONALITY

The section above shows how the individual has “within a number of decades” evolved “from an illegitimate child to a well-accepted family member of international law.”<sup>148</sup> It also showed that the journey has only just begun. In the words of German Professor Christian Tomuschat: “[t]he transformation from international law as a State-centered system to an individual-centred system has not yet found a definitive new equilibrium. . . .”<sup>149</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> Gerhard Hafner, *The Emancipation of the Individual from the State Under International Law*, 358 RECUEIL DES COURS 275, 437–41 (2011).

<sup>148</sup> Andreas Th. Müller, *Kate Parlett's, The Individual in International Law*, 23 EUR. J. INT'L L. 294, 299 (2012) (book review).

<sup>149</sup> Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS 23, 161–62 (1999) (“[T]he international legal order cannot be understood any more as being based exclusively on State sovereignty. . . . States are no more than instruments whose inherent function is to serve the interests of their citizens as legally expressed in human rights. At the present time, it is by no means clear which one of the two rivalling Grundnorms will or should prevail in case of conflict. Over the last decades, a crawling process has taken place through which human rights have steadily increased their weight, gaining momentum in comparison with State



As mentioned above, one of the obstacles making it difficult for individuals to exercise their international rights is the lack of appropriate international forums that give immediate access to exercise international rights and to receive remedies. While substantive thinking about rights of the individual has evolved at a confident pace, functionally, the international legal system is still mostly constructed to respond and accommodate the rights of States. This means that while international substantive rights are increasingly given directly to individuals, individuals often have no immediate standing or any remedy available to access redress for violations of these rights.

Oppenheim notes that “[n]ationality is the principal link between individuals and international law”<sup>150</sup> and underlines that nationality is the “quality of being a subject of a certain state.”<sup>151</sup> As the individual acquires subjectivity in international law and is emancipated from the State, the status of “being a subject of a certain state” to access international law needs rethinking. In the paragraphs below I explain why, and I argue against using nationality to provide standing and remedies to the individual to assert individual international rights.

Traditionally, as discussed in the first section of this Article, individuals were not subjects of international law. States were the only subjects of international law, and individuals could only be objects of international law.<sup>152</sup> The only link that individuals had with international law was through their nationalities. Nationality provided “a right of protection over nationals abroad which every state held and could assert against other states.” Indeed, in 1912 Oppenheim remarked that:

If . . . individuals are never subjects but always objects of the Law of Nations, then nationality is the link between this law and individuals. It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations.<sup>153</sup>

Absent that nationality link, however, individuals had no access to international protection.<sup>154</sup> The absence of nationality resulted in the absence of international protection.<sup>155</sup>

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sovereignty as a somewhat formal principle.”).

<sup>150</sup> OPPENHEIM’S INTERNATIONAL LAW, *supra* note 21, § 379.

<sup>151</sup> *Id.* § 378.

<sup>152</sup> *See generally* Tomuschat, *supra* note 149, at 149.

<sup>153</sup> OPPENHEIM, *supra* note 6, § 291.

<sup>154</sup> See the excellent introduction by PARLETT, *supra* note 14, at 15. *See also* OPPENHEIM, *supra* note 6, § 291 (individuals that “do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, there being no State which would be competent to take their case in hand. As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals.”).

Gradually, the position of the individual has changed. There is now a recognition that States are the primary, but not the only, subjects of international law. The individual has acquired some legal personality in international law. Individuals have acquired a variety of international rights. Those rights derive from treaties, but also from international custom or from the UN Security Council. The individual has also acquired obligations and can commit international crimes for which she can be held responsible.<sup>156</sup>

In certain cases, such as human rights, individuals may be able to exercise their rights directly in the international sphere.<sup>157</sup> In other situations, such as in international investment law, the individual can enter into direct legal relations with a hosting State, but has no direct procedural recourse.<sup>158</sup> In those cases, to the extent that individuals are not considered direct subjects of international law, nationality provides a link between the individual and international law.<sup>159</sup> It is through their nationality that individuals are afforded direct representation in international courts and tribunals.<sup>160</sup> In fact, there is often a requirement to show a certain nationality before an individual can access international claims.<sup>161</sup>

In sum, the position of the individual has evolved in such a way as to have created two different trajectories that are out-of-synch with each other. While the thinking and substantive rights of the individual have evolved at a sustained pace, the procedural aspects, and the individuals' access to international law remedies, have not yet completely followed suit. Nationality has become a significant issue in this delay. A significant act that could precipitate changes in the system would be to provide access to international claims to the individual through a mechanism that is detached from the State and hence is different from nationality.

Historically, one of the functions of nationality has been the right of protection that States could assert against other States over their nation-

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<sup>155</sup> See G.A. Res. 896, at 49 (IX) (Dec. 4, 1954) (it was through this resolution that the Convention on the Reduction of Statelessness was enacted. Statelessness is explored in detail below.).

<sup>156</sup> See *supra* Part I.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> PARLETT, *supra* note 14, at 28 (“To the extent that individuals are not subjects of international law, nationality is the link between individuals and international law. . . . If individuals who possess nationality are wronged abroad, as a rule, it is the state of nationality which has an exclusive right to ask for redress.”). See also generally *id.* at 26–29.

<sup>160</sup> F Orrego Vicuña, *Individuals and Non-State Entities Before International Courts and Tribunals*, in 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 56–57 (Jochen A. Frowein & Rüdiger Wolfrum eds., 5th ed. 2001).

<sup>161</sup> *Id.* at 59.

als travelling or living abroad and their property.<sup>162</sup> Oliver Dörr explains that “[t]he legal authority of States with regard to their nationals extends to their relations with other States and allows them to make the rights and duties of their nationals a matter of their international relations.”<sup>163</sup> With the international legal changes related to the position of individuals discussed above, however, nationality has become, in certain situations, an obstacle that blocks direct access by the individual to the international legal sphere.<sup>164</sup>

In truth, nationality requirements nowadays hinder an individual’s access to international law. Indeed, nationality has become the marking of State sovereignty over the individual—a notion that comes directly from the origin of nationality as “allegiance owned by the subject to his king.”<sup>165</sup> Acknowledging the origins and social construct of nationality can have important implications and may help in thinking how to advance the position of the individual in international law.

Nowhere are the contradictions of the nationality system more clear than in the plight of refugees.<sup>166</sup> Refugees escape their country of origin because that country, rather than protecting them, abuses them. Indeed, refugees flee their country of origin because of a “well-founded fear of persecution.”<sup>167</sup> The idea that the positions of the State and their nationals are always in synch is wrong and naïve.<sup>168</sup>

The section that follows explores these questions further. It first explains how nationality is regulated by domestic law and the international law principles it must follow. The limits and weaknesses of linking indi-

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<sup>162</sup> OPPENHEIM’S INTERNATIONAL LAW, *supra* note 21, § 379 (“This function of nationality becomes apparent with regard to individuals abroad, or to property abroad belonging to individuals who are themselves within the territory of their home state . . .”).

<sup>163</sup> Oliver Dörr, *Nationality*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 44 (Nov. 2006).

<sup>164</sup> OPPENHEIM, *supra* note 6, § 294; PARLETT, *supra* note 14, at 15.

<sup>165</sup> OPPENHEIM’S INTERNATIONAL LAW, *supra* note 21, § 378.

<sup>166</sup> Paul Weis, *The International Protection of Refugees*, 48 AM. J. INT’L L. 193, 218 (1954) (“The international protection of refugees purports to remedy the situation created by the fact that they lack the protection which is usually afforded to nationals abroad by the state of nationality. Like nationals abroad, refugees are aliens in the country of residence and subject to the territorial supremacy of the state of residence.”).

<sup>167</sup> Convention Relating to the Status of Refugees, *supra* note 51, at 152 (stating that “[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

<sup>168</sup> See Weis, *supra* note 166, at 219.

vidual international subjectivity to nationality are explored next, from different angles; first, by highlighting how the present regulatory construct has led to a misunderstanding and misinterpretation of the nationality requirement in international dispute resolution settings, and then by exploring circumstances of stateless people and individuals with multiple nationalities.

These analyses will set the scene for the final section of the Article, where I offer alternative solutions to using nationality to provide standing and remedies to the individual to assert individuals' international rights.

#### A. *Nationality in International Law*

Nationality identifies and recognizes individuals under international law, and often provides them with rights and obligations.<sup>169</sup> It is, at present, central to the human experience in a global society.<sup>170</sup> Malcolm Shaw writes that “[t]he link between the state and the individual for international law purposes has historically been the concept of nationality.”<sup>171</sup> As Paul Weis notes:

The function of nationality in international law is usually described as that of providing a link between the individual and the benefits of the Law of Nations. However, in international law, as at present constituted, nationality as a concept can only be defined by reference to the rights and duties of States. Nationality, according to international law, is a specific relationship between an individual and a particular State which grants that State a right to permanent and unconditional protection of his person and property. . . .<sup>172</sup>

It is a long-standing principle in international law that the acquisition of nationality is regulated by domestic law.<sup>173</sup> Domestic law mandates how nationality is acquired and lost. This principle was explicitly recognized by the PCIJ in the *Nationality Decrees* case.<sup>174</sup> More recently, the Eu-

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<sup>169</sup> See generally DÖR, *supra* note 163, ¶ 44.

<sup>170</sup> AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY ix–x (2009).

<sup>171</sup> SHAW, *supra* note 24, at 204; see also PARLETT, *supra* note 14, at 28.

<sup>172</sup> PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 239 (1979).

<sup>173</sup> Herbert Hugh Naujoks, *Power of the National State in International Law to Determine the Nationality of an Individual*, 7 TEMP. L.Q. 176, 176 (1933).

<sup>174</sup> JAN ANNE VOS, THE FUNCTION OF PUBLIC INTERNATIONAL LAW 37 (2013) (“[T]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.”) (quoting *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. Rep. 1 (Feb 7)). See also *Convention on Certain Questions Relating to the Conflicts of*

ropean Convention on Nationality also confirmed the validity of the principle, stating that “[e]ach State shall determine under its own law who are its nationals.”<sup>175</sup>

There are different ways domestic law assigns nationality. At birth, nationality can be acquired based on where the person was born (*jus soli*)<sup>176</sup> or based on the nationality of the parents (*jus sanguinis*).<sup>177</sup> Often, domestic law applies a mix of both. For example, someone is a U.S. National if she was born in the U.S., but also if she was born outside the U.S. from U.S. Nationals. After birth, domestic law also regulates how nationality is acquired (“naturalization”). Naturalization can occur by marriage, residence, or by special reasons such as military service.<sup>178</sup>

Historically, an issue of concern in assigning nationality was the avoidance of statelessness (i.e. the absence of nationality) due to territorial changes.<sup>179</sup> The nationality of women was also an issue, as under some domestic legislation, women lost their nationality when marrying a foreign national, and acquired the nationality of the spouse and risked losing the new nationality if their spouse died, thus becoming stateless.<sup>180</sup>

More recently, the issue of acquiring multiple nationalities has become more of a concern.<sup>181</sup> Overlapping nationalities are the by-product of a system based on domestic law, where an individual can be subject to more than one set of nationality laws, based on her family and on where she lives. Thus, both dual nationality and statelessness are issues that derive from the freedom of the State to decide the matter of nationality internally.<sup>182</sup>

International law plays a limited role in the regulation of nationality.<sup>183</sup> The European Convention on Nationality provides that domestic nationality law “shall be accepted by other States in so far as it is con-

*Nationality Laws*, League of Nations Doc. C.224M.III. 1930 V (1930) [hereinafter *Conflicts of Nationality*] (“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international convention, international custom, and the principles of law generally recognised with regard to nationality.”).

<sup>175</sup> European Convention on Nationality, art. 3, Nov. 6, 1997, E.T.S. 166.

<sup>176</sup> *Jus soli*, OXFORD REFERENCE (8th ed. 2015).

<sup>177</sup> *Jus sanguinis*, OXFORD REFERENCE (7th ed. 2009).

<sup>178</sup> See, e.g., *Conflicts of Nationality*, *supra* note 174 (“It is for each State to determine under its own law who are its nationals.”).

<sup>179</sup> Dörr, *supra* note 163, ¶ 16.

<sup>180</sup> See Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65; European Convention on Nationality, *supra* note 175, at 3.

<sup>181</sup> See generally ALFRED M. BOLL, *MULTIPLE NATIONALITY AND INTERNATIONAL LAW* 179–80 (2007).

<sup>182</sup> Dörr, *supra* note 163, ¶ 9.

<sup>183</sup> *Id.* ¶ 4 (“The most prominent feature of nationality under international law is that it is in principle no matter for international law, but for the domestic law of States.”).

sistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality.”<sup>184</sup>

That said, international law may, to a certain extent, limit the discretion in which States may determine nationality.<sup>185</sup> Domestic legislation on nationality must follow non-discrimination principles, including on matters of sex, religion, race, and abilities.<sup>186</sup> When a State regulates nationality, it must also obey by the general principle of State sovereignty, so that each State may only regulate the acquisition, loss, and events linked to nationality of its own nationals and not those of other States. Similarly, the State must refrain from intervening in another State’s domestic affairs by regulating nationality in a manner that would interfere with another State’s rights, for example, by naturalizing a large number of nationals of another State.<sup>187</sup>

*B. The Limits of Nationality as a Mechanism for Individual’s Redress*

Above, I highlighted the origin of the state-centric principle of nationality and explained how nationality is regulated. Nationality provides a link between individuals and international law when they do not enjoy direct rights under international law.<sup>188</sup> How is this link activated? Essentially in two ways: either directly by the State through a system of diplomatic protection, or by giving the individual herself direct access to international remedies through treaties signed by the State that provide

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<sup>184</sup> European Convention on Nationality, *supra* note 175, at 3.

<sup>185</sup> Dörr, *supra* note 163, ¶¶ 4, 17 (“International law limits that discretion [of determining nationality under domestic law], but it neither contains nor prescribes certain criteria for acquisition and loss of nationality. . . . Only a few limits are established in inter-national law to the freedom of States to confer their nationality; that is situations in which the conferment would not be recognized on the international plane. Such a situation is the naturalization *ex lege* of persons who are national of another State and who do not have any connections with the naturalizing State.”).

<sup>186</sup> European Convention on Nationality, *supra* note 175, art. 5 (stating “[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.”).

<sup>187</sup> Dörr, *supra* note 163, ¶ 4–5 (“the—scarce—rules of international law with respect to nationality mostly do not affect the legal validity of conferment of nationality under international law, but simply its acceptance on the international plane, ie [*sic*] the consequences of nationality vis-à-vis other States.”). Dörr also notes that International law may have more to say in relation to the acceptance of the assignment of nationality in the international plane and the consequences of the assignment of nationality in relations to other states.

<sup>188</sup> Walter, *supra* note 9, ¶ 18.

access to forums based on nationality requirements.<sup>189</sup> Each situation is explained in turn below.

Under diplomatic protection, a State can bring a claim that belongs to one of its nationals via a system of diplomatic espousal in front of an international tribunal and against the State that wronged the national. Diplomatic protection is “an extraordinary legal remedy”<sup>190</sup> and “is well established in customary international law.”<sup>191</sup> By espousing a claim of its national, the State is taking the claim as its own. The assumption is that by injuring a national, the State itself has been injured. Vattel phrased it thus:

Whoever uses a citizen ill, indirectly offense the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety.<sup>192</sup>

Thus, diplomatic protection is aimed at strengthening the bond between the State and the national and not necessarily aimed at providing a remedy for violating an international right to the individual. Under diplomatic protection, the claim is the claim of the State, not the individual. Any compensation awarded to the State is given to the State, not to the individual, as compensation for any damage the State received to its reputation. Through diplomatic protection “individuals were mediated in international law by the States involved in their treatment in a specific situation and had no legal position of their own.”<sup>193</sup>

The limitations of using diplomatic protection for individuals’ international claims are many. First, espousing an individual’s claim is discretionary as the individual must acquire the attention and the support of

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<sup>189</sup> See SHAW, *supra* note 24, at 612 (“Nationality is the link between the individual and his or her state as regards particular benefits and obligations. It is also the vital link between the individual and the benefits of international law. Although international law is now moving to a stage whereby individuals may require rights free from the interposition of the state, the basic proposition remains that in a state-oriented world system, it is only through the medium of the state that the individual may obtain the full range of benefits under international law, and nationality is the key. The principle of diplomatic protection originally developed in the context of the state by foreign nationals.”).

<sup>190</sup> Weis, *supra* note 166, at 219 (“The diplomatic protection of nationals in an extraordinary legal remedy, in the exercise of which the state may resort to all the methods at its disposal for the enforcement of rights under international law.”).

<sup>191</sup> *Id.* at 219.

<sup>192</sup> PARLETT, *supra* note 14, at 49 (quoting E. de Vattel, *The Law of Nations or, Principles of Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*).

<sup>193</sup> Walter, *supra* note 9, ¶15.

the State.<sup>194</sup> The State may, moreover, have different priorities and interests from the individual, or simply not value the claim. Diplomatic protection claims are also generally costly, both in terms of reputation and actual financial cost. The State must weigh all its diverse interests before going forward and may decide that it is not worth filing a claim against another sovereign. This decision could leave the individual with no remedy. And international law and international courts that apply it seem to be unfazed by the lack of remedies this situation produces. A recent ICJ decision is telling in this regard. In *Jurisdictional Immunities*,<sup>195</sup> Germany filed a case against Italy concerning the extent of its immunity to certain decisions by Italian courts. The case related to claims brought by Italian victims of Nazi-era war crimes against Germany in Italian courts. The substance of the facts was not disputed by Germany, but Germany claimed that a number of international agreements had either waived claims for compensation or already provided compensation. Germany had also enacted domestic laws to compensate victims of Nazi-era atrocities. Despite this, the Italian nationals who had sought compensation from Germany in Italian courts had not received any. Italian courts ruled in favor of the individuals, and Germany claimed at the ICJ that these rulings violated its State immunity. The ICJ sided with Germany and claimed that:

102. Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, *it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.*

[...]

104. In coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned.<sup>196</sup>

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<sup>194</sup> Weis, *supra* note 166, at 219 (“Diplomatic protection of citizens purports to present the violation of the citizens’ rights, or to secure redress for effected violation. In asserting this protection, the state does not represent the individual citizen who has suffered injury to his rights, but, at least according to the traditional theory, gives effect to its own rights which have been violated in the person of its subject. The state has, according to international law, no duty to exercise this protection, and a national has no rights to demand protection . . .”).

<sup>195</sup> *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 143, 2 (Feb. 3).

<sup>196</sup> *Id.* ¶¶ 102, 104 (emphasis added).



This decision truly encapsulates what is wrong with the present system which bases international individual claims on nationality. It also delivers support for an alternative approach to give direct access to international remedies for individuals. First, the decision offers a clear example of a conflict of interest between the interest of the individual in compensation and the State. Specifically, in the instant case, Italy had received compensation from Germany, but that compensation had not reached the individuals. Italy and Italian nationals clearly had different interests, and Italy may not have acted in the best interest of its nationals.

Indeed, the decision of the ICJ also clearly shows the limit encountered by individuals seeking redress. Italian nationals sought compensation for war crimes committed by Germany. The ICJ applied today's legal provisions, and the result was the preclusion of any actions of redress by the individuals. Indeed, the Court was aware that its decision would preclude judicial redress to the Italian nationals. The Court was unmoved by the situation. It even stated that "it is difficult to see" why the fact that individuals were not compensated should give individuals access to alternative forms of remedies. That the ICJ failed to see the importance of the repercussions is telling and underscores the need to move beyond claims based on nationality and instead create a new system that looks beyond nationality to give standing and access to international remedies directly to the individual.<sup>197</sup>

In sum, diplomatic protection is generally not an effective way to provide direct remedies to individuals for international law violations – there is no guarantee of action by the State, and conflicts of interest between the State and the individual abound.<sup>198</sup>

A second way in which nationality is relevant for individual claims is in situations where treaty provisions allow an individual of the treaty-signatory State to bring an international claim against another Signatory-State in an international forum in support of the individual's own claim.

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<sup>197</sup> Ingrid Wuerth, *ICJ Issues Jurisdictional Immunities Judgement*, OPINIO JURIS (Feb. 7, 2012), <http://opiniojuris.org/2012/02/07/icj-issues-jurisdictional-immunities-judgment/>.

<sup>198</sup> There is one exception to this: claims for wrongs to individuals in situations where the individual truly acts on behalf of the State. i.e. in cases of violations of diplomatic or consular rights. In these cases, the individual officially represented the State. Therefore, bringing claims through diplomatic protection is the correct way to proceed. See generally Vienna Convention, *supra* note 128. Article 38 of the Vienna Convention offers privileges and immunities only to members of a diplomatic mission who are nationals of the sending State. Vienna Convention, *supra* note 128. Similarly Art. 36 of the Vienna Convention on Consular Relations includes of communication and contact with nationals of the sending State. 1963 Vienna Convention on Consular Relations, *supra* note 129. See also John Dugard, *Article on Diplomatic Protection 2006*, U. N. AUDIOVISUAL LIBR. INT'L L. 8 (2006), <http://legal.un.org/avl/ha/adp/adp.html>; David Leys, *Diplomatic Protection and Individual Rights: A Complementary Approach*, 57 HARV. INT'L L.J. (ONLINE) 1, 4–5 (2015).

In these cases, individuals acquire procedural rights to seek remedy for violations of their international rights through their nationality, because a certain forum is open to them thanks to their nationality. In the matter of treaty law, “nationality is an essential element in bringing individuals under the personal scope of certain treaties.”<sup>199</sup> This method is how most individuals acquire standing and remedies for their international law claims in international forums.

Though this mechanism seems appealing in theory because it provides access to international legal remedies to individuals, in practice it is not. First, these claims are individual claims. There is no theoretical necessity to attach a nationality requirement for the individual to access international remedies. The claim originates from rights that are rights of the individual, and are not rights of the State. For example, the minimum standard of treatment is an individual right that every foreigner is entitled to when they engage in business in another country or when they reside in another country.<sup>200</sup> It is not necessarily linked to a particular nationality, but to the status of being a foreigner. Similarly, provisions against illegal expropriation create an individual right which provides a protection for the foreign investor; the State of nationality of the investor is not relevant for the individual claim.<sup>201</sup>

Yet, the individual can only acquire standing and access to international remedies through her nationality, even if that right derives from customary law (as it is the case for claims of expropriation and minimum standard of treatment). Today, access to international remedies is part of the negotiation of bilateral and multilateral treaties, which may render the right actionable. When State A negotiates a treaty with State B, part of the negotiation by State A can concern granting access to nationals of State B to an international forum for claims of violation of the treaty by State A. State B will then grant the same rights to nationals of State A. While this happens in practice, there is no compelling reason for continuing to include such nationality-related provisions in treaties. One can envisage, as will be argued below, a different system where procedural access is not based on nationality.<sup>202</sup> Rights could become actionable based on many other issues. This novel approach would align doctrinal development with functional requirements and it will also be responsive to the needs of individuals and will allow many more international claims to be brought in international forums.

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<sup>199</sup> Dörr, *supra* note 163, ¶ 46.

<sup>200</sup> OECD (2004), “Fair and Equitable Treatment Standard in International Investment Law”, *OECD Working Papers on International Investment*, 2004/03, OECD Publishing, <http://dx.doi.org/10.1787/675702255435>.

<sup>201</sup> See generally Secretary-General of UNCTAD, Expropriation, United Nations Conference on Trade and Development, UNCTAD/DIAE/IA/2011/7 (July 2012).

<sup>202</sup> See *infra* Part III.

Moreover, as explained in the next sections below, the principle of linking a procedural nationality requirement to the substantive international rights of individuals is wanting for practical reasons. First, the way it is applied results in a review of domestic legislation that often second-guesses States' actions and further limits access of the individual to international remedies. Second, because some international tribunals have interpreted the nationality requirement by adding a "dominant and effective" nationality test, the norms applicable to dual nationals are unclear, and are becoming outdated and non-responsive to today's globalized world. Third, by making nationality a procedural requirement for remedy access, stateless individuals and other possible holders of meritorious claims are excluded. Each of these criticisms are explained below.

1. *The Downside of Second-Guessing States*

The first argument that undermines using nationality as a link for individuals to access international law remedies is that international tribunals routinely second-guess States' nationality legislation when they initially review the case for their jurisdiction. In fact, once acquired, nationality is reviewed and 'validated' in the international sphere in cases where the individual seeks to access specific procedural remedies. Even though nationality is regulated domestically, international courts and tribunals retain the right to review issues of nationality to establish jurisdiction, and this includes issues of nationality of convenience or "effective nationality." International courts and tribunals can disregard the claim of an individual or even a State in relation to a nationality.

This review by international courts and tribunals of domestic legislation on nationality has resulted in several misapplications of the nationality principle. Indeed, international courts and tribunals have shown a willingness to review domestic law and disregard the claim of an individual or even the relevant State in relation to a nationality. Several decisions pertaining to international investment law are telling.

For example, in *Soufraki v. United Arab Emirates*, an international investment tribunal denied jurisdiction to the claimant investor for failing to satisfy the nationality requirements, notwithstanding the fact that the claimant's Italian nationality was supported by several nationality certificates issued by several Italian public authorities. The Tribunal concluded that, despite the nationality certificates (and unbeknownst to the claimant), the claimant had lost his Italian nationality.<sup>203</sup> As a result, the claim

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<sup>203</sup> *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on the Application for Annulment and Separate opinion, ¶ 133 (June 5, 2007). (Mr Soufraki filed a Request for Arbitration against the UAE at ICSID in 2002. In it he sought to invoke the protection afforded by the UAE to Italian citizens under the 1997 UAE-Italy bilateral investment treaty. The case related to a Concession Contract with the Dubai Department of Ports and Customs, which Mr Soufraki entered into in 2000. In support of his claim to be an Italian national Mr. Soufraki produced two Italian

by Mr. Soufraki was not heard by the Tribunal, and Mr. Soufraki had no redress against the United Arab Emirates.

Similarly, in *Siag v. Egypt*, another international investment tribunal found Egypt liable to Mr. Siag and Mrs. Vecchi for damages they had suffered.<sup>204</sup> The Tribunal found that Egypt violated numerous provisions of the Italy-Egypt bilateral investment treaty (BIT). Claimants were both natural citizens of Italy and the principal investors in two Egyptian corporations. They alleged that Egypt had expropriated their investment unlawfully. Egypt rejected the claim and asserted that Claimants were at all relevant times nationals of Egypt, and therefore could not bring a claim against Egypt under the Italy-Egypt BIT. Egypt also argued that the claimants could not deny their Egyptian nationalities, because they had relied on it in the past to acquire and use Egyptian passports and conclude business deals. These facts were not contested by claimants. The majority of the tribunal, however, dismissed the objections put forth by Egypt, and instead concluded that the claimants had “acted in good faith in obtaining their Egyptian passports and in their subsequent business and other dealings with Egypt.” The claimants “did not know at that point, nor as lay persons could they reasonably be expected to have known, that in law they had legally lost their Egyptian nationality. Thus, the claimants are not estopped from now denying their Egyptian nationality.”<sup>205</sup> In this case, it was the State that suffered from a misapplication of domestic nationality law. The Tribunal found it had jurisdiction in a situation in which Egypt thought its nationals were involved, and thus was not an international claim.

These cases are significant because they show that international tribunals will review and second-guess a State’s nationality legislation, both in terms of finding jurisdiction when the State argues none is to be found, and in terms of denying jurisdiction even if the State has provided certification of nationality.

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passports, five Certificates of Italian nationality issued by Italian authorities and a letter from the Ministry of Foreign Affairs of Italy confirming his right to have recourse to the BIT on the basis of his Italian citizenship. The UAE, however, rejected Mr. Soufraki’s claims to be an Italian national. The UAE objected that in 1991 Mr. Soufraki had acquired Canadian nationality without taking the steps necessary under Italian law to preserve his Italian nationality, with the result that he lost his Italian nationality in 1991 and was not therefore a national of Italy at the relevant times necessary under ICSID. The Tribunal remarked that “had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be.”).

<sup>204</sup> *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB 05/15, Resort development, ¶ 631(V)-(VI) (June 1, 2009).

<sup>205</sup> *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Resort development, ¶ 483 (June 1, 2009).

In sum, the present system creates an obvious tension. On one side, States decide how to grant nationality. On the other, international tribunals can review that decision and deny access to remedy independently. This puts individuals in a weak position, as the link that gives them access to international law is subject to review by an international tribunal. It also undermines the State, as international tribunals can disregard nationality certificates and declarations by States.

Reviewing domestic legislation and second-guessing States on matters of nationality can undermine an individual's access to international remedies. They also provide support for a new system not based on nationality links, in order to grant procedural rights to individuals in matters of international claims by the individuals. I offer suggestions on possible systemic changes in the last part of this Article.

2. *The Limits of the “Dominant & Effective Nationality” Rule: Dual Nationals and the Paradox of Nottebohm*

A second flaw of a system that bases an individual's access to international claims on nationality is the requirement that a nationality must be the “dominant and effective” nationality in order for it to grant access to international remedies.

The rule derives from the ICJ *Nottebohm* decision.<sup>206</sup> The case relates to the vicissitudes of Mr. Nottebohm, a German national born in 1881. Mr. Nottebohm lived in Guatemala from 1905 until 1943, but never became a citizen of Guatemala. In 1939, at the beginning of the Second World War, he applied to become a naturalized citizen of Liechtenstein. The application was approved in an expedited manner, and following the payment of a sum of money in taxation to Liechtenstein. He then returned to Guatemala on his Liechtensteiner passport, and informed Guatemala of his change of nationality. He traveled and returned to Guatemala again in 1943, after Guatemala's entry into World War II, but was refused entry as an enemy alien due to his German nationality. Nottebohm's property was confiscated and he was extradited to the U.S. to an internment camp. After World War II ended, Mr. Nottebohm moved back to Liechtenstein. In 1951, Liechtenstein brought a case on behalf of Mr. Nottebohm against Guatemala for unjust enrichment and sought redress. Guatemala, however, argued that Mr. Nottebohm was not a national of Liechtenstein under international law. The Court agreed, and found it had no jurisdiction to entertain the case. This is surprising—and wrong—for several reasons.<sup>207</sup> Mr. Nottebohm lost his German nationality and only had his Liechtensteiner nationality. By precluding access to the

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<sup>206</sup> Nottebohm Case (Liech. v. Guat.), Judgment, 1953 I.C.J. Rep. 111 (Nov. 18).

<sup>207</sup> See the excellent article by Professor Slone criticizing the ICJ decision: Robert D. Slone, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. J. INT'L L.J. 1, 1–3 (2009).

ICJ because his nationality “was not genuine,” Mr. Nottebohm in effect lost his capacity to access international remedies.<sup>208</sup>

By so doing, the ICJ essentially added a new requirement to diplomatic espousal, which created “different classes of nationals: those having acquired their nationality by birth or change of civil status, and those having been naturalized.”<sup>209</sup> The decision makes it even harder for individuals to bring their claims and again signals the need for a new system of individual remedies.

The effective nationality principle is mostly applied in cases of dual nationality, which is where the principle actually originated,<sup>210</sup> to determine which nationality should be used in a given case.<sup>211</sup> In fact, it was the decision in *Nottebohm* that was followed by the Iran–U.S. Claims Tribunal (IUSTC) in deciding claims brought by U.S. nationals against Iran and Iranian nationals against the U.S. The Tribunal decided that, for jurisdictional purposes, a dual U.S.-Iranian national would be considered the national of his or her “dominant and effective nationality” in the period between the formation of the claim and the date of the establishment of the Tribunal.<sup>212</sup> To assess the “dominant and effective nationality,” the Tribunal reviews “all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.”<sup>213</sup> However, this is not an easy task, and it is a subjective analysis. Moreover, with the rising number of dual nationals,<sup>214</sup> the principle of effective and dominant nationality is becoming increasingly obsolete.<sup>215</sup> With globalization and intensified travel by many people, including dual nationals—which nationality is “real and effective” may not be obvious.<sup>216</sup>

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<sup>208</sup> See Dörr, *supra* note 163, ¶ 54 (the Court “deprived the individual of the advantages of nationality in relation to other States and thereby rendered him de facto stateless”).

<sup>209</sup> *Id.* ¶ 54.

<sup>210</sup> See generally Nottebohm, *supra* note 206.

<sup>211</sup> For dual nationality, see generally, Donner, *supra* note 11, at 16.

<sup>212</sup> Iran v. United States of America, Case No. A/18 5 Iran–US Cl. Trib. Rep. 251, Concerning the Question of Jurisdiction Over Claims of Persons with Dual Nationality, ¶ 10 (Apr. 6, 1984).

<sup>213</sup> *Id.* ¶ 21.

<sup>214</sup> Jason Schacter, *Dual Citizenship Trends and Their Implication on the Collection of Migration Statistics*, UNECE (Sept. 10, 2014), [https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.10/2014/mtg1/presentations/10\\_UNECE\\_Dual\\_citizenship.pdf](https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.10/2014/mtg1/presentations/10_UNECE_Dual_citizenship.pdf) (noting a rapidly growing trend across many countries; dual nationals in Spain grew 5x between 2002 and 2014).

<sup>215</sup> WEIS, *supra* note 172, at 239 (“Nationality, in the sense of membership of a State, the ‘belonging’ of an individual to a State, presupposes the co-existence of States. Nationality is, therefore, a concept not only of municipal law but also of international law. As a concept of municipal law it is defined by municipal law; as a concept of international law it is defined by international law.”).

<sup>216</sup> See Donner, *supra* note 11, at 25 (“Further, the International Law Commission

It is very possible that a person splits her time among several places for which she has nationality, none of which is more effective than others. Similarly, globalization may also result in disseminated centers of interests, where one person may work in State A, have a family in State B and frequently travel to State C. When the person is also a national of State A, B, and C, which is the “real and effective” nationality?

In sum, the “effective and dominant” nationality principle can arbitrarily deprive single nationality holders of the possibility of bringing a claim and finding a remedy under international law. For dual nationals, it adds a layer of difficulties that is becoming increasingly anachronistic.

### 3. *Other Limitations of Nationality: Refugees and Stateless Individuals*

This Article argues to reject nationality-based international claims for individuals for another reason: the fact that such a mechanism precludes access by individuals who are stateless and thus have no nationality.

At present, an estimated 15 million people are stateless, and are thus not protected by any nationality.<sup>217</sup> Statelessness can occur for many reasons. There are some “technical” causes, such as the application of mutual domestic provisions relating to *jus sanguinis* and *jus soli*, marriage, divorce, and adoption, which result in no nationality being given. States at times also arbitrarily deprive individuals of nationality, for example, as a consequence of hostilities.<sup>218</sup> Statelessness can also be a consequence of

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had by August 2004 produced one Preliminary and five consequent numbered Reports on Diplomatic Protection. . . . Art. 6 of the First Report, of 7 March 2000, states: ‘Subject to Art. 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual’s [dominant and effective] nationality is that of the former State.’).

<sup>217</sup> Vincent Chetail, Laura Van Waas’s: Nationality Matters - Statelessness Under International Law’, 28 REFUGEE SURVEY Q. 236, 236 (2009).

<sup>218</sup> In Art. 5(1) of its Statute, the Eritrea-Ethiopia Claims Commission [hereinafter EECC] was tasked with deciding the claims of nationals of one party against the Government of the other party. G.A. Res. A/55/686, annex, Agreement Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, ¶5(1) (Dec. 13, 2000). Still, Art. 5(9) provided that, “[i]n appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party’s nationals.” *Id.* art. 5(9). For historical reasons there were a large number of dual Eritrean and Ethiopian nationals. The wrongful deprivation of nationality was a core claim made by Eritrea against Ethiopia. In an important decision, the EECC recognized the continued force of the rule of dominant and effective nationality in many circumstances. Eritrea-Ethiopia Claims Commission (Eri. v. Eth.), 26 R.I.A.A. 505, 586-87 (Perm. Ct. Arb. 2009). (“However, it believe[d] that application of the rule must be qualified in situations, such as those presented here, involving claims centered on expulsion or deprivation of nationality by the respondent State. It cannot be that, in such situations, international law allows a State wrongfully to expel persons or deprive them of its own nationality, but then deny State responsibility

State succession.<sup>219</sup> Van Waas also identifies the “new” causes of statelessness, and namely irregular migration and deficiencies of the registration of births and marriages.<sup>220</sup>

Whatever the cause, statelessness has serious repercussions on the lives of individuals.<sup>221</sup> Stateless individuals lack remedies when they have a claim under international law because they have no nationality that can “attach” to the claim.<sup>222</sup> Statelessness also puts a strong spotlight on the unnecessary and unjust nature of the present international legal system based on nationality. Indeed, the present system is anomalous: direct international rights are given to the individual. However, individuals too often lack the procedural means to exercise their rights.

In the section above, I offer three reasons why the present system is unjust and unhelpful. First, nationality provisions are reviewed by international courts and tribunals and this review can result in second-guessing States’ domestic provisions and barring access to individuals. Second, the application of the ICJ *Nottebohm* test may prevent nationals from accessing international courts and is unhelpful to identify claims by dual nationals. Finally, the present system does not give voice to anyone who, for no fault of her own, lacks a nationality all together.

But most of all, a nationality-based system does not keep up with the recent doctrinal changes in international law. As individuals acquire legal personality, what is important is the content of the rights and the kind of violation individuals suffered, not their nationality.

Nationality is no panacea for individuals. Nationality too often does not grant access to the individual to an effective international remedy. In the section below, I will suggest alternative ways to give individuals access, and expedite the development of a more representative international law system.

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because of the very social connections or bonds of nationality it wrongfully ended.”) (Citing Art. 5(9), the EECC then concluded that the provision was a “compelling indication that the Parties did not view the general rules of diplomatic protection as applying in the unusual circumstances that led to that Agreement.”). Thus, the EECC made awards in favor of Eritrea for “dual nationals who were arbitrarily deprived of their Ethiopian nationality while present in third countries” *Id.* at 590, ¶ 267 and for the wrongful expulsion of “dual nationals by local Ethiopian authorities.” *Id.* at 598, ¶ 302.

<sup>219</sup> LAURA VAN WAAS, NATIONALITY MATTERS—STATELESSNESS UNDER INTERNATIONAL LAW 123 (2008).

<sup>220</sup> *See generally id.* at 121–92.

<sup>221</sup> WEIS, *supra* note 172, at 166.

<sup>222</sup> ERIC FRIPP, NATIONALITY AND STATELESSNESS IN THE INTERNATIONAL LAW OF REFUGEE STATUS 95 (2016). The case of the Palestinians is emblematic in this respect. Palestinians have no nationality of their own, and often enjoy nationality from other States in the region. Lacking a Palestinian nationality makes it difficult, at the moment, to compensate claims for damages. *See* Abbas Shiblak, *Stateless Palestinians*, 26 FORCED MIGRATION REV. 8, 8–9 (2006).



### III. RETHINKING THE INDIVIDUAL IN INTERNATIONAL LAW— BEYOND NATIONALITY?

In the sections above, I first discussed how the individual gradually acquired a substantial amount of rights and obligations in international law. I then noted that, in terms of procedure, individuals' venues for enforcing international rights remain limited. I highlighted that in most areas, access to remedies is only available if the individual, in addition to the claim based on an international legal right, has a certain nationality that allows her into specific international forums.

However, recognizing claims by an individual in international law based on her nationality has often proven wanting. Nationality claims are not always correctly resolved by international courts and tribunals. Globalization has also brought to bear the fallacies and limitations of a policy centered on the relation with one State: how are claims of dual or multiple nationals to be reviewed? Nationality-based claims also leave out of the system an entire category of claimants—those who do not have a nationality. This Article argues that the present system—where individuals' international claims are based on nationality—needs rethinking. Indeed, severing the nationality requirement will allow the individual to play a more distinct, direct and independent role in international law.

In order to address the lack of procedural rights, and grant the individual access to international remedies for her international law claims, a new approach is required—an approach based on an alternative understanding of the characteristics that identify individuals' claims under international law. Truly, we need to rethink the individual in international law. Only a new approach to international procedural rights would adequately respond to the gradually recognized idea that the individual is a separate subject of international law. As Gorski asserts:

Sovereignty could no longer blind the view of the individual. Both the rise of international humanitarian law and, in particular, of human rights law showed an increased intent of the international system to grant rights directly to individuals. Doctrinally, this change in State practice was legally accommodated by showing a more flexible approach towards the concept of subjects of international law.<sup>223</sup>

The next step in this evolution is improving procedures to grant individual access to international courts. In *Reparation*, the ICJ clarified that “subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights.”<sup>224</sup> Indeed, the evolution of international law concerning its subjects, and especially individuals, “requires

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<sup>223</sup> Gorski, *supra* note 7, ¶ 15.

<sup>224</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *supra* note 36, at 178.

laying more emphasis on differences in the capacity to act.”<sup>225</sup> So, when this Article suggests thinking about providing individuals with procedural access for their international claims, it is not arguing for the individuals to become like States. There are obvious differences. The thinking must be differentiated and more refined. The individual must find a new and proper role in international law. This role will be unique.

At the outset, it is exciting to reflect on how the recent proliferation of international courts and tribunals has shown that personal jurisdiction can be based on multiple kinds of actors and subject-matters. Indeed, the multiplication of international courts and tribunals has been instrumental—and thus an enabling factor—in generating new thinking about subjects in international proceedings. As new actors intervening in the settled business of international adjudication, international courts and tribunals have altered the equilibrium that existed before, and their establishment and practice has fostered the creation of newer venues for recourse.

Traditionally, international adjudication was focused on inter-State disputes, which were heard by the PCIJ (and later the ICJ), or by international arbitral tribunals and claims commissions. The evolution of the subject matter jurisdiction of international courts and tribunals has been substantial. International courts and tribunals that hear claims concerning subjects other than States thrive. The European Court of Human Rights (ECtHR), for example, hears cases brought by individuals against States for violations of human rights law.<sup>226</sup> Arbitral tribunals applying the International Convention for Settlement of Investment Disputes (ICSID) have jurisdiction over disputes brought by international individuals and companies against States hosting their investments.<sup>227</sup> The ICC, ICTY and ICTR all have jurisdiction over individuals regarding violations of international criminal law.<sup>228</sup>

The creation of these new international forums has enabled and stimulated the theoretical consideration of a wider and more diverse typology of claimants, and thus, by association, could also foster and enable a new thinking on how to grant access to a wider range of individuals to international forums that can hear individual international law claims. In

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<sup>225</sup> Walter, *supra* note 9, ¶ 29.

<sup>226</sup> See generally ECHR, *supra* note 75.

<sup>227</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25, March 18, 1965, 575 U.N.T.S. 159, 174 [hereinafter ICSID Convention] (“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”).

<sup>228</sup> See *supra* Part I(c).

sum, the practice of international courts and tribunals can serve as an instructive blueprint to a new thinking about how to grant access to individuals for their international claims.

Currently, when individuals can bring cases directly in international courts and tribunals, these forums generally have jurisdictional requirements based on nationality.<sup>229</sup> Access to forums based on nationality is usually negotiated by States in the relevant treaties that create the forum or substantive right. This is now part of the *quid-pro-quo* of international negotiations.<sup>230</sup> It does not need to be this way. Indeed, a rethinking is necessary. As Müller remarks:

If contemporary international legal science seeks to give the individual its proper place in the international legal system, if it wants conceptually to incorporate the individual as a hitherto widely alien factor, subject and actor in international law, it must be prepared to look for the reflections of the undisputed rise of the individual on the level of positive law in the mirror of our theorizing on international law.<sup>231</sup>

Some relevant alternative examples exist. They are explored below. The ICJ also clearly confirmed that the development of international law adapts to the needs it faces. It stated:

Throughout 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.<sup>232</sup>

Today, “international life” (in this case—the present doctrinal understanding of rights and obligations of the individual internationally) requires a new development in international law.

As international law stands now, individuals are endowed with some legal personality, but are precluded from fully exercising their claims by the lack of procedural rights.<sup>233</sup> The present system is often based on nationality. Instead of empowering the individual, however, nationality has often become an obstacle that blocks the individual from acquiring an international legal personality. The difference between subjective and procedural rights highlights the discrepancy between theory and reality. This discrepancy—and how to close it—is addressed in this Section.

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<sup>229</sup> See, e.g., ICSID Convention, *supra* note 227, at 174.

<sup>230</sup> See *supra* Part II(b).

<sup>231</sup> Müller, *supra* note 148, at 299.

<sup>232</sup> Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, *supra* note 36, at 178.

<sup>233</sup> *Id.* at 179.

In her analysis of the doctrine of subjects, former ICJ President Rosalyn Higgins specifically noted the difficulty of adapting the doctrine of subjects to a variety of subjects. She stated: “We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.”<sup>234</sup>

It is time to re-think this intellectual prison and adapt the doctrine of subjects to reflect reality. More specifically, it is time to rethink the gap that exists between the theory that accepts the individual as the holder of international rights and obligations, and the practice that does not allow the individual to fully exercise those rights.

The following Sections will examine how this change can be effectuated and will give some illustrations on how the new theory can be applied in practice.

#### A. *How It Can Be Done*

Having determined that there is a need to change the way individuals are able to access international remedies, this Section assesses two ways that can provide the basis for international claims not based on nationality.

As a preliminary matter, it is useful to think about the common features shared by the individual claims considered in this Article. First, the right that is the object of the claim is an international right that belongs to the individual. It is a right of the individual *qua* individual, and not a right of the individual as representative of a State. For example, it is a right that guarantees a protection to the individual, for example to enjoy family life or to own property.<sup>235</sup> It is not a right the individual has on behalf of the State, such as a diplomatic claim arising from the fact that the individual serves, for example, as the Ambassador of a certain State.<sup>236</sup> Also, the claim is a claim asserted for a violation that the individual suffered, not the State. For example, if an individual’s property is arbitrarily expropriated, it is the individual *qua* individual and owner of the property who suffered, not the State. The State of nationality of the expropriated individual has no personal claim. Finally, the remedy requested is a remedy for the individual. Monetary compensation or just satisfaction are awarded directly to individuals for damages that they suffered directly.<sup>237</sup> The award does not compensate for any damages—not even reputational—suffered by the State.

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<sup>234</sup> HIGGINS, *supra* note 60, at 49.

<sup>235</sup> ECHR, *supra* note 75, art. 8. *See also id.* art. 1.

<sup>236</sup> *See, e.g.*, Vienna Convention, *supra* note 128, art. 38.

<sup>237</sup> *See, e.g.*, ECHR, *supra* note 75, art. 41 (“If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”).

In sum, the common features of these types of claims clearly establish that these claims belong to the individual, regardless of her State of nationality. Although individuals often get access and redress for their claims thanks to their nationality (because access is given by treaty) there is nothing necessarily and intrinsically linked to the State of nationality as to the substance and content of the claim.

It follows that de-linking individuals' international claims procedures from their nationality, and giving them another base to establish jurisdiction will go a long way to address the lack of access to international remedies for the individual, and it will be an important first step in establishing a new system of international relations, where the individual is recognized as playing a more relevant and diverse role.

### 1. *An Alternative Base for Jurisdiction*

Dörr points out that nationality has become irrelevant in the area of human rights because “under human rights law the individual is addressed and protected as a human being and not as the national of a State.”<sup>238</sup> This is an important consideration and offers much food for thought. As explained in Section I above, human rights provisions are given to individuals as such, and protect the individuals from adverse States' actions.<sup>239</sup>

Importantly, human rights protections are not limited to substantive rights. Under certain systems, and notably the ECtHR, they are extended procedurally as well. Protocol 11 ECHR, which entered into force on November 1, 1998, provides the strongest direct enforceability instrument for individuals. Protocol 11 allows for the right of individual petitions and makes the jurisdiction of the permanent European Court of Human Rights for cases against all the States Parties to the Council of Europe compulsory.<sup>240</sup> This is a very significant and unique instrument.<sup>241</sup> Provided certain requirements are fulfilled, the individual may have direct access to international remedies.<sup>242</sup>

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<sup>238</sup> Dörr, *supra* note 163, ¶ 3 (asserting that “[i]t was only with the development of the international protection of human rights, and it still is only for the purposes of that area of international law, that nationality as core of the individual's status became irrelevant, since under human rights law the individual is addressed and protected as a human being, not as a national of a State.”).

<sup>239</sup> See *supra* Part I(c).

<sup>240</sup> Protocol No. 11, *supra* note 84, arts 32, 34.

<sup>241</sup> See Reisman, *supra* note 61, at 873 (arguing the international law of human rights renders much of the pre-existing international law anachronistic).

<sup>242</sup> ECHR, *supra* note 75, art. 35 (“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”).

The Court has had enormous success in practice.<sup>243</sup> The caseload of the ECtHR is significant. Protocol 11 gives direct access to the ECtHR to more than 800 million people that live in territories controlled by members of the European Council, and increased the activity of the Court exponentially.<sup>244</sup> Over 90% of the judgments of the Court's first 50 years were delivered after the entry of Protocol 11 into force in 1998.<sup>245</sup> In September 2008, the Court delivered its 10,000th judgment.<sup>246</sup> Judgments touch on issues such as what constitutes inhuman or degrading treatment or punishment, the definition of torture, the prohibition against non-refoulement, the right to liberty and security of the person, and the right to property, as well as such personal issues as assisted suicide, the death penalty, in-vitro fertilization and the freedom to manifest one's religion.<sup>247</sup>

The Court's success also clearly signals that, given the opportunity, individuals are willing and able to access international courts directly. In fact, individuals have shown time and time again their interest in bringing their cases to the ECtHR where they ask for remedies unavailable to them in the domestic sphere.<sup>248</sup>

The ECtHR is an extraordinary example and model, not only because it grants immediate access to individuals for their international law claims, but because the jurisdiction of the Court is based on effective control of territory, and not nationality. Indeed, Article 1 of the ECHR requires all Contracting Parties to secure "to everyone within their jurisdiction" the rights and freedoms enumerated in the Charter.<sup>249</sup> Thus, the provision of rights is based on the control that the Contracting Parties

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<sup>243</sup> H.E. Judge Rosalyn Higgins, President, Int'l Court of Justice, Speech at the Ceremony Marking the 50th Anniversary of the European Court of Human Rights: The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights (January 30, 2009) (President Higgins suggests "[t]he European Court of Human Rights is surely one of the busiest and most exemplary of international judicial bodies. It exerts a profound influence on the laws of social realities of its Member States and has become the paradigm for other regional human rights courts, not to mention other international judicial bodies in general.").

<sup>244</sup> Christiane Bourloyannis-Vrailas, *The European Court of Human Rights*, in THE RULES, PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 324 (C. Giorgetti ed., 2012).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 337–39. See also *S.H. v. Austria*, 2011 Eur. Ct. H.R. 1.

<sup>248</sup> See, e.g., *Apply to the Court*, COUNCIL OF EUROPE, [http://www.echr.coe.int/Pages/home.aspx?p=applicants&c=#n1357809352012\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=applicants&c=#n1357809352012_pointer) (last visited August 25, 2018) (the Court's website contains a wealth of information demonstrating how to lodge an application).

<sup>249</sup> ECHR, *supra* note 75, art. 1.

enjoy over their territory, irrespective of the claimant's nationality. This approach has been confirmed in practice repeatedly.

*Al-Skeini and Others v. the United Kingdom* concerned the deaths of several of the applicants' close relatives, which occurred in Basra, Iraq while it was under UK occupation.<sup>250</sup> The principal issue in the case related to whether the ECHR applied in regards to the killing of Iraqi nationals in Iraq by British troops, and thus whether the Iraqi relatives could go to the ECtHR to seek redress. The Court found that there was indeed a jurisdictional connection between the UK and the individuals killed in the course of British security operations, because the UK had assumed authority and responsibility for the maintenance of security in Basra during that time. The Court thus found that the UK had violated the Convention by not investigating the circumstances related to the deaths of the relatives of the claimants. Significantly, the Court found that the nationality of the victims and claimants were not a necessary link for a finding of jurisdiction.<sup>251</sup> Contracting Parties to the ECHR are liable to uphold their obligations under the ECHR when they exercise public powers in the territory where the relative events occur. The relevant issue for jurisdiction is who has the power to provide the substantive right.

These conclusions were confirmed in another similar, but not identical, situation. In *Hirsi Jamaa and Others v. Italy*,<sup>252</sup> the ECtHR found that Italy could be held accountable under Article 1 (obligation to respect human rights) of the Convention in a case brought by certain Somali and Eritrean migrants travelling from Libya and then repatriated to Libya by Italy. The Court found that even if the claimants had not touched Italian soil, the events at the center of the complaint had taken place entirely on-board Italian military ships. In the time between boarding the ships and being handed over to the Libyan authorities, the applicants "were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities."<sup>253</sup>

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<sup>250</sup> Press Release, European Court of Human Rights, United Kingdom required to investigate deaths of six civilians killed in Iraq in 2003 in incidents involving British soldiers (July 7, 2011) (holding: "The case concerned the deaths of the applicants' six close relatives in Basrah in 2003 while the UK was an occupying power.... An extra-territorial act would fall within the State's jurisdiction under the Convention only in exceptional circumstances. One such exception established in the Court's case-law was when a State bound by the Convention exercised public powers on the territory of another State. . . . Since the applicants' relatives were killed in the course of United Kingdom security operations during that period, the United Kingdom was required to carry out an investigation into their deaths.").

<sup>251</sup> *Al-Skeini v. United Kingdom*, 2011 Eur. Ct. H.R. 1, 62.

<sup>252</sup> *Jamaa v. Italy*, 2012 Eur. Ct. H. R.1 (the case concerned Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya; the events giving rise to the alleged violations fell within Italy's jurisdiction within the meaning of Article 1 of the Convention).

<sup>253</sup> *Id.* ¶ 81.

These cases are important for many reasons. First, they make clear that the proper test for jurisdiction is based on the control exercised by the Contracting Party over the relevant territory and situation. The nationality of the claimants and victims is irrelevant, because their State of nationality is irrelevant for the analysis. What is relevant is which State has the power and obligation to grant the rights in question. The test is a functional one, based on control, where what matters “is not some abstract or generalized test of personal or geographical control, but rather the specific power or authority assumed by the state”.<sup>254</sup> The steps for identifying the claim brought under the ECHR plays out as follows: Whose human rights is the claim compensating? The individual’s. Who has the power to provide these human rights? The State that has control over the territory where the situation occurs. The purpose of the remedy is to compensate the individual for a violation of a specific human rights by a controlling authority to specific persons. The remedy is asked by the subject (the individual) who suffered the violation to the subject (the State) that should have provided the right.<sup>255</sup>

A second fundamental and larger point is also interesting. The ECHR also demonstrates the willingness of States to agree to different bases of jurisdiction other than nationality. Often, the assumption is that States adopt nationality as a requirement of granting access to international forums as part of their treaty negotiation process with other States, so that what they obtain for their nationals, they then offer to nationals of other States.<sup>256</sup> But this does not need to be so. The jurisdiction of the ECtHR shows that States (some 47 of them in this case)<sup>257</sup> are also willing to negotiate alternative ways of granting individuals access to international remedies, which, in the ECHR case, is based on territorial control. This obligation ultimately covers not only nationals of any of the Contracting Parties to the ECHR, but in reality covers an unknown number of people a Contracting Party may exercise control over. Articulated in this way, the jurisdictional provision of the ECtHR shows its uniqueness as an international remedy system. It also sheds light on the diverse methodologies that could be used to identify and resolve individuals’ claims under international law.

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<sup>254</sup> Thomas Gammeltoft-Hansen, *Growing Barriers: International Refugee Law*, in *UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS* 73 (Mark Gibney & Sigrun Skogly eds., 2010) (defining functional jurisdiction and also stating that “[j]urisdiction in this sense flows from the de facto relationship established between an individual and a state through the very act itself”).

<sup>255</sup> *Supra* Part I(c) (nationality only plays a role when the international law system—negotiated by Treaties by States—imposes it as a requirement to access a forum. There is no logical need to include the nationality in the calculation).

<sup>256</sup> *Supra* Part I(c).

<sup>257</sup> *47 Member States*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/portal/47-members-states> (last visited August 25, 2018).



Indeed, an approach that is not based on nationality could be used for individual claims arising out of other areas of international law, provided these claims arise from rights of the individual and not of the State, the redress and remedy of which benefits the individual and not the State. In such cases, the link that permits access to specialized forums could be based on a nexus that is alternative to nationality.

A new analysis would better serve the individual. The analysis would start by asking what is the *de facto* (factual) relationship established between an individual and a state, what or whom is the right trying to protect, who has the responsibility of providing the right, and the reason of the remedy sought. Let's consider international economic rights as an example. One of the fundamental reasons for providing international economic rights is to protect foreign nationals and their capital when they invest substantial funds in a foreign country.<sup>258</sup> In the bargaining process, one side brings foreign capital, and the receiving side offers guarantees of redress if rights linked to the investment are violated.<sup>259</sup> It follows that the reason for providing the right is to protect the foreign investor. Providing compensation if a right is violated ensures that the equilibrium is maintained and—in the larger context—that the flow of foreign capital continues.<sup>260</sup> The remedy exists because the individual is an alien (not because she has a certain nationality) acting in a foreign environment. The obligation of State X to compensate an investor Y for an illegal expropriation, for example, is not linked to the fact that the investor holds the nationality of State Y, but rather because she is an alien—a non-X national—who has established a certain relationship with State Y and whose property was taken in violation of international law.<sup>261</sup> The right violated is a personal right of the individual, and the compen-

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<sup>258</sup> See ICSID Convention, *supra* note 227, at 160 (“Considering the need for international cooperation for economic development, and the role of private international investment therein; Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States; Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases; Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting states may submit such disputes if they so desire; Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development”).

<sup>259</sup> *Id.*

<sup>260</sup> See Part A: *Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, in 1 THE HISTORY OF THE ICSID CONVENTION 2, <https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20I.pdf>.

<sup>261</sup> Were she a national of State X, her remedies for a domestic violation would be found under domestic recourse. See, e.g., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 1(3–4) (amended 2006) (UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1985).

sation goes directly to the individual. Nationality does not have to play a role. It only does now because of the system we chose to build.

Moving away from nationality as an identifier of claims would require rethinking the reasoning behind granting individual's rights, and why we want to compensate the individual if a right is not respected. A functional analysis bases jurisdiction on the de facto relationship created between the individual and the state through the act itself.<sup>262</sup> A similar analysis could provide an alternative basis for jurisdiction for other areas where the individual has acquired international rights.

Undoubtedly, this move will go hand-in-hand with the rethinking of subjects in international law, which doctrinally has already shown to be more receptive to reconsidering the role of individuals.<sup>263</sup> It will most likely result in placing the individual in a stronger position as a subject in international law, often detached from the State of nationality. This should not be seen as problematic. Attaching international remedies to nationality is not logically necessary. As Higgins said, the intellectual prison related to the doctrine of subjects is entirely our own making.<sup>264</sup> It is time for us to no longer consider it unalterable.<sup>265</sup>

## 2. *Multiple Bases for Jurisdiction*

An additional technique to free the individual from the nationality requirement for international claims is to provide alternative bases to exercise jurisdiction.

We find, again, one useful example in practice. As explored in Section I above, international criminal law provides for the parallel acquisition of individual international obligations and their enforceability on the international plane.<sup>266</sup> Specifically, under the Rome Treaty that established the International Criminal Court (ICC), jurisdiction over individuals for violations of international criminal law come from a variety of sources. At the ICC, jurisdiction may be based on nationality, territoriality, or can be given by Security Council resolution.<sup>267</sup> Article 12(2) of ICC Statute provides the conditions to the exercise of jurisdiction, and namely:

If one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- i. The State on the territory of which the conduct in question occurred or, if the crime was committed on board a

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<sup>262</sup> Gammeltoft-Hansen, *supra* note 254, at 73.

<sup>263</sup> See *supra* Part I(a).

<sup>264</sup> HIGGINS, *supra* note 60, at 49.

<sup>265</sup> *Id.*

<sup>266</sup> See *supra* Part I(c).

<sup>267</sup> Rome Statute, *supra* note 115, art. 12.

vessel or aircraft, the State of registration of that vessel or aircraft;

- ii. The State of which the person accused of the crime is a national.<sup>268</sup>

Additionally, jurisdiction over a specific case can be acquired through a Resolution of the Security Council if “[a] situation in which one or more . . . crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations . . . .”<sup>269</sup>

Truly, the jurisdictional provisions of the ICC are unique in scope and reach. Several issues are relevant and example-setting. First, the ICC provides multiple alternative modes of jurisdiction. An individual can fall under the jurisdiction of the Court because she is a national of a contracting State or because her conduct occurred in a space (territory, vessel or aircraft) controlled by a contracting State. This is in the alternative; it is not a cumulative test. The guiding idea is to facilitate jurisdiction as much as possible. If jurisdiction cannot be found under one principle, it could be established under an alternative method.

Moreover, similarly to the ECtHR provisions analyzed above, the jurisdiction of the ICC includes alternatives to nationality. Indeed, the first jurisdictional mechanism cited in the Statute is based on territoriality, not nationality. Jurisdiction can be based on where the relevant conduct occurred. This is important because it detaches jurisdiction from nationality—which is desirable for the reasons already stated<sup>270</sup>—and because it provides alternative bases for jurisdiction.

The ICC approach is also appealing because it introduces a jurisdictional mechanism that is completely detached from the relationship between the State and the individual, and instead relies on an action from a body external to that relation. In the ICC, jurisdiction can be found through mandates from the Security Council to the Prosecutor. A similar approach could be imagined for other relations also, where the mandate bestowing jurisdiction could come from an actor who is external to the

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<sup>268</sup> *Id.* (note also that under ¶ 3 of the same provision, non-signatory can also accept the competence of the Court for a specific case. “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception . . .”).

<sup>269</sup> *Id.* art. 13(b) (stating that “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations . . .”).

<sup>270</sup> *See supra* Part I(c).

relationship between the State and the individual, but still capable and relevant in creating a jurisdictional link.

The ICC has an extraordinary link to the Security Council. Yet the ICC is not the only international adjudicative body that has a relationship with the Security Council. The ICTY and ICTR, two of the main international criminal tribunals that predate the ICC, were created by Security Council resolutions.<sup>271</sup> The Security Council also created the United Nations Claims Commission (UNCC), a commission tasked with compensating individuals, States, and companies for injuries suffered as a consequence of Iraq's invasion of Kuwait in 1990.<sup>272</sup> The Security Council maintained its link with the UNCC throughout the existence of the Commission. In fact, the Governing Body of the UNCC—the principal organ responsible for the general policy and legal framework of the Commission—mirrored the composition of the Security Council.<sup>273</sup>

An approach based on multiple bases for jurisdiction would be a welcomed development in other areas of international law. Take, for example, individual claims arising from violations of humanitarian law. In a situation in which an individual seeks redress for an international criminal law violation, jurisdiction could be attached in several alternative ways. For example, in the event of an international conflict between States A and B, Individual A could claim compensation as a victim of State B's crimes because the crime was committed in territory of State A by troops of State B, or because the crime was committed against Individual A as a national of State A, or because the Security Council determined that the situation was of such a nature as to deserve international redress and compensation. Creating diverse jurisdictional links would give individuals multiple ways to bring a claim to an international venue; it would also recognize and acknowledge the complexities and uniqueness of creating a new system of relationships between individuals and other actors in international law.

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<sup>271</sup> See *supra* Part I(c) at notes 100–01.

<sup>272</sup> S.C. Res. 687 (Apr. 3, 1991) (the jurisdiction of the UNCC included claims for individuals who were forced to leave Iraq or Kuwait as a result of the invasion, individual claims for serious personal injury or death, claims for individual losses, claims by corporations and other private or public enterprises, claims from governments in the region (including Iran, Saudi Arabia, Syrian, Jordan and Kuwait) and international organizations. Overall, about 2.7 million claims were filed, and as of 2005, the year in which it concluded its work, the UNCC has paid \$47.8 billion in compensation). See also BRILMAYER ET. AL., *supra* note 143, at 18–19; WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: DESIGNING COMPENSATION AFTER CONFLICT xxxi (Timothy J. Feighery et al. eds., 2015). See generally Timothy J. Feighery, *The United Nations Compensation Commission*, in THE RULES, PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 515–35 (C. Giorgetti, ed. 2012).

<sup>273</sup> See generally *Governing Council*, UNCC: UNITED NATIONS COMPENSATION COMMISSION, <https://uncc.ch/governing-council> (last visited Aug. 26, 2018).

The UNCC also provides an interesting perspective on this issue. In fact, the jurisdiction of the UNCC over individuals' claims was based on a unique phrasing of the nationality requirement. In its first session, the UNCC Governing Council decided that "[c]laims will not be considered on behalf of Iraqi nationals who do not have bona fide nationality of any other State."<sup>274</sup> Under the UNCC procedural rules, therefore, Iraqi nationals were allowed to file claims if they possessed a bona fide nationality of any other State. This opened up the UNCC to dual-nationals also. Further, acknowledging the difficulties of providing compensation based only on links to nationality, especially in the aftermath of the chaotic situation created by Iraq's invasion of Kuwait, the UNCC rules provided that "[a]n appropriate person, authority, or body appointed by the Governing Council may submit claims on behalf of persons who are not in a position to have their claims submitted by a Government."<sup>275</sup>

In sum, there are mechanisms that would address the procedural deficits that now blocks the individual's access to international remedies. These are based on single or multiple bases for jurisdiction that could rely on control, location of the events, external factors, and even nationality as a possible alternative. The section below explores how these mechanisms can be useful in practice.

#### *B. Why it Would Be Good—Two Examples*

Rejecting nationality as a requirement for individuals to access international remedies also allows for and facilitates addressing important contemporary challenges.<sup>276</sup> Two examples are considered below, namely claims arising from climate change, and investment claims by a permanent tribunal.

##### *1. Compensation for Damages Caused by the Effects of Climate Change*

The recently concluded Paris Agreement—part of a larger international effort to address climate change<sup>277</sup>—includes language that recog-

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<sup>274</sup> U.N. Comp. Comm'n, Criteria for the Expedited Processing of Urgent Claims, U.N. Doc. S/AC.26/1991/1, ¶ 17 (August 2, 1991) ("Claims will not be considered on behalf of Iraqi nationals who do not have bona fide nationality of any other State.").

<sup>275</sup> U.N. Comp. Comm'n, Provisional Rules for Claims Procedure, U.N. Doc. S/AC.26/1992/10 at 5 (June 26, 1992).

<sup>276</sup> In addition to the two scenarios briefly outlined above, see *supra* Part II(a).

<sup>277</sup> *Find Out More About COP21*, COP21PARIS.ORG, <http://www.cop21paris.org/about/cop21/> (last visited Aug. 26, 2018) (the 1992 United Nations Framework Convention on Climate Change (UNFCCC) entered into force in 1994, with near universal participation of 196 parties. The parties to the UNFCCC meet annually for a Conference of the Parties (COP)).

nizes the need for “addressing loss and damage associated with the adverse effects of climate change.”<sup>278</sup>

The specific mechanisms for future monetary compensation are surely complex and beyond the scope of the Article.<sup>279</sup> However, at the outset, it is valuable to note that a compensation mechanism for climate change injuries would be a perfect candidate to implement a model based on alternatives to the individual’s nationality.

The consequences of climate change are increasingly visible.<sup>280</sup> Rising sea level, coastal erosion and flooding, ocean acidification and coral bleaching are just some of the ways in which climate change impact the ocean. Climate change also impacts freshwater resources, and can change weather patterns, produce more intense precipitation, flooding, drought and heat-waves. At the poles, ice melting and permafrost thawing are also attributable to climate change.<sup>281</sup> The economic costs of climate change are expected to be considerable.<sup>282</sup>

There are periodic proposals on how to compensate victims of climate change, for example, those who lose their homes or livelihoods to rising water levels, floods, or changed weather patterns.<sup>283</sup> Compensating climate change damages is challenging because climate change is caused by the accumulation of man-made greenhouse gases in the atmosphere over time and from many diverse sources. Moreover, the effects of climate change are not usually felt in proximity to the sources of the gases, but in distant locations. People in developing countries living in low-elevation lands are particularly vulnerable to the effects of climate change.<sup>284</sup> Attributing responsibility and compensating damages from climate change is therefore particularly difficult.

For these reasons, an approach that relies on diverse bases of jurisdiction will be particularly adept to climate change compensation. Bases for jurisdiction could include the location of damage—for example in

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<sup>278</sup> Paris Agreement, art. 8, Dec. 12, 2015 (in Paris, parties agreed to continue the Warsaw Agreement, which was established by the UNFCCC (2013), Decision 2/CP.19 in 2013. Specifically, under Art. 8 Parties agreed to “recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage”).

<sup>279</sup> For a proposal to use claims commissions to address the issue, see BRILMAYER ET. AL., *supra* note 143, at 226–31.

<sup>280</sup> See generally Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability—Summary for Policymakers* (2014), [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) [hereinafter 2014 Summary for Policy Makers on Impacts].

<sup>281</sup> *Id.* at 32.

<sup>282</sup> *Id.* at 19.

<sup>283</sup> Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1633–34 (2006).

<sup>284</sup> 2014 Summary for Policy Makers on Impacts, *supra* note 280, at 13.

cases of floods. If relocation of a certain population is needed, the nationality or location of the residency of the people to be moved could also serve as bases for jurisdiction. If the injury pertains to the loss of a specific source of livelihood—for example loss of fishing availability because of changing weather patterns—the link to the compensation could be based on a demonstrable loss of livelihood.

By choosing an alternative to nationality to establish a link to the injury an individual has suffered under international law, the injured person would enjoy additional ways to present her claims. Additionally, creating multiple bases of jurisdiction also increase the likelihood that the entire group of people that deserve compensation is reached.

As explained above, this change does not need to be difficult. Rather, it signals a new appreciation and understanding of the role of the individual in international law, which is in line with the doctrinal appreciation of the increasingly relevant role of the individual.

In addition to climate change-related claims, an approach based on multiple bases for jurisdiction could also be helpful to compensate other claims that originate from diffuse violations and claims arising from actions by many international actors, such as other environmental claims.

#### 2. *Investment Claims by a Permanent Tribunal*

A second example to appreciate the usefulness of severing nationality as a link to international claims builds on the recent proposal to create a permanent tribunal to hear claims arising out of international investment within the European Union (EU).<sup>285</sup>

International investment arbitration is a system established to hear claims by individual investors against host States for claims based on nationality and arising from violations of Investment Treaties.<sup>286</sup> International investment arbitration enjoys increasing success from users. However, the system of international investment arbitration as presently constituted has also come under attack. Critics argue that a system based on the parties' selection of arbitrators is inherently suspicious.<sup>287</sup> They al-

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<sup>285</sup> Transatlantic Trade and Investment Partnership between the EU and U.S. (TTIP) ch. II, EUR. COMM'N ON TRADE (Nov. 12, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (the TTIP negotiations are now suspended, but similar provisions are included in other recent EU investment treaties).

<sup>286</sup> *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isd> (last visited Aug. 27, 2018).

<sup>287</sup> Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, KLUWER ARBITRATION BLOG (Oct. 5, 2010), <http://kluwarbitrationblog.com/blog/2010/10/05/are-unilateralappointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration>.

so claim that international investment arbitration lacks transparency and may be too inclined to rule in favor of investors and against States.<sup>288</sup>

To address these concerns, alternatives to investment arbitration have been proposed. Specifically, the EU proposed to create a permanent international court for investment, with permanent judges, to hear all claims arising from treaties with the EU.<sup>289</sup> This also goes hand in hand with the current trend to negotiate multilateral, rather than bilateral, investment treaties.<sup>290</sup> Indeed, separating individual claims from nationality requirements may also contribute to the rethinking of bilateral treaties that are focused on investment, so that the new generation of treaties may be focused on foreign investment in a multilateral setting, providing rights to all foreign individuals that seek to invest per se, rather than because of their country of origin.

As we elaborate on the creation of a new system to provide redress to individuals for their international claims, the issue of how to link the claim to the individual can also be reconsidered. Claims based on nationality could be altered so that individual claims are based on a characteristic of the individual not linked to her State of nationality, but to a different identifier linked to her as an investor.

Specifically, a functional test, based on control and on the specific power and authority that the State receiving the investment assumes vis-à-vis the individual, would work better in this instance.<sup>291</sup> This rethinking will acknowledge the fact that compensation is given because the State has failed to uphold an obligation it owed to an individual from another State. The relationship between the individual and the State responsible

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<sup>288</sup> See, e.g., Anthony DePalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, ¶ 1 (stating, in reference to NAFTA arbitration, that “[their] meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed.”). See also *Behind Closed Doors: A Hard Struggle to Shed Some Light on a Legal Grey Area*, ECONOMIST (Apr. 23, 2009), <https://www.economist.com/international/2009/04/23/behind-closed-doors> (reviewing the issue of transparency and secrecy in international arbitration and assessing calls for increased transparency).

<sup>289</sup> *Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations*, EUROPEAN COUNCIL (Mar. 20, 2018), <http://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/>.

<sup>290</sup> See generally *International Energy Charter Consolidated Energy Charter Treaty* (Jan. 15, 2016), <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty>. See also *Is a Multilateral Investment Treaty Needed?*, WORLD TRADE INSTITUTE (June 19, 2017), [https://www.wti.org/media/filer\\_public/b9/f9/b9f94071-2dac-47ae-b840-ca6abaf09e3f/investment\\_conference\\_19\\_june\\_2017.pdf](https://www.wti.org/media/filer_public/b9/f9/b9f94071-2dac-47ae-b840-ca6abaf09e3f/investment_conference_19_june_2017.pdf) (demonstrating recent discussion about the topic of multilateral investment treaties at a 2017 World Economic Forum Conference).

<sup>291</sup> Gammeltoft-Hansen, *supra* note 254, at 73 (defining functional jurisdiction and also stating that “[j]urisdiction in this sense flows from the de facto relationship established between an individual and a state through the very act itself”).



to provide the right matters. But the specific origin of the individual is not relevant, especially if the claim is based on multilateral treaties. This approach will also facilitate the identification of the claimant, and will sidestep the risk of an incorrect analysis of the nationality requirements by Tribunals.

Embracing a system that recognizes the claims of the individual based on functional test and not on nationality will provide significant procedural rights to the individual and will be an essential development toward the recognition of the changing role the individual plays in international law.

### CONCLUSION

International law has displayed a schizophrenic attitude towards nationality. On one side, it is at the center of an individual's international recognition. On the other, international courts and tribunals ultimately decide whether a claim of protection based on nationality should be supported or not.

This Article suggests that, as the position of the individual evolves in international law, alternatives to nationality are used as bases of jurisdiction. This approach will provide a more expansive standing and redress of individuals for claims under international law. It will also be particularly helpful for claims by stateless people and dual nationals.

This Article does not suggest eliminating nationality completely. In today's international legal system, nationality, and thus a connection to a State, is still important for many reasons for the individuals, for example for the ability to travel. What it does suggest, however, is that when international claims belong to the individual, the individual should be able to exercise them fully. The discrepancy that exists between the recognition of the individual as a holder of international rights and the lack of procedural rights would be reduced, and the position of the individual will be enhanced by severing the link to nationality for international individuals' claims.

International law is still essentially state centric. States negotiate treaties, form custom, create international organizations and make up the members of the Security Council. Embracing a new system to provide international procedural rights to individuals detached from nationality will also be an important step to acknowledge and support the increasingly relevant role of the individual in international law.