SEE THE PINK ELEPHANT IN THE COURTROOM?

Private individuals should have legal standing before international courts

Master Thesis

Mihai Martoiu Ticu

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Supervisors: prof. dr. H.H.A. van den Brink, prof. C.G. Roelofsen

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Student name: Mihai Martoiu Ticu

Student number: 0058149

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Table of contents

> "The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add…that the right of individual petition is undoubtedly the most luminous star in the universe of human rights."
>
> Judge Antônio Augusto Cançado Trindade

1. Introduction

Imagine that you, as a British citizen, are abducted at gunpoint in Kuwait and held responsible for spreading sexual videotapes involving Sheikh Jaber Al-Sabah Al-Saud Al-Sabah. Once imprisoned on false charges in the Kuwaiti State Security Prison, you are beaten by the guards for several days running. Forced to sign a false confession, you are released on the third day, but the Sheikh abducts you again at gunpoint and takes you in a government car to the Emir of Kuwait's brother's palace. Amongst other ordeals, your head is repeatedly held underwater in a swimming pool containing human corpses, and you are dragged into a small room, where the Sheikh sets fire to mattresses soaked in petrol. Once back in England, you are hospitalized for six weeks, treated for burns covering 25 per cent of your body and the doctors diagnose you as suffering from a severe form of post-traumatic stress disorder. This is not screenplay for the newest James Bond film, but what allegedly happened in real life to a pilot, Sulaiman Al-Adsani.

You might find it a thrilling experience, or you might consider that you had deserved it for being naughty, or you may believe that "the King can do no wrong,"[1] but Al-Adsani believes that some of his fundamental rights were violated, such as the right not to be tortured. Following the British government's refusal to assist him, he tried to sue the government of Kuwait in the British courts, but he discovered that the principle of *state immunity* prevented him from suing a state in the courts of another state, even in cases of torture, despite being one of the peremptory norms of international law, "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[2] The European Court of Human Rights upheld the British courts' decisions[3] with

[1] "That the king can do no wrong is a fundamental principle of the English constitution. Nothing that goes amiss in the conduct of public affairs can be charged personally to him.", W.S. Blackstone and W.H. Browne, *Commentaries on the laws of England in one volume together with a copious glossary of writers referred to, and a chart of descent of English sovereigns.* St. Paul: West Pub. Co., 1897, p.Para. 156.

[2] Article 53, Vienna Convention on the Law of Treaties, 1969.

a majority of one and, in his dissenting opinion, Judge Loucaides called this decision a 'travesty of law.'[4]

Al-Adsani's case is just one example of the many that make an adjustment of the current international law imperative. *What I want to argue in this paper is that individuals should have the possibility of bringing claims against states, their own or foreign, at international courts, enabling them to compel states to take, or refrain from taking, certain actions, or to compensate them for damages or for violations of their rights which have been brought about by a state's actions.*

When taking courses in International Law, one gains the impression that individuals have a smidgen of rights and a crumb of legal personality, but that they are left in the clutches of states when it comes to deciding their fate.[5] The most classical positivistic theories claim that individuals have never had a standing before international courts and that they should not have it. They are, and should be, addressed through their states, not directly. In the first part of the paper, I want to submit that there are many legal precedents that give individuals legal standing against states, their own and foreign, that individuals even have international legal rights, independent of the will of the states, and that states cannot nowadays take those rights away. Thus the positivistic view does not correspond to the reality.

Public International Law is customary, meaning that if the participants regularly behave in certain ways, believing that they act in accordance with the prescription of the law, they thus create the law and make it stronger. I will show that we can see an evolution in international law, starting in the nineteenth century, which gives individuals legal standing. There were

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[3] EHCR 21 November 2001. *Al-Adsani v. the United Kingdom*

[4] Ibid., Dissenting Opinion Of Judge Loucaides: "[O]nce it is accepted that the prohibition of torture is a *jus cogens* rule of international law prevailing over State immunity rules, no such immunity can be invoked in respect of any judicial proceedings whose object is the attribution of legal responsibility to any person for any act of torture. I cannot see why there should be a distinction between criminal and civil proceedings in this respect, as contended by the majority. In view of the absolute nature of the prohibition of torture it would be a travesty of law to allow exceptions in respect of civil liability by permitting the concept of State immunity to be relied on successfully against a claim for compensation by any victim of torture. The rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid in relation to any legal liability whatsoever."

[5] "The student learning international law for the first time is often simply told that international law is primarily an inter-state law; that the individual may benefit indirectly, however, from treaties made specifically for his advantage; and that, in a few isolated areas, international law is beginning to acknowledge that he has certain direct rights and duties.", R. Higgins, "Conceptual Thinking about the Individual in International Law," 24 *N. Y. L. Sch. L. Rev.* 11 (1978): p.11-12.

some initial tentative occurrences and then, gradually, more and more courts began to give individuals legal standing. *We could view this as an emerging principle of international law, one which gives individuals legal personality and legal standing.* We could also argue that these precedents reflect a need.

Another impression one is left with after courses in International Law is that there is something in the nature of International Law that prevents individuals from having legal personality and legal standing. I will submit that this image is erroneous. Even during the deliberations on the statute of the Permanent Court of Justice, it was not self-evident that individuals should be excluded as parties. Moreover, there have been numerous propositions to give individuals standing before the court. States and great legal scholars alike have regularly pleaded for individuals to be given legal standing and for the creation of international courts of human rights. In the second part of the paper, I will present a number of those dissenting opinions.

I intend to close the legal argument with a proposition for a system of international courts which give individuals the chance to sue states, outlining how the system itself might work and the law that should be applied in those courts.

After presenting the legal argument, I will set out to justify the necessity of giving individuals locus standi before international courts from a philosophical point of view. There are two complementary reasons for doing this. First, we have a right to life and to defend ourselves. As a measure of self-defence, one can impose a judicial system upon others, one that renders final decisions on the way the world should be changed by the present actors. Second, it is rational to sign a contract with all the other actors in the world whereby important conflicts are conclusively decided by neutral third parties. Finally, presenting those arguments I will submit that John Rawls should have come to the same conclusion in his treatise about international law.[6]

[6] J. Rawls, *The Law of Peoples: with "The Idea of Public Reason Revisited.".* Cambridge, Massachusetts: Harvard University Press, 1999.

2. Existing courts[7]

> *"[T]he historian of the future will look back with wonder and amazement to the time when nations did not settle their justiciable disputes by judicial process, and did not organize permanent courts for their trial and disposition."*
>
> **James Brown Scott,** *January 12, 1914*

In this chapter, I will enumerate the courts that (almost) give individuals direct access and the development of some of those courts, in order to perceive an evolution in the procedural capacity of the individual.[8] Two different trends which have emerged over the last 100 years, and which serve to prove this evolution, can be identified. First, more courts have been enacted which give individuals direct access and second, we can identify an evolution within the extant courts, from a tentative beginning whereby, for instance, individuals are given access via a commission, to a final stage, wherein individuals can lodge complaints themselves. I shall call this development the Emerging Thesis (ET); in other words, a thesis that, in IL, there is an emerging custom of giving individuals legal standing before international courts in bringing claims against states. This trend has also been observed by others.[9]

Around 1900, some courts started to deal directly with individuals; the European Commission of the Danube[10] and Central Commission for the Navigation of the Rhine,[11] being two such

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[7] "[T]he historian of the future will look back with wonder and amazement to the time when nations did not settle their justiciable disputes by judicial process, and did not organize permanent courts for their trial and disposition.", J.B. Scott, *The proposed court of arbitral justice; letter of James Brown Scott to the Netherland Minister of Foreign Affairs, dated January 12, 1914, with accompanying documents concerning the establishment of the court of arbitral justice.* 1915, p.45.

[8] "Each of the procedures that regulates the right of individual petition, under international human rights treaties and instruments, has contributed in its own way to the gradual strengthening of the procedural capacity of the complainant at the international level, despite differences in their legal nature.", A.A. Cançado Trindade, "The consolidation of the procedural capacity of individuals in the evolution of the international protection of human rights: present state and perspectives at the turn of the century," 30 *Colum. Hum. Rts. L. Rev.* 1-27. (1998): p.14.

[9] "A characteristic trend of modern developments of international law is the granting of procedural capacity to individuals for the protection of certain well-defined rights.", J. Paulsson, *Denial of justice in international law.* Hersch Lauterpacht memorial lectures Cambridge, UK ; New York: Cambridge University Press, 2005, p.55.

[10] See generally C.A. Nørgaard, *The position of the individual in international law.* Copenhagen: Munksgaard, 1962.

"The contention by the orthodox positivists that only states can be subjects of international law became, at the opening of the twentieth century, more and more irreconcilable with the factual experience of nations. As early as 1906 the German subjective positivist, von Liszt, was able to discern in the regulations of certain international bodies, such as the European Danube Commission, the faint

instances. Later developments then led to a "torrential stream of changes."[12] I will not be discussing the Mixed Arbitral Tribunals in this paper; however, they were seen as an important step,[13] giving individuals the chance to obtain compensation for their losses during the First World War by suing states directly.

Another problem created by that war was the border between Poland and Germany and the legal status of the population in Upper Silesia. The Upper Silesian Arbitral Tribunal gave individuals, both Polish and German, the chance to bring claims against both states; including their own. The Tribunal's decisions were binding on the parties. In the case of *Steiner and Gross v. Poland*, the tribunal even gave Steiner, a Czechoslovak national, the chance to sue Poland, despite the fact that Czechoslovakia was not a party to the Convention. Georges Kaeckenbeeck, the president of the tribunal, wrote an extensive book on the matter.[14] His enthusiasm for giving individuals procedural status under international law inspired Australia to propose a European Court for Human Rights; during the Second World War peace talks and, later in the 1940s, during the negotiations on the Universal Declaration of Human Rights,

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beginnings of an international legal personality for the individual. The abortive attempt to establish an international Prize Court in 1907 and the Washington Treaty of the same year which brought into being the Central American Court of Justice further weakened the position of the extreme positivists.", O. Svarlien, "International Law and the Individual," 4 *J. Pub. L.* 138 (1955): p.141-42.

[11] "Beginning in the nineteenth century, states, as a problem-solving technique, started to pursue a course of action which, in a very limited way, established the individual as a subject of international law. Illustrative of the transformation was the establishment of the Central Commission for the Navigation of the Rhine, in 1815, under the terms of the Final Act of Vienna. The Treaty of Paris, of March 30, 1856, created the European Commission of the Danube. These bodies recognized the individual as a juristic entity for the purposes of international law. They enforced individual rights independent of municipal law.", E.W. Tucker, "Has the Individual Become the Subject of International Law," 34 *U. Cin. L. Rev.* 341 (1965): p.355.
J. Cassidy, "Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights Articles," 9 *Deakin L. Rev.* 533 (2004): p.565.

[12] "These developments are only indirectly germane to the question of the position of individuals as subjects of international law, but they show, in conjunction with the other changes outlined above, how antiquated is the conception of international law confined to sovereign States and their purely governmental agencies. How obsolete, in comparison with that almost torrential stream of changes, appear the arguments—such as those based on the status of the International Danube Commission or the provisions of the (unratified) Convention on the International Prize Court— adduced at the beginning of the twentieth century as a challenge to the doctrine that only States are subjects of international law.", H. Lauterpacht, *International law and human rights.* [Hamden, Conn.]: Archon Books, 1968, p.65-66.

[13] "The Mixed Arbitral Tribunals, established by virtue of the peace treaties after the First World War, mark an important step in the development of the position of the individual under international law.", Nørgaard, *The position of the individual in international law*, p.230.

[14] G. Kaeckenbeeck, *The international experiment of Upper Silesia: a study in the working of the Upper Silesian Settlement, 1922-1937.* London etc.: Oxford University Press, 1942.

Australia put forward a very serious proposal for an International Court for Human Rights, citing Kaeckenbeeck directly.

In 1907, the Convention for the Creation of an International Prize Court, which would adjudicate appeals from national prize courts, gave individuals direct access to the court.[15] The advantages of giving individuals the right to sue states were seen by some authors as being evident; this was particularly true of the fact that the interests of a state and of its citizens are not always identical.[16] Thus, Colombos would seem to assume that the interests of the state do not always supersede the rights of individuals and that states might be reluctant to use diplomatic protection. In the end, the convention was not ratified and critics in the United States and United Kingdom opposed it on the grounds that it violated national sovereignty.[17]

I would like to discuss certain courts in more detail in the following sections.

2.1 The Central American Court Of Justice

In the same year, 1907, the convention of the Central American Court Of Justice[18] stated that "[t]his Court shall also take cognizance of the questions which individuals of one Central American country may raise against any of the other contracting Governments, because of the violation of treaties or conventions, and other cases of an international character; no matter whether their own Government supports said claim or not; and provided that the remedies which the laws of the respective country provide against such violation shall have been

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[15] Convention (XII) relative to the Creation of an International Prize Court. Adopted: October 18, 1907.:
"Art. 4. An appeal may be brought
…
2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, No. I), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;
3. By an individual subject or citizen of an enemy Power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, No. 2, except that mentioned in paragraph (b).
…
Art. 5. An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the national court. Persons so entitled may appeal separately to the extent of their interest."

[16] "The advantage of giving to the particular individuals the right to sue before the Court will exempt neutral Governments from the burden of examining and endorsing the claims of their nationals, if they do not care to do so. The interests of a Power and those of its citizens are, besides, not always identical, whilst, in the majority of cases, it is the individuals who are most directly affected by the seizure.", C.J. Colombos, "International Prize Court, The First Day's Proceedings," 30 *Int'l L. Ass'n Rep. Conf.* 29 (1921): p.41.

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[18] See, generally, Nørgaard, *The position of the individual in international law*.

exhausted or that denial of justice shall have been shown."[19] Above all, what was revolutionary was its compulsory jurisdiction.[20] The court was short-lived, with the convention remaining unrenewed in 1918, and all the five cases started by individuals against states were dismissed.

One of these cases is interesting; that of Pedro Andrés Fornos Diaz, a Nicaraguan, bringing claims against Guatemala,[21] "alleging false arrest, imprisonment and expulsion, and asking for an indemnity."[22] The court stated that "the case comes under its jurisdiction if we look at it exclusively from the stand-point of the nature of the charges, for the fundamental rights and powers of the human individual in civil life are placed under the protection of the principles governing the commonwealth of nations, as international rights of man",[23] but dismissed the case because Diaz had not exhausted local remedies. Nevertheless, what we see here is that, in 1907, jurists had already started to believe that fundamental (human) rights were a part of international law, suggesting that individuals have those rights independently of the will and actions of states.[24] *This is one example of the kind of claims I have in mind when arguing for enabling individuals to bring claims against states.*

[19] Article 2, Convention for the establishment of a Central American Court of Justice, signed in Washington 20 December 1907.

[20] Nørgaard, *The position of the individual in international law*, p.228.

[21] The Central American Court of Justice 6 March 1909. *Dr. Pedro Andrés Foenos Diaz v. The Government of the Republic of Guatemala*,(1909).

[22] M.O. Hudson, "Central American Court of Justice, The," 26 *Am. J. Int'l L.* 759 (1932): p.769.
See also "Judicial Decisions Involving Questions of International Law," 3 *Am. J. Int'l L.* 729 (1909).

[23] "Judicial Decisions Involving Questions of International Law," p.743.

[24] "In the case of the Central American Court the fact that the individual was given access to an international court did not make it necessary to create special substantial rules of international law applying to individuals.", Nørgaard, *The position of the individual in international law*, p.227.

2.2 The Permanent Mandates Commission

> *"No universe can be deemed well ordered unless it be built upon the only solid foundation of true law, that is, of a system of generally respected and enforceable norms."*
> **William Emmanuel Rappard** (Director of the Mandate Department of the League of Nations)

Another development which supports the ET is that of the League of Nations Mandates system[25] and its successor, the UN Trustee system. The task of the Permanent Mandates Commission was to supervise the working of the mandates.[26] Despite the absence of any legal provision, the inhabitants of the territories concerned just assumed that a natural right to petition existed[27] and it was introduced without any difficulty.[28] The oral hearing of petitioners was not something to be

[25] After World War I, the League of Nations, which is to say, the victor nations, start to administer the former colonies of the defeated nations. According to the League covenant, the Mandate system was maternal care by the "advanced nations", which would take under "tutelage" the territories "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world", in accordance with "the principle that the well-being and development of such peoples form a sacred trust of civilization".

[26] There was a presumption against the mandatories for having unsavory intentions in respect of the mandates and petitions were also intended to prevent that: "But Smuts [see below] conceived the mandates system, not as a means by which to secure national advantage, but as a trust in the strictest sense of the word. 'The mandatary state,' he wrote, 'should look upon its position as a great trust and honor, not as an office of profit or a position of private advantage for it or its nationals'. And in order to guard against the sort of misrule that occurred in the Congo Free State, Smuts proposed a number of safeguards that went well beyond the provisions of the Berlin Act. Dependent peoples should be consulted in the nomination of their mandatory power, they should be entitled to petition the league of nations in order to seek relief of grievance, and the league of nations should seek periodic reports to ensure the faithful discharge of the trust. Moreover, he proposed that 'in case of any flagrant and prolonged abuse of this trust', the League of Nations should 'assert its authority to the full, even to the extent of removing the mandate, and entrusting it to some other state, if necessary'.", W. Bain, *Between anarchy and society: trusteeship and the obligations of power.* Oxford: Oxford University Press, 2003, p.92.

"SMUTS, JAN CHRISTIAAN (1870–1950). General Smuts was an illustrious commando leader during the Boer War (1899–1902) and helped create the Union of South Africa. He was the minister of defense when he joined the British Commonwealth delegation to the Paris Peace Conference. He played a major role in the drafting of the Covenant. His *The League of Nations: A Practical Suggestion* had a significant influence on the framing of Article XXII. From 1919 to 1924, he was South Africa's prime minister.", A.H.M.v. Ginneken, *Historical dictionary of the League of Nations.* Historical dictionaries of international organizations series; no. 23 Lanham, MD etc.: Scarecrow Press, 2006, p.172.

[27] H.D. Hall, *Mandates, dependencies and trusteeship.* Washington: Carnegie Endowment for International Peace, 1948, p.198.

found in the rules of procedure on petitions either;[29] nevertheless, the Commission had two reasons to give this serious consideration, for justice demanded it. First, there were cases where the Commission felt it could not form an objective opinion and therefore "it might appear indispensable to allow the petitioners to be heard by it."[30] Second, it seemed unfair only to hear the mandatories' representative, since they not only had the chance to express their position orally, but had other advantages as well. Lord Lugard, the British representative, expressed his frustrations rather openly: "I found it difficult to reconcile an attitude of complete impartiality with a denial of audience to a petitioner while hearing the representative of the Mandatory."[31] "If audience is granted to any petitioner or memorialist it is in order that he may oppose his own version of the circumstances to that of the accredited representative, and perhaps inform the latter of matters within his knowledge which invite further investigation. He should, therefore, be heard in the presence of the representatives and allowed to question him."[32]

The states rejected the idea of oral hearings for various reasons, one of them being the claim that it would transform the Commission in a kind of *tribunal*, which would be inconsistent with the nature of the Mandate System.[33] One school of rejection claimed that a tribunal "might lend itself to intrigues on the part of ill-disposed persons."[34] According to this argument, most petitioners have subversive intentions.[35] Lord Lugard[36], however, was not,

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[28] "It was a mark of the elasticity of the League procedure that although the petitions system had no place either in the Covenant or in the texts of the mandates, it was set up by the League without any difficulties of a constitutional character", ibid., p.198.

[29] Ibid., p.202.

[30] Ibid., p.203.

[31] D. Gorman, "Liberal Internationalism, the League of Nations Union, and the Mandates System," 40 *Canadian Journal of History* 449 (29) (2005).

[32] R.N. Chowdhuri, *International mandates and trusteeship systems; a comparative study.* The Hague: M. Nijhoff, 1955, p.213.

[33] "[S]uch a procedure -- which would involve the hearing at the same time of a representative of the mandatory Power -- the parties would, in fact, be engaged in a controversy before the Commission and that any procedure which would seem to transform the Commission into a court of law would be inconsistent with the very nature of the mandatory system.", Hall, *Mandates, dependencies and trusteeship*, p.203.

[34] Chowdhuri, *International mandates and trusteeship systems; a comparative study*, p.214.

[35] "Ook ten aanzien van de petitionarissen vielen de antwoorden van de Mandatarissen negatief uit. Benadrukt werden de subversieve bedoelingen van de meeste petitionarissen en ook de omvorming van de Commissie tot een tribunaal werd onwenselijk geacht. In maart 1927 besloot de Raad dat de lot dan toe gevolgde procedure inzake petities niet gewijzigd zou worden. Als de Commissie meer informatie over petities wilde, kon ze daar bij de Mandataris om vragen", A.H.M.v. Ginneken, *Volkenbondsvoogdij: het toezicht van de Volkenbond op het bestuur in mandaatgebieden 1919-1940.* Utrecht: Rijksuniversiteit Utrecht, 1992, p.62.

[36] "LUGARD, FREDERICK (1858–1945). Lugard had been Great Britain's governor of Hong Kong and Nigeria. He won some fame with his book *The Dual Mandate in British Tropical Africa* (1922) and

himself, over-impressed by this argument: "Those who have genuine cause for submitting a petition will receive satisfaction,"[37] while "agitators who seek notoriety and self-advertisement will find that they do not succeed in their object."[38]

Another argument was that "a long line of pilgrims would march to Geneva on the pretext of obtaining justice the Secretariat to overflowing with their intrigues during each session of the Commission. The Commission would end by collapsing beneath the weight of too heavy a load, which it would itself have been responsible for shouldering."[39] The French representative, Merlin, argued that not only ill-disposed persons would take advantage of the tribunal, but that all "[p]etitioners, especially the Orientals among them, had a natural inclination to intrigues and complaints."[40] This idea that culture or race was linked to the capacity to complain meaningfully was not unique to Merlin: "All peoples, and especially peoples of a less advanced civilization, are always ready to address to any authority, complaints about the most insignificant matters, for reasons which have little if any, foundation."[41]

During the formation of the Commission, George Louis Beer, its future director, rejected the idea of an African member, because, as the Commission would function like "an ultimate court of appeal in constant session and exercise(s) its control in a conspicuous manner, the peoples of the mandated areas will be in constant ferment."[42] The Belgian, Vandervelde, also wished to close his ears to any mention of oral hearings, maintaining that the danger was just too great for the mandate territory.[43] "[T]he hearing of petitioners would tend to weaken the authority of the mandatory powers."[44] Representatives Austen Chamberlain and Aristide Briand considered the thought of appearing together with a complaining indigenous person before some kind of tribunal and being treated as equals to be unacceptable.[45] Under no

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served as a member of the Permanent Mandates Commission from 1921 to 1936.", Ginneken, *Historical dictionary of the League of Nations*, p.125.

[37] Gorman, "Liberal Internationalism, the League of Nations Union, and the Mandates System."

[38] Ibid.

[39] Chowdhuri, *International mandates and trusteeship systems; a comparative study*, p.213.

[40] Ginneken, *Volkenbondsvoogdij*, p.186.

[41] Ibid., p.179.

[42] Ibid., p.21.

[43] "Het gevaar waaraan bet mandaatgebied werd blootgesteld als aan petitionarissen een al te grote tegemoetkomendheid werd getoond, was daarvoor veel te groot.", ibid., p.61.

[44] Hall, *Mandates, dependencies and trusteeship*, p.203.

[45] "…bleek de gedachte samen met klagende inboorlingen voor een soort tribunaal te moeten verschijnen en met hen op gelijke voet behandeld te worden, voor hen simpelweg onaanvaardbaar te zijn", Ginneken, *Volkenbondsvoogdij*, p.186.

circumstances would they accept this "humiliating position"[46] and such "excessive demands".[47] Nevertheless, the question of oral hearings simply failed to go away, emerging repeatedly at the third, eighth and ninth sessions of the Commission. Finally, the Commission developed an unofficial procedure in which "[a]ll the members of the Commission were entitled to hear persons who applied to them for an interview…"[48]

We can thus see that states put forward no legal arguments as to why individuals should not be able to plead their rights against states; they did not claim that something in the nature of IL would prevent this, but produced other, non-legal arguments, arguments that do not stand the test of argumentation rules. There is no evidence that states (or their representatives) are somehow superior to individuals and, even if this were the case, it does not follow from this alleged superiority that individuals should be denied a right to plead for themselves and assert their rights before neutral institutions. The remaining arguments also represent a non sequitur. If some individuals abuse their rights, filing inappropriate complaints, or too many complaints, or are induced to a state of "ferment", it does not therefore follow that all individuals should be denied their rights. All those possible inconveniences were solved by an institutional filter mechanism.[49]

Although we are not talking about a court, the story of the Commission is illustrative in terms of the development in IL. At an initial stage of the process, states admit that individuals have certain rights, but they do not give them the procedural power to enforce those rights.[50] Then the institution responsible for the supervision of those rights assumes new responsibilities, beyond those originally mandated to it, believing that one can only guarantee the rights if one gives the individual a procedural status, thus enabling him to plead his case before a neutral instance. Finally, the states accept this development. We will see later that a similar process

[46] Ibid., p.186.
[47] Ibid., p.61.
[48] Hall, *Mandates, dependencies and trusteeship*, p.203.
[49] The Mandates Section filtered petitions for their admissibility.
[50] "[T]he Imperial War Cabinet, when it came to discuss the mandates system, took for granted that petitions would form a part of it. General Smuts, in his study of the League published in December, 1918, proposed that the population of a mandated territory should be able to "appeal for redress to the League." A petition clause was proposed by Lloyd George at the Peace Conference in the meeting of the Council of Ten on January 24. President Wilson added a like clause to his fourth draft of the Covenant issued on February 2, but this was drawn up after agreement had been reached on the main lines of the mandate article, and in the end no provision actually covering petitions was inserted. Nor was the omission rectified in the draft texts of the mandates as drawn up by the Principal Allied and Associated Powers. The Council took no initiative in the matter. The Assembly of the League at its second session was the first League body to suggest the possibility of petitions from mandated areas.", Hall, *Mandates, dependencies and trusteeship*, p.199.

unfolded with both the European Court of Human Rights and the Inter-American court. There are some indications that the African court is following the same path. *This is the Emerging Thesis (ET) of evolution within the same institution, from a phase without individuals, to a later phase when individuals are given legal standing.*

Moreover, we can see this development not only within institutions, but also during the succession of institutions. Thus the Mandates Commission's procedures started without petition rights, then acquired those rights and ended with informal oral hearings. Its successor, the Trusteeship Council, guaranteed oral hearings under its rules of procedure from the very beginning, influenced by the experience of its predecessor.[51] With the introduction of oral hearings, we have definitive proof that the arguments against this were baseless, since the world is still alive and kicking.

2.3 The Permanent Court Of International Justice

The Advisory Committee of Jurists who drafted the court's statute discussed the question of giving individuals legal standing before the court; the final vote, however, rejected the idea. Nevertheless, the Committee did not wish to exclude individuals definitively, stating that it was "without prejudice to any subsequent development."[52] The fact that serious jurists even considered the idea and that it was seriously weighed up is relevant to our discussion.

The Norwegian, Francis Hagerup, wished to point out that there was an international precedent in the Convention for the establishment of the International Prize Court.[53] Albert de Lapradelle (Fr.) enthusiastically defended the idea of empowering individuals, especially for cases of denial of justice: "It sometimes happens that a private individual who has made a contract with a State, finds it impossible to obtain justice against it on account of a species of privileged right of sovereignty recognised by the legislation and jurisprudence of some countries, such as France."[54] The Court would accept his case "provided that the case was not of a political nature."[55] Dr. Loder, the Dutch representative, loved the idea and mentioned that Article 14 of the Covenant of the League of Nations referred to "parties" with a small "p", showing that the designers had no intention of limiting the disputes before the court to States

[51] "It may be pointed out that, in providing under the rules of procedure of the Trusteeship Council for the oral hearing of petitioners, the United Nations took into account the points which had been emphasized by the Mandates Commission, namely, that petitioners should not appear before the international supervisory body without the administering authority being given the opportunity to put forward its views in relationship to the petition.", ibid., p.204.
[52] Procès-Verbaux of the Proceedings of the Committee (16 June-24 July 1920, with Annexes), p.723.
[53] Ibid., p.205.
[54] Ibid., p.205.
[55] Ibid., p.205.

alone.[56] The situation after the creation of the League was not the same as it had been previously: "The sovereignty of the States had been used to prevent private individuals from taking action against them. Once an institution like the Permanent Court of International Justice was established, no such obstacles could exist."[57] He also disregarded the counter argument, namely, that it would lead to an excessive number of cases.

Those arguments were rejected by Lord Phillimore (UK), who claimed that, eventually, States "could adopt as their own the case of their subjects",[58] it being a duty of the state to protect its subjects.[59] Simply because a municipal law did not give individuals the right to sue the state, it was "not admissible that it should be introduced by a roundabout method of international jurisdiction."[60] Besides, it would increase the number of international disputes. "A State would never permit itself to be sued before a Court by a private individual. If a private individual felt that his rights were affected he should appeal to his Government, and if the latter found his complaint justified it would not fail to open communications with the offending State, and possibly, to take legal action against it."[61] Individuals entering into contracts with foreign states should accept the same risks as the subjects of that State and if the State does not allow itself to be sued, then the individual is simply unlucky and an international Court could do nothing in such a case; "it was not a Court of Appeal placed over national Courts."[62]

Elihu Root (US) agreed with Loder and realized the importance of what Lapradelle said, but thought that this issue could be solved only by giving states access to the Court, based on the principle of sovereignty of States, whereby "no State could be summoned before the Court without its previous consent."[63] Giving individuals access to the courts might go against the concepts held by some states and that would decrease the chance of the Court's success. His second objection was that the extant system afforded individuals better protection[64] because, if states believed an individual to have a justified case, they would give him diplomatic

[56] Ibid., p.206.
[57] Ibid., p.206.
[58] Ibid., p.206.
[59] Ibid., p.206.
[60] Ibid., p.206.
[61] Ibid., p.207.
[62] Ibid., p.214.
[63] Ibid., p.207.
[64] Individuals might believe otherwise: "In the public hearings before the European and Inter-American Courts of Human Rights, especially in those pertaining to reparations, the victims and their relatives have observed more and more frequently that, had they not had access to an international forum, justice would never have been done in their concrete cases.", Cançado Trindade, "The consolidation of the procedural capacity," p.15.

protection, which would solve the disputes in 99 out of 100 cases.[65] Besides, the word 'international' in the Covenant meant 'between states'. States could transform such a case into an international conflict by adopting it as their own and he "doubted whether the claim of a private individual which was not supported by his Government would carry enough weight before an international Court."[66]

Arturo Ricci-Busatti (IT) claimed that "[i]t is impossible to put States and private individuals on the same footing; private individuals are not subjects of international law and it is entirely within the realm of that law that the Court is called upon to act."[67]

Baron Descamps (Be), the President, was against the idea: "international law governs relations between States as such, and it is the duty of States to protect their nationals",[68] agreeing that it was a question of diplomatic protection. "It is scarcely conceivable in international law that a private citizen brings judicial action by his own authority against a foreign State which has not agreed to such jurisdiction and without the mediation of his own Government."[69] Individuals should first exhaust all the local remedies and then ask their own government for diplomatic protection.

And it was thus that Lapradelle and Loder were silenced and we acquired the famous current Article 34 of the International Court of Justice: "Only states may be parties in cases before the Court."

The sole answer Lapradelle could devise to this counteroffensive was to quote examples demonstrating that individuals wished to take part in the proceedings themselves, even if states took up their case.[70] Lapradelle was vindicated by the fact that many individuals did try to sue states at the PCIJ[71] and, subsequently, at its successor, the International Court of Justice.[72]

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[65] Procès-Verbaux of the Proceedings of the Committee (16 June-24 July 1920, with Annexes), p.207.
[66] Ibid., p.208.
[67] Ibid., p.208.
[68] Ibid., p.209.
[69] Ibid., p.209.
[70] Ibid., p.211.
[71] "In spite of the exclusion effected by Article 34, individuals have on numerous occasions sought to approach the Court with claims against Governments;", M.O. Hudson, *The Permanent court of international justice, 1920-1942.* New York: The Macmillan company, 1943, p.396.
[72] "That is a fact that is not very well-known and each year the court [ICJ] receives nearly 2000 individual petitions from individuals who seek redress from the Court in the expectation that the Court has jurisdiction to give individuals personal redress.", C.G. Weeramantry, *The World Court, It's conception, Constitution and contribution.* p.9.

Lapradelle "recalled the idea of creating a High Court competent to deal with offences against the law of nations. He hoped that the proceedings before this Court would be undertaken against individuals, but if the international jurisdiction is thus made competent to try individuals, access to the International Court should be given reciprocally to individuals for the protection of their interests."[73] In fact, this is a good argument even today, when we have the International Criminal Court and many other courts that try individuals.[74]

To summarize, the counterarguments, which were very weak, ran as follows:

- States cannot be sued if they do not want to be.
- States will never agree to be sued.
- Existing mechanisms, such as diplomatic protection, guarantee individuals a better respect for their rights.
- The word 'international' means between nations, not between nations and individuals.
- States know better than individuals, and serious international courts would not take up cases the mother state would not find actionable in a court.
- Individuals are not the subjects of international law.
- States and individuals cannot stand on the same footing.

After the press conference announcing that only states would be parties to the court, W. Elink Schuurman,[75] wrote a letter to Loder, the vice-president. I quote:

> "It is deeply regretted that the organisation of the new Court of International Justice will probably be such that States only may appear before it.
>
> When an individual feels that an injustice exists there should be nothing to hinder recourse to justice, even though the sentence were only of declaratory nature…The arguments put forward in the Communiqué to the Press, in support of the principle that States only may take action before the Court, are all part of the system that we were hoping to leave behind; they are opposed to the fundamental principle on which the League of Nations is based: it is to be a League of *Nations*, not a League of *Sovereign States*. I trust I am not taking too much upon myself in saying that I am quite prepared to develop orally the ideas put forward in this letter, either to you personally, or before the Commission."[76]

W. Elink Schuurman was not invited to air his opinion.

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[73] Procès-Verbaux of the Proceedings of the Committee (16 June-24 July 1920, with Annexes), p.211.
[74] To name but a few: the ICTY, the tribunals for Rwanda, Congo, Cambodia, Charles Taylor and Hariri.
[75] Dutch public servant
[76] Procès-Verbaux of the Proceedings of the Committee (16 June-24 July 1920, with Annexes), p.279-80.

In his book on the Court, Judge Manley O. Hudson argued that "[a] practical approach to the problem reveals no imperative need for a permanent international tribunal to which individuals may bring their claims against States",[77] but his view was criticized by Lauterpacht, who claimed that he had not argued his assertion.[78] Hudson brought other meager arguments to bear: "Claims tribunals are frequently inter-State tribunals; even where they are directly open to individuals, they usually have a special character which would seem to indicate that they cannot easily be generalized. Moreover, many States would probably be reluctant to confer jurisdiction upon any international tribunal which would permit them to be sued by individuals; and at any rate until a strictly inter-State tribunal has been established on firm and lasting foundations, the attempt to overcome such reluctance might be postponed."[79] From these words we are able to perceive that Judge Hudson himself is well aware that denying individuals access to the courts cannot be defended in the long run.

However, this is refuted by the very proposals made by some states. A Committee appointed by the government of the Netherlands definitely contemplated the notion that the Court shall be open to suits in which one of the parties is a private individual.[80] The German proposal stated:

> "Besides a jurisdiction over disputes between States, the international tribunal shall be entitled to decide on:
> (a) Complaints of private persons against foreign States and heads of States, when the State tribunals have declared their incompetency;
> (b) Disputes between subjects of different States which are Members of the League of Nations, so far as the interpretation of treaties forms the object of the dispute."[81]

In the Paris Committee's "La Ligue internationale de la Paix et de la Liberte" project, we read that: "The International Court has the function of deciding on all disputes affecting a Nation, when they have been submitted to it, whether these disputes are between Nation and Nation, or between a Nation and a private individual, or between a private individual and a Nation, with the exception, however, of disputes on private law between a Nation and its citizens"[82] and the proposal made by the League to enforce Peace wanted a "Court of Claims", which

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[77] Hudson, *The Permanent court of international justice, 1920-1942*, p.396.
[78] Lauterpacht, *International law and human rights*, p.51.
[79] Hudson, *The Permanent court of international justice, 1920-1942*, p.396.
[80] Advisory Committee of Jurists, *Documents presented to the Committee relating to existing plans for the establishment of a permanent court of international justice.* The Hague: 1920, p.29.
[81] Ibid., p.29.
[82] Ibid., p.29.

should entertain suits brought by private persons.[83] Both the draft by the Belgian senator, M. Henri La Fontaine, and the Rapport Loder stated: "Considered as international disputes are those which occur between States, between States and citizens of other States, and between citizens of different States. The States reserve the right to submit to an arbitral or contentious jurisdiction the disputes of the two last classes only in case of appeal or cassation."[84] Moreover, in Article 72: "The writ, introductory to a lawsuit before the International Court of Justice, may be served at the request of a State in its own name or in the name of one of its citizens, or at the direct request of a citizen of one of the States, either upon another State or upon a citizen of another State to which the applicant belongs."[85] At the same time, Congres Mondial des Associations International proposed that the PCIJ should admit individuals in appeals from national tribunals.[86]

We can thus conclude that, during the negotiations for the creation of the PCIJ, when positivism was in its heyday, it was not self-evident that individuals should be denied procedural standing. This is proven by both the fact that the committee discussed the question seriously, and felt it necessary to quote Elink Schuurman's letter in their process-verbaux, and by their declaration that their exclusion was "without prejudice to any subsequent development",[87] as well as by the fact that there were numerous proposals for giving individuals access to the court, some of them made by states. Only Ricci-Busatti claimed that individuals are not subjects of international law, suggesting that if individuals were subjects, they should be given legal standing. Despite his claim, even in Ricci-Busatti's time individuals were subjects, in their capacity, for instance as captains, fishermen, pearl divers[88] and pirates, contrabandists, slave traders, and bankers,[89] and in cases of economic arbitration,

[83] Ibid., p.29.
[84] Ibid., p.29.
[85] Ibid., p.31.
[86] Ibid., p.31.
[87] Procès-Verbaux of the Proceedings of the Committee (16 June-24 July 1920, with Annexes), p.723.
[88] "It is, however, well-known, for instance, that captains of private vessels, fishermen and pearl divers fishing in their own name in certain areas of the sea contribute, by their conduct, to the development of international customs concerning open sea, territorial sea, the continental shelf, etc.", D.P.O. O'Connell, "Sedentary Fisheries and the Australian Continental Shelf," 49 Am. J. Int'l L. 185 (1955): p.188.
[89] Bankers "often go against positive law. What definitely give[sic] the customary rule which is created by the repetition of their acts the obligatory force of a legal rule", L. Kopelmanas, "Custom as a Means of the Creation of International Law," 18 Brit. Y.B. Int'l L. 127 (1937): p.150. see also at p.151: "all the subjects of law…contribute to the formation of international custom." See also at p.149: "On the other hand these conditions are present when the international relations connect individuals belonging to different national organizations, even if the organs of the state take no part. This is why we are able in fact to find the existence of customary rules worked out by simple private individuals."

diplomatic immunity, rights of aliens, governments in exile[90] and soldiers; nowadays individuals are also subjects as insurgents, refugees, terrorists and, above all, as possessors of human rights.

2.4 The European Court of Human Rights (ECHR)

From the very beginning, scholars all over the world saw the ECHR as an important advance in the development of international law,[91] and a proof that sovereignty is not an obstacle to giving individuals access international courts.[92]

However, the ECHR is a model that exemplifies one of my arguments, namely that of an evolution from nothing to a full procedural capacity for individuals before courts. Originally, the European Convention only granted individuals the right to petition the Commission.[93] Then the idea of an European Court where only the states could start procedures arose. This did not work and, in the course of fifty-one years, the European states have brought only nineteen claims for violations of human rights against other states. These were mostly politically motivated; only three were genuine.[94] This refutes Root's argument that diplomatic

[90] I admit that diplomatic immunity, rights of aliens, governments in exile are usually seen as having something to do with rights of the state, but in some cases they lead to individual rights. For instance instance ICJ concluded that Vienna Convention on Consular Relations "Article 36, paragraph 1, creates individual rights", La Grand case (Germany v. United States of America) I.C.J. Reports 2001, p. 466 at paras. 76-77.

[91] "[T]he agreement to set up this [European] Court marks an important advance in the development of international law. In spite of the fears and hesitations of the states which have taken the first steps towards its ultimate creation, it may yet prove an important influence and model for the protection of fundamental rights and liberties.", L.S. Schapiro, "European Court of Human Rights, The Note," 2 *U.W. Austl. Ann. L. Rev.* 65 (1951): p.79.

[92] "Moreover, the experience, since the creation in 1953 by the fifteen countries of the Council of Europe of the European Court of Human Rights and the Commission of Human Rights, demonstrates that an international forum and procedure for their enforcement can operate practically and without infringing upon true national sovereignty.", A.J. Goldberg, "Need for a World Court of Human Rights, The Closing Address," 11 *Howard L.J.* 621 (1965): p.622.

[93] Cançado Trindade, "The consolidation of the procedural capacity," p.12.

[94] "During the first fifty-one years of the existence of the European inter-state model, only nineteen such applications were brought. If one looks at them more closely, it turns out that with the exception of three cases, the background of the application was always a serious conflict between the applicant and the defendant State; this applies to the two applications brought in 1956 by Greece against the United Kingdom in connection with Cyprus; to the application of Austria v. Italy concerning problems in the Southern Tyrol; to Ireland v. United Kingdom; and to the applications brought by Cyprus against Turkey. The exceptions are two applications brought by four countries against Greece during the Colonels' regime established in 1967 and the application brought by five countries against Turkey after the military had taken over in 1982. Finally, there is the application brought by Denmark against Turkey, which concerned the case of a Danish journalist who had been imprisoned and which lies between the two poles.", S. Trechsel, "A World Court for Human Rights?," 1 *Nw. U. J. Int'l Hum. Rts.* 3 (2003): p.9.

protection, rather than individual access to international courts, gives individuals the best protection.

But the fact that only states could start procedures was not self-evident. Pierre-Henri Teitgen, chairman of the International Juridical Section, also called the 'father of the Convention', "argued that individuals and states should have an equal right to petition the Court"[95] supported by the Italian Francesco Dominedo.[96]

States opposed the European court on the basis of national sovereignty,[97] and giving individuals access to the court was initially looked upon with suspicion and skepticism, for instance by the British government.[98]

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[95] A. Kjeldgaard-Pedersen, "The Evolution of the Right of Individuals to Seise the European Court of Human Rights," *Journal of the History of International Law, Vol 12, No. 2, pp. 267-306* (2010): p.270.

[96] "If the Court is to carry out its work effectively in every case of a violation of human rights and fundamental freedoms, access to the Court must be available not only to States, but also, after an opinion has been rendered by a Committee of the Council, to individuals and corporate bodies, thereby differing from the timid provisions of the Statute of the Hague Court.", Travaux Préparatoires quoted in ibid., p.271.

[97] I quote from minutes of the British government: "The Lord Chancellor said that…[o]bviously the Government must continue to disclaim the jurisdiction of the proposed European Court of Human Rights, since this would seriously compromise the sovereignty of Parliament. But there would remain some risk that the Government, or some subsequent Government, might be forced to concede some right of appeal to this Court; and it was therefore important to ensure that the Protocol was not framed in dangerously ambiguous terms. There was general agreement that the Government should maintain its opposition to the grant of a right of appeal to a supra-national authority. If any subsequent Government should concede this claim, the position was safeguarded by the right which existed to contract out on giving six months' notice.", CONCLUSIONS of a Meeting of the Cabinet held at 10 Downing Street, S.W. 1, on Thursday, 18th January, 1951, at 11 a.m., Council of Europe. Convention on Human Rights. (Previous Reference: CM . (50) 68th Conclusions, Minute 2 (4).) CAB 128/19/0/0004 p.30-31.

"It is obvious that the major inhibiting factor [in giving procedural capacity to individuals before international tribunals] is political. A significant number of governments are reluctant to assent to any arrangement which might seem to confer international personality on individuals, even if the capacity involved is very restricted and specialised. The United Kingdom has not accepted the jurisdiction of the European Court of Human Rights on this ground.", I. Brownlie, "The Individual before Tribunals Exercising International Jurisdiction," 11 *International & Comparative Law Quarterly* 701-20 (1962): p.719.

"The resistance that states then manifested to the establishment of a new international jurisdiction for the safeguard of human rights was characteristic of another period and colored by claims of state sovereignty. This resistance manifested itself in states' attempts, through the European and Inter-American Commissions of Human Rights, to prevent the direct access of individuals to the two regional tribunals of human rights.", Cançado Trindade, "The consolidation of the procedural capacity," p.17.

[98] Sir Eric Beckett, Legal Adviser to the British Foreign Office, commented "It seems inconceivable that any Government, when faced with the realities of this proposal, would take the risk of entrusting these unprecedented powers to an international court, legislative powers which Parliament would never

In the next phase it was only the European Commission of Human Rights that could start a procedure at the ECHR, and not individuals. This procedure was heavily criticized.[99] The Commission revolted during the very first case,[100] *Lawless v. Ireland*,[101] passing the court the individual complainant's written arguments.

The Irish government protested, claiming that the Commission "attempts by a subterfuge to bestow on the individual the quality of a party before the Court,"[102] admitting that refusing the individual complainant the chance to communicate with the Court created inequality, but "[t]he inequality, such as it is, is… deliberate, not in the sense of States wishing to place individual citizens at a disadvantage, but because in agreeing to the limited, I concede very limited, jurisdiction of the Court created by the Convention, States went as far as it appeared to them that they would be warranted in doing at present in recognising, for individuals, a status of any kind in international law."[103] The court rejected that argument and admitted the

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agree to entrust to the courts of this country which are known and which command the confidence and admiration of the world.", G. Marston, "United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950, The," 42 *Int'l & Comp. L.Q.* 796 (1993): p.803. Beckett "concluded by stating that an international court to which individuals had recourse against the judicial, legislative and executive decisions of their own country would be an innovation which would be abused by pressure groups, provide a "small paradise" for some lawyers and result in a situation where individuals or groups in one country would support recourse to the court by individuals and groups in another country, with subsequent retaliation in like manner.", ibid., p.803-04. and "We attach the greatest importance to a well-drafted Convention of Human Rights but we are dead against anything like an international court to which individuals who think they are aggrieved in this way could go.", ibid., p.804.,

Gladwyn "Jebb went on to observe: It is necessary, however, to make a clear distinction between this task of drawing up the substantive provisions of Human Rights and the quite separate question of enforcement, which ought of course to come after, and not before, the establishment of the principles. Mr Bevin feels that any proposal for an International Court of Human Rights, at which presumably individuals would be able to appeal against their own courts or Governments, would (apart from being premature) be quite impracticable at the present stage of European development and very undesirable from the point of view of the Governments concerned. You might, for example, have inhabitants of the Saar, or of Gibraltar, or of the small areas of Germany which are to go to Belgium and Holland bringing complaints before the Court against political conditions, which would be very embarrassing.", ibid., p.805.

[99] See generally W.P. Gormley, *The procedural status of the individual before international and supranational tribunals.* The Hague: M. Nijhoff, 1966.

"Sometime in the future the individual concerned should have a *jus standi in judicio* before the court.", H. Mosler, "The Protection of Human Rights by International Legal Procedure," 52 *Geo. L. J.* 800 (1963): p.822.

[100] Cançado Trindade, "The consolidation of the procedural capacity," p.17.

[101] ECHR 1 July 1961. *Lawles v. Ireland*.

[102] A.H. Robertson, "First Case before the European Court of Human Rights: Lawless v. The Government of Ireland, The Note," 36 *Brit. Y. B. Int'l L.* 343 (1960): p.344.

[103] Ibid., p.345.

remarks of the individual complainant, stating that "it is in the interests of the proper administration of justice that the Court should have knowledge of and, if need be, take into consideration, the applicant's point of view"[104] Robertson concluded that "[t]his will constitute a big step forward in establishing the status of the individual in international law."[105]

Ten years later, we see a new evolutionary step; the Court admits the pleadings of the lawyer representing the three complainants.[106] The regulations were changed and, on 1 January 1983, the legal representatives of the individual complainants have been admitted before the court.[107] Then, in 1990, Protocol 9 gave individuals themselves legal standing before the court.[108] Finally, in 1998, Protocol 11 gave individuals the right to sue states themselves.[109] "Contrary to what skeptics predicted, in a relatively short time all the States Parties to the European Convention, in an unequivocal demonstration of maturity, have also become parties to Protocol No. 11."[110] *We can also assert that, since no cataclysmic events occurred after Protocol 11, the original fears and skepticism have proved to be unfounded; thus, IL can function perfectly well even if individuals have procedural capacity.*

Individuals were able to appear before the European Coal and Steel Court of Justice, established in December 1952 and, later, in 1958, before its successor, the Court of Justice of

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[104] Ibid., p.345.
[105] Ibid., p.354.
[106] Cançado Trindade, "The consolidation of the procedural capacity," p.17.
[107] Ibid., p.17.
[108] Ibid., p.17.
[109] "With the entry into force of the *11th Additional Protocol to the European Convention* in 1998, the Council of Europe removed the dust of the 1950s (all optional clauses, the European Commission of Human Rights and the decision-making role of the Committee of Ministers) and created *a single and full-time European Court of Human Rights*. Today, all individuals in the 47 West, Central and Eastern European Member States of the Council of Europe, including the Russian Federation, Turkey, Cyprus and the Caucasus Republics, enjoy the unrestricted right to lodge an individual application against their respective States, and the European Court of Human Rights decides by a final and legally binding judgment whether or not the respective government violated any of the rights contained in the Convention and its Additional Protocols.", M. Nowak, "Eight Reasons why we need a World Court of Human Rights," in *International Human Rights Monitoring Mechanisms*, ed. G. Alfredsson (2009), p.701.
[110] "The entry into force of Protocol No. 11 represents a highly gratifying step to all those who support the international protection of human rights. The individual is thus endowed, at last, with direct access to an international tribunal (jus standi) as a true subject and with the full juridical capacity of the International Law of Human Rights. This has been made possible principally by a new mentality regarding the protection of human rights, internationally and nationally.", Cançado Trindade, "The consolidation of the procedural capacity," p.19.

the European Communities.[111] Louis B. Sohn said of the European court that "the access thereto of aggrieved individuals in the Common Market, had meant a greater growth of international law than if only governments had access thereto" and named it as one of the memorable achievements for "its contribution to the development of the new international principle of the abuse of power."[112]

Let us return to the drafting of the PCIJ statute. Dr. Loder was right in asserting that sovereignty had been used to prevent private individuals from taking action against states. Since individuals have been able to sue states directly at the ECHR, the number of cases has grown explosively, with some 141,450 cases pending before the court.[113]

However, it has not been without results: "In the past four decades, criminal justice in the Netherlands has experienced profound transformations. The European Convention has broken through its traditional national isolation and has exposed it to new and unfamiliar concepts and ideas. The Convention has opened up the Dutch system to the world and forced it to adapt itself to international standards of fairness. In a way, one could say that the Dutch system of criminal justice has become less naïve, more sophisticated and more mature."[114] This, as an aside, might be the empiric proof for Lauterpacht.[115] However, the impact of the Court has also been felt in the fields of family law, tax law, social security law and immigration law.[116] This proves that even a democratic society like the Netherlands, which views itself as respecting individual rights in an almost perfect manner, will benefit from giving individuals access to an international court.[117] It also works against Elihu Root's argument that, in 1907,

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[111] Cassidy, "Emergence of the Individual," p.567.

[112] L.B. Sohn, "Panel I: Regionalism and International Law: The Most-Favored-Nation Clause in a Changing World: Discussion," 54 *Am. Soc'y Int'l L. Proc.* 192 (1960): p.193-94.

[113] On 31th of October 2010. See the official Pie-Chart, accessed on 6 December 2010: http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending_applications_chart.pdf

[114] B. Swart, "The European Convention as an Invigorator of Domestic Law in the Netherlands," 26 *Journal of Law and Society* 38-53 (1999): p.52.

[115] "The law of nations, conceived in the fulness (sic) of its proper-function, exists for the double purpose of accomplishing that object by making man's freedom secure from the State and by rendering the State secure from external danger. It is not enough to say that the law of the State is circumscribed by its purpose and by the external nature of its power. Democracy, although an essential condition of freedom, is not an absolute safeguard of it. That safeguard must lie outside and above the State.", Lauterpacht, *International law and human rights*, p.123.

[116] Swart, "The European Convention as an Invigorator of Domestic Law in the Netherlands," p.39.

[117] Similar self-images can be found elsewhere in Europe: "Sweden, to take but one example, was particularly self-satisfied for many years. Suddenly, an application was brought by Mr. Sporrong and Mrs. Lönnroth. The Commission and Court came to the conclusion that a number of fundamental rights had been violated. This triggered a long series of applications regarding the lack of judicial protection

"the present system [already] gave to individuals a means of protecting their rights superior to that which would be given them if they had the right to summon a State before an international tribunal"[118] and that diplomatic protection would solve the disputes in 99 out of 100 cases. In most cases, the ECHR found the Dutch courts to have violated the right to fair trial (Article 6), and it is precisely this, the denial of justice, which is one of the most important reasons for diplomatic protection to kick in.

ECHR was named a "world court of human rights"[119] because its decisions are quoted in courts all over the world, which suggests that we need an ICHR. *All these developments are a certain proof that a revolution is taking place.*[120] Moreover, other examples are available; for instance, in 1947, "the attitude of Soviet Russia on the subject became so clear and well defined as to justify the view that in the foreseeable future no Russian participation in an enforceable international bill of rights could be expected."[121] In 1989, Russia retracted all its reservations regarding human rights treaties and accepted the compulsory jurisdiction of the ICJ[122] in this respect. Today, Russian citizens sue Russia at the ECHR.

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in administrative matters; later on there came a series of allegations, not all of them ill-founded, regarding unjustified interferences by the State with the right to respect for family life, and many more followed.", Trechsel, "A World Court for Human Rights?." para. 13

[118] Procès-Verbaux of the Proceedings of the Committee (16 June-24 July 1920, with Annexes), p.279-07.

[119] "The ECHR may be becoming a sort of world court of human rights. Its jurisdiction extends from Iceland and may eventually reach all the way to the eastern borders of Russia... The decisions of the ECHR are cited by courts in Canada, Australia, and New Zealand. The Canadian Supreme Court is quite open about looking to the authority of other countries or international tribunals. The Canadian Supreme Court has some background in approaching private law questions from a comparative perspective and this carries over to constitutional interpretation. The Australian Supreme Court routinely refers to international material and demands that counsel appearing before it provide it with these materials.", J.B. Attanasio, "Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts Symposium Issue: The Interaction between National Courts and International Tribunals," 28 *N.Y.U. J. Int'l L. & Pol.* 1 (1995): p.16.

[120] This was already visible in the 60s: "[T]he European Commission of Human Rights, EURATOM, the Common Market, the European Coal and Steel Community, and certain expressions of the World Court, all of which promise the individual a greater hand in initiating procedures to vindicate and redress the substantive rights granted him by world law, than does traditional international law, which leaves such procedures entirely to the sovereigns. ED", C.Q. Christol, "Remedies for Individuals under World Law," 56 *Nw. U. L. Rev.* 65 (1961): p.65.

[121] Lauterpacht, *International law and human rights*, p.300.

[122] "Proceeding from the above, the Presidium of the USSR Supreme Soviet adopted on February 10, 1989, a Decree under which the Soviet Union recognizes the binding jurisdiction of the International Court of Justice in respect of the following international treaties: 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitutions of Others, 1952 Convention on the Political Rights of Women, 1965 International Convention on the Elimination of All Forms of Racial Discrimination, 1979 Convention on the Elimination of All Forms of Discrimination against Women, and 1984

2.5 The Inter-American Court of Human Rights (IACHR)

The American Convention of Human Rights[123] appears to be a mirror image of the European.[124] However, it goes one important step further, in that it gives third parties the right to petition (*legitimatio ad causam*) without being victims themselves,[125] which helps some victims, namely "those detained *incommunicado* and disappeared persons." Theodor Meron[126] and Antônio Augusto Cançado Trindade,[127] the president of the IACHR, have observed that it is living through the same evolutionary process as the ECHR, and that this court is well on the way toward giving individuals full standing before it. Exactly as in the European case, it was the Commission and the Court itself that revolutionized the court's original mandate.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.", "Official Documents; Soviet Union Accepts Compulsory Jurisdiction of ICJ for Six Human Rights Conventions," 83 *Am. J. Int'l L.* 457 (1989).

[123] The American Convention of Human Rights of November 22, 1969.

[124] "The American Convention of Human Rights of November 22, 1969 has almost the same wording as the European Convention. It contains rights of the individual, too. The individual can likewise bring a violation of his or her rights before the American Commission of Human Rights (Article 44). Contrary to the European Convention on Human Rights (as it stood until November 1, 1998) no special acceptance is required for this procedure. Article 44 is applicable upon ratification of the Convention as such." A. Randelzhofer, "The legal position of the individual under present international law," in *State responsibility and the individual: reparation in instances of grave violations of human rights* (1999), p.238. see also Nowak, "Eight Reasons why we need a World Court of Human Rights," p.701.

[125] A.A. Cançado Trindade, "The procedural capacity of the individual as subject of international human rights law: recent developments," in *Karel Vasak amicorum liber: les droits de l'homme à l'aube du XXIe siècle = los derechos humanos ante el siglo XXI = human rights at the dawn of the twenty-first century.* (1999), p.13.

[126] "The Inter-American system may be moving in a direction similar to the European system as regards direct access to the Court. '[T]he legal representatives of the victims have been integrated into the delegation of the Inter-American Commission to the Court with the euphemistic designation of 'assistants' to this delegation.' In 1996, judges of the Court began asking questions directed to the representatives of the victims, whose briefs were presented to the Court. By the end of that year, revised Rules of Procedures were adopted which provided that 'at the reparations stage, the representatives of the victims or of their next of kin may independently submit their own arguments and evidence.' Under Article 35(4) of the 2002 Rules of Procedure of The American Court of Human Rights, individuals have autonomous standing to participate in the Court's proceedings in cases that have been submitted to it.", T. Meron, *The humanization of international law.* Hague Academy of International Law monographs Leiden; Boston: Martinus Nijhoff, 2006, p.340.

[127] "In the ambit of the inter-American system of human rights protection, developments which in this respect are taking place nowadays appear similar to those which occurred in the European system in the last decade, in relation to the matter at issue. In the procedure before the Inter-American Court, for example, the legal representatives of the victims have been integrated to the delegation of the Commission with the euphemistic designation of « assistants » to this latter. This «pragmatic» solution counted on the endorsement, with all good intentions, of the decision taken in a joint meeting of the Inter-American Commission and Court, held in Miami in January 1994...Time has come to overcome such ambiguities also in the inter-American system, given that the respective roles of the Commission (as guardian of the Convention assisting the Court) and of the individuals (as the true plaintiff) are clearly distinct.", Cançado Trindade, "The procedural capacity of the individual," p.536.

2.6 The African Court on Human and Peoples' Rights

Finally, the African Court on Human and Peoples' Rights chose its judges in 2006.[128] Under Article 30(f) of the Court statute, individuals can "submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned."[129] However, this jurisdiction is optional and states can make a reservation to this article. The possibility to make such reservations has been met with fierce criticism,[130] especially in view of the fact that all other the courts of the RECs (Regional Economic Communities) grant direct access to individuals.[131] Nevertheless, individuals have direct access to the Commission.[132] Yet this optional jurisdiction is better than the IACHR, where individuals are not yet able to start proceedings, and we should not forget that the ECHR only gave individuals this right after forty years of existence. The African court is a further proof of an increasing legal standing of individuals before international courts.

Asia and the Pacific are the only regions nowadays that have no regional court of human rights, "primarily because of its diversity, could not even agree on founding a proper regional organisation."[133]

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[128] I. Kane and A.C. Motala, "The Creation of a New African Court of Justice and Human Rights," in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2006*, eds M.D. Evans, R. Murray (Cambridge, UK; New York: Cambridge University Press, 2008), p.406.

[129] Protocol On The Statute Of The African Court Of Justice And Human Rights.

[130] "Many States were opposed to the introduction of the general reservation
for the following reasons:

- The protocols that form the foundation for the new text do not contain any provision on reservations.
- The main purpose of the reservation is to enable States that are opposed to direct access of individuals and non-governmental organisations to the new Court to get around the decision made in the meeting to open up the new Court to the latter. This undermined the object and purpose of the treaty as forbidden by the Vienna Convention on the Law of Treaties.", Kane and Motala, "The Creation of a New African Court of Justice and Human Rights," p.423.

[131] I have not yet verified this information, which was taken from the Internet: "Besides all the courts of the RECs (Regional Economic Communities), e.g. Court of Justice of the Economic Community of West African States (ECOWAS), the East African Court of Justice (EACJ); the Southern African Development Community (SADC) Tribunal, the Court of Justice of the Common Market of the East and Southern Africa (COMESA), and the Court of Justice of the Economic and Monetary Union of West Africa (UEMOA), grant direct access to individuals.",
http://www.africancourtcoalition.org/editorial.asp?page_id=162

[132] R. Wright, "Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights," 24 *Berkeley J. Int'l L.* 463 (2006): p.471.

[133] Nowak, "Eight Reasons why we need a World Court of Human Rights," p.701.

In conclusion, this part of the paper has set out a substantiated argument, showing that, from the 1800s onward, we can trace a change in the legal standing of the individuals under International Law. The number of courts permitting this does nothing but grow and, slowly but surely, the existing courts are changing.

3. Dissenting opinions

Many great scholars have proposed giving individuals international legal standing against their own and foreign states, by creating international courts of human rights (ICHRs). Space does not allow me to set forth all of their arguments, but I would like to enumerate them in part, at least, and focus on some in greater detail.

3.1 Edward Hambro

In 1941,[134] Edward Hambro argued that individuals should receive a "greater competence to defend their rights", especially stateless people and minorities,[135] one of the advantages being a decreasing of the dangers of diplomatic and political intervention. The "old dogma"[136] that international law was a law exclusively between states was already losing ground in his time.

Hambro cited a statement which appeared in the yearly report of the Permanent Court of International Justice, to the effect that private individuals who had lost their original status often lodged claims at the PCIJ for compensation for dispossession. He refuted two possible counter arguments:

(1) The argument that the courts could become overloaded is weak and immoral. We should exert our energies rather than giving up on justice when it proves itself to be complicated.
(2) The argument that it might infringe upon sovereignty is not an argument against, but rather "the very strongest argument in favor of enlarging the scope of the individual in international law."[137] The "dogma of sovereignty"[138] is invoked by the states when they want to act against the interest of the community. We must work to counteract "extreme nationalism and the omnipotence of the state which has caused so many catastrophes in the past."[139]

We ought to support international law and create a real international society, and this entails giving individuals access to international courts.

Hambro gives other examples of proposals to give individuals international legal standing. In 1934, following the assassination, in Marseilles, of Yugoslavia's King Alexander and France's Foreign Minister, Barthou, a committee of jurists proposed the establishment of an

[134] E.I. Hambro, "Individuals before International Tribunals," 35 *Am. Soc'y Int'l L. Proc.* 22 (1941).
[135] Ibid., p.25.
[136] Ibid., p.25.
[137] Ibid., p.26.
[138] Ibid., p.26.
[139] Ibid., p.26.

International Penal Court, where individuals could also claim damages.[140] Séfériadès wrote a report for *l`Institut de Droit International* that adopted a resolution to give individuals access to international tribunals in certain cases.[141]

3.2 James Oliver Murdock

In 1944, Murdock proposed permanent international tribunals in each capital, in order to solve the current "mumbo-jumbo" of 50,000 cases of arbitration waiting to be resolved.[142] The PCIJ should be a type of Supreme Court in a "[s]ystem of interrelated permanent international courts with obligatory jurisdiction."[143] The increased number of PCIJ judges would ride circuit and decide cases, having an impartial view, and would be aided by at least one International Commissioner with a commanding knowledge of the local laws. The latter could, for instance, be drawn from the host state. Eventually, when the system maturates, and if the PCIJ becomes overloaded, a new layer of intermediate regional courts could be added, deciding appeals from the local courts. The governments would bring claims on behalf of their citizens and the applied law would be the same as that at the PCIJ. Thus sources of injustice and international conflict would be settled promptly.

3.3 No kangaroo courts

In the period between 1946 and 1951, Australia was the world champion in terms of human rights.[144] At the Peace Conference in 1946, it proposed a European Court of Human Rights[145]

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[140] Ibid., p.24-25.

[141] Ibid., p.25.

[142] J.O. Murdock, "International Judicial Organization," 69 *Annu. Rep. A.B.A.* 373 (1944): p.378.

[143] Ibid., p.379.

[144] See generally A. Devereux, *Australia and the birth of the International Bill of Human Rights, 1946-1966.* Annandale, N.S.W.: Federation Press, 2005. and J. Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent.* Pennsylvania studies in human rights Philadelphia: University of Pennsylvania Press, 1999.

[145] "The Australian Delegation will propose the establishment by the Treaties of a special Court of Human Rights. To this proposal we attach great importance. The history, of the territorial adjustments made at the Conference of Versailles suggests that basic and essential rights and freedoms of the individual - who is so often the cipher in territorial adjustments - should not hinge simply upon declarations made by states. Such declarations, standing alone, are not sufficient, to guarantee the inalienable rights of the individual and behind them it is essential that so[unreadable] sufficient sanction be established. That is why we have suggested the setting up by the Treaties of a European Court of Human Rights to implement the relevant clauses of the Treaties. The Court should have a status parallel to that of the International Court of Justice with jurisdiction to hear and determine, subject to reasonable conditions and safeguards against abuse of legal process disputes concerning the enjoyment of human rights and of fundamental freedoms, or any disputes as to citizenship resulting from the Treaty provisions. In the draft treaties, the declarations do not deal with minorities as such but with human beings and their rights as human beings. None the less, the declarations would operate to give protection to minority groups because it is usually against members of such groups that oppression

to protect minorities and individuals, giving individuals and groups legal standing, with decisions being enforceable against states, arguing that fundamental rights should not depend on state declarations. It drew its inspiration from the works of Professors Norman Bentwich[146] and Georges Kaeckenbeeck,[147] whom Australia also cited during the negotiations.[148] Bentwich proposed an international court to deal with statelessness,[149] especially that which resulted from State succession, as happened after WWI. Kaeckenbeeck, president of the Arbitral Tribunal of Upper Silesia, was a passionate believer in giving individuals access to international courts.

After the war, the UN started negotiations on the Universal Declaration of Human Rights, and, eventually, an International Bill of Rights. Australia rejected a declaration without teeth and wanted guarantees in respect of enforcement. During the first session of the Commission on Human Rights, in January and February 1946, Australia's representative Colonel William Roy Hodgson proposed an International Court of Human Rights:

"The Australian proposals for an International Court of Human Rights have been put forward because we favour a continuous, effective, and just system of international supervision. In English law the remedy is just as important as the right, for without the remedy there is no right. Our basic thesis is that individuals and associations as well as states must have access to and full legal standing before some kind of international tribunal charged with the supervision and enforcement of the covenant. In our view either a full and effective observance of human rights is sought, or it is not. If we do seek it, then the consequences must be admitted and the idea of compulsory judicial decisions accepted. The present International Court is unsuitable because of the limitations placed on it as regard individuals and associations."[150]

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is likely to be exerted. The power to invoke the jurisdiction of the proposed Court would extend to individuals and to groups as well as to states, and its judgments would be accepted by the parties to the treaties as enforceable, not only against individuals and groups, but also against states and local agencies. The jurisdiction of such an international tribunal might not be invoked frequently, because its very existence would act as a strong deterrent against the non-observance of the declarat[ions] to be contained in the treaties. We are deeply indebted to the United States for its initiative in relation to the inclusion of these formal, declarations in the present treaties, but the proposals should in our view be strengthened and reinforced in the manner proposed by the Australian amendment.", AUSTRALIAN AMENDMENTS AND PROPOSED ADDITION TO DRAFT TREATIES - STATEMENT BY DR. HERBERT EVATT - FIRST DELEGATE OF THE AUSTRALIAN DELEGATION - FOR RELEASE 3 P.M. 21st AUGUST - 1946., p.4-5.

[146] N. Bentwich, "Statelessness Through The Peace Treaties After The First World-War," 21 *Brit. Y.B. Int'l L.* 171-76 (1944).

[147] Kaeckenbeeck, *The international experiment of Upper Silesia*.

[148] Devereux, *Australia and the birth of the International Bill of Human Rights, 1946-1966*, p.180.

[149] Bentwich, "Statelessness Through The Peace Treaties After The First World-War," p.176.

[150] Australian Archive Document: AA: A432, 1947/725, III.

On 10th May 1948, Australia proposed a statute for the court, a modified version of the ICJ statute, giving individuals access to the court and making the necessary modifications to the UN charter.[151]

United Nations *Nations Unies*

ECONOMIC AND SOCIAL COUNCIL **CONSEIL ECONOMIQUE ET SOCIAL**

UNRESTRICTED

E/CN.4/AC.1/27
10 May 1948

ORIGINAL: ENGLISH

"Draft Articles for Inclusion in Covenant

International Court of Human Rights

1. There is established an International Court of Human Rights. The Court shall be constituted and shall function in accordance with the Statute of the Court, which forms an integral part of this Covenant.

2. All parties to this Covenant are ipso facto parties to the Statute of the Court.

Competence of the Court

Article 17

1. The following may be parties in cases before the Court:
   (a) States
   (b) individuals
   (c) groups of individuals
   (d) associations, whether national or international.

[151] U.N. doc. E/CN.4/AC.1/27.

Article 19

1. The jurisdiction of the Court shall comprise the following:

(i) All disputes arising out of the interpretation and application of the Covenant on Human Rights referred to it by any party to such Covenant;

(ii) All disputes arising out of the interpretation and application of Articles concerning human rights in any treaty or convention between States referred to it by any party to such treaty or convention;

(iii) All matters concerning the observance of human rights by the parties to such Covenant or to any such treaty or Convention referred to it by the Commission on Human Rights.

Article 27

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

The proposal was rejected, especially by the Soviet Union, the United States, Great Britain and France. India and the Philippines agreed with the establishment of international judicial machinery, but India wanted a special chamber of the ICJ.[152]

The Dutch government "outlined the measures of implementation which in their opinion should be adopted in order to create a complete international guarantee for the realization of the human rights and freedoms formulated in the Covenant,"[153] and considered "that in the event that a court is empowered to be the final guarantor this should be a Special Chamber of the International Court of Justice,"[154] but it "feel [sic] that individuals or groups of individuals or non-governmental organizations should for the time being not be given the right to put into effect the international machinery of implementation. They admit that the complete international protection of human rights and freedoms should eventually include this right, but they deem it desirable that, before this right is granted, a certain practice has developed with regard to the limits of international safeguarding of human rights and freedoms."[155]

[152] U.N. doc. E/CN.4/366, p.10.
[153] Ibid., p.18.
[154] Ibid., p.10.
[155] Ibid., p.42.

Years later, in 1961, Colombia submitted a draft resolution[156] requesting that the establishment of an international tribunal for the protection of human rights be included in the agenda for the seventeenth session of the Assembly.[157] In 1970, in a speech before the General Assembly, Kenneth Kaunda, President of Zambia, also acting in his capacity as Chairman of the Organization of African Unity and Chairman of the Third Summit of Non-Aligned Countries, said that "the United Nations should, during the rest of the century, devote its attention to the improvement of the machinery for the implementation of human rights which has become a very urgent and desperate problem in many parts of the world",[158] arguing that "the creation of an international tribunal to deal with complaints against violations of human rights must be given serious consideration."[159] Ironically, when googling 'Kaunda', I found an angry article written in toward the end of May 2010 and arguing that Kaunda should be tried at the International Criminal Court in The Hague for crimes against humanity. So, be careful what you ask for.

3.4 Louis B. Sohn

"Professor Louis B. Sohn (1914–2006) was not only present at the creation of the modern international legal system, he was its principal architect. He participated in the 1945 drafting conference in San Francisco that created the United Nations, as well as in events leading up to the conference. He also played a leading role in the creation or development of many other areas of international law, including human rights, international environmental law, law of the sea, international organizations, arms control and disarmament, and international dispute settlement. Each of these areas of international law bears his creative and indelible mind-print."[160]

Professor Sohn wrote a book, together with Clark Grenville. "World Peace through World Law: Two Alternative Plans"[161] dealt with the reform of the UN and the abolition of all weapons. They proposed a new UN Charter and new international courts to deal with the matter. Under their plan, individuals should have direct access to those courts. A set of twenty to forty regional United Nation courts would try individuals for violating the laws on disarmament passed by the UN. However, individuals would be able both to start procedures

[156] U.N. doc. A/C.6/L.493.
[157] Yearbook of the International Law Commission: 1962 , vol. II A/CN.4/145, p.98.
[158] K. Das, "Some reflections on implementing human rights," in *Human rights: thirty years after the Universal Declaration: (1979), P. 131-157.* (1979), p.142.
[159] Ibid., p.143.
[160] D.B. Magraw, "Louis B. Sohn: Architect of the Modern International Legal System," 48 *Harvard international law journal* 1-17. (2007): p.1.
[161] The first edition was published in 1958. G. Clark and L.B. Sohn, *World peace through world law; two alternative plans.* Cambridge: Harvard University Press, 1966.

against states at the same courts when their rights were violated,[162] and bring claims against the UN in economic matters, such as compensation for property or services.[163] The ICJ would adjudicate appeals from the regional courts, and Article 34 of the statute needed amendment to make this possible.[164] The ICJ would also be a constitutional court, guaranteeing a Bill of Rights against violations by the UN itself, not by the member states. The ICJ could declare any UN regulation and decision void if they violated the Bill of Rights.[165] The regional courts and the ICJ would have compulsory jurisdiction.

In a less utopian work,[166] Sohn proposed the establishment of a System of International Tribunals giving individuals direct access, giving a rich list of similar proposals which had been made previously.[167] After the PCIJ gave access to the court solely to states, jurists interested in the problem tried alternative options.[168]

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[162] "The jurisdiction of the regional courts would include:
a. The trial of individuals and private organizations accused of offenses against the revised Charter or any law or regulation enacted thereunder;
...
f. any other matter where access to a regional court by nations, public or private organizations or individuals is specifically provided for the revised Charter (including any Annex thereto) or in any law or regulation enacted thereunder.
...
The General Assembly would be authorized to enact laws specifying the categories of cases in which appeals from decisions of the regional courts to the International Court of Justice would be allowed. It would be provided that these laws must permit appeals when it appears to at least one third of the judges of the International Court of Justice: (a) that a decision of a regional court may be inconsistent with a prior decision of the same issue of law by the International Court of Justice or by another regional court; (b) that a regional court may have wrongly decided a question involving the interpretation of the Charter of the United Nations; (c) that a regional court may have exceeded its jurisdiction; (d) that a regional court may have deprived a person of a right or privilege guaranteed by the Bill of Rights (Annex VII); or (e) that a regional court may have made a fundamental error resulting in a serious denial of justice." Ibid., p.342.

[163] Ibid., p.304.

[164] Ibid., p.336-37.

[165] Ibid., p.XL.

[166] L.B. Sohn, "Proposals for the Establishment of a System of International Tribunals," in International trade arbitration: a road to world-wide cooperation, ed. M. Domke (New York: American Arbitration Association, 1958).

[167] "After the creation of the Permanent Court of Arbitration, to which only disputes between States could be submitted, the emphasis shifted to the establishment of a separate tribunal for dealing with disputes between States and individuals. For instance, Hans Wehberg proposed in 1911 that an international tribunal for private matters be empowered to deal with:" 1. Private claims against debtor States and claims by creditor States against private persons. "2. Disputes relating to questions of private international law (on appeal from national courts). "3. Private claims based on international treaties establishing uniform laws (on appeal from national courts). "4. Private claims based on an allegation that a decision of a national court constituted a violation of international law.", ibid., p.66.

[168] "From that point on efforts were directed principally to the creation of a separate tribunal or of a system of tribunals, apart from the Permanent Court of International Justice and its successor, the

Sohn envisages how those tribunals could work. There is one tribunal in each State for cases brought by foreigners against the host state. They are specialized in international law and they apply general international law, but not as interpreted by the host state. Some states might even hire foreign judges to staff the tribunals, giving them an additional (perceived) impartiality.[169] There should be some appellate tribunals, national or regional, or the ICJ could hear the appeals, provided that article 34 were changed to enshrine the acceptance of individuals as parties.[170]

3.5 Hersh Lauterpacht

One of the converts to the concept of an ICHR, Lauterpacht rejected it as controversial and impracticable when Australia proposed at the UN in 1946. His concerns pertained to the scope of domestic jurisdiction and state sovereignty. Four years later, he concluded that his original objections were no longer decisive.[171]

> *"Once the cobwebs of that antiquated theory have been swept aside, the procedural incapacity of individuals is deprived of its logical foundation."*
> **Sir Hersch Lauterpacht**

In his book on human rights, Lauterpacht searches for effective guarantees of respect for human rights and submits that: "(a) that the doctrine that States are the only subjects of international law is not an accurate statement of the actual legal position; (b) that the modern development of international law, from a system of procedural and ceremonial rules regulating the external intercourse of States and delimiting their jurisdiction, to a body of law concerned with substantive interests of States and their nationals, has rendered the traditional positivist doctrine on the subject obsolete and unworkable; and (c) that the time is now ripe for assessing the significance of these changes in the substantive law and in the functioning of organised international society."[172]

International Court of Justice. At the Stockholm meeting of the International Law Association in 1924, Mr. Paul de Auer proposed the establishment of a "permanent international court in civil matters", but no action was taken by the Conference. Soon thereafter, Sir Cecil Hurst suggested "an international court of piepowder", and the editor of the Journal du droit international, M. Andre-Prudhomme, drafted a proposal for an international tribunal to consider appeals from national tribunals in cases arising from contracts between States and private persons.", ibid., p.68.

[169] Ibid., p.75.

[170] Ibid., p.76.

[171] Lauterpacht, *International law and human rights*, p.383.
Devereux, *Australia and the birth of the International Bill of Human Rights, 1946-1966*, p.187.

[172] Lauterpacht, *International law and human rights*, p.6.

He argues that the individual is the ultimate unit of society and of all law, and the entire purpose of the international law, and of both state and democracy is the fullest development of the potential inherent in the human personality.[173] These possibilities are grounded in natural law, in the following "objective factors" present in the nature of humankind: "[t]he social nature of man; the generic traits of his physical and mental constitution; his sentiment of justice and moral obligation; his instinct for individual and collective self-preservation; his desire for happiness; his sense of human dignity; his consciousness of man's station and purpose in life."[174] Natural law and international law must set limits to any municipal law.[175] Even the concept of social contract is grounded in presupposed natural rights.[176] Of course, one should be on guard, since the idea of natural rights has been abused in order to protect

[173] "The purpose of the State is to safeguard the interests of the individual human being and to render possible the fulfilment, through freedom, of his wider duty to man and society.", ibid., p.68.

[174] Ibid., p.101. See also: "The law of nations, and, we may say, the law of nature, by denying, as they needs must do, the absolute sovereignty of States, give their imprimatur to the indestructible sovereignty of man. It is probably the natural law of humanity to develop its capacities to all attainable perfection. This is also an essential part of man's moral duty. That duty man has a natural right to fulfill through freedom. Inasmuch as freedom means the fullest development of the possibilities of human personality it is not a means of the highest order, but an end in itself. The State is to ensure that freedom. The law of nations, conceived in the fullness of its proper-function, exists for the double purpose of accomplishing that object by making man's freedom secure from the State and by rendering the State secure from external danger. It is not enough to say that the law of the State is circumscribed by its purpose and by the external nature of its power.", ibid., p.123.

[175] "Even after human rights and freedoms have become part of the positive fundamental law of mankind, the ideas of natural law and natural rights which underlie them will constitute that higher law which must forever remain the ultimate standard of fitness of all positive law, whether national or international.", ibid., p.74.

"Where else can that ultimate sanction be found? It must rest in a legal source superior to that of the State. That superiority may be of two kinds. It may be that of the law of nature conceived as a limitation inherent in the nature of all rational law and as a standard of justice and fitness disregard of which must reduce law to a mere form of arbitrary power. That law of nature is not without its sanctions. For it is a factor whose operation shapes that habitual obedience which is at the basis of all positive law. It moulds the minds of rulers and legislators by instilling into them that degree of reasonableness and restraint which constitutes the barrier between obedience and rebellion.

...

The other legal source which is above the supreme authority of the State and in which lie the ultimate safeguards of the rights of man is the law of nations or, as it is more often called, international law. It is, predominantly, the body of rules which are voluntarily accepted or imposed by the existence of international society and which govern the conduct of States and are subject to enforcement by external sanction. The rights of man cannot, in the long run, be effectively secured except by the twin operation of the latent forces of the law of nature and of the compelling force of the law of nations-both conceived as a power superior to the supreme power of the State.", ibid., p.93.

[176] "The very notion of the social contract implies, it will be noted, the existence of rights which the individual possesses before entering organised society. Most of the propounders of the doctrine of the social contract taught that there were insurmountable limits to the power of the State not only on account of the terms of the contract, but also for the simple reason that some rights, because of the nature of man, are inalienable.", ibid., p.87.

vested interest,[177] avert positive progress and exclude groups of people from having rights, "[i]t has been invoked by enemies of political freedom and champions of absolutism…justifying interference with personal liberty on eugenic grounds…" and "some of the most outspoken advocates of war and imperialism have been based on the idea of the law of nature."[178]

He proposes a very detailed Bill of Rights, which would be characterized by its binding, legal language. *This Bill should be enforceable through an ICHR.* Besides the argument in respect of the law of nature, he submits that:

(1) There is no rule of international law precluding individuals from being legal subjects, or from having procedural rights enforceable in international courts.[179]
(2) The individual is already the subject of IL.[180] The UN Charter made it definitively so[181] and the judgment in the case concerning the Jurisdiction of the Courts of Danzig

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[177] "The law of nature is in no sense a substitute for positive law; it cannot by itself supply the solution of the problem of the rights of man. Whenever that happens the doctrine of natural rights degenerates into a doctrine of vested rights. Whenever the law of nature is treated as an alternative to changes in existing law it ceases, on balance, to be a beneficent force and becomes a check upon progress.", ibid., p.126.

[178] Ibid., p.107.

[179] "[t]here is nothing inherent in the structure of international law which prevents individuals and, generally, persons other than States from being parties to proceedings before international tribunals. The matter is one of machinery and of the determination of governments in any given case. For this reason it is probable that Article 34 of the Statute of the International Court of Justice, far from declaring an immutable rule of international law, has gone to an excessive length in giving countenance, in a rigid way, to what was assumed to be one of the consequences of the view that States only can be subjects of international law. It would have been proper and practicable for the Statute to provide that the Court shall have jurisdiction only in cases in which at least one party is a State.", ibid., p.51.

[180] As proof the "almost torrential stream of changes…at the beginning of the twentieth century as a challenge to the doctrine that only States are subjects of international law. ", ibid., p.65-66.

[181] "It is in the Charter of the United Nations that the individual human being first appears as entitled to fundamental human rights and freedoms. We shall fail utterly to realise the full significance of that innovation if we permit our understanding of it to be blurred by the fact that these rights are not defined in detail or, so far as the Charter is concerned, that they are not fully enforceable.", ibid., p.33.
"The Charter of the United Nations is a legal document; its language is the language of law, of international law. In affirming repeatedly the ' fundamental human rights ' of the individual it must of necessity be deemed to refer to legal rights-to legal rights recognised by international law and independent of the law of the State. These rights are only imperfectly enforceable, and, in so far as the availability of a remedy is the hallmark of legal right, they are imperfect legal rights.", ibid., p.34.
"Moreover, irrespective of the question of enforcement, there ought to be no doubt that the provisions of the Charter in the matter of fundamental human rights impose upon the Members of the United Nations the legal duty to respect them. In particular, it is clear that a Member of the United Nations who is guilty of a violation of these rights commits a breach of the Charter. There may be no international tribunal endowed with compulsory jurisdiction to ascertain the fact of such violation, but international tribunals have, as a rule, no compulsory jurisdiction in the matter of the fulfillment of international duties. This fact does not deprive them of their legal character.", ibid., p.34.

dealt “a decisive blow to the dogma of the impenetrable barrier separating individuals from international law.”[182]

(3) "In the matter of the fundamental rights of man the remedy is not complete—it is defective—unless in the last resort a judicial remedy is available."[183]
(4) The right to petition is presupposed in the UN charter.[184]
(5) The relations across frontiers are no longer ‘rudimentary’ and IL needs to regulate the new complex interrelations between states and individuals satisfactorily.
(6) Democracy is fancy and, although essential, is not an absolute safeguard of human rights,’ the safeguard “must lie outside and above the State."[185]

Among his arguments for giving individuals international procedural capacities are those that:

(1) Stateless persons would have remedies.[186]
(2) Individuals would have remedies even if their state does not bring a claim on their behalf.[187]
(3) When claims are brought by a state, they tend to be (seen as) politicized. The resulting friction would be avoided if individuals could bring direct private claims.[188]

It follows that individuals should enjoy procedural capacity in IL[189] and that Article 34 of the ICJ statute should be changed.[190] It is also logical that some form of compulsory jurisdiction is necessary, at least for claims started by individuals.[191]

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[182] Ibid., p.29.
[183] Ibid., p.291.
[184] "There is no prospect of the fulfilment of the purpose of the Charter in the matter of human rights and freedoms unless an effective right of petition is accepted as being of the essence of the system established by the Charter. The Charter does not refer to the right of petition as a safeguard of human rights and fundamental freedoms. Yet this is a right which must be held to be implied in the Charter as the very minimum of the means of its implementation.", ibid., p.244.
[185] Ibid., p.123. and “[I]t is inadmissible that the State should claim, in the conditions of the modern world, that it is the best instrument for protecting all these interests and that it is entitled to exclude from this legal sphere individuals and non-governmental bodies which may be created for that purpose. As within the State, so also in the international sphere the paramount danger arises when, in the words of John Stuart Mill in an eloquent concluding passage of his essay on Liberty, the State 'instead of calling forth the activity and the powers of individuals and bodies ... substitutes its own activities for theirs.' The administrative convenience resulting from the exclusive competence of the organs of the State in the international arena ... may be bought at the high price of stifling the individual...”, ibid., p.68.
[186] Ibid., p.52.
[187] Ibid., p.52.
[188] Ibid., p.52.
[189] "The fact that the Charter of the United Nations has gone a long way towards recognising the status of the individual as a subject of international law cannot be altogether without influence upon his procedural capacity. Such hopes will not be in vain if the United Nations and its organs adhere to the spirit of the Charter with regard to the promotion of respect for and observance of human rights and fundamental freedoms.", ibid., p.241.
[190] "The discussions in the Committee of Jurists who drafted the Statute of the Court in 1920 showed how strongly the adoption of Article 34 was influenced by the dogma that States only can be subjects of international law.", ibid., p.59.

Enforcement might be realized by expelling offending states from membership of specialized agencies such as the International Postal Union.[192]

Lauterpacht also refutes some of the objections as follows:

1. International Courts could be overwhelmed with (frivolous, malicious) claims (based on obviously deficient information), or become the instrument of political machinations. This will be avoided by having a filtering system, like the mandates and trustee systems.[193]

2. It will touch upon vital aspects of national sovereignty, especially in matters that are more political than legal, for instance, questions of the suspension of civil liberties in a state of emergency and the weighing of individual against general interest. Lauterpacht responds that it does not follow that individual rights are of inferior nature and should be sacrificed. He contends that a combination of semi-judicial, conciliation and compromise could find the right solution.[194] An appropriate legal organ could take everything into consideration and make legal binding decisions.

3.6 Antônio Augusto Cançado Trindade

A former president of the Inter-American Court of Human Rights and now a judge at the ICJ, Cançado Trindade can be placed among a long line of international judges who have pleaded for giving individuals full international legal capacity.[195]

> *"Without the right of individual petition, and the consequent access to justice at the international level, the rights set forth in human rights treaties would be reduced to a little more than a dead letter."*
>
> **Judge Antônio Augusto Cançado Trindade**

We can see some similarity to Lauterpacht in his argument. The individual is the ultimate unit of law, the law is made to serve individual wellbeing.[196] Diplomatic protection is not enough

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[191] "For to confer upon individuals the general right to invoke the jurisdiction of international tribunals whenever they feel themselves aggrieved by a foreign State would be to introduce, in a wide field of international relations, the principle of obligatory arbitral and judicial settlement which States have so far refused to accept…", ibid., p.52-53.

[192] Ibid., p.294.

[193] Ibid., p.374-76.

[194] Ibid., p.376.

[195] My list contains by now: Hersch Lauterpacht, Antônio Augusto Cançado Trindade, Rosalyn Higgins, Taslim Olawale Elias, Humphrey Waldock, Thomas Buergenthal.

[196] "The human being emerges, at last, even in the most adverse conditions, as the ultimate subject of Law, domestic as well as international…As it can be inferred from this historical case of the "Street Children", the international juridical subjectivity of individuals is nowadays an irreversible reality, and the violation of their fundamental rights, which emanate directly from the international legal order,

to guarantee respect for fundamental rights in the international arena.[197] Thus Lauterpacht and Cançado Trindade contradict Elihu Root's assertions, made during the drafting of the PCIJ-statute. Like Lauterpacht, Cançado Trindade regards the positivist doctrine as old fashioned and dogmatic,[198] and maintains that there is nothing in the rules of international law that precludes the legal personality and capacity of individuals.[199] The individual has rights apart from, and independent of, the actions and will of states,[200] and the concept of the individual's

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brings about juridical consequences.", A.A. Cançado Trindade, "The Emancipation of the Individual from his Own State: the Historical Recovery of the Human Person as Subject of the Law of Nations," in *Human rights, democracy and the rule of law: liber amicorum Luzius Wildhaber*, ed. S. Breitenmoser (Zürich etc.: Dike etc., 2007), p.168.

"Ultimately, all Law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights and the respect for his personality. The respect for the individual's personality at the international level is instrumentalized by the international right of individual petition.", ibid., p.167.

[197] "In fact, already in the first decades of the XXth century one recognized the manifest inconveniences of the protection of the individuals by the intermediary of their respective States of nationality, that is, by the exercise of discretionary diplomatic protection, which rendered the "complaining" States at the same time "judges and parties". One started, as a consequence, to overcome such inconveniences, to nourish the idea of the direct access of the individuals to the international jurisdiction, under certain conditions, to vindicate their rights against States, a theme which came to be effectively considered by the Institut de Droit International in its sessions of 1927 and 1929.", ibid., p.159.

[198] "Besides being untenable, that conception appears to be contaminated by an ominous ideological dogmatism, which had as its main consequence the alienation of the individual from the international legal order. It is surprising - if not astonishing - besides regrettable, to see that conception repeated mechanically and ad nauseam by a doctrinal trend, apparently trying to make believe that the intermediary of the State, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more fallacious.", ibid., p.156.

"As the systems of protection of the European and American Conventions were originally conceived, the mechanisms adopted did not provide for the direct representation of individuals in the proceedings before the two international human rights courts created by the two regional conventions, the only tribunals of the kind existing under human rights treaties to date. The resistance that states then manifested to the establishment of a new international jurisdiction for the safeguard of human rights was characteristic of another period and colored by claims of state sovereignty. This resistance manifested itself in states' attempts, through the European and Inter-American Commissions of Human Rights, to prevent the direct access of individuals to the two regional tribunals of human rights.", Cançado Trindade, "The consolidation of the procedural capacity," p.16-17.

[199] "As a result, it is quite clear today that there is nothing intrinsic to international law that impedes or renders it impossible for non-State actors to enjoy international legal personality. No one in good conscience would today dare to deny that individuals effectively possess rights and obligations which emanate directly from international law, with which they find themselves, therefore, in direct contact.", Cançado Trindade, "The Emancipation of the Individual," p.156.

[200] "The multiple international instruments in this field disclose a fundamental unity of conception and purpose, beginning with the assumption that the rights they protect inhere in all human beings, and precede and exist apart from the state and all other forms of political organization.", Cançado Trindade, "The consolidation of the procedural capacity," p.1.

"The denationalization of human rights protection and of the conditions for international action to safeguard human rights thus sensibly enlarged the circle of protected persons. These processes have

submission to the 'will' of the State is entirely unfounded.[201] The right to petition is the most important of all human rights.[202] For Cançado Trindade, however, the right to petition seems either to be almost identical to, or to entail, a right to bring claims in a court of law.

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also rendered it possible for individuals to exercise rights emanating directly from international law (droit des gens), implemented in light of the aforementioned collective guarantee and no longer simply "granted" by the state. The access of individuals to justice at the international level, by means of the exercise of the right of individual petition, has at last given concrete expression to the recognition that the human rights to be protected are inherent in the human person and are not derived from the state. Accordingly, the actions of the state do not, and cannot, exhaust the range of possible action for the protection of these rights.", ibid., p.13-14.

"With the access of individuals to justice at international level, by means of the exercise of the right of individual petition, concrete expression was at last given to the recognition that the human rights to be protected are inherent in the human person and do not derive from the State.", Cançado Trindade, "The procedural capacity of the individual," p.531. "Besides being untenable, that conception appears to be contaminated by an ominous ideological dogmatism, which had as its main consequence the alienation of the individual from the international legal order. It is surprising - if not astonishing - besides regrettable, to see that conception repeated mechanically and ad nauseam by a doctrinal trend, apparently trying to make believe that the intermediary of the State, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more fallacious.", Cançado Trindade, "The Emancipation of the Individual," p.156.

"There is a growing and generalized acknowledgement that human rights, rather than deriving from the State (or from the will of individuals composing the State), all inhere in the human person, in whom they find their ultimate point of convergence. ... The non-observance of human rights entails the international responsibility of States for treatment of the human person"", ibid., p.164.

[201] "But the individual's submission to the "will" of the State was never convincing to all, and it soon became openly challenged by the more lucid doctrine. The idea of absolute State sover-eignty - which led to the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it (or in its name) against human beings - appeared with the passing of time entirely unfounded.", Cançado Trindade, "The Emancipation of the Individual," p.154.

[202]"I saw fit to characterize such international right of individual petition as a fundamental clause (clausula petrea) of the human rights treaties which provide for it, adding that [t]he right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, - allowing myself the metaphor, - that the right of individual petition is undoubtedly the most luminous star in the universe of human rights. Ibid., p.167.

"The right of individual petition, whereby individuals are granted direct access to justice at the international level, is a defining accomplishment of international human rights law. The essence of the international protection of human rights is the opposition of individual complainants to respondent states in cases of alleged violations of the protected rights. It is precisely this mechanism of protection that has effected the historical rescue of the position of the individual, by endowing him with international procedural capacity as the subject of international human rights law.", Cançado Trindade, "The consolidation of the procedural capacity," p.7.

"[W]ithout the right of individual petition, and the consequent access of individuals to justice at international level, the rights enshrined into the regional human rights treaties would be reduced to practically a dead letter. It is by the free and full exercise of the right of individual petition that the rights set forth in those treaties become effective. The right of individual petition provides shelter, in fact, to the last hope of those who did not find justice at national level.", Cançado Trindade, "The procedural capacity of the individual," p.543.

For Lauterpacht the right to petition was very important: "The effective right of petition must be deemed to be an irreducible right of the individual not only in relation to his own nation but also in relation to the United Nations. There is no effective right of petition if the petitioned authority has 'no

Cançado Trindade confirms the ET thesis, remarking on an evolutionary trend in international law toward give individuals procedural capacity,[203] especially subsequent to the 1968 Conference on Human Rights in Teheran.[204] He proved this gradual increase in legal standing in the evolution of the European Court of Human Rights and saw the same process unfolding in the Inter-American Court of Human Rights. Both the human rights commissions and the judges of the courts rebelled against the original restriction imposed by the states and conventions. Gradually the states relented and granted individuals more and more procedural capacity.[205] Of course, he lent his weight to the revolution as both judge and president of the American Court.

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power to take any action' on the subject-matter of the complaint.", Lauterpacht, *International law and human rights*, p.231.

[203] "Each of the procedures that regulates the right of individual petition, under international human rights treaties and instruments, has contributed in its own way to the gradual strengthening of the procedural capacity of the complainant at the international level, despite differences in their legal nature. The Declaration and Programme of Action of Vienna, the main document adopted by the Second World Conference on Human Rights in 1993, expressly recognized the relevance of the right of individual petition. The Declaration and Programme of Action urged the examination or adoption of the right of additional petition as an additional method of protection, by means of optional protocols to the Convention on the Elimination of All Forms of Discrimination against Women and to the Covenant on Economic, Social and Cultural Rights. [FN50] Moreover, the Declaration and Programme of Action recommended that States Parties to human rights treaties accept all the available optional procedures for individual communications and petitions.", Cançado Trindade, "The consolidation of the procedural capacity," p.14.

[204] "The First World Conference on Human Rights (Teheran, 1968) represented, in a way, the gradual transition from the legislative phase–which included the adoption of the early international instruments of human rights, such as the two U.N. Covenants on Human Rights of 1966–to the phase of the implementation of these instruments.", ibid., p.1.

[205] "In the examination of their very first contentious cases, both the European and the Inter-American Courts of Human Rights rebelled against the artificiality of the intermediating function of the respective commissions. From its first decision, in Lawless v. Ireland, the European Court began to receive written arguments of the complainants themselves through the delegates of the European Commission...One decade later, during the proceedings in the Vagrancy cases, the European Court accepted the Commission's request for the Court to give the floor to a lawyer representing the three complainants...The developments that followed are well-known: the reform by the Regulations of 1982 pertaining to cases submitted to the European Court by the Commission or the States Parties, in force since January 1, 1983, granted locus standi to the legal representatives of the individual complainants before the European Court. The landmark Protocol No. 9 to the European Convention was then adopted in 1990. As the Explanatory Report of the Council of Europe on the matter stresses, Protocol No. 9 granted "a form of locus standi" to individuals whose cases have been "referred to the Court." This was undoubtedly an advance, but the protocol did not yet secure for individuals the "equality of arms" with the respondent states or the full benefit of the utilization of the European Convention for the vindication of their rights.", ibid., p.17. See also at pp.18-19 and at pp.21-23

Individuals see international courts as a gift from heaven, a last hope, and without access to international courts, all human rights would be dead letters.[206]

He sees a general emancipation of the individual from the state:[207] "The recognition of the direct access of individuals to international justice reveals, at this beginning of the XXIst century, the new primacy of the raison de l'humanite over the raison d'État, inspiring the historical process of humanization of international law."[208]

3.7 Others no less important

When he was the Nigerian Attorney General, former ICJ president, Taslim Olawale Elias, presented a paper[209] at the 1969 International Conference on Human Rights, at the request of the Preparatory Committee. In the paper, he critiques the existing human rights institutional protection and proposes new types of implementation machinery. He revives the Australian proposal for an ICHR as a necessary continuation of the impressive expansion of the human rights conventions over the previous twenty years, and proposes a new, completely reorganized Commission on Human Rights, modeled after the European one. Besides that, there should be regional Commissions and Courts of Human Rights, adapted to local diverseness, but still consistent with the human rights enumerated in the global covenants. Taking the European Court as an example, he argues that states have nothing to fear with regard to loss of sovereignty.[210]

Judge Buergenthal also envisaged a United Nations human rights court, "initially with advisory jurisdiction only to interpret the six treaties… [it will not] be a court with contentious jurisdiction or a court to which individuals could appeal"[211], but this is only a Trojan horse because "over time [it will] lead to the establishment of a court with contentious jurisdiction modeled on the European or Inter-American Court of Human Rights."[212]

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[206] "In the public hearings before the European and Inter-American Courts of Human Rights, especially in those pertaining to reparations, the victims and their relatives have observed more and more frequently that, had they not had access to an international forum, justice would never have been done in their concrete cases. This point has particularly drawn the attention of these courts.", ibid., p.15. see also Cançado Trindade, "The Emancipation of the Individual," p.167-68.

[207] Cançado Trindade, "The Emancipation of the Individual."

[208] Ibid., p.170.

[209] T.O. Elias, "International Institutions and Machinery of Implementation in the Field of Human Rights," *U.N. Doc A/Conf.32/L.3* (1968).

[210] A slightly more developed version can be found in T.O. Elias and R. Akinjide, *Africa and the development of international law.* Dordrecht etc.: Nijhoff, 1988.

[211] T. Buergenthal, *Implementation, compliance and effectiveness: proceedings of the 91st annual meeting, April 9-12, 1997.* Washington, DC: American Society of International Law, p.483.

[212] Ibid., p.483.

Dame Rosalyn Higgins, a former ICJ president, citing Lord Denning's assertion "that a right which depended for its enforcement upon the consent of another party, was close to being no legal right at all",[213] argues, like Lauterpacht, that "there is nothing *in the nature of international law* which" dictates that individuals should not be parties to the ICJ. "But the very notion of international law is not predicated upon this assumption, and the international legal system survives conceptually even were this to change. Additionally, these assumptions about access to international tribunals and force are in fact changing rapidly, with significant consequences in the delicate balance between the state and the individual."[214]

In 1954, Luis Kutner proposed an international writ for Habeas Corpus and an International Court of Human Rights,[215] to guarantee fair trials. A prisoner could be extradited to this court of the United Nations even as a national of the extraditing state. He would be "entitled to a hearing for the determination of his rights";[216] individuals could appeal to this court themselves,[217] the system would encourage the state to cooperate; and states "could no longer proclaim human rights without fulfilling them in good faith, and they could no longer assert their willingness to cooperate without actually cooperating."[218]

American Supreme Court Justice William J. Brennan argued for a International Court of Habeas Corpus against the dangers of a police state, in order to enforce the guarantees of the Universal Declaration of Human Rights.[219] He denied that such a court would necessitate a superstate,[220] and endorsed Kutner's argument that the court should be realized through a treaty, and that the World Court would be an appellate court from regional courts, still to be created.

In 1965, Supreme Court Justice Arthur J. Goldberg thought that "[t]he time is overdue for the adoption of a binding treaty on human rights to implement the Declaration and for the establishment of an International Court of Human Rights to enforce the rights guaranteed by

[213] Higgins, "Conceptual Thinking," p.15.
[214] Ibid., p.15.
[215] L. Kutner, "A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights," 4 *Tul. L. Rev.* 417 (1954).
[216] Ibid., p.439.
[217] Ibid., p.440.
[218] Ibid., p.440.
[219] W.J.J. Brennan, "International Due Process and the Law Comments," 48 *Va. L. Rev.* 1258 (1962).
[220] Ibid., p.1259.

such a treaty."[221] He fully endorsed the Colombian proposal and believed that the European Court proves that sovereignty is not an obstacle to such a court.[222]

More recently, in 2009, Manfred Nowak gave us eight reasons for an international court of human rights:[223]

1. First, the very idea of rights means a claim against somebody and entails that, if the duty-bearer does not respect her obligation, either the rights-holder can hold the duty-bearer accountable, or the right is meaningless.
2. Final views on communications are nice, but legally binding judgments on complaints are even nicer. The current conventions on human rights have no proper enforcement. Usually, some kind of Commission receives a complaint (euphemistically called a "communication") about human rights abuses. After research, this communication is communicated to the violating state and the state communicates back that everything is OK and that the commission should go back to sleep. The commission might get angry, launching a "final view" which is duly ignored by the violator. Legally binding judgments would therefore be better.
3. For those who have failed to notice, the Cold War is over. It is generally believed that the former divide between East and West made the legal enforcement of human rights difficult. This is not the case anymore.
4. The experience of such regional court of human rights as those of Europe, America and Africa is sufficient to be put to use in respect of a world court.
5. The Human Rights Council is formed by member states, which are politically motivated. A court would be independent, and could therefore conduct better investigations. The Council would not have to carry out fact-finding missions and read myriad reports. Instead, they could just rely on the judgments of the court and assess whether these are being implemented by the violator.
6. The creation of the court might be easier than we think. It "can be achieved smoothly without any treaty amendment and without abolishing the present treaty monitoring bodies"[224] by creating a new treaty similar to the Rome Statue of the International Criminal Court.
7. The new court would be open as regards non-state actors such as NATO, the EU, international organizations and transnational corporations, and would function as a place where they can be sued by individuals, which would work better than the current "voluntary codes of conduct."
8. The court can enforce adequate reparations to the victims.

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[221] Goldberg, "Need for a World Court of Human Rights, The Closing Address," p.621.

[222] Ibid., p.622. See also: "Others object to the signing of the proposed treaty guaranteeing international due process on the ground that this "would tend to undermine the sovereignty and independence of states." The simple answer to this states' rights contention is that there is no sovereign right of any state large or small to deny the fundamental Rights of Man — rights which belong to him because as a child of God he is endowed with human dignity.", ibid., p.621.

[223] Nowak, "Eight Reasons why we need a World Court of Human Rights."

[224] Ibid., p.703.

Ulfstein[225] and Scheinin[226] agree with Nowak that a new court could be created by treaty, and could be accessed directly or as an appellate instance for the decisions of the current treaty bodies and/or the decisions of the regional human rights courts. The advantage of creation by treaty is that states might choose for which treaties they want to be held responsible, and even for which provisions in the treaties. Ulfstein also believes that the court would overcome the present weaknesses of the supervisory system and strengthen the effectiveness of complaints. In contrast with the current supervisory system, the court would be more visible[227], more efficient,[228] of higher quality,[229] and more effective.[230] He sees the need for a screening mechanism, in order to avoid overload. The world court would also give Asia the only chance of a court, since there is no regional Asian court.

Italian Supreme Court Justice Amedeo Postiglione proposed a special international court for the environment, within the United Nations framework,[231] where individuals have access because they have a right of "access to environmental information, the right to participate in administrative and judicial proceedings and the right of access to the courts."[232]

ICC judge Stefan Trechsel proposed an ICHR in 1993,[233] but changed his mind in 2003,[234] when he concluded that "[r]ealistically speaking, the creation of a world court for human rights is, at the present time, neither desirable, nor necessary, nor probable."[235] Nevertheless, he thought the same about the ICC 40 years ago,[236] yet from its bench, he now puts bad East Europeans behind bars. Well, the story has come full circle, because from the very beginning,

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[225] G. Ulfstein, "Do we need a World Court of Human Rights?," in *Law at War: the Law as it was and the Law as it should be: liber amicorum*, eds O. Engdahl, P. Wrange, O. Bring (Leiden etc.: Nijhoff, 2008).

[226] M. Scheinin, "Proposed Optional Protocol to the Covenant on Economic, Social, and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform - without Amending the Existing Treaties, The United Nations and Regional Human Rights Systems: Recent Developments," 6 *Hum. Rts. L. Rev.* 131 (2006).

[227] Ulfstein, "Do we need a World Court of Human Rights?," p.263.

[228] Ibid., p.263.

[229] Ibid., p.264.

[230] Ibid., p.265.

[231] A.V. Lowe and M. Fitzmaurice, *Fifty years of the International Court of Justice: essays in honour of Sir Robert Jennings.* Cambridge; New York: Grotius Publications; Cambridge University Press, 1996, p.303-04.

[232] Ibid., p.303-04. see also: A. Postiglione, "Need For An International Court Of The Environment " http://www.biopolitics.gr/HTML/PUBS/VOL8/html/Postiglione.htm.

[233] S. Trechsel, "International Implementation Of Human Rights In The 21St Century," *KEIO LAW REVIEW* 120-42 (1993).

[234] Trechsel, "A World Court for Human Rights?."

[235] Ibid., p.para 70.

[236] Personal communication, quoted with his permission.

Bentwich, Kaeckenbeeck and the first Australian proposal for a European Court were meant to protect minorities in Eastern Europe.

The "International Congress of Jurists, of judges, lawyers in private and government practice, and teachers of law from 75 countries, […] assembled in December 1962 in Brazil under the aegis of the International Commission of Jurists" produced the "Resolution of Rio", where they called for "[t]he encouragement of the establishment of International Courts of Human Rights on a regional basis."[237]

Other scholars have proposed giving individuals access to international courts, including the ILC,[238] Theodor Meron,[239] Marek Stanislaw Korowicz (together with P.K. Menon),[240]

[237] Resolution of Rio.

[238] "The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights.", J.R. Dugard, *First report on diplomatic protection (U.N.-doc A/CN.4/506).* 2000, p.4.

[239] "A desirable long-range solution would be to establish through a special protocol a U.N. Human Rights Tribunal, which would be empowered ratione materiae to apply not only the International Bill of Human Rights but the entire corpus juris of international human rights adopted under the aegis of the United Nations, or only such enumerated instruments as each state would accept. The (optional) ratione personae jurisdiction of the tribunal would extend to states that become parties to the special protocol. By consistently and rationally applying and interpreting human rights instruments, such a tribunal would greatly reduce the risk of normative conflicts. It would widen the spectrum of norms which would be applicable to specific violations. The U.N. Human Rights Tribunal would have such competence as would be accepted by each state that becomes a party to the protocol establishing it. It could be given authority to give advisory opinions, or to decide on the basis of reciprocity or unconditionally disputes between states pertaining to the interpretation or application of particular human rights instruments, or to entertain complaints from individuals, or various groups, or organizations against states parties, or any-hopefully the greatest combination of such powers. The advance achieved by the new U.N. Convention on the Law of the Sea in establishing tribunals and fostering the concept of third-party settlement should create an auspicious climate for attempts to promote such concepts also in the field of human rights. States that would accede to the new protocol would be states that are dedicated to the promotion of human rights. Members of the tribunal, elected from among nationals of such states would be individuals having the highest qualifications. An objective and apolitical tribunal would inspire broader confidence and encourage wider accessions.", T. Meron, "Human Rights-Effective Remedies: Remarks," 77 *Am. Soc'y Int'l L. Proc.* 397-404 (1983): p.403.

[240] "There are many practical and moral reasons for recognizing the right of an individual to the direct assertion before international bodies of his claim against a foreign state.", M.S. Korowicz, "Problem of the International Personality of Individuals, The," 50 *Am. J. Int'l L.* 533 (1956): p.562. Actually this quote was plagiated by Menon P.K. Menon, "International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine, The," 1 *J. Transnat'l L. & Pol'y* 151 (1992): p.182. He uses it also here: P.K. Menon, "States, International Organizations and Individuals as Subjects of International Law," 20 *Korean J. Comp. L.* 97 (1992): p.161.

Kamleshwar Das,[241] Fernando Tesón,[242] J. W. Bruegl,[243] John Whitfield,[244] Clarence Clyde Ferguson,[245] L. S. Schapiro,[246] René Bruet,[247] Alfred de Zayas,[248] Willard B. Cowles,[249] Francisco Orrego Vicuña,[250] Paul Gormley,[251] Quincy Wright,[252] Jann Kleffner,[253] Carl Q. Christol,[254] and Edgar Turlington.[255] Of a certainty, Ian Brownlie would not reject it.[256]

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[241] "Therefore, there appears to be no barrier to include in it alternative provisions, including those for an International Court of Human Rights. This is desirable also because it is difficult to envisage easy passage of suitable alterations to the Statute of the Inter-national Court of Justice.", Das, "Some reflections on implementing human rights," p.141.

[242] "I would also advocate the creation of a Universal Court of Human Rights, one analogous to the European Court of Human Rights, but with global jurisdiction. One of the problems of the International Court of Justice is that only states can be parties. That is fine, we can keep that. But I think we ought to have an International Court of Human Rights where individuals (those excluded voices), not governments, can sue their governments for human rights violations. In my opinion, these reforms are obvious; they are also not likely to happen any time soon.", F.R. Tesón, "The Project of Reconfiguration: How Can International Law Be Reconstituted: Remarks," 94 *Am. Soc'y Int'l L. Proc.* 78-79 (2000): p.79.

[243] "It is hardly surprising that these well-thought-out proposals were not taken as the basis for the future work of the Commission in this field. The present Australian Government made it known that it does not uphold its predecessor's ideas in this matter. There is, however, no doubt that it will be necessary to revert to them, if it is seriously desired to tackle the question of creating an international authority, competent to deal with petitions.", J.W. Bruegl, "Right to Petition an International Authority, The," 2 *Int'l & Comp. L.Q.* 542 (1953): p.558.

[244] "At a time when human rights violations are increasing throughout the world, the need for an "International Court of Human Rights" is of paramount importance.", J.H. Whitfield, "How the Working Organs of the European Convention Have Elevated the Individual to the Level of Subject of International Law," 12 *ILSA J. Int'l L.* 27 (1988): p.46.

[245] C.C.J. Ferguson, "United Nations Human Rights Covenants: Problems of Ratification and Implementation, The Panel: The United Nations Human Rights Covenants: Problems of Ratification and Implementation," 62 *Am. Soc'y Int'l L. Proc.* 83-96 (1968).

[246] "Nonetheless, the agreement to set up this [European] Court marks an important advance in the development of international law. In spite of the fears and hesitations of the states which have taken the first steps towards its ultimate creation, it may yet prove an important influence and model for the protection of fundamental rights and liberties.", Schapiro, "European Court of Human Rights, The Note," p.79.

[247] R. Brunet, *La garantie internationale des droits de l'homme d'après la Charte de San Francisco.* Genève: Grasset, 1947.

[248] "It is only a matter of time until the international community accepts not only the notion but also the necessity of an International Court of Human Rights, which could be modelled after the International Court of Justice at the Hague.", A. de Zayas, "International Court of Human Rights, An Part Two: Papers and Reports from the Eighth and Ninth Nordic Seminars on Human Rights: IV: Background Papers for the Seminars," 61-62 *Nordic J. Int'l L.* 267 (1992): p.267.

[249] He has a similar proposal to Murdock. W.B. Cowles, "Review of the United Nations Charter and the Adjudication of International Claims," 48 *Am. J. Int'l. L.* 460-64 (1954).

[250] "The key point, however, is whether the individual might have full access to the Court to bring a case. Rosalyn Higgins has convincingly explained that there are powerful reasons for amending the Statute to allow for this development. Access to the Court by international organizations could also be considered, for given aspects within their mandates. The same writer has also warned that a number of procedural safeguards would need to be introduced together with this step in order to avoid misconceived or frivolous claims, in particular a screening service similar to the function that the

Having thus traced the evolution of International Law (IL), by which individuals have been given an ever-increasing procedural status against states, and having outlined some of proposals and arguments put forward by distinguished scholars in favour of giving individuals international legal standing against their own and foreign states by creating international courts of human rights (ICHRs), I will now move on to outlining a proposal for a system under which the concept might be turned into reality.

European Commission of Human Rights had in respect of the Strasbourg Court. A Special Committee of Jurists has also been proposed to work in conjunction with the ICJ to this end and also to screen requests for advisory opinions.", F. Orrego Vicuña, "Individuals and non-state entities before international courts and tribunals," 5 *Max Planck Yearbook of United Nations Law* 53-66. (2001): p.57.

[251] Gormley, *The procedural status*.

[252] Agrees with Luis Kutner's Habeas Corpus court. Q. Wright, "Human Rights and Charter Revision," 296 *Annals of the American Academy of Political and Social Science* 46-55 (1954).

[253] "It is submitted that one such means would be to provide individuals with the possibility to submit complaints to an international judicial or quasi-judicial mechanism, which could determine their claims to be victims of violations of IHL committed by parties to an armed conflict.", J.K. Kleffner, "Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure," 15 *Leiden journal of international law* 237-50 (14) (2002): p.238.

[254] "Since man in the ultimate sense is the primary subject of law, why should he not be recognized as a subject of world law and as such entitled to individual remedies in such a legal order? In short, why should not man be permitted to advance his own world claims under remedial procedures made available to him under world law?", Christol, "Remedies for Individuals under World Law," p.67-68.

[255] He proposed international courts in every state. "Since man in the ultimate sense is the primary subject of law, why should he not be recognized as a subject of world law and as such entitled to individual remedies in such a legal order? In short, why should not man be permitted to advance his own world claims under remedial procedures made available to him under world law? ", ibid., p.67-68.

[256] "Even if the individual is not to be given procedural capacity a tribunal interested in doing justice effectively must have proper access to the views of individuals whose interests are directly affected whether or not they are parties as a matter of procedure.", Brownlie, "The Individual before Tribunals Exercising International Jurisdiction," p.719. and "The need to find solutions is the more urgent in the case of persons who cannot claim the diplomatic protection of any government.", ibid., p.720.

4. A Proposal for International Courts

4.1 Introduction

Originally, individuals were not subjects of IL and their rights were guaranteed by states through diplomatic protection;[257] however, this was only a solution for a world where individuals had no other forms of redress.[258] Diplomatic protection alone simply fails to suffice. In many cases, states are reluctant to defend individual rights, the matter of Al-Adsani referred to in the introduction of this paper being a case in point.[259] Other individuals, such as, for instance the Palestinians, or the Iraqis being tortured in Abu Ghraib, are either stateless or living under military occupation. Less democratic regimes cut easy deals with foreign powers. For instance, Pakistan, Somalia and Yemen turn a blind eye to the extrajudicial killings by drone carried out by the US. Individuals are abducted and imprisoned at Guantanamo for lengthy periods without having been indicted by any court, and are not released, even if local courts demand it.

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[257] "In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments. This has been recognized by the International Court of Justice in the La Grand and Avena cases. This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights. The individual has rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad.", ILC Draft Articles on Diplomatic Protection with commentaries, A/61/10, 2006, p.25-26 Para. 4.

[258] Permanent Court of Arbitration 17 December 1999. *Eritrea-Yemen, Award of the Arbitral Tribunal in the Second Stage - Maritime Delimitation*. para. 101: "There is no reason to import into the Red Sea the western legal fiction – which is in any event losing its importance – whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State. That legal fiction served the purpose of allowing diplomatic representation (where the representing State so chose) in a world in which individuals had no opportunities to advance their own rights. It was never meant to be the case however that, were a right to be held by an individual, neither the individual nor his State should have access to international redress."

[259] See also infra note 343 and in UKHL 26 *Jones v. Saudi Arabia*,(2006). The House of Lords decided for the immunity of the Saudi officials and state in a case where four British citizens, Ron Jones, Alexander Mitchell, Dr William Sampson and Leslie Walker, were falsely accused of terrorist activities in Saudi Arabia. Allegedly, they were repeatedly tortured. In secret trials, Mitchell and Sampson were sentenced to death by partial beheading and Walker to 18 years in prison. After almost three years, two-and-a-half of which were spent in solitary confinement, public pressure brought about their release. The UK government intervened in favor of Saudi Arabia.

There is no reason to give states the last word; it is a fundamental principle of law that no one should be judge in her own case,[260] and individuals should be able to disprove the legal arguments of states in international courts. Other individuals believe that dictators who hold sway over them are only able to stay in power with outside help. The individuals in states recently liberated from tyrannies, such as the Eastern European countries, could have been given assistance before their states became civilized.[261] The ever-increasing tens of thousands of pending cases before the ECHR prove that individuals feel the need for such courts. Nowadays, it is difficult to deny either that individuals are subjects of IL[262] or that they have

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[260] "It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Briand-Kellogg Pact, whether preventive action was a necessity, and that in making her decision final judgment was conclusive. But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.", "Judgment of the International Military Tribunal," http://avalon.law.yale.edu/subject_menus/judcont.asp.
"On the one hand jurists from weaker countries legitimately recoiled from the perceived threat of force under the fig-leaf of the law of nations. Unable to affect the realities of power, they attacked the fig-leaf. On the other hand, jurists fervently seeking the propagation of the rule of law found it inconceivable that any serious scholar would insist that a state, as a subject of international law, could be the judge of the legality of its own conduct.", Paulsson, *Denial of justice in international law*, p.24-25.

[261] Nollkaemper writes about the ECHR: "Wellicht nog belangrijker is de invloed die het Hof in meer indirecte zin heeft geleverd aan de versterking van de rechtsstaat in de verdragspartijen. In de laatste jaren geldt dat vooral voor de nieuwe lidstaten, zoals Rusland en andere staten uit het voormalig Oostblok. Maar ook voor de lidstaten van het eerste uur, zoals Nederland, blijft het Hof een zeer belangrijke functie houden bij de bescherming van de rechtsstaat'", A. Nollkaemper, *Kern van het internationaal publiekrecht.* Boom juridische studieboeken Den Haag: Boom Juridische uitgevers, 2007, p.434.

[262] "Like various other tenets of the positivist creed, the doctrine that only States are subjects of international law is unable to stand the test of actual practice.", Lauterpacht, *International law and human rights*, p.9.
"A state violates international law if, as a matter of state policy, it practices, encourages or condones
(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.", American Law Institute., *Restatement of the law, the foreign relations law of the United States.* St. Paul, Minn.: American Law Institute Publishers, 1987, p.§ 702.
"Against this background, once-axiomatic declarations to the effect that only states may be subjects of international law fall on modern ears like an echo of an incomprehensible ancient dogma.", Paulsson, *Denial of justice in international law*, p.55.
"The fact that the Charter of the United Nations has gone a long way towards recognising the status of the individual as a subject of international law cannot be altogether without influence upon his procedural capacity. Such hopes will not be in vain if the United Nations and its organs adhere to the

rights in IL against their own and foreign states.[263] The rights they have are best protected if independent courts establish what constitutes a violation and decide on the course of action that should be taken.[264]

In the previous chapters, we have seen the development in International Law (IL) which has given individuals an increasing procedural status against states. Nevertheless, the procedural rights and remedies available to individuals are limited, at best. In this chapter, I shall put forward a proposal for a system of International Courts giving individuals legal standing against any state in the world, their own, or foreign.

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spirit of the Charter with regard to the promotion of respect for and observance of human rights and fundamental freedoms.", Lauterpacht, *International law and human rights*, p.241.
"In the 9th edition of Oppenheim one finds the following succinct footnote: 'The question whether there could be any subjects of international law other than states was at one time a matter of strenuous debate. In the first three editions of this work the view was expressed that states only and exclusively are the subjects of international law. It is now generally accepted that there are subjects other than states, and practice amply proves this. One of the most important pioneers in getting this ''modern'' view accepted was Sir Hersch Lauterpacht, the editor of the 8th ed of this vol' (Oppenheim, vol. I, at p. 16, note 1)", Paulsson, *Denial of justice in international law*, p.54.
Christol, "Remedies for Individuals under World Law," p.85.
G. Manner, "Object Theory of the Individual in International Law, The," 46 *Am. J. Int'l L.* 428 (1952).
Menon, "International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine, The."
Cassidy, "Emergence of the Individual."
C. Ochoa, "The Individual and Customary International Law Formation," 48 *Va. J. Int'l L.* 119 (2007).

[263] "The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments…", ILC Draft Articles on Diplomatic Protection with commentaries, A/61/10, 2006, p.25-26 Para. 4.
"International law today recognizes that individuals and other subjects are directly entitled to international rights ... the alien is internationally recognized as a legal person independent of his State; he is a true subject of international rights.", U.N.-doc. A/CN.4/96; International Law Commission, "International Responsibility," Report by F. V. Garcia-Amador, Special Rapporteur. para. 97 and 111
"There is a growing and generalized acknowledgement that human rights, rather than deriving from the State (or from the will of individuals composing the State), all inhere in the human person, in whom they find their ultimate point of convergence. ... The non-observance of human rights entails the international responsibility of States for treatment of the human person", Cançado Trindade, "The Emancipation of the Individual," p.164.
[264] "The most important single factor in guaranteeing the effective protection of human rights - including economic and property interests -is that private individuals and groups be capable of maintaining a judicial action against any sovereign State causing them injury. Thus, individuals must possess the necessary *locus standi* at both the regional and international levels. A private individual must be able to prosecute an action before an international tribunal - in his own name - against an offending Government, particularly his own", Gormley, *The procedural status*, p.V.

The system is formed on the basis of a three-tier organization. There would be *Local Supranational Courts* in every state. Appeals from those courts would be fought at *Regional Supranational Courts* and the *International Court of Justice* would function as a 'Supreme' Court.

Why do I call them 'supranational' and not 'international'? The term 'international' suggests that they are between nations, and that would somehow contradict our purpose of making individuals parties before those courts.

I would describe these courts as being both specialized and independent of their host states, and would set out the ensuing advantages, along with a description of the jurisdiction and organization for each kind of court. I would also address the unlawful use of armed force as a possible violation of individual rights, and I would answer several pressing questions concerning local remedies, sovereign immunity, the criminalization of the state, and legal interest. Finally, I would address the possible enforcement of the decisions.

4.2 Local Supranational Courts

Local Supranational Courts[265], which I would refer to as '(the) Local Courts' from now on, would be Courts seated in each state, known as the 'host state' in this context.

In describing the Local Courts, I shall cover the following matters:

- The Local Courts are host-state independent;
- They are specialized in IL;
- The proceedings take place between individuals and any state, their own, or a foreign one. The individuals may be from any state, from the host state, foreign (failed) states or non-self-governing territories;
- Group claims;
- The jurisdiction is IL related to the rights of individuals and the duties of states towards individuals; human rights, humanitarian law, contract law, tort, self-defence are what are encompassed here;
- The administrative organization of a Local Court;
- Local remedies;
- Criminal punishment of the state;
- The law of state immunity;

[265] A similar proposal was made by Sohn: "The foregoing survey shows that there are several methods of approach to a system of international tribunals. The following principal areas require further exploration: (a) National Claims Tribunals. It might be possible to establish in each State a special claims tribunal for foreigners having claims against the State. Such tribunals would be different from ordinary courts of claims mostly in two respects: they would be composed of persons trained in international law and they would be bound to apply general international law rather than international law as interpreted by a particular State. It is conceivable that some States might be willing to go even further and appoint to such tribunals foreign international lawyers to ensure that the tribunals not only are impartial but also clearly appear to be impartial.", Sohn, "Proposals," p.75.

- Universal jurisdiction.

4.2.1 The neutrality of the Local Courts

The Local Courts are independent of the host state. Their premises are neutral and inviolable in the same way as the perimeters of UN diplomatic missions.[266] The status of the Courts might well become an integral part of the UN charter. The UN and the host state would sign a treaty covering the hosting of the Court, just as treaties have been signed in respect of the UN premises in New York and Geneva. Although the host states would bear the administrative costs, they shall not interfere with the process. The courts are independent of national laws and jurisdiction.

Why these Local Courts and not simply local municipal courts with universal jurisdiction? Because their neutrality would make them more impartial and unbiased, despite the fact that the majority of the judges might well be nationals of the host state.[267] This neutrality would mean that the decisions would be more acceptable to both the defendant state and public opinion within that state.[268] States might be more willing to accept complains from individuals if the courts are not connected with other states.[269]

Municipal courts are prone to the influences of politics,[270] and subject to national legislation which may conflict with international norms. In some countries, the prevalent 'political

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[266] See Article 105 UN Charter, Convention on the Privileges and Immunities of the United Nations, 1946

[267] See 2.9 for the organizational structures

[268] Lauterpacht has mentioned the advantages of compulsory jurisdiction of an International Court of Human Rights, but those advantages will also be the case for our argument: "In all these cases the provision of a remedy by way of the automatic jurisdiction of the Court would promote justice and divest the foreign State of the character—some will say, of the stigma—of an arbitrary instrumentality of power. Moreover, it would remove a source of international friction inasmuch as it would direct private claims into the normal channels of the ordinary judicial process. At present the espousal of a claim by the State tends to impart to the complaint the complexion of political controversy and unfriendly action.", Lauterpacht, *International law and human rights*, p.52.

[269] "It is remarkable, in this context, that twice as many states have accepted the right of individual petition under the Optional Protocol to the International Covenant on Civil and Political Rights as have accepted the right of inter-state complaint under Article 41. Contrary to conventional wisdom, states are apparently more inclined to admit complaints from individuals than from other states.", M.T. Kamminga, *Inter-state accountability for violations of human rights.* Pennsylvania studies in human rights Philadelphia: University of Pennsylvania Press, 1992, p.145.

[270] Brennan et all used statistical information on judge voting to confirm their hypothesis that, during periods of economic recession, judges either punish the government, or rally behind it, depending on the perceived governmental responsibility. During crises conceived as beyond the government's control, such as during a time of war, or the depression in the 1930s, judges display 'team spirit' and are more likely to vote for the government when it appears in court as a litigant. Conversely, judges 'punish' the government when the economic crisis is perceived as having occurred as a result of a

doctrine' forbids the courts to decide on questions of foreign policy, government decisions and military operations.[271] Municipal law gives foreign states Sovereign Immunity.[272] When citizens of state A sue A in the courts of state B, this might have a negative influence on the inter-state relationship.[273] *As international courts, the Local Courts would be free from those disadvantageous constraints.*

When one state commits a wrongful act towards another state or its citizens and the latter state holds the former responsible, the former might disagree and the whole affair might thus become the seed of a greater conflict. That conflict may be further aggravated if the responsible state is then 'judged' by a court in the claimant state.[274] Critics of the ATCA[275] have advanced this argument regarding the bad influence on foreign relations.[276] Making the courts independent of the host state would prevent the litigation's being perceived as related to the foreign policy of the host state. There are two reasons for this. First, they are not seen as being the court of the other party. Second, the claim against the foreign state is brought by an individual and thus does not represent a conflict between the states. Despite the procedure's having been brought before the court, relations between the states may be as bad as before, but they would not be changed for the worse as a result of the claim.

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government's failures. T. Brennan, L. Epstein, and N. Staudt, "Economic Trends and Judicial Outcomes: A Macrotheory of the Court," 58 Duke L.J. 1191-230 (40) (2009).

[271] For instance, in the U.S. "the judiciary is constitutionally barred from interference in foreign affairs, a result of the constitutional assignment of such issues to the executive branch.", B. Stephens, "Individuals enforcing international law: the comparative and historical context," 52 DePaul L. Rev. 433-72. (2002): p.463.

[272] See, for instance, The Foreign Sovereign Immunities Act (FSIA) of 1976 in the US and, in the United Kingdom, the State Immunity Act of 1978

[273] "Modern human rights litigation has been criticized as permitting individuals to draw the U.S. government into controversies that are none of its business, forcing the exercise of jurisdiction over events or people that have no connection to the United States.", Stephens, "Individuals enforcing international law: the comparative and historical context," p.468.

[274] It would also circumvent the problem of sovereign immunity. See 0

[275] Alien Tort Claims Act (28 U.S.C. § 1350): "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

[276] "The most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives. The plaintiffs and their representatives decide whom to sue, when to sue, and which claims to bring. These actors, however, have neither the expertise nor the constitutional authority to determine US foreign policy. Nor, unlike our elected officials, will these actors have the incentive to weigh the benefits of this litigation against its foreign relations costs. There is simply no reason to expect that, in pursuing their specific litigation goals, the plaintiffs and their lawyers will take into account broader issues relating to the US national interest. Furthermore, these individuals lack the accountability of elected officials for making bad foreign relations decisions.", C.A. Bradley, "The Costs Of International Human Rights Litigation," 2 *Chi. J. Int'l L.* 457 (2001): p. 460.

4.2.2 Specialization

The courts would be specialized in IL, which could, alternatively, be named supranational law. In general, they would be specialized because it is assumed that specialized courts are better.[277] In particular, because municipal courts called upon to apply and interpret IL are known to make a mess of it.[278] It would be cumbersome and expensive to educate every judge to the requisite high level of expertise in IL and, perhaps, too great a demand to impose upon developing countries. The judges would need to be thoroughly familiar with both the ever-increasing number of municipal laws and the rapidly expanding rules of IL. They would have to keep up to date in both systems and follow current developments in respect of them both. Besides this, some judges might be more naturally inclined toward national law, while others have a greater interest in IL.

Of course, there could also be advantages to national courts applying international norms. The judges would be more aware of the international norms; a judge sentencing an individual today through the application of national law would know that she may well have to free that same individual tomorrow, when the individual appeals on rules of IL.

For all these reasons, the courts should therefore be specialized.

4.2.3 Individuals vs. States

The Local Courts would admit individuals as parties in a process; this is, indeed, the whole point of creating those Courts. The proceedings would be started by individuals, or through agreement between individuals and states. States, however, would not have the right to start a suit against individuals, since they can do that in their own national courts.

Individuals would be able to start procedures against their own state, or against foreign states. The individuals can be from the host, or from a foreign (failed), state, occupied territories or

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[277] "Scholars, pundits, and politicians periodically call for greater specialization among judges, typically motivated by concerns that generalist judges simply cannot master the many complex areas of law and fact involved in modern litigation.", C. Guthrie, J.J. Rachlinski, and A.J. Wistrich, "The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice," 58 *Duke law journal* 1477-530 (54) (2009): p.1479., but Guthrie and his colleague discovered no empirical evidence for a difference in cognitive bias between specialized and generalist judges.

[278] "It is already obvious that some federal judges have either been misled concerning the primacy of international law or have no understanding of relevant long-standing Supreme Court case law. Unfortunately, this may not be so unusual because most lawyers and judges in the United States have never taken a course in international law…", J.J. Paust, "Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward," 18 *Tulane Journal of International & Comparative Law* (2010).

other non-self-governing territories. Persecuted individuals would have the possibility of fighting for their rights from safe places and at a distance. Moloch states would thus think twice before invading places which, formerly defenseless, would now be defended by justice.

4.2.4 Group claims and exceptions

Individuals would be able to bring group claims against states. They would not be able to sue states if a just group settlement is in place concerning the violation in question. Of course, some states may well establish very bad settlement agreements; dictatorships do sell their own people to the highest bidder. The Local Courts would scrutinize these agreements and would be able to decide to admit a case if the extant agreements are unjust.

Moreover, it has been argued that the very fact of litigation puts the intergovernmental settlement agreements on the agenda on the first place.[279]

However, the remedies and reparations awarded should not be a burden out of all proportion.[280] Reparations and restitutions should also be materially possible and reasonable.[281]

4.2.5 The jurisdiction of the Local Courts

The jurisdiction of the Courts would be compulsory. The individual starting a procedure must prove that she has a direct legal interest. In bringing a claim against a State, the individual so doing must prove that her/his interests are at stake in the legal proceedings that she/he wishes to start.

The applicability of human rights treaties is sometimes treated in the light of the question as to whether the state has jurisdiction or effective control over a territory. However, this gives rise to two problems, as follows:

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[279] A.-M. Slaughter and D. Bosco, "Plaintiff's Diplomacy," 79 *Foreign Aff.* 102 (15) (2000).

[280] See Annex 1, Article 35

[281] Article 35 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, 2001.

Hugo Princz, a Holocaust victim, sued Germany under FSIA for 20 million dollars. If all the next of kin of the 60 million dead during the WWII were to have been awarded 20 million dollar, the Germans would have lived in slavery for many generations. C. Tomuschat, "Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law," in *State responsibility and the individual: reparation in instances of grave violations of human rights*, eds A. Randelzhofer, C. Tomuschat (The Hague etc.: Nijhoff, 1999).

- First, the meaning of the term 'effective control' has not yet been determined. It might be 30 years, as in the cases of the Turkish occupation of Northern Cyprus[282] or the Palestinian occupied territory, or it could be brief, as with the Russian occupation of Moldova;[283]

- Second, it is almost certain that some human rights violations occur outside the effective control of a state, or within the jurisdiction or control of another state. For instance, in the Al-Skeini case,[284] the House of Lords found that the British troops did not have effective control over the area where the killings occurred. In the Bankovic case,[285] the ECHR found that NATO air domination of a territory did not amount to effective control. Even more problematic would be to find a Court willing to take on the case of targeted U.S. killings in Pakistan, Somalia, Yemen and elsewhere.[286] There is no good reason why states should escape responsibility for acts outside their jurisdiction.[287] It would be absurd to claim that a state cannot kill me on its territory, but can legally kill me as soon as I swim into international waters. The Local Courts would therefore have jurisdiction over the acts of every state.

The case of Titiana Loizidou is precisely what I have in mind as a model for the international courts. Loizidou was forced to leave her home during the Turkish occupation of Northern Cyprus. After 24 years, the ECHR decided in her favor and the Turkish government evacuated her house, making it available to her again and paying her more than one million dollars in compensation.[288] This should become the model, on a global scale, for all individual victims of states. Nevertheless, the Turkish government claimed that it had reached an

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[282] EHCR 18 December 1996. *Loizidou v. Turkey*.

[283] EHCR 8 July 2004. *Ilaşcu and Others v. Moldova and Russia*.. Ilie Ilaşcu was released from prison after he sued Russia and Moldova and the Court found that being threatened with execution amounted to torture. He, and others, were awarded more than €400,000

[284] UKHL 26 13 June 2007. *Al-Skeini and Others v the Secretary of State for Defence*. The House of Lords decided that British troops did not have effective control over the Basra and thus the state had no obligation under European Convention for Human Rights and the UK's Human Rights Act 1998 to conduct an investigation into the death of five Iraqi civilians in Basra in 2003.

[285] EHCR 12 December 2001. *Bankovic and Others v. Belgium and 16 Other Contracting States*.

[286] F. Patel, "The Writ Stops Here: No Habeas for Prisoners Held by U.S. Forces in Afghanistan," 14 *ASIL Insight* (2010). L.C. Percival, "Article I Torture Courts: Can Administrative Law Serve as a Constitutional Means of Compensation and Deterrence?," *SSRN eLibrary* (2010).

[287] "With due respect, while the legal arguments [in *Bankovic*] may look convincing, it is hard to understand why a State should be able to kill people abroad by dropping bombs and then escape responsibility for the violation of the most valuable human right—the right to life—under the pretence that it did not exercise jurisdiction.", Trechsel, "A World Court for Human Rights?," p.para 38.

[288] BBC-News, "Turkey compensates Cyprus refugee," http://news.bbc.co.uk/2/hi/europe/3257880.stm.

agreement with the Council of Europe that this case would not be a precedent for more than 600 other similar cases pending before the Court.[289] There is no reason whatsoever why Turkey should be exempted from these other cases, since the prospect of paying out 600 million in compensation and being required to return appropriated property to so many individuals would make states think twice before they invade other countries. The Court was not very impressed by the deal between Turkey and EU, and started awarding other Cypriot victims large sums of money.[290]

Another departure from the traditional doctrine is also found in the fact that the proposed Local Courts have compulsory jurisdiction, while most International Courts depend on the consent of the State.[291]

Under the system I am proposing, the International Courts would apply the following law:[292]

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[289] Ibid.

[290] For instance, the court awarded €885,000 in 2006 in the case *Demades v. Turkey* and, in 2008

[291] See Lotus case, PCIJ, Series A, No. 10, p. 18: "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 independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

"The international legal order is a prime example of a simple form of social structure which consists only of the primary rules, because of its lack of a centralised legislature, network of recognised courts with compulsory jurisdiction and organised means of enforcement.", M.N. Shaw, *International law*. Cambridge, UK; New York: Cambridge University Press, 2008, p.52.

[292] "After the creation of the Permanent Court of Arbitration, to which only disputes between States could be submitted, the emphasis shifted to the establishment of a separate tribunal for dealing with disputes between States and individuals. For instance, Hans Wehberg proposed in 1911 that an international tribunal for private matters be empowered to deal with:" 1. Private claims against debtor States and claims by creditor States against private persons. "2. Disputes relating to questions of private international law (on appeal from national courts). "3. Private claims based on international treaties establishing uniform laws (on appeal from national courts). "4. Private claims based on an allegation that a decision of a national court constituted a violation of international law."", Sohn, "Proposals," p.66.

"The issue of international jurisdiction over private claims was brought to the fore after the First World War in connection with the drafting of the Statute of the Permanent Court of International Justice in 1920. Among the drafts presented to the Advisory Committee of Jurists, the draft of the Inter-Parliamentary Union granted to the Court jurisdiction with regard to conflicts between private persons relating to the interpretation of conventions concerning industrial and literary property, commercial law, maritime law and private international law, and with regard to "conflicts between private persons and foreign States (public works, concessions, etc.)." The proposals by the German Government envisaged that the Court shall not only deal with disputes between States but also with: "(a) Complaints of private persons against foreign States and heads of States, when the State tribunals have declared their incompetency. " (b) Disputes between subjects of different States which are Members of the League of Nations, so far as the interpretation of State treaties forms the object of the dispute."

i. Articles on Responsibility of States for Internationally Wrongful Acts Towards Individuals;[293]
ii. Treaties with provisions creating individual rights;
iii. Custom, either state or individual;
iv. General principles of law, judicial decisions and more;
v. Tort cases and *erga omnes* obligations;
vi. Contracts.

These points are elaborated below.

i. Articles on Responsibility of States for Internationally Wrongful Acts Towards Individuals

I have proposed a collection of basic articles,[294] which I would refer to as '(the) Articles' from now on. They concern the duties of states towards all individuals, the rights of individuals, independent of the will of the states,[295] in contrast with other views,[296] and the consequences of violating those rights.[297]

Similarly, the draft prepared by an official Dutch Committee provided that the Court shall have power to try "judicial disputes, either between States or between a State and a citizen of another State, or between citizens of different States, which are brought before it by virtue of a treaty or a special agreement, either between States or between a State and a citizen of another State."
In the Advisory Committee, M. Albert Geouffre de Lapradelle considered that the Court should be open to individuals in case of conflicts caused by double nationality and in cases of denial of justice where the dispute was based on economic relations between a State and an individual, "provided the case was not of a political nature." He was supported, however, only by M. Loder; the Court remained limited to inter-State disputes.", ibid., p.67-68.

[293] See Annex 1

[294] See Annex 1

[295] Some authors claim that individuals have rights simply on the basis of the fact that they are human, independently from states' recognition of those rights: "Moreover, a State, in becoming party to the Convention, does not give away any of its rights to its subjects. It does not burden itself with any new liability. It merely confirms its subjects in the enjoyment of those rights which are theirs by virtue of their humanity. Human rights are never a gift from the State and hence the State, in recognizing them, is not imposing any burden upon itself. We have long passed the historical stage when a sovereign, granting to his subjects what we would today call a human right, could claim their gratitude for surrendering to them what was then considered to be a part of his absolute and undoubted right as sovereign. Human rights treaties are no more than a formal recognition by the sovereign of rights which already belong to each of the sovereign's subjects. Far from being largesse extended to them by their sovereign, they represent the entitlement to which they are born.", Judge Weeramantry, Separate Opinion in *Bosnia and Herzegovina v Yugoslavia*, I.C.J Reports, 1996 (II), p.595 para. 640
"The access of individuals to justice at the international level, by means of the exercise of the right of individual petition, has at last given concrete expression to the recognition that the human rights to be protected are inherent in the human person and are not derived from the state. Accordingly, the actions of the state do not, and cannot, exhaust the range of possible action for the protection of these rights.", Cançado Trindade, "The consolidation of the procedural capacity," p.13-14.
Judge Koijmans comments: "It is often said that the individual as bearer of rights under international law, has a (restricted) legal personality, but that this personality is derivative. He or she has this personality because his or her State has consented to grant him or her this personality, e.g. by ratifying a human rights convention. His legal personality is dependent upon State consent. On the other hand

In the Articles, I have defined the general rules of the state's responsibility towards individuals. These were forged by drawing upon four sources and melding what I extracted anew:

- the ILC Articles on Responsibility of States for Internationally Wrongful Acts;
- Basic Principles And Guidelines On The Right To Reparation For Victims Of Gross Violations Of Human Rights And Humanitarian Law, E/CN.4/Sub.2/1996/17[298];
- the International Covenant on Civil and Political Rights (ICCPR);
- my own insights.

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there is general agreement that a number of human rights issues are linked to the obligations erga omnes: the prohibition of genocide, of slavery, of racial discrimination etc. and that such obligations exist independently of State consent. That raises the question: if a State, each State, is the bearer of the obligation not to perpetrate massive human rights violations, who is the bearer of the corresponding right? From a procedural point of view it can be said that all other States are entitled to compliance with that obligation and therefore qualify as injured States in the sense of the ILC draft articles on State responsibility if that obligation is breached. But is there also a corresponding right of those in whose interest that prohibition is given: the individual? That would mean that there is a differentiated concept of the bearer of rights: from the procedural point of view all other States, from a substantive point of view the individual... Since we have seen that erga omnes obligations exist independently of State consent, the corresponding rights exist also independently of State consent. That means that the bearer of these rights, the individual, has an international legal status that cannot be dependent upon state consent either. The individual's status in international law, therefore, would not be derivative but original.", Randelzhofer, "The legal position of the individual under present international law," p.247. "The progressive development of international human rights law has endowed every person with the abstract capacity to invoke international, customary law, and treaty law against a state, include the national state, which is responsible for an abusive exercise of its governmental powers.", F. Francioni, *Access to justice as a human right.* The collected courses of the Academy of European law New York: Oxford University Press, 2007, p.6.

[296] See the *Mavrommatis Palestine Concessions* case: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, its right to ensure, in the person of its subjects, respect for the rules of international law", PCIJ, Series A, No. 2, 1924, p. 12.

"Although international law is now moving to a stage whereby individuals may acquire 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 available under international law, and nationality is the key", Shaw, *International law*, p.809.

[297] Judge Trechsel would include more: "At any rate, nowadays it would hardly be acceptable to limit the notion of human rights to the civil and political rights of the Second Covenant. There is no reason to exclude totally and from the outset the economic, social and cultural rights of the First Covenant. Furthermore, in my view, racial discrimination, religious discrimination, discrimination against women, the rights of the child, the prohibition of torture, etc., should all be included in the special instrument.", Trechsel, "A World Court for Human Rights?," p.par 41.

[298] Basic Principles And Guidelines On The Right To Reparation For Victims Of Gross Violations Of Human Rights And Humanitarian Law, E/CN.4/Sub.2/1996/17.

The ILC Articles define the basic rules of IL concerning the responsibility of States for their internationally wrongful acts, rules conceived at a high level of abstraction; they also lay emphasis on secondary rules, "that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom."[299]

However, the ILC Articles do not deal with individual rights, despite evident new tendencies in IL.[300] I thus supplemented the ILC Articles with the "Basic Principles" prepared by Special-Rapporteur Theo van Boven for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, "which aim at recognizing the right of any victim of (gross) violations of human rights to obtain redress".[301] In contrast with the ILC Articles, the "Basic Principles" are specifically tailored toward individuals.

To be even more specific as to which rights individuals would enjoy beyond any doubt, I have added a couple of the non-derogable articles from the ICCPR. I have called those articles the "Minimal Bill of Rights." Thus, we are able to take advantage of the fact that 174 states have already signed the ICCPR, albeit that 8 of them are too lazy to ratify it.

From ratifying the ICCPR to making the Articles legally binding and enforceable in International Courts is but a small step. The states could adopt a UN General Assembly resolution without a vote, and with all the characteristics of legally binding GA-resolutions.[302] Or there is an alternative. The Articles could comprise the basis of a treaty. Initially, it would

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[299] ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, 2001, p.31.

[300] According to commission member Christian Tomuschat, the ILC-articles "contain some glaring gaps. In particular, no trace of any rights of individuals can be found in the proposed regime of secondary rules. This reluctance to deal with the individual as a holder of rights under international law contrasts sharply with new tendencies that seem fundamentally to alter traditional concepts of international law, tendencies which the ILC has apparently discarded.", A. Randelzhofer and C. Tomuschat, "Foreword," in *State responsibility and the individual: reparation in instances of grave violations of human rights*, eds A. Randelzhofer, C. Tomuschat (The Hague etc.: Nijhoff, 1999), p.VII.

[301] Ibid., p.VII.

[302] "Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption.", International Law Association, "Statement Of Principles Applicable To The Formation Of General Customary International Law, London Conference," (2000): p.61.

only be signed by some of the 'civilized' states,[303] but gradually more and more states would sign it, just as has happened with the optional clause of the ICJ.[304]

ii. Treaties

Besides the Articles, the Local Courts could decide on violations of human rights on the basis of self-executing provisions in treaties that enact enforceable rights for individuals.[305] Newer treaties would have a clause enumerating those articles in the treaty that lend themselves to claims in the Supranational Courts. Older treaties such as the ICCPR could be amended with the addition of clauses giving the International Courts compulsory jurisdiction. The Local Courts could also adjudicate regional treaties such as the European Convention on Human Rights. In every European state, the Courts could take some of the pressure off the European Court of Human Rights.[306]

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[303] Lauterpacht has a similar proposition for creating a Bill of Rights and make it the subject of (regional) treaties in case it is unsuccessful in the UN. Lauterpacht, *International law and human rights*.

"A new direction was given to the discussion of this problem by a group of French lawyers who decided to depart from the universal approach and to substitute for it a step-by-step method. Instead of advocating either the creation of a world court for private claims or the opening of the international courts at The Hague to individual claimants, they proposed the establishment of mixed arbitral tribunals for any pair of States willing to accept the new idea. In consequence of the activities of this group, the French Chamber of Deputies adopted unanimously a resolution inviting the French Government "to start negotiations with foreign Governments with a view to the establishment of international mixed tribunals empowered to decide disputes either between a State and an individual or between individuals who are citizens of the States which have accepted the jurisdiction of these tribunals." Though negotiations were soon started with Sweden, Spain, Belgium, Greece, Switzerland and Italy, only those with Belgium led to the preparation of an actual draft of a convention for the creation of a "High Tribunal." These proposals were favorably considered by various international associations and writers, and Professor A. de Geouffre de Lapradelle presented to the International Law Association's Conference at Budapest in 1934, on behalf of the French branch, a draft of "a convention concerning the creation of international tribunals of private law".", Sohn, "Proposals," p.69-71.

[304] Article 36(2) ICJ Statute

[305] "In modern international law, it is clear that individuals and companies they form may have rights under international law. A multiplicity of treaties, such as those on commerce, labor, tax, transit, road traffic, extradition, the conduct of hostilities, social security payments, copyrights, etc., give individuals rights under treaties.", S.M. Schwebel, *Justice in international law: selected writings of Stephen M. Schwebel.* Cambridge; New York: Grotius Publications, 1994, p.209.

[306] On 31th of October 2010. See the official Pie-Chart, accessed on 6 December 2010: http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending_applications_chart.pdf

iii. Custom

It is generally accepted that, in part, human rights are already a part of customary international law.[307] Individuals themselves could create new customary rules through their acts.[308]

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[307] For instance the non-discrimination norm entered customary international law: "we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law", *South West Africa*, ICJ Reports, 1966, pp 291–93.

ICJ, *Barcelona Traction Case*: ". . . customary international law recognizes—in particular since the second world war— respect for fundamental human freedoms as an interest of the international community. In fact, even before and between the two World Wars the idea of the protection of 'human rights' by public international law was never absent from international decisions concerning the responsibility of States for the treatment of aliens. Here as in the protection of international commerce, it is not a matter of creating a common legal order determining the legal relationship between the public authorities and private persons or between private persons inter se, but of 'checking' the application of the municipal legal order in order to sanction the unlawful use of force, arbitrary discrimination and usurpation of jurisdiction, which violate a human being's 'right to existence'. Here, as in the protection of international commerce, the different methods adopted by the municipal law of different countries are irrelevant to the attainment of the objectives of the rules of customary international law.", Judge Riphagen, Disenting Opinion, *Barcelona Traction Case*, Judgment on Second Phase, ICJ Reports, 1979, p.233.

"While court holdings vary from one State to another, it is the position in many States, including the United States, that individuals not only have rights under customary international law but may enforce those rights in national courts.", Schwebel, *Justice in international law*, p.209.

Judge Kooijmans suggested that a part of the Universal Declaration of Human Rights has become customary law, despite the fact that it is a declaration of the General Assembly, without being legal binding: "in 1968 the international community stated in the Declaration of Tehran that the Universal Declaration constitutes an obligation for all States. That statement may be seen as an expression by the international community of an opinio iuris sive necessitatis, which is one component element of customary law." Randelzhofer, "The legal position of the individual under present international law," p.247. According to Judge Kooijmans, the state practice might suggest the same thing; the violators of human rights deny that they violate those rights and this denial suggests the *opinion juris* that human rights are a part of the customary law.

Judge Mbaye: "The Universal Declaration of Human Rights, which is not a treaty and which was considered at the time of its adoption simply as an ideal to be attained, has become as a whole - including therefore the provisions on economic, social and cultural rights - an element of customary law.", K. Mbaye, "Human Rights and Rights of Peoples: Introduction," in *International law: achievements and prospects*, ed. M. Bedjaoui (Paris; Dordrecht; Boston Norwell, MA: UNESCO; M. Nijhoff Publishers;, 1991), p.1054.

"In 1988, UN Secretary-General Javier Perez de Cuellar declared that '[the Universal Declaration's] gradual and growing acceptance by the international community have led to the conclusion that the Declaration constitutes binding law as international custom, in accordance with Article 38 of the Statute of the International Court of Justice'", Kamminga, *Inter-state accountability*, p.133.

"The better view is that these documents [the human rights convenants] have become a part of international customary law and, as such, are binding on all states.", L.B. Sohn, "New International Law: Protection of the Rights of Individuals Rather Than States, The," 32 *Am. U. L. Rev.* 1 (1982): p.12.

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981).: "No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."

iv. General principles, judicial decisions and more

In the case of *Rodriguez-Fernandez v. Wilkinson* "The Court found all individuals to have certain customary international legal rights, enforceable in the municipal courts even without the support of the individual's government. The essence of the decision therefore lies in the assertion that, even in the absence of constitutional guarantees and domestic legal rights, individuals have certain basic human rights protected by customary international law.", Cassidy, "Emergence of the Individual," p.560.

[308] "It is, however, well-known, for instance, that captains of private vessels, fishermen and pearl divers fishing in their own name in certain areas of the sea contribute, by their conduct, to the development of international customs concerning open sea, territorial sea, the continental shelf, etc.", O'Connell, "Sedentary Fisheries and the Australian Continental Shelf," p.188.

Bankers "often go against positive law. What definitely give[sic] the customary rule which is created by the repetition of their acts the obligatory force of a legal rule", Kopelmanas, "Custom as a Means of the Creation of International Law," p.150. see also at p.151: "all the subjects of law…contribute to the formation of international custom." See also at p.149: "On the other hand these conditions are present when the international relations connect individuals belonging to different national organizations, even if the organs of the state take no part. This is why we are able in fact to find the existence of customary rules worked out by simple private individuals."

According to Sohn, "Governments don't really make the human rights but "silly" professors and engaged individuals." L.B. Sohn, "Sources of International Law III: The Status and Future of the Customary International Law of Human Rights," 25 *Ga. J. Int'l & Comp. L.* 399 (1995). The New Haven School, as represented by scholars such as Lasswell, McDougal and Reisman, contends that individuals make customary international law. In the light of this view, the positivistic standpoint is mistaken in talking about subjects and objects of law; instead, the discussion should be about participants. In international law, they might be "international organizations, state officials, nongovernmental organizations, pressure groups, interest groups, gangs, and individuals, who act on behalf of all other participants and on their own.", W.M. Reisman, "View from the New Haven School of International Law, The Jurisprudence of International Law: Classic and Modern Views, The," 86 *Am. Soc'y Int'l L. Proc.* 118 (1992): p.122. The participants are "making claims across state lines, with the object of maximizing various values. These values will relate, among other things, to power, wealth, prestige and notions of vindication and justice. The participants will promote their claims by a variety of techniques, ranging from force to diplomacy and public persuasion. Finally, a variety of decision-makers, be they foreign office legal advisers, international arbitration tribunals or courts, will pronounce authoritatively upon these claims.", Higgins, "Conceptual Thinking," p.16. Realists claim that the positivists make a mistake in ignoring individuals as regards the formation of CIL just because they have a limited access (*locus standi*) in international courts; "individuals with effective bases of power have always had access to a wide variety of arenas", M.S.L. McDougal, Harold D. Reisman, W. Michael, "World Constitutive Process of Authoritative Decision, The," 19 *J. Legal Educ.* 253 (1966): p.274. Globalization will only increase the role they play. As regards examples: "The transnational impact of an Onassis on the shaping and sharing of wealth hardly requires emphasis" ibid., p.274. Other names with a "cross-cultural impact" are Paul of Tarsus, Mohammed, Marx and Engels, Gandhi and Nehru. Ibid., p.274. Professor Paust assures us that customary international human rights law (CIHRL) is rich in individual participation. Each of us can initiate a change, "reaffirm its validity" and terminate it. At least the *jus cogens* norms are the result of collective hope, demand and expectations, and we all participate in a "dynamic process of acceptance or expectation which leads to patterns of *opinio juris*, measurable at various moments." Individuals also participate in the "shaping of attitudes" even though they may be unaware of it. Individuals are involved in sanctions to promote human rights which use diplomatic, ideological, economic and military strategies. Human rights groups use diplomacy, education, media, and networking, they disseminate information, lobby, advise, draft, testify, investigate, invocate and "mobilize shame.", J.J. Paust, "The Complex Nature, Sources and Evidences of Customary Human Rights," 25 *Ga. J. Int'l & Comp. L.* 147 (1995).

The other applicable law would be the general principles of law recognized by civilized nations, along with judicial decisions and the teachings of the most highly qualified publicists from the various nations as subsidiary means for the determination of the rules of law. These means are identical to Article 59(c-d) of the ICJ statute.

v. Tort cases and Erga Omnes obligations

The International Courts would be able to accept individual tort claims against states. When states violate obligations *erga omnes*,[309] the individuals directly affected, and with a legal interest, would be able to start procedures at the International Courts. For instance, the victims of Srebrenica would be able to sue Serbia.

vi. Contracts

The Supranational Courts could handle disputes regarding the provision of (investment) contracts and their violation on the part of states and would thus replace the usual arbitration courts. Other claims that might be lodged would be intellectual property disputes and taxes.

4.2.6 Local remedies

IL contains a general principle of local remedies.[310] This principle would work only for a segment of the claims under consideration here. Individuals bringing claims against their own state should first follow the path of the national legal system and the Supranational Courts would reject claims which have violated this rule. This provides states with the opportunity to preserve their dignity and solve their problems internally, thus avoiding the letting loose of an international procedure.[311] However, just as with the European Court for Human Rights, exceptions would be made for cases where it is unreasonable to enforce strict compliance with this rule.[312]

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[309] "The Court further warned that States cannot subordinate or condition the observance of the fundamental principle of equality before the law and non-discrimination to the aims of their migratory or other policies. In my Concurring Opinion I sustained that this fundamental principle belonged to the domain of *jus cogens*, and stressed the importance of the *erga omnes* obligations (encompassing also inter-individual relations) vis-a-vis the rights of undocumented migrants.", Cançado Trindade, "The Emancipation of the Individual," p.169.

[310] See, for instance, Article 35, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11

See Article 14, ILC Draft Articles on Diplomatic Protection with commentaries, A/61/10, 2006.

[311] I.C.J. *Interhandel (Switz. v. U.S.)*, 1959 6, 27: "[T]he State where the violation has occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."

[312] ECHR 6 May 2003. *Kleyn v The Netherlands*, p.para. 156.: "The obligation to exhaust domestic remedies is however limited to making use of those remedies which are likely to be effective and

For individuals who are not citizens of the state brought as a party, it would be not mandatory to follow the local remedies path. This would help individuals to avoid the additional costs arising from procedures in foreign states. Individuals from occupied, or other non-self-governing, territories could start a procedure directly at an International Court.

4.2.7 Criminalizing the state?

The courts may afford the victims remedies and reparation, but their decisions would avoid the punishment or humiliation of the state concerned.[313]

4.2.8 Is Sovereign Immunity dead?

The evolution of Sovereign Immunity might be another element serving to prove the ET. Prior to 1900, it was absolute,[314] meaning that a state could never be tried in the courts of other states.[315] Yet today, more and more states are introducing a restrictive form of immunity.[316] In most cases, it is not possible to sue a state for 'official acts' (*acta jure imperii*), but only for commercial activities. This leads to such interesting matters as, for example, the possibility of trying a state for a parking ticket, but not for torture or murder.

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available in that their existence is sufficiently certain and they are capable of redressing directly the alleged violation of the Convention. An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail."
See also Article 15, ILC Draft Articles on Diplomatic Protection with commentaries, A/61/10, 2006.

[313] See Article 37 Annex 1

[314] E.K. Bankas, *The state immunity controversy in international law: private suits against sovereign states in domestic courts.* Berlin; New York: Springer, 2005.

[315] *Underhill v. Hernandez*, 168 U.S. 250 (1897): "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."
Article 6(1) The United Nations Convention on Jurisdictional Immunities of States and their Property 2004.:"A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected."
"In *Bouzari v. Iran*, the Superior Court of Justice of Ontario, Canada, noted, in the light of the Canadian State Immunity Act 1982, that 'regardless of the state's ultimate purpose, exercises of police, law enforcement and security powers are inherently exercises of governmental authority and sovereignty' and concluded that an international custom existed to the effect that there was an ongoing rule providing state immunity for acts of torture committed outside the forum state.", Shaw, *International law*, p.716.

[316] "Until quite recently the notion of absolute sovereign immunity was embraced and accepted without question, but of late, many have started questioning the legitimate basis of the concept of state immunity and have in turn suggested that limitations be placed on state immunity. This in fact has prompted some countries, notably U.S.A., U.K., Canada, Singapore, Australia, Pakistan and South Africa, to resort to legislation as a means of introducing restrictive immunity into their statute books.", Bankas, *The state immunity controversy*, p.VIII.

There are two components to the immunity of the state: sovereignty and the equality of states.[317] The equality of states[318] prevents them from adjudicating over each other.[319] In our case, however, by establishing the Local Courts as International Courts, we would circumvent this equality of states. Human rights are a substantive rule of law, while the rule of immunity, on the other hand, is a procedural bar to the exercise of jurisdiction by one state over another.[320] This only makes sense if it is meant to promote comity and good relations between states through respect towards another state's sovereignty,[321] thus avoiding states making each others' lives impossible by continuously trying each other in national courts. Immunity merely diverts any breach of norms "to a different method of settlement."[322] Since there are no other, different methods of settlement, they should be created and the Supranational Courts are what we need for this purpose, especially when states do not want to employ diplomatic protection for their citizens.

Sovereignty is defined as the power to make laws, and to be the supreme power in a defined territory. The development of the concept is attributed to Jean Bodin, who posited that the state, being the source of law, was also necessarily above the law. From this, one would conclude that the state is also above international law, which could only bind states with their consent. This idea gives rise to some obvious contradictions. One is that peremptory norms bind the states without their consent. Another reads like this. Since one state cannot enact laws binding other states, it cannot try the other state in its courts even if the latter violates the former's rights; this cannot even be done in international courts, given that states cannot be

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[317] Ibid.

[318] "Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature,—nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.", E.d. Vattel, B. Kapossy, and R. Whatmore, *The law of nations, or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns, with three early essays on the origin and nature of natural law and on luxury.* Natural law and enlightenment classics Indianapolis, IN: Liberty Fund, 2008, p.lxiii.

[319] "If she makes an ill use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her… perfect equality of rights between nations, in the administration of their affairs and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment;", ibid., p.lxiii.

[320] *Jones v. Saudi Arabia.*, para. 9

[321] *Al-Adsani v. the United Kingdom*

[322] Hazel Fox, in *The Law of State Immunity,* quoted by Lord Hoffmann and Lord Bingham in *Jones* v. *Saudi Arabia*

sued there without their consent. However, while the violator of rights is not expected to renounce a part of its sovereignty, the victim is expected to do exactly that; the victim is no longer 100% sovereign on her territory because she is obliged to grant immunity to the violator. There is no good reason whatsoever why the victim, and not the violator, should be the one to surrender some of her rights.

Let's make an analogy. Imagine that, as equally free citizens, if you were to catch me burglarizing your jewelry in your home, where you have supreme authority, I am not expected to give up a part of my freedom and be obligated to appear before a court, but you are expected to give up a part of your freedom and not force me to appear in a court.

However, the same international law does entitle the victim state to countermeasures. To continue our analogy, this would mean that, while you are not free to drag me before a judge, you are free to punch me in the face, and to keep on punching me until I give you your jewels back; and this, supposedly, does not violates my freedom. At the same time, if I disagree about the ownership of the jewels, I cannot sue you to stop you from punching me in the face, since this would violate your freedom, but I am free to take countermeasures by, for example, seizing your silverware as well. This continues until the supposed equality of states evaporates, since the smaller states can neither afford to take countermeasures against the larger ones, nor can they endure their illegitimate countermeasures.

Therefore, sovereignty only makes sense when it gives people the power decide their future and shields them from more powerful states, from being robbed, killed or otherwise coerced into doing things, or having things done to them, to which they themselves would not consent. Sovereignty loses its purpose when it is used by the state, or by those in power, to oppress the population and escape outside scrutiny.

Sovereignty is a contradiction when it claims that a foreign state can kill me and that its sovereignty prevents me from suing that state at an international court and compelling it to stop killing me. It is like claiming that, if Johnny and Jimmy call themselves 'a state', they are allowed to kill George, but George is not allowed to take them to court, since sovereignty magically grants them a right to be bound only to things they have agreed to beforehand.

It is of no matter if they are recognized as a state by other states; nothing changes if Mary and Magdalene call themselves 'a state' and also recognize Johnny and Jimmy as 'a state.' Adding more people who adhere to an abstract concept that they believe produces magical powers which, in turn, give them special freedoms, while denying others those same

freedoms, changes nothing of the claim's absurdity. Sovereignty does not imply the freedom to violate IL or human rights.[323]

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[323] "[T]here is no sovereign right of any state large or small to deny the fundamental Rights of Man — rights which belong to him because as a child of God he is endowed with human dignity.", Goldberg, "Need for a World Court of Human Rights, The Closing Address," p.621.

ICJ, *Corfu Channel*, Judgment of 9 April 1949: "It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation."

"Some clear conclusions can be drawn from this brief review of World Court rulings. A matter is within domestic jurisdiction if it is not subject to an international obligation...The extent of domestic jurisdiction in a particular context depends on the treaty obligations of the state concerned and on the status of customary in-ternational law.", Kamminga, *Inter-state accountability*, p.132.

Judge Georg Ress: "States in their domestic statutes on sovereign immunity have accepted some exceptions even to the *iure imperii* element. The American FSIA accepts exceptions as to expropriations, which are of course sovereign State acts, and there are exceptions to tort claims where the tort is done in the territory of a foreign State against an American citizen. Furthermore, if State A acts in violation of human rights with effect within the territory of the U.S., it cannot claim sovereign immunity when a tort action by an individual victim is brought before the courts of the U.S. So there are already in the existing statutes exceptions precluding immunity with regard to *acta iure imperii*, and I wonder whether there is not an underlying tendency to restrict sovereign immunity in relation to human rights violations.", "Commentary," in *State responsibility and the individual: reparation in instances of grave violations of human rights* (1999), p.44-45.

"A state violates international law if, as a matter of state policy, it practices, encourages or condones
(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.", American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States (1987), § 702

"The most serious argument used against the access of individuals is that it might infringe upon the sovereignty of the state. This argument, to my mind, is the very strongest argument in favor of enlarging the scope of the individual in international law. The dogma of sovereignty is in reality the very negation of international law invoked whenever a state wishes to pursue a line of policy against the interest of the community of states. The strongest reason for working in favor of a better position of the individual in international law is exactly that it can counteract extreme nationalism and the omnipotence of the state which has caused so many catastrophes in the past.", Hambro, "Individuals before International Tribunals," p.26.

"Notable also are those numerous provisions in the Charter which recognize that the treatment of the individual citizen is no longer a matter solely of domestic concern and that the denial of fundamental human rights to a citizen can no longer be shrouded behind the impenetrable cloak of national sovereignty. Sovereignty in the sense of exclusiveness of jurisdiction in certain domains, and subject to overriding precepts of constitutional force, will remain a usable and useful concept, just as in the constitutional system of the United States the forty-eight states are considered sovereign. But sovereignty in its old connotations of ultimate freedom of national will unrestricted by law is not consistent with the principles of community interest or interdependence and of the status of the individual as a subject of international law. With the development of international law regulating the state's use of force and the implementation of the sovereignty would no longer constitute a major obstacle to the development of a genuine international community. Theoretical difficulties confronting

States should admit that tradition grants them undeserved privileges through the concept of sovereignty, a concept which is neither properly defined, nor bound only to function usefully by clearly stating its exceptions. It should thus not be possible for states to invoke sovereign immunity in these International Courts.

4.2.9 Is Universal Jurisdiction dead?

There are authors who have already declared that universal jurisdiction dead.[324] The spinelessness displayed by states such as Belgium, Great Britain and Spain under pressure from other, mightier states, has rendered their laws virtually unusable, especially for foreign individuals. However, universal jurisdiction would be of no help to us, because it can only be used against individuals, such as, for instance, state officials no longer in office,[325] and not against states. What we are addressing is the fact that our individuals are not starting procedures against (former) state officials, but against the states themselves.

4.2.10 The organization of the court

The courts would be enacted through treaties between the UN and the host states for the Local Supranational courts. As the Regional Supranational Courts would also be based in various countries, the same procedure would be followed for their enactment.

The courts are deemed to be neutral territories and independent of the host state. The host state would bear the court's administrative costs. The contending parties would pay their own process costs, as is currently the case at the ICJ.[326] The Court would be able to decide that the violating state should reimburse the victim's procedure costs.

There are nine Judges, appointed for life. The defendant states could be given the right to nominate three Judges from among their own nationals. This would make the judgment more acceptable to both the defendant state itself and to public opinion within that state, thus acknowledging that a full-scale outcry could otherwise evolve against a judgment passed in a foreign state.[327] The court's neutrality would reinforce this, which is another advantage of this

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the acceptance of the supremacy of international law would then disappear.", P.C. Jessup, *A modern law of nations: an introduction.* New York etc.: Macmillan, 1948, p.41-42.

[324] L. Reydams, "The Rise and Fall of Universal Jurisdiction," in *Handbook Of International Criminal Law*, eds W. Schabas, N. Bernaz (London: Routledge, 2010).

[325] ICJ (*2000*), *Arrest Warrant of (Democratic Republic of the Congo v. Belgium)*

[326] Article 64, Statute Of The International Court Of Justice

[327] This argument was also made by Sohn in Pece through law or Lauterpacht in Human rights.

system over courts under the national jurisdiction of the host states. The host state names the six other judges from amongst its nationals and/or a pool of international judges.[328]

The Regional Court Judges would enjoy all the diplomatic privileges and protection enjoyed by ICJ judges.

4.3 Regional Supranational Courts

These courts would handle nothing but appeals from the Local Supranational Courts. The appeals would be filtered by a Commission modelled after the European Commission for Human Rights,[329] which would decide if an appeal is serious or not. For the rest, the Regional Courts would have the same properties as the Local Courts and the same jurisdiction. Giving the States the possibility of appealing against the decisions of the Local Courts would make the entire system more acceptable, since it is believed that States avoid procedures at the ICJ because there is no possibility of appeal.

The possibility for appeal would not only increase the rule of law generally, but would also do so for the victims.

4.4 The International Court of Justice

Appeals from the Regional Courts would be fought at either the ICJ[330] or a new, specialized court handling procedures between individuals and states.

4.4.1 Jurisdiction

The jurisdiction for appeals from the Regional and Local Supranational Courts, referred to here as the 'Lower Courts', would be compulsory. Legal disputes between states would follow the existing procedure. States would either have to accept the jurisdiction of the court for a particular case of their own volition or, for certain kinds of dispute, sign both the optional clause and reservations in respect of specific issues.

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[328] "It is conceivable that some States might be willing to go even further and appoint to such tribunals foreign international lawyers to ensure that the tribunals not only are impartial but also clearly appear to be impartial.", Sohn, "Proposals," p.75.

[329] Until Protocol 11, which came into force in 1998, the Commission would filter the well-founded cases.

[330] Sohn had a similar proposal: "(c) Appeals. If several tribunals, either national or international, should be established, it would be desirable to provide an appellate tribunal to ensure uniformity of jurisprudence. While this function could be left to the International Court of Justice, that Court is accessible to States only, and individual claimants would have no appellate remedy if their own State should refuse, for political reasons, to bring an appeal. It would be necessary, therefore, either to amend the Statute of the International Court of Justice to authorize appeals by individuals in certain restricted categories of cases, or to establish a special appellate claims tribunal.", Sohn, "Proposals," p.76.

Article 34(1), 35(2) would need to be adjusted to include individuals, though only for appeals from the Lower Courts.

Either there would be no Commission for the filtering of disputes, or this role could be fulfilled by the UN Human Rights Committee. If the task is not allocated to the Committee, the judges themselves could decide which cases to hear, as is the practice of the United States Supreme Court.

4.4.2 Self-defence and Humanitarian Intervention

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence.[331] In cases of external armed conflict, the humanitarian law (IHL) might sometimes replace human rights law as *lex specialis*. This could lead to the abrogation of some human rights,[332] which, while it might be a good idea in cases of self-defence, should, nonetheless, be otherwise for cases involving the unlawful use of military force or aggression. Moreover there are two problems with the IHL. First, there are no judicial mechanisms giving individuals the possibility to file complaints using the IHL rules.[333] Second, most of the IHL rules create obligations amongst states and very few individual rights and, even when the rights are individual, it is unclear whether they "can also provide the basis for individual claims brought by victims of humanitarian law violations."[334] The Local Courts shall then apply the Human Rights Law or the IHL according to the rules that afford individuals the most extended protection.[335] The aggressor state should be liable for all damages it causes to individuals, even for the killing of the soldiers of the state exercising self-defence. The ICJ should therefore have the last word as to whether a State was acting in self-defence in any instance of armed conflict.[336]

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[331] Article 21 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, 2001.

[332] For instance, article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms permits a derogation from the right to life in the case of "lawful acts of war".

[333] Kleffner, "Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure."

[334] Ibid., p.245.

[335] For instance, the Geneva Conventions place greater restrictions on the death penalty in armed conflicts than the ICCPR does; that the latter only restricts it for persons under 18 years old. Ibid., p.241.

[336] The Judges at Nuremberg stated that only a court, rather than a state, could have the final word: "It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Briand-Kellogg Pact, whether preventive action was a necessity, and that in making her decision final judgment was conclusive. But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."

This should also be the case for humanitarian interventions; the ICJ should provide the final decision. This represents a departure from current international law. Humanitarian intervention is controversial,[337] but it is still lawful if permitted by a SC-decision under Chapter VII. But the SC can be deadlocked by politics. States should be able to sue other states and demand a halt to gross human rights violations. For those cases, the ICJ should have compulsory jurisdiction. If the ICJ decides that those violations should stop and the defendant state does not comply with the Court's decisions, other states should be able to request the ICJ to consent to military intervention. The reverse should also be possible. When the SC sanctions a humanitarian intervention, some of those on the receiving end of the intervention might disagree with the benignity of the SC's motives. Individuals should thus be granted the right to fight the SC decisions in the International Courts, and the last word should rest with the ICJ. Thus, even if the SC launches a humanitarian intervention and the ICJ declares it unlawful, the states ignoring the ICJ would be liable.

4.4.3 Organization of the ICJ

According to the current statute, if there is one Judge of the same nationality as each of the parties, the Judges retain their right to sit on the case before the Court.[338] In cases where individuals are parties before the ICJ, the normal selection of judges should be adjusted and the defendant State should be granted the right to choose three of its nationals, or three other, ad-hoc judges. However, the president of the court should not be of the same nationality as either the defendant state or the individual, because in the event of a deadlock, the President, or the judge acting in his stead, has the casting vote.[339]

The ICJ is becoming busier even without individuals storming its gates. It might well prove possible to make use of chambers for deciding those cases.

There has been some criticism that the current procedure is none too public-friendly.[340] Some adjustment of the rules of the court might thus be desirable in order to make it friendly to both the public at large and the individual.

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[337] "In fact the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal.... But the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention", D.J. Harris, *Cases and materials on international law.* London: Sweet & Maxwell, 1998, p.918.

[338] Article 31(1) Statute ICJ

[339] Article 55(2) Statute ICJ

[340] "The Court proceedings themselves would be far more enlightening-not to say interesting to the public - if the judges were free to engage in spontaneous dialogue with counsel. The work of the judges

4.5 Enforcement

There is no world police force. So who is actually going to enforce the judgments of the Supranational Courts? First, this might not be necessary, since, in most cases, the decisions of international Courts are generally respected by the states in question.[341] Nonetheless, I do believe that we might consider of three kinds of enforcement, namely, individual states, the SC, and self-help. All three are examined below.

4.5.1 Individual State Enforcement

Pursuant to the Articles, the decisions of the Supranational Courts would be binding upon all states and all states would have a legal duty[342] to implement the decisions in accordance with their abilities. For instance, if a victim is awarded a pecuniary reparation, every state would be entitled to freeze some part of the guilty state's assets in order to make good the payment to the victim. However, it is not only a question of the fact that they would be entitled to do it; it is also a matter of their being obliged to do it or become liable themselves. This is not so strange a proposition, as article 16 of the ILC Articles states that a State "which aids or assists

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would be more manageable, and their effectiveness might be augmented if they were allowed to have judicial clerks recruited from among the world's top graduates in international law. Both changes, incidentally, would make more publicly accessible the Court's somewhat obscure role in the global system of governance; this paradoxically, may be one reason why they are not widely favored among the judiciary or the bar", T.M. Franck, *Fairness in international law and institutions.* Oxford New York: Clarendon Press; Oxford University Press, 1995, p.347.

[341] A.P. Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice," 18 *European Journal of International Law* 815-52 (2007).

"At first glance, the overall percentage of full compliance as measured by Charney, 80 percent from 1946 to 1987, appears to have decreased since 1987, to 60 percent from 1987 to 2004. However, as most cases of partial compliance could be characterized as mostly or nearly compliant, overall compliance has probably increased or, at least, stayed roughly the same.", C. Paulson, "Compliance with Final Judgments of the International Court of Justice since 1987," 98 *Am. J. Int'l L.* 434-61 (2004): p.460.

[342] "The International Law Association has similarly expressed the conviction 'that the protection of human rights is a matter of international concern; that the claim that violations of human rights within a country are matters of exclusive domestic concern and hence may not be subject to international appraisal, is unfounded in international law; and further that actions (including the making of allegations), consistent with the principles of the U.N. Charter, taken in respect of internationally recognized rights, are not violations of state sovereignty.'", Kamminga, *Inter-state accountability*, p.194.

"According to a slightly more sophisticated resolution adopted by the Institut de Droit international, 'every State has a legal interest in the protection of human rights'; '[a] State acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within domestic jurisdiction', Resolution on the protection of human rights and the principle of non-inter-vention in internal affairs of states, 13 September 1989, Annuaire de Vlnstitut de Droit international, vol. 63-11 (1990), pp. 339-45. Quoted in ibid., p.194.

"The protection of human rights is the legitimate and continuous duty of the world community and of nations individually.", Declaration on Human Rights, adopted by the Foreign Ministers of the European Community, 21 July 1986, 19 Bull EC (1986), no. 7/8, para. 2.4.4. Cited in ibid., p.183.

another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so". Article 41 is also enlightening:

"1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

Well, article 40 is about serious breaches of the "peremptory norms" of international law. However, there is no reason not to hold states responsible for failing to enforce the judgements of the Supranational Courts "in accordance with their possibilities" and as far as is reasonable. One cannot expect Andorra to invade the United States in order to free the Guantanamo detainees simply because a Supranational Courts has decided that way. However, Andorra could very easily freeze a given sum of American money if a Supranational Court were to have awarded one of the detainees reparation. The detainee might approach Andorra and request that the sum awarded be frozen and delivered to him. If Andorra were to refuse to do so, the respective individual might then sue Andorra and, as a result, be awarded even more damages.

This might have an advantage over and above the usual countermeasures. The countermeasures named in the ILC Articles could lead to a deterioration in the good relations between states, or might inflame conflicts, especially if the state affected by the countermeasures denies any wrongdoing. Enforcement by a neutral state would avoid these kinds of conflict, as the neutral state cannot do otherwise than enforce the binding decision.

However, this does not mean that the mother state cannot enforce the decision on behalf of its citizens. In this case, the countermeasures are justified by the decision of a neutral, impartial and independent court. The normal channels of diplomatic protection are still available, though states are reluctant to make use of them.[343] Diplomatic protection is seen as having a

[343] "While States are sometimes willing to bring before the Court claims based on injuries to individuals or corporations, many private claimants have found that the Foreign Offices of their countries are usually very reluctant to press claims against other governments. Consequently, attempts have been made to find a way to avoid this bottleneck. It has been alleged, for instance, that Foreign Offices have two standard answers to requests of private claimants: (a) "our relations with the other State are so bad that we don't want to pour additional oil on the fire", or (b) "our relations with the other State are so good that we don't want to spoil them by arguing about petty claims."", Sohn, "Proposals," p.65-66.

"residual role,"[344] with even the ILC suggesting that it be adapted by means of giving individuals access international forums.[345]

4.5.2 Security Council

In a case of consistent refusal to implement the Court's decisions, the Court might defer the question to the SC. Normally, this is only done by a state in a case where another state does not respect the binding decisions of the ICJ. In our case, it would be the ICJ itself that would request the SC to take measures in the form of (economic) sanctions, military demonstrations or, in cases of such gross violations of human rights as genocide, a military intervention.

4.5.3 Self-help

If every state refuses to enforce the decision and the SC is deadlocked by its usual game of Veto Ping-Pong, then the individuals concerned would have to recourse to self-help.

First, there are different methods of applying public pressure. The Mandate Commission achieved very nice results simply by pillorying states violating human rights.[346] Nowadays, there is an army of really quite successful NGO's lobbying for victims.

Individuals could also take matters into their own hands. If you are George Soros, you could exchange 10 billion pounds and devaluate the British currency. If you are somewhat less fortunate, you might just resort to terrorism. Would this terrorism be a legal form of self-help? It would not, after all, have been individuals' first choice. Following the process of two appeals, the ICJ decided in their favor. Every other state has reneged on their obligation to enforce the decision. And the SC refused to do its duty. So who would there be to demand that the individual just shut up and endure?

The burden of proof lies with those arguing that individuals give up terrorism, while at the same time claiming that individuals should not be able to sue states. By way of analogy, let us imagine that a bystander sees a 2.20m giant raping a little girl and the girl sticks her ballpoint pen in his eye. This bystander knows that the giant is not prepared to stop raping, nor to

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[344] "Increasingly the possibility for the individual to claim in his own right has been recognized and diplomatic protection is acquiring a residual role rather than the principal one it had in the past.", Orrego Vicuña, "Individuals and non-state entities before international courts and tribunals," p.59.

[345] "The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights.", Dugard, *First report on diplomatic protection (U.N.-doc A/CN.4/506)*, p.4.

[346] Ginneken, *Volkenbondsvoogdij*.

comply with decisions of a judge. The bystander might see it as smarter not to provoke the wrath of the giant; however, she also has no moral grounds for trying to convince the girl of the immorality of her deed. This is because the bystander's first moral duty is to help the girl to have her say in court, and then to help enforce the judgment of that court, even at a high costs to herself. Only when the bystander invests her resources in justice for the underdog does she gather the moral authority to demand of the underdog that she renounce violence. "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[347]

Having put forward a concrete proposal for creating international courts whereby human rights could be protected by the rule of law by means of giving individuals international legal standing against their own and foreign states, I now propose to examine the philosophical justifications for doing exactly that.

[347] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948). preamble

5. Philosophical foundations

In this chapter of the thesis, I will develop a second argument, gauged this time for philosophers and pleading the same; namely that individuals should have the possibility of suing states, both their own and foreign, and demand that states act in certain ways, or refrain from certain acts.

The argument uses a thought-experiment, indebted to the Rawlsian "original position" argument and "veil of ignorance." Making an abstraction of individual, accidental characteristics, I will argue that rational individuals, in trying to decide before being born what rules of conduct shall govern the world, would agree to allow independent and impartial judges to decide the outcome in any serious conflict. But I will first argue that, as a measure of self-defence, we have a right to coerce others to accept judges and their decisions. Therefore, individuals also have a right to sue states at international courts.

5.1 The state of nature and self-defence

Imagine that a cataclysmic catastrophe destroys much of the Earth. Most of the continents sink beneath the waters and a new continent arises from the ocean. You and a group of people from all over the world survive the catastrophe and colonize the new continent.

For a while, there is no state, there are no laws, no judges and no courts. People divide the land into farms and try to rebuild their lives as best as they can. We could call this *the state of nature.*

In this state of nature, a conflict arises between you and your neighbor. You notice that the fence between your farms is frequently moved, to your disadvantage, making your territory smaller and your neighbor's larger. Mister S. Mart, hereinafter referred to as Smart, your neighbor, denies that he has anything to do with it, or, indeed, that it even happens. After a while, your stock starts dying out since there is not enough grass and hunger leads to the death of some of your children.

Then a new incident occurs. Mister Smart kills your twelve year old daughter and sells her organs; at least, this is what you are pretty firmly convinced is the case, especially since you have seen it yourself, together with several witnesses. By chance, it was filmed from different angles. You also have similarly compelling evidence that he has sold her organs. You confront Smart with your argument, but he denies that he has committed a crime.

Confronted with your accusation, he replies using one or more of the following arguments:

1. "You are a little bit short-sighted, your cameras are flawed and all your witnesses are unreliable junkies who cannot discern the difference between a human and a cow."
2. "Yes, indeed, I took her life, and I feel the pain very deeply, I feel compassion and I am empathic with you, but I could not do otherwise". He then adds one of the following:
    - "She attacked me with a weapon and I had to defend myself."
    - "I have suffered terribly unfortunate brain damage and lose control of myself sometimes."
    - "I didn't sell her organs, but used them for seminal scientific research and have discovered a cure for a sickness that will save the lives of billions of children in the future, children who would otherwise die before they were ten. It is the same sickness that your other two children have, and thus I could save them."
3. "The whole story is a mendacity intended only to destroy my magnificent self. You are just jealous of my freedom, my money, and my moral and intellectual superiority."

Given the situation, and as the reasonable person you are, you try to remain tranquil. You propose to Smart that you take the matter to a competent, neutral and detached, third party with as few interests at stake as is possible; namely, to a judge or some kind of a court. This new, first-enacted judge should look at the evidence and decide who is right and what should be done. Her decision should be binding on both of you. If the judge decides that the fence should be moved to the old location, Smart should abide without reservations. The same should happen if the judge finds him guilty of the killing; he should accept the punishment and/or the payment of compensation. It goes without saying that you pledge to resign yourself to any decision unfavorable to you.

Smart reacts with indignation at the accusation leveled against him and at the waste of his valuable time and says that he is not going to let a judge make the final decision, since he is good and certain that his argument is more than solid. In short, *he demands the freedom to be the sole arbiter in respect of his guilt.*

Mr. Smart is not a dumb ass. He has read the philosopher Thomas Hobbes and tells you that life on the new continent is exactly like the state of nature. Since there is no state and no laws

and he has signed no contract with you, he is free to do whatever he pleases. Even if all your allegations were true, since there are no rules of conduct, he would, anyway, have been free to move the fence and to kill your daughter and sell her organs. In the state of nature, according to Hobbes, everyone has the right to everything, even to the lives and bodies of others. To be sure, according to Hobbes everyone's life would be worse, our lives would be characterized by "continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."[348] Hobbes claimed that, since it would be rational to surrender your freedom to commit violence and form a state, the state is therefore justified, even if it is a tyranny, since anything is better than anarchy. But since there is no state yet, no sovereign, no government, no laws, and no police to enforce both the laws and the verdicts of a judge, you are actually in a state of nature and Smart has no obligation whatsoever to submit himself to a newly made judge. Since nobody has made any laws, and Smart certainly has neither agreed to any rules and laws, nor has he signed any agreement with you, what rules and laws would this judge apply?

In what way could you react? You could say something like 'Oh, stupid me, I didn't realize all that. Please, please forgive me for my indelicate interruption of your life.' But you have no obligation to buy his story. If Smart is free to do whatever he wants, you are as free as he is and have the same right to everything, even to the lives and bodies of others. Even more to the point, you have the right to force Smart to submit to whatever judge you enact and whatever laws you see as fit. You are totally free to believe that Smart has committed a crime against you, or that he is committing a crime, that he has violated some of your rights and that he is a danger to your survival and to that of your relatives.

One could say that you should do whatever you want to Smart, even kill him. However, this might not be such a good idea. His family, or friends, or clan, for example, identifying with him or feeling that he was in the right, could retaliate against you. Thus the conflict can become unending and spiral until most of your allies and his allies are dead. One wants to prevent that.

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[348] "Whatsoever therefore is consequent to a time of war, where every man is enemy to every man, the same consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.", T. Hobbes and J.C.A. Gaskin, *Leviathan.* Oxford world's classics Oxford; New York: Oxford University Press, 1998, p.78.

At the same time, even if it does not escalate to continental proportions, your conflict is a danger to third parties. Anyone in either your or his group of allies, as well as neutrals who appreciate their lives, have the freedom to force you both, you and Smart, to settle your differences through a judge. For any such neutral, this is a form of self-defence, a right to oppose a greater conflict being launched by you and Smart, a conflict that would endanger her. Thus she has the freedom to impose a security system on you and Smart in order to guarantee her safety as far as is possible. And the security system might take the form of a judge.

The second reason to avoid killing Smart immediately is the simple fact that we have limited intellectual capacities. You cannot just kill Smart simply because you feel like it; after all, you may be mistaken. Even if, in our fictional case, you are not, generally the conflicts that make it to court, or end up in courts of appeal, are not so clear cut; they are less evident, due to the nature of the world and the limits to our powers to know facts and gather information. We are blinded by our interests; our survival instinct biases us in our own favor. If you decide that, whatever the imperfections of your knowledge capacities, you do not care, and you just kill Smart, thinking that it is better to be safe than sorry, you merely make yourself less safe.

At this point, you might well ask, 'Why?' The answer is that since everybody can be mistaken, others can mistakenly believe that you have committed crimes, or endanger their lives. For instance, imagine that somebody mistakenly believes that you have raped and killed her four-year-old daughter and that you are a danger to her or her other relatives. You can assume that there is a high chance of this person's taking action against you under the influence of those strong emotions. If you value life, then you try to avoid being killed by others once their imperfect knowledge has led them to believe that you are a danger to their life, or that you have committed some horrendous crime, or crimes, against them. You do not want them killing you 'just in case.' You want them take their claim to a neutral third party, who can look at the argument with a cool head and with no personal interest in any outcome, preferably a party trained in argumentation, and you want a situation whereby, after the decision that you are innocent has been made, you will have a guarantee that your accusers will leave you in peace. You have no wish to live in continuous fear of unspecified future reprisals.

Even if you think that such things are of no concern to you, anyone who does cares about them is free to impose them on you and Smart, by force if necessary, as means of self-defence.

International Law is positivistic, meaning that rights exist only as the result of a human decision, usually the act of enacting a rule of law. It is shy in declaring natural rights, but if one looks more closely at the major human rights treaties, the human rights within them are founded on human nature. For instance, the preamble of the Universal Declaration of Human Rights (UDHR) starts with the recognition of the "*inherent dignity* and of the equal and inalienable rights of all members of the human family."[349] The drafters of the UDHR talked specifically about this inherent property and agreed that there are certain human rights that are bestowed on us simply by nature of the fact that we are human beings.[350] Their discussions reveal that they were leaning heavily on natural law. This "inherent dignity" is present in other major human rights treaties. Thus we see a comeback of natural rights.

I am not sure what human dignity means or whether it exists. But *the only thing I ask of the reader is to grant our argument the premise that we all have a right to life, a right which does*

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[349] Universal Declaration of Human Rights.

[350] "In section A ("Enlightenment Precedents") of this chapter, I show how the drafters of the Universal Declaration stood on the shoulders of their eighteenth-century predecessors and took over from them the idea that human rights are inherent in the human person and not simply the result of social, legal or political processes. In section B ("From Natural to Human Rights") I discuss the key link of inherence that the drafters of the Universal Declaration sought to preserve between their own ideas and those of the eighteenth century. The retention of this idea of human rights as genuinely (and not merely rhetorically) inherent in the human person puts the Declaration at odds with a good many contemporary accounts of human rights.", J. Morsink, *Inherent human rights: philosophical roots of the universal declaration.* Pennsylvania studies in human rights Philadelphia: University of Pennsylvania Press, 2009, p.18.

"Right in its opening clauses the Universal Declaration presents us with a very important philosophical challenge. There the drafters reach back to the eighteenth century and present us with what I shall refer to in this book as the doctrine of inherent human rights. This doctrine consists of two complementary theses about the universality of human rights, some key Enlightenment terms of which I have italicized in the citations that follow. The first universality thesis is a metaphysical one about the way the world is. It states that people everywhere and at all times have rights that are not man-made, but inherent in the human person from the moment of birth. This metaphysical universality thesis is found in the First Recital and in the first sentence of Article 1. The drafters there tell us that "The recognition of the *inherent* dignity and of the equal and *inalienable* rights of all members of the human family is the foundation of freedom, justice and peace in the world" (First Recital) and that "All human beings are *born free and equal in dignity and rights*" (Article 1). The second universality thesis is a matching epistemological one which tells us that ordinary people in any of the world's villages or cities can come to know in a natural manner—unaided by experts—that people everywhere have the moral birthrights spoken of in the first universality thesis. We find this matching epistemic or knowledge-focused equivalent in the Second Recital of the Preamble and in the second sentence of Article 1. In the Second Recital the drafters share with their readers the observation that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the *conscience of mankind*" and in the second sentence of Article 1 they add "reason" to this route of conscience with the claim that all people "are endowed with *reason and conscience* and should act toward one another in a spirit of brotherhood."", ibid., p.17.

not depend on the will or mercy of others, or on the whims of those in power. Accepting that one has a right to life, one has to accept that there is also a right to self-defence. [351]

I do not see rights as something existing in a real and material world, since I think the only things that exist are those things that can be measured, meaning that they can have physical, causal effects on other physical objects. *I see a right as a freedom to change the world in a certain way, without having any obligation to consult any of its other inhabitants, or ask their consent to this change.* If they oppose this change, my freedom has argumentatively more weight, giving it priority above their opposition. When I say argumentatively, I mean that there is a better argument for changing the world in line with what I have the right to, than the argument that others might have against this change. For instance, when I say that I have a right to life, I say that I have the freedom to change the world in such a way as to avoid threats from situations that might shorten my life, and to change the world in such a way as to prolong my life.

Thus a right is a premise or the conclusion of an argument, meaning that the burden of proof rests on those who deny that I have the freedom to change the world according to my right.

The right to self-defence gives one the freedom to force others to cooperate in enacting a judicial system, something that either resembles, or is, a court of justice; in other words, a system that uses third neutral parties, arbiters called judges, and decides that one argument, presented by one of the parties involved in a dispute, should take precedence over the other argument or arguments presented by the other party. One also has also the freedom to impose this decision on the losing party by force, to enforce this decision against her will.

How much force, and of what kind, am I free to use in order to compel others to cooperate in enacting courts? Any and all the force required to do so. My assertion is that, without courts, I am the supreme and final instance able to decide alone when and/or whether others are a threat, and how much force is necessary to defend myself; without the courts I am even free to kill all those who do, or might, present a danger to my life. The enacting of the courts is a surrendering of this freedom to kill others, or to use the force necessary to defend myself. One can view this renouncement of the freedom to kill others immediately, and for any subjective

[351] "The very notion of the social contract implies, it will be noted, the existence of rights which the individual possesses before entering organised society. Most of the propounders of the doctrine of the social contract taught that there were insurmountable limits to the power of the State not only on account of the terms of the contract, but also for the simple reason that some rights, because of the nature of man, are inalienable.", Lauterpacht, *International law and human rights*, p.87.

reason, as a favor one does to others. *Courts are the replacement of sheer force with a procedure that establishes how the world should be changed, in accordance with some standard of rational argument.* Therefore, in a case where one disagrees that courts should be enacted, one has either to propose a better system that promises my protection, or to bear the burden of proof as to why those courts should not be enacted.

Do I assert that one is free to impose any laws and any form of judicial system on any other person by force? No. The laws and the functioning of the courts should be just and fair. The person forced to accept a judicial system should have the possibility of influencing which laws are enacted and which rules are applied by the court in deciding what is a good argument, as well as that of influencing the severity and nature of the punishments and forms of redress that are applied by the court. It is not within the scope of this paper to define justice and fairness. *My aim is only to assert that, besides all the rules of conduct that we might have, one is free to force others to cooperate in enacting judicial systems and in enforcing their decisions.*

Thus you have two freedoms; the freedom to force Smart to abide by the decision of a judge and the freedom to force those who have claims against you to make their claims via the offices of a judge and to abide by his decisions, instead of taking measures against you on the basis of their own emotions and judgments of the moment.

Argumentative consistency demands that, since you are free to force others to solve their important conflicts by means of judges, you cannot deny that others have the same right to challenge you before a court, and that you yourself have an obligation, a duty to submit to the verdicts of a judge.

In this section we have seen that, if one admits that we have an right to life, one has to admit that we have a right to self-defence. The individual herself is the only one who can decide what constitutes a threat to her life and which means to employ in her defense against that threat. Knowing that the human capacity to know the world is limited and tainted by different factors, it is rational and prudent to introduce a check, in the form of a neutral third party, namely a judge and a judicial system, that assesses the arguments without self-interest and in accordance with a set of argumentation rules. Thus the right to life provides one with the freedom to coerce others into cooperating in enacting, sustaining and abiding by the decisions of such a judicial system.

5.2 The Heaven Position

In this section I want to present a second argument contending that it is rational to enact courts where individuals would be able to sue states at international courts. This argument is based on John Rawls' thought experiment, the original position behind the veil of ignorance, designed to discover what justice is.

Imagine that you are a smart spirit, like the one conceived by Plato, dwelling between rebirths in some kind of heaven, and you are going to be born soon, but you have no knowledge of where. Just as in Rawls's experiment, you have no knowledge as to what particular properties you will have in the actual world.[352] Rawls would also say that you have no knowledge of your future conception of good.[353]

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[352] "It is assumed, then, that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong. These broader restrictions on knowledge are appropriate in part because questions of social justice arise between generations as well as within them, for example, the question of the appropriate rate of capital saving and of the conservation of natural resources and the environment of nature. There is also, theoretically anyway, the question of a reasonable genetic policy. In these cases too, in order to carry through the idea of the original position, the parties must not know the contingencies that set them in opposition. They must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to.", J. Rawls, *A theory of justice.* Cambridge, Mass.: Belknap Press of Harvard Univeristy Press, 1999, p.118-19.

[353] "Such a conception must not be understood narrowly but rather as including a conception of what is valuable in human life. Thus, a conception of the good normally consists of a more or less determinate scheme of final ends, that is, ends we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations. These attachments and loyalties give rise to devotions and affections, and so the flourishing of the persons and associations who are the objects of these sentiments is also part of our conception of the good. We also connect with such a conception a view of our relation to the world religious, philosophical, and moral by reference to which the value and significance of our ends and attachments are understood. Finally, persons' conceptions of the good are not fixed but form and develop as they mature, and may change more or less radically over the course of life.", J. Rawls, *Political liberalism.* The John Dewey essays in philosophy no. 4 New York: Columbia University Press, 1993, p.18-19.

"conception of the good: a conception of the ends and purposes worthy of our devoted pursuit, together with an ordering of those elements to guide us over a complete life.", ibid., p.104.

What you certainly will know about the future is that everybody's capacity to know the truth will be limited.[354] Again, as in Rawls' experiment, you are allowed to have any general knowledge you might want. You know something about human psychology, about group dynamics and about how politics works.[355]

What you will certainly know is that humans encounter each other regularly, which inevitably leads to conflicts about the rules of behavior, about what is allowed, mandatory and prohibited, about facts and actions. You know that most humans value life either above all other values, or as a necessary precondition to satisfying one's conception of good, since death would prevent most of us from realizing our plans.

One question is whether, in this heaven position, we want to decide upon some minimal rules of conduct or whether we should leave that for later, once we have been born. I shall not dwell on that question here. *What I want to assert here is that even before we decide upon our rules of conduct, we should have some rules about the rules, called metarules, regarding how should we decide who is right in cases where we disagree with each other and the disagreement is a matter of such importance that we cannot agree to disagree.* We also want some disagreements to be solved definitively one way or another. For instance, if we disagree as to whether a certain house is mine or yours, this disagreement might be of such vital importance that we cannot continue with our lives until it is solved.

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[354] "I also suppose that men suffer from various shortcomings of knowledge, thought, and judgment. Their knowledge is necessarily incomplete, their powers of reasoning, memory, and attention are always limited, and their judgment is likely to be distorted by anxiety, bias, and a preoccupation with their own affairs. Some of these defects spring from moral faults, from selfishness and negligence; but to a large degree, they are simply part of men's natural situation. As a consequence individuals not only have different plans of life but there exists a diversity of philosophical and religious belief, and of political and social doctrines.", Rawls, *A theory of justice*, p.110.

[355] "As far as possible, then, the only particular facts which the parties know is that their society is subject to the circumstances of justice and whatever this implies. It is taken for granted, however, that they know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice. There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of the systems of social cooperation which they are to regulate, and there is no reason to rule out these facts. It is, for example, a consideration against a conception of justice that, in view of the laws of moral psychology, men would not acquire a desire to act upon it even when the institutions of their society satisfied it. For in this case there would be difficulty in securing the stability of social cooperation. An important feature of a conception of justice is that it should generate its own support. Its principles should be such that when they are embodied in the basic structure of society men tend to acquire the corresponding sense of justice and develop a desire to act in accordance with its principles. In this case a conception of justice is stable. This kind of general information is admissible in the original position.", ibid., p.119.

We do not want irrelevant factors to influence the way in which a conflict is solved. For instance, some people have more developed muscles than others, younger individuals are physically stronger than older ones; other examples of irrelevant factors would be having bigger families, clans, more and better weapons, a charming character, or a talent for lying convincingly.

What makes these factors irrelevant? The resolution of a conflict can leave us at something of a disadvantage. For instance, after years of believing that a certain house is mine, the conflict might end with the house in your possession. *We do not want to undergo disadvantages without a good reason.* The disadvantage has to be the conclusion of a good argument. One good argument would be that I have previously signed a contract selling you the house and you paid the agreed sum in its entirety. The fact that I signed the contract and that you paid the money are relevant factors, since they are valid premises of an argument which leads to the conclusion that the house is yours. Now imagine the opposite, that I did not sell you the house, there is no contract, neither has there been any transfer of money, that the house is registered in my name, and that the only premise you advance to defend your conclusion that the house is yours is the fact that you have bigger biceps and some terrifying weapons. That the house either is, or should be, yours is not something that follows from your having all those things, at least not without other premises. They are, therefore, irrelevant factors.[356]

We have two reasons to avoid irrelevant factors. One reason is that, in part, the rules are designed to serve the common good. If everybody behaves in a certain way, we will all prosper. For instance, if enough people respect their contracts, the whole group prospers more than it would in a case where only few people respect them, or when nobody does. It would be irrational to permit irrelevant factors to decide the outcome of conflicts, since the entire prosperity of the group, or of humanity as a whole, would recede, even if the possessors of those qualities prospered more than the rest.

The second reason is that it is rational to avoid the risks involved in being the disadvantaged party. Remember Mister Smart? Smart might have a bigger family and better weapons, he might be associated with a clan, or with the Mafia, or even be part of a powerful country. Our lives are too important to risk being born as one that loses out to the more powerful.

[356] The best definition of a fallacy is that the premises or argumentative steps used are irrelevant to the conclusion drawn. A fallacy is an argument that does not survive the "so what?" test.

It is certainly possible that most of the people would respect the rules, without abusing the fact that they have more power than others. It is also possible that, when there is a disagreement about the facts or the rules, those who are more powerful would negotiate a solution with those who are less powerful. But given all we know about human nature these are unlikely possibilities. If some spirits in the heaven position are skeptical about this possibility, the others have no justification for imposing it by force. *Therefore, it is rational to sign a social contract that no person has the last word in her own conflicts.*

There is no essential difference between individuals and groups in this matter. If you want to defend yourself from other single individuals and control their behavior using a judge, then the same is the case when a group of individuals are a danger to your life or your rights. It does not matter to you whether Smart is acting alone or with his peers, or whether he is the CEO of an enterprise, the representative of an international organization or a head of state. What it matters to you is that, in a case of conflict, he and his group should not have the last word. On the contrary, the bigger the group, the more pressing your need for an instrument of control.

5.3 Rawls and International Law

We turn now to Rawls treatise about international law: "The law of peoples" (referred to hereinafter as LoP). Rawls departs from the concept of liberal individualism in no uncertain terms.[357] His treatise starts from Kant's "Perpetual Peace"[358] but comes to slightly different conclusions. For instance, to Fernando Tesón, it follows from Kant's argument in "Perpetual

[357] "LoP retreats from the ambitions of A Theory of Justice and is almost anti-individualistic.", C. Audard, "Cultural Imperialism and 'Democratic Peace'," in *Rawls's law of peoples: a realistic utopia?*, eds R. Martin, D.A. Reidy (Malden, MA: Blackwell Pub., 2006), p.59.
"In his international theory Rawls, as indicated above, abandons the individualist assumptions about human nature. In A Theory of Justice he wrote:
'The essential idea is that we want to account for the social values, for the intrinsic good of institutional, community, and associative activities, by a conception of justice that in its theoretical basis is individualistic. For reasons of clarity among others, we do not want to rely on an undefined concept of community, or to suppose that society is an organic whole with a life of its own distinct from and superior to that of all its members in their relations with one another.'
In contrast, in The Law of Peoples, Rawls indicates that this individualist assumption is biased in favor of liberalism. The law of nations must, therefore, make room for nonindividualistic (i.e., communitarian) normative conceptions. One wonders, however, if this innovation is anything more than an ad hoc hypothesis.", F.R. Tesón, *A philosophy of international law.* New perspectives on law, culture, and society Boulder, Colo.: Westview Press, 1998, p.110.

[358] "The basic idea is to follow Kant's lead as sketched by him in Perpetual Peace (1795) and his idea of foedus pacificum. I interpret this idea to mean that we are to begin with the social contract idea of the liberal political conception of a constitutionally democratic regime and then extend it by introducing a second original position at the second level, so to speak, in which the representatives of liberal peoples make an agreement with other liberal peoples.", Rawls, *Law of Peoples*, p.10.

Peace" that individuals should be able to sue states at international courts: "First, the theory suggests the creation of compulsory judicial mechanisms to settle controversies arising from the three Definitive Articles: an International Court of Human Rights, the International Court of Justice, and an International Court of Trade (roughly corresponding to Kant's three Definitive Articles)."[359] None of those courts existed in Kant's time; the last two exist nowadays, though with some imperfections, while regional courts of human rights were born in the last century.[360]

In spite of Kant's implications, the LoP makes mention of neither social contract between individuals on an international level, nor of international courts. Rawls only argues an original position, whereby state leaders choose political principles for justice between states from behind a veil of ignorance, inasmuch as they have no knowledge of which states they lead.[361] But not all the leaders are part of this social contract, only the leaders of decent, or well-ordered peoples, meaning liberal and *decent hierarchical peoples* (DHPs). The tyrants, excluded from the social contract, are outlaws.

To qualify as decent, peoples have to satisfy two requirements: (1) On an international level, they are neither expansionistic nor aggressive towards other peoples, and they make no attempt to export their model of the state to other countries; (2) At the domestic level their "system of law, in accordance with its common good idea of justice secures for all members of the people what have come to be called human rights."[362] These are limited to the "right to life, namely, to the means for subsistence and security; to liberty, meaning freedom from slavery, serfdom, a forced occupation and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought; to property, namely, personal property; and to formal equality as expressed by the rules of natural justice, that is, that similar cases be treated similarly."[363]

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[359] Tesón, *A philosophy of international law*, p.25.

[360] The European Court of Human Rights, The Inter-American Court of Human Rights and The African Court on Human and Peoples' Rights.

[361] "The basic idea is to follow Kant's lead as sketched by him in Perpetual Peace (1795) and his idea of foedus pacificum. I interpret this idea to mean that we are to begin with the social contract idea of the liberal political conception of a constitutionally democratic regime and then extend it by introducing a second original position at the second level, so to speak, in which the representatives of liberal peoples make an agreement with other liberal peoples. This I do ...again later with nonliberal though decent peoples... Each of these agreements is understood as hypothetical and nonhistorical, and entered into by equal peoples symmetrically situated in the original position behind an appropriate veil of ignorance. Hence the undertaking between peoples is fair.", Rawls, *Law of Peoples*, p.10.

[362] Ibid., p.65.

[363] Ibid., p.65.

Let us now subject Rawls to some criticism. There is no good reason why we should chose a social contract between peoples and not between individuals at the global level.[364] After all, we have no say in the matter of which state we are born into.[365] In footnote 9[366] on page 17, he promises to explain the reason in paragraphs 2 and 11, but I was unable to distillate any reason from those two paragraphs. According to Rawls, at the first level in the original position, the veil of ignorance amongst citizens of liberal societies has a very important property, namely, the fact that there is always a risk of ending up in the least advantaged position. He tells us in ToJ, and I agree, that we are not prepared to take this risk, and that we would therefore agree only upon rules that would advance the position of the least advantaged more than anything else.

Rawls seems to assume that a global veil of ignorance at the first level, amongst individuals, necessarily entails that "all persons are to have the equal liberal rights of citizens in a constitutional democracy."[367] This necessarily leads to the liberal people's having a foreign

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[364] Others have had difficulty to find the reason. For instance Buchanan writes: "In the only passage in which he responds explicitly to those who criticize his assumption that the parties should be representatives of peoples, not of individuals, he suggests that it would be parochial, and hence intolerant, to conceive of the parties as representing individuals *as liberals conceive them* - as free and equal participants in cooperation", A. Buchanan, "Taking the Human out of Human Rights," in *Rawls's law of peoples: a realistic utopia?*, eds R. Martin, D.A. Reidy (Malden, MA: Blackwell Pub., 2006), p.161. Tesón understands something similar but he talks about the first article Rawls wrote, not the book: "Rawls rejects a global contract among individuals (as opposed to representatives of states) because "in this case it might be said that we are treating all persons, regardless of their society and culture, as individuals who are free and equal, and as reasonable and rational, and so according to liberal conceptions." This, Rawls believes, makes the basis of the law of peoples too narrow. The central question here is one of the definition of the self: what is a person, a human being? Is it possible to defend any moral theory without presupposing some degree of sameness among all persons? This is a much debated question in philosophy today, and I will not address it here. Yet the greatness of A Theory of Justice was, in my opinion, its persuasive (and very Kantian) attempt to capture our essential humanity regardless of other contingent interests or preferences that people may have in this or that tradition or culture (what Kant calls "anthropological" traits). This is precisely the greatness of the international human rights movement, too.", Tesón, *A philosophy of international law*, p.110-11.

[365] "The obvious question, for anyone who takes the international human rights movement seriously, is why the hypothetical agreements that determine the most fundamental principles of the international legal order should only include choosers representing peoples, not individuals. Given that the first modern human rights conventions were in large part a conscious response to the Holocaust – in which millions of individuals were slaughtered by their own government in the name of a people (the German Volk) – one would think that the hypothetical international contract should include choosers who represent individuals.", Buchanan, "Taking the Human out of Human Rights," p.160-61.

[366] "A question sure to be asked is: Why does the Law of Peoples use an original position at the second level that is fair to peoples and not to individual persons? What is it about peoples that gives them the status of the (moral) actors in the Law of Peoples? Part of the answer is given in §2, in which the idea of peoples is specified; but the fuller explanation is given in §11.", Rawls, *Law of Peoples*, p.17 Footnote 9.

[367] Ibid., p.82.

policy that would act to transform all non-liberal societies into liberal ones.[368] Though it is unclear whether Rawls himself believes that this is a necessary conclusion of a global individual veil of ignorance, or attributes this conclusion to his critics, he tries to refute it. This conclusion would assume that only liberal societies are acceptable and Rawls rejects this idea. For Rawls, it seems that the principle of toleration makes it necessary for the liberal peoples to accept the DHP's as part of the global society, without interfering with their internal organization; acting otherwise would make the liberal peoples parochial, a flaw they should avoid.[369]

I would like to refute the foregoing. The idea of making social contracts with peoples having radical different '*comprehensive doctrines'* is not unique to liberalism; for instance, it is present in Islam. And even if it were, it does not follow from a veil of ignorance at the first level that every person in the world is to have the equal, liberal rights of citizens in a constitutional democracy. Nor does it follow that liberal societies should impose liberalism on DHP's. Behind an individual veil of ignorance in the heaven position it would be rational to sign a contract to the effect that, if one is born in a DHP and, as result of growing up in that culture, one were to come to adopt it voluntarily as preferable to a liberal one, one should have a claim against others, protecting one from outside interference in one's comprehensive doctrine. What I mean is that the original position argument, especially my heaven position one, can accommodate communitarian, *hierarchical groups*, or other groups who are guided by rules that are significantly different from the liberal ones. In the heaven position, one has to admit that one might be born in a non-liberal culture, or that a group of people could rationally chose to secede from a liberal culture, in order to enact a non-liberal way of life. One might genuinely endorse this non-liberal culture, not as the result of unreasonable indoctrination, such as life threats, extreme pavlovian conditioning, brainwashing and so forth. Of course, one has to provide a good answer to the question as to what should be done when a liberal dissenter is born in a non-liberal society, or a non-liberal dissenter in a liberal one, such as Mohammed B.[370] However, within the scope of this paper, we can leave this question unanswered for now.

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[368] "On this account, the foreign policy of a liberal people—which it is our concern to elaborate—will be to act gradually to shape all not yet liberal societies in a liberal direction, until eventually (in the ideal case) all societies are liberal.", ibid., p.82.

[369] Buchanan, "Taking the Human out of Human Rights," p.161.

[370] Mohammed Bouyeri is a Dutch–Moroccan citizen, currently serving a life sentence without parole for the murder of Dutch film director Theo van Gogh. Mohammed Bouyeri did not recognize the court, which would make him the prototype for a non-liberal dissenter.

Even if one has a comprehensive doctrine based on a form of collectivism or communitarism, one is still aware that, in the heaven position one has, as an individual, some claims against other individuals and against other groups, that one has some rights of one's own. When Laliberte, the liberal, threatens to kill Comunale, the communitarian, Comunale sees this as a potential harm to herself, not to her group. If Comunale begs Laliberte for her life, she does not cry out "please don't hurt my community," but asks or demands to be spared in her own name. This means that one individual from anywhere in the world can have claims against individuals and groups from other parts of the world, individual claims or individual rights, notwithstanding having a non-liberal comprehensive doctrine.

In the heaven position one cannot leave the defense of one's individual rights to representatives, not least because negotiations between groups (states) tend to be guided by utilitarian considerations that might result in sacrificing individuals for the greater utility of the group.[371] One such example might be Al-Adsani, the individual discussed in the introduction to this paper, the man who could not sue Kuwait in the British courts, since this state immunity is seen by International Law as necessary in order to maintain friendly relations amongst nations. I wish to oppose this. If someone prefers a direct testing of her arguments against anybody in the world in a court of law, nobody should be able to deprive her of that, since anyone who tries to deprive her of that freedom becomes another opponent, with contesting claims, claims that can only be decided by a judge.

Thus we have no good explanation as to why Rawls' original position at the international level is not individual, but is set at the second level, amongst peoples. Maybe Rawls wanted to protect his theory from the criticism "A Theory Of Justice" received from American international lawyers, namely, that if its conclusions were to be followed faithfully, the United States would have to share its wealth with all those people perceived by Rawl's critics as being lazy third worlders with irresponsible breeding habits.[372]

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[371] Rawls opposed utilitarianism strongly.

[372] See, for instance: "A rich nation thus trades off its potential for population increase for material things. We have often heard the expression "He may be a rich man, but he has no children, and therefore he's really very poor." Similarly, a family in the United States that has two children may be "poorer" in a very real way compared to a family in India that has ten children. But then, why should the Indian family have a claim against the U.S. family for a portion of the latter's material wealth?", A. D'Amato, "International Law and Rawls' Theory of Justice Faculty Comment," 5 *Denv. J. Int'l L. & Pol'y* 525 (1975): p.529. and "A second counter-argument to the levelling tendency in Rawls' theory points back to the "supply" side of the picture: the earth's resources are finite and non-infinitely renewable. Now suppose that Rawls' "difference principle" applies between advantaged nation A and disadvantaged nation D. Nation A would then be constrained by the principles of justice to pay foreign aid to nation D until such time as A loses its capital-formation incentives due to the heavy nature of the "tax" that comprises this foreign aid. So, let us establish a maximum for the tax; say, forty percent of all income. If this forty percent is five billion dollars per year, then A would pay to D five billion dollars

In “A Theory Of Justice” (ToJ), we are allowed to have any general knowledge possible about human psychology, about group dynamics and about how politics works.[373] We can say that having that knowledge means that we know some of us will be born under the yoke of totalitarian leaders, in what Rawls calls ‘outlaw states’, ie states lead by “regimes [that] refuse to comply with a reasonable Law of Peoples.”[374] Since the tyrants are excluded from the social contract, their subjects are also excluded, meaning that they have no say as to how the world’s problems should be solved, or as to what rules of conduct should exist between the citizens of the world, and between states (peoples). Thus, even though the International Law affects them, the tyrannized are only the objects of this law and not its subjects; they have no means of influencing how this law is made, even if it affects their legitimate interests in a negative way. They are left at the mercy of others.

On this essential point, Rawls differs from Kant, for whom, since there was no international court to decide who was right, it would therefore be impossible for us to decide whether wars were just.[375] Accordingly, he rejected the notion of humanitarian interventions.[376] Rawls allows for humanitarian interventions in cases of egregious violations of human rights.[377] However, I would assert that only having an original position between peoples cannot justify interventions and that its acceptability is contingent upon two necessary conditions.

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annually. But what would D do with the money? If D used the money for capital-formation, then in the course of time we might expect the people of D to approach in personal wealth per capita the people of A (assuming that there is no runaway population growth in D, as per the preceding argument). But why would D necessarily have the incentive to save and invest the money paid over by A? Human nature being what it is, D might simply decide upon a program of hedonistic consumption, spending for short-run pleasure five billion dollars per year, secure in the knowledge that next year another five billion dollars will be received from the hard-working people of A. In other words, while the forty percent tax on A might not wipe out the incentive to invest and produce within A, the payment of that forty percent tax might wipe out any incentive to invest and produce within D. As a result, a reckless consumption program may be set up, cutting into the earth's stock of nonrenewable resources, to the detriment of all nations. D would proceed (in theory) on its merry way, knowing that only by spending all of the five billion dollars per year the people of D will remain technically "poor" and thus will ensure, under Rawls' theory, continuing annual receipts of this amount of foreign aid. Clearly, from a global perspective, this result is unjust.", ibid., p.529-30.

[373] Rawls, *A theory of justice*, p.119.

[374] Rawls, *Law of Peoples*, p.5.

[375] "In war neither of the two parties can be declared an unjust enemy (since such an assessment presupposes a judicial decision).", I. Kant et al., *Toward perpetual peace and other writings on politics, peace, and history*. Rethinking the Western tradition New Haven: Yale University Press, 2006, p.70.

[376] "No state shall forcibly interfere in the constitution and government of another state.", ibid., p.70.

[377] "If the offenses against human rights are egregious and the society does not respond to the imposition of sanctions, such intervention in the defense of human rights would be acceptable and would be called for.", Rawls, *Law of Peoples*, p.94 note 6.

First, only if the original position is imagined between individuals, as in the heaven position, can one ever justify humanitarian intervention. Rawls tells us that being in the heaven position one is allowed to know specific facts about the human nature. It follows that one will know that there is, indeed, a chance that one might be born in a state that violates human rights. One knows the higher the misery of one's life, the more ready one is to take risks involving one's possible death in order to improve one's life. For instance, people participating in revolutions weigh the risks of dying and the continuation of their life in miser, against the better life envisaged. The same is the case when one is the subject of an humanitarian intervention. One estimates, roughly, the probability that the intervention will lead to one's death, or permanent mutilation as one of the cases of collateral damage or war's other drawbacks. Therefore *humanitarian intervention is only acceptable if one would* ***individually*** *accept this risk of dying in the intervention before one is born (in the heaven position) and would sign a contract that would permit the interveners to intervene.*

There is one more condition necessary in order to make humanitarian intervention acceptable: courts of law that can decide whether a specific intervention was genuine or unjustified. Remember Mr Smart? In one of his answers he admitted killing your daughter and saying about her organs that he "used them for seminal scientific research and discovered a cure for a sickness that will save the lives of billions of children in the future, children who would otherwise die before they were ten. It is the same sickness that your other two children have, and thus I could save them." What is wrong about this answer is that it is somebody else who decides whether one negative consequence for you is acceptable in order to produce a greater good, or to serve the common good, and does so without any form of consent from you. He ignores what your daughter might think about it and whether she would accept this sacrifice.

I assert that she would accept this sacrifice only if, in the heaven position, she would be prepared to take the risk of being born as herself and still be prepared to sacrifice herself for the greater good. You certainly would not give Mr. Smart the privilege of deciding himself, without your consent, or without the existence of a court that will decide that he is right. In the same way, at the international level, one knows that certain peoples could call themselves liberal and invent some human rights abuses in your state as pretext for invading your country, for reasons of personal (undeserved) gain, resulting in unnecessary and unfair disadvantages for you. You know that even genuine liberal peoples might do that from time to

time and you certainly are not prepared to take this unnecessary risk.[378] You might only be prepared to take the intervention risks if there are courts where the individuals in the invaded states could sue the invader and ask the court to decide whether the invasion was, or is, a legitimate one or not, and if not, what should be done about it.

Without a court, nobody could force you to trust any of the people that call themselves liberal interventionists if you mistrusted them, exactly as nobody could force you to trust Mr. Smart in the absence of a judge. Rawls' veil of ignorance was necessary because we are imperfect rational beings and our arguments are biased as result of our contingent propensities.[379] But Rawls fails to see that, when we decide as a group, even as liberal states, we are still prone to the same judgment failures as we were as individuals. Aggregating imperfect, fallible, biased judgments does not necessarily lead to unbiased, more correct judgments. Even if democratic group decisions were to be made on the basis of a miraculously acquired, godlike knowledge, that would still not justify imposing them on others without the mediation of a judge. If Mr Smart tells you that he is not going to accept a judge because he has a godlike knowledge and knows better than you, nonetheless, as long as he cannot prove this knowledge to you, you are in no way obligated to let the matter rest. Rawls fails to see this and is unwarranted in relying too much on the reasonableness of the liberal peoples. It follows that, in accepting military interventions, he imposes this alleged reasonableness of the liberal peoples on others as a

[378] Rawls admits that liberal societies "sometimes" fight wars in order to "gain economic wealth or to acquire natural resources," ibid., p.91. Sometimes liberal peoples are moved by "monopolistic and oligarchic interests without the knowledge or criticism of the public", or "economic interests behind the scenes" in the presence of some "subterfuge", such as self-defence and humanitarian intervention: "Hence, given the great shortcomings of actual, allegedly constitutional democratic regimes, it is no surprise that they should often intervene in weaker countries, including those exhibiting some aspects of a democracy, or even that they should engage in war for expansionist reasons. As for the first situation, the United States overturned the democracies of Allende in Chile, Arbenz in Guatemala, Mossadegh in Iran, and, some would add, the Sandanistas in Nicaragua. Whatever the merits of these regimes, covert operations against them were carried out by a government prompted by monopolistic and oligarchic interests without the knowledge or criticism of the public. This subterfuge was made easier by the handy appeal to national security in the context of superpower rivalry, which allowed such weak democracies to be cast, however implausibly, as a danger. Though democratic peoples are not expansionist, they do defend their security interest, and a democratic government can easily invoke this interest to support covert interventions, even when actually moved by economic interests behind the scenes.", ibid., p.53.

[379] "I also suppose that men suffer from various shortcomings of knowledge, thought, and judgment. Their knowledge is necessarily incomplete, their powers of reasoning, memory, and attention are always limited, and their judgment is likely to be distorted by anxiety, bias, and a preoccupation with their own affairs. Some of these defects spring from moral faults, from selfishness and negligence; but to a large degree, they are simply part of men's natural situation. As a consequence individuals not only have different plans of life but there exists a diversity of philosophical and religious belief, and of political and social doctrines.", Rawls, *A theory of justice*, p.110.

sufficient condition by force, even if those helped have genuine reasons to doubt the benevolence of those intervening.

The same applies in the case of self-defence.[380] Only when there is a court to deem the use of military force as a genuine act of self-defence can the one suffering the consequences be forced, and is obliged, to accept it as such.

We have rights independently of the will of others. Rights entail remedies[381] and there is no reason to let the liberal societies play judge in their own conflicts, in violation of the very rule of law.[382] Rawls therefore missed the opportunity to conclude that individuals should be able to sue states, and he also fails even to mention the International Court of Justice, or any other judicial mechanism for solving conflicts between states.

In conclusion, on the one hand, Rawls departs from the classical statist assumptions that all states are "equally legitimate provided they have an effective government."[383] On the other hand, he still fosters a view of the peoples as isolated entities that interact with each other only at the head-of-state level. International lawyers had already deemed this view 'artificial' in the post-WWII years, making note of the ever increasing cross-border interaction between

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[380] Various norms of International Law make war illegal, such as articles 2(3) and 2(4) of the UN charter:
2(3): "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[381] "The very idea of a right means that somebody has a claim against somebody else, and the other one has a duty to meet this claim. If the duty-bearer does not live up to his or her obligations, the rights-holder has a remedy to hold the duty-bearer accountable. Otherwise, the right would be meaningless. A remedy means that the rights-holder can sue the duty-bearer before an independent neutral body, which has the power to decide in a binding manner whether or not the duty-bearer violated his or her obligations. Such an independent neutral body is usually called a court. If the court finds that the duty-bearer violated certain obligations, it has the power to order the duty-bearer to provide reparation to the rights-holder.", Nowak, "Eight Reasons why we need a World Court of Human Rights," p.697.
Dame Rosalyn Higgins, a former ICJ president, citing Lord Denning's assertion "that a right which depended for its enforcement upon the consent of another party, was close to being no legal right at all", Higgins, "Conceptual Thinking," p.14.
"In the matter of the fundamental rights of man the remedy is not complete—it is defective—unless in the last resort a judicial remedy is available.", Lauterpacht, *International law and human rights*, p.291.

[382] "[J]udges must be independent and impartial, and no man may judge his own case.", Rawls, *A theory of justice*, p.210.

[383] Tesón, *A philosophy of international law*, p.109.

individuals themselves and between individuals and foreign states, which necessarily leads to legal relations.[384]

In Rawls' "realistic utopia", the international law depends only on the decency and reasonableness of the citizens of the liberal states and the hope that, at some stage in the future, every state will have become decent. He fails to tackle many of the problems pointed up by liberal criticism of the current international law, such as Tesón's conclusion that, while there has been an "exponential" growth of individual liberty following WWII, an "impressive expansion of human rights", this "enlightened moral and political global reality is ill-served by the traditional model of international law. The model promotes states and not individuals, governments and not persons, order and not rights, compliance and not justice. It insists that rulers be permitted to exercise whatever amount of coercion is necessary to politically control their subjects. Yet the reasons to prefer a world of free nations are strong enough to put the burden of proof on the international lawyers who cling to the traditional statist paradigm that privileges power-holders and ignores people."[385] "The […] positivist paradigm, by clinging to the deceptively simple notion of the unrestrained practice of states as the touchstone for legitimacy, ends up surrendering to tyranny and aggression, the evils that international law was intended to control in the first place."[386] Here, what Tesón has in mind is more the tyranny of dictators; thus he seems to fall for the statist assumption that citizens have rights only against their own state. But we could just as well contend that traditional, positivistic international law tolerates a tyranny of the non-liberal states toward their own people and toward individuals in liberal societies, as we have seen in Al-Adsani's case. What is even

[384] For instance, Lauterpacht: "Above all, with regard to both international rights and international duties the decisive factor has been the change in the character and the function of modern international law. The international law of the past was to a large extent of a formal character. It was concerned mainly with the delimitation of the jurisdiction of States. Substantial portions of it were devoted to immunities of States, their diplomatic representatives, and their property. In so far as it was concerned with substantive law, it was mainly concerned with the law of war. There is not much difference in this respect between the treatises of the early publicists and those of modern writers. In traditional international law the individual played an inconspicuous part because the international interests of the individual and his contacts across the frontier were rudimentary. This is no longer the case. The interdependence of States which requires regulation is the interdependence of the individuals who compose them was mainly concerned with the law of war. There is not much difference in this respect between the treatises of the early publicists and those of modern writers. In traditional international law the individual played an inconspicuous part because the international interests of the individual and his contacts across the frontier were rudimentary. This is no longer the case. The interdependence of States which requires regulation is the interdependence of the individuals who compose them. An international law which disregards that fact is bound to be artificial. There is a growing tendency to take that fact into account.", Lauterpacht, *International law and human rights*, p.62-63.

[385] Tesón, *A philosophy of international law*, p.25.

[386] Ibid., p.26.

more troubling, however, is that international law tolerates a tyranny of the liberal states toward individuals in non-liberal societies. This is a double opression of the opressed. There is no excuse for it whatsoever and Rawls does little to soothe the pain.

6. Conclusion

We are imperfect in knowledge and we experience many vital conflicts that demand resolutions one way or another. One smart way to solve those conflicts is to let neutral arbiters decide which arguments are better. This is not only a service to the common good; a free and rational individual would also sign a social contract providing for future conflicts to be decided by a judge. What is more, we have the freedom to impose such a judicial system on others as a measure of self-defence. This is just as much the case for conflicts that individuals have with groups as it is for the conflicts that they have with states. Therefore, individuals should be able to sue states at international courts, thus compelling them to act in certain ways or refrain from certain acts, and demanding just compensations for transgressions on the part of a state or states.

"There are many practical and moral reasons for recognizing the right of an individual to the direct assertion before international bodies of his claim against a foreign state,"[387] and the same applies to his own. Article 34 of the Statute of the International Court of Justice is not declaratory of any IL principle that excludes individuals from having legal standing before international courts,[388] nor does the conceptual IL thinking exclude individual standing.[389]

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[387] Korowicz, "Problem of the International Personality of Individuals, The," p.562.

[388] "The traditional doctrine in the matter of subjects of international law has derived much support from the rule that only States have a *locus standi* before international tribunals. That rule has found terse expression in Article 34 of the Statute of the International Court of Justice, which lays down that 'Only States may be parties in cases before the Court'. However, the importance of this provision of the Statute, in relation to the question under discussion, ought not to be exaggerated. It is a provision defining the competence of the Court. It is not intended to be declaratory of any general principle of international law. No such principle prevents States, if they so wish, from securing to individuals and international public bodies access to international courts and tribunals.", Lauterpacht, *International law and human rights*, p.48.

[389] "One will, therefore, not easily meet the argument that there is some inherent quality of international law which excludes individuals from direct participation in the formation or the application of this law. All law must certainly be applied to individuals. There can be no law without human will. Individuals have always applied international law and individuals have always in the last resort been subjects of international law either directly (as pirates, officers, etc.) or indirectly (as citizens of the state against which sanctions of one kind are applied).", Hambro, "Individuals before International Tribunals," p.23. "The interpretation of the Charter in that matter depends to a substantial degree upon the realisation that there is no rule of international law which definitely precludes individuals and bodies other than States from acquiring directly rights under or being bound by duties imposed by customary or

The exclusion of individuals from article 34 was not a self-evident fact and was not achieved without a fight, even when positivistic doctrine was at its zenith. Moreover, an evolution in IL, originating in the 19th century, can be identified. Individuals have gained a central role, while their well-being is now recognized as being of enormous significance. During this period, existing institutions have progressed from an initial phase, wherein there is no role for individuals, to a stage were individuals gain access, as with, for instance, the Mandates Commission, and the European and American courts of human rights. At the same time, new institutions without individual access are now unthinkable. There are many precedents of legal standing which prove that the arguments against individual access have no substance of any weight, and it is the great legal scholars, states and philosophers[390] who have pleaded in its favor. One might thus claim an emerging rule of International Law, granting individuals full *locus standi*.

The genie is out of the bottle.

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conventional international law, and that the developments of the last quarter of a century have translated that capacity, in many fields and in respect of both rights and duties, into part of positive law.", Lauterpacht, *International law and human rights*, p.4. "Yet there is no rule that the individual cannot have some degree of legal personality, cannot have personality for certain purposes… there is no rule that individuals cannot have procedural capacity before international jurisdictions..", Brownlie, "The Individual before Tribunals Exercising International Jurisdiction," p.702. "[I]t is quite clear today that there is nothing intrinsic to international law that impedes or renders it impossible for non-State actors to enjoy international legal personality. No one in good conscience would today dare to deny that individuals effectively possess rights and obligations which emanate directly from international law, with which they find themselves, therefore, in direct contact.", Cançado Trindade, "The Emancipation of the Individual," p.156. "But the very notion of international law is not predicated upon this assumption, and the international legal system survives conceptually even were this to change. Additionally, these assumptions about access to international tribunals and force are in fact changing rapidly, with significant consequences in the delicate balance between the state and the individual.", Higgins, "Conceptual Thinking," p.15.

[390] Tesón pleaded it himself, but he believed that it was a consequence of Kantian philosophy: "The Kantian theory is not limited to a rarified philosophical domain... First, the theory suggests the creation of compulsory judicial mechanisms to settle controversies arising from the three Definitive Articles: an International Court of Human Rights, the International Court of Justice, and an International Court of Trade (roughly corresponding to Kant's three Definitive Articles).", Tesón, *A philosophy of international law*, p.25.

7. ANNEX 1

Draft Articles on Responsibility of States for Internationally Wrongful Acts Towards Individuals

Introduction

This annex is an adaptation of the ILC Articles On State Responsibility.[391] I have omitted the articles that are exactly the same or that might be deleted since they apply only to states. To those article I have added a Minimal Bill of Rights,[392] and a short possible implementation.[393]

Part one - The internationally wrongful act of a State

Chapter I - General principles

Article 1

1. Responsibility of a State for its internationally wrongful acts
2. Every internationally wrongful act of a State entails the international responsibility of that State.
3. Under international law every State has the duty to respect and to ensure respect for human rights and humanitarian law.[394]
4. The obligation to respect and to ensure respect for human rights and humanitarian law includes the duty: to prevent violations, to investigate violations, to take appropriate action against the violators, and to afford remedies and reparation to victims. Particular attention must be paid to the prevention of gross violations of human rights and to the duty to prosecute and punish perpetrators of crimes under international law.[395]

Chapter II - Attribution of conduct to a State

Professor Kamminga analyzed the possibility that states might be held responsible for human rights violations and concluded:

[391] ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, 2001.

[392] See Part five – The Minimal Bill of Rights

[393] See Part Six – Implementation

[394] Article 1 from Basic Principles And Guidelines On The Right To Reparation For Victims Of Gross Violations Of Human Rights And Humanitarian Law, E/CN.4/Sub.2/1996/17.

[395] Article 2 from ibid.

"In sum, the following acts contrary to international human rights law may be imputed to the state:

a. Abuses committed by officials, even if they were acting ultra vires.

b. Abuses committed by private individuals acting on the direct orders or under the direct control of the authorities.

c. Abuses committed by private individuals in response to which the authorities failed to exercise due diligence by taking adequate preventive and repressive measures."[396]

Chapter III - Breach of an international obligation

Article 12
Existence of a breach of an international obligation

1. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.
2. Breaches of obligations *erga omnes* are breaches against individuals only if there is a direct link between the individual and a State act constituting a violation of one of the rights enumerated in the Minimal Bill of Rights.

Commentary:
The ILC comments that the state's responsibility can arise from breaches of obligations that states owed to the international community as a whole, for instance, genocide, slavery, apartheid, torture, war crimes and crimes against peace.[397] It is a part of the doctrine of international law that, in such a case, any state can consider itself the victim. However, Article 12(2) is introduced to avoid actions by individuals against states on the basis of breaches of obligations *erga omnes*, breaches where there is no direct link between the breach and the personal interests of the individual at stake. The individual bringing a claim against a State must prove that her/his own interests are at stake in the legal proceedings she/he wishes to start. The reason for preventing it is to accommodate concerns expressed by states, and in the literature, that giving individuals a right to petition, or legal standing before international courts, would result in political procedures which might well be "frivolous, malicious, based on obviously deficient information as to the correct legal position."[398]

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[396] Kamminga, *Inter-state accountability*, p.143.

[397] Barcelona Traction case (Second Phase), ICJ Reports, 1970, p. 3 Para. 33:
"… an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character."

[398] See India's Proposal On Implementation Of Human Rights Instruments: "I realize the difficulties in the way of dealing with representations from individuals. Such representations will not always be reliable. They may be malicious and even frivolous. But it will, not be difficult to weed out such petition.", E/CN.4/153, p.2

Chapter V - Circumstances precluding wrongfulness

Article 20
Consent

1. Valid consent by individual to the commission of a given act by a State precludes the wrongfulness of that act in relation to the individual to the extent that the act remains within the limits of that consent.
2. Valid consent by a State to the commission of a given act by another State does not preclude the wrongfulness of that act in relation to the individuals in the former State.

Commentary:
Paragraph 2 is introduced to avoid situations where a state violates the rights in the Minimal Bill of Rights with the consent, or on the request, of the state where those individuals reside or of which they are nationals. For instance, if state A asks state B to torture A's nationals, state B cannot invoke this request to preclude it's responsibility.

Article 21
Self-defence and humanitarian intervention

1. The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence, or an humanitarian intervention taken in conformity with the Charter of the United Nations.
2. States are not the ultimate decision makers. The declaration of self-defence or humanitarian intervention shall be null and void in circumstances where one of the International Courts named under Part Six decides that a given case is not a case of legal self-defence or of humanitarian intervention.
3. The International Courts named under Part Six may decide that an humanitarian intervention sanctioned by the Security Council is unlawful.
4. Humanitarian intervention without specific Security Council approval shall be legal only if sanctioned in advance by the International Court of Justice.
5. This rule is without prejudice to the law of war.

"There are three main objections to considering an International Court…In the first instance, there is a possibility that an international court might be overwhelmed by a multitude of complaints coming from distant parts of the world…frivolous, malicious, based on obviously deficient information as to the correct legal position, or otherwise not deserving of serious consideration.", Lauterpacht, *International law and human rights*, p.347-48. see also at p.57 "It is also possible that at times the new procedural right conferred upon individuals might be abused in order to cause embarrassment or to gain notoriety."
Under the Mandates System some of the mandatory powers opposed the individual right to oral hearings before the Mandate Commission arguing that it "might lend itself to intrigues on the part of ill-disposed persons." Chowdhuri, *International mandates and trusteeship systems; a comparative study*, p.214. According to the same argument, most petitioners have subversive intentions. Ginneken, *Volkenbondsvoogdij*, p.62. Other representative stated that: "All peoples, and especially peoples of a less advanced civilization, are always ready to address to any authority, complaints about the most insignificant matters, for reasons which have little if any, foundation." Ibid., p.179. Lugard, the British representative, was not very impressed by this argument: "Those who have genuine cause for submitting a petition will receive satisfaction," while "agitators who seek notoriety and self-advertisement will find that they do not succeed in their object." Gorman, "Liberal Internationalism, the League of Nations Union, and the Mandates System," p.472.

Commentary:
First, I want to make mention of a ILC-comment, namely "As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct."[399]

Article 21 has been changed drastically. In the first paragraph, humanitarian intervention is introduced as precluding state responsibility. Humanitarian intervention is controversial[400] in international law and is normally only lawful if sanctioned by a binding Security Council (SC) resolution under Chapter VII.

The new formulation of article 21 therefore has two advantages. First, it avoids political deadlock in the Security Council. A State might engage in humanitarian intervention which has been sanctioned in advance by ICJ, without SC approval. Second, it avoids political abuses by the SC, giving ICJ the power to decide that a humanitarian intervention is illegal despite being approved by the SC.

Article 22
Countermeasures in respect of an internationally wrongful act
The wrongfulness of an act of a State not in conformity with an international obligation towards an individual is precluded if and to the extent that the act constitutes a countermeasure taken against the individual in accordance with chapter II of Part Three.

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[399] ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, 2001, p.74.

[400] 'The state practice to which advocates of the right of humanitarian intervention have appealed provides an uncertain basis on which to rest such a right. Not least this is because history has shown that humanitarian ends are almost always mixed with other less laudable motives for intervening, and because often the 'humanitarian' benefits of an intervention are either not claimed by the intervening state or are only put forward as an ex post facto justification of the intervention. In the nineteenth century, interventions by the Western Powers to protect the Christian and other minorities in the Ottoman Empire, such as the Maronites on Mount Lebanon, are those most often said to have been for humanitarian ends. The two most discussed instances of alleged humanitarian intervention since 1945 are the Indian invasion of Bangladesh in 1971 and Tanzania's 'humanitarian' invasion of Uganda in 1979. But, although both did result in unquestionable benefits for, respectively, the peoples of East Bengal and Uganda, India and Tanzania were reluctant to use humanitarian ends to justify their invasion of a neighbour's territory. Both preferred to quote the right to self-defence under Article 51. And in each case the self-interest of the invading state was clearly involved. In fact the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal.... But the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments none at all; and finally on prudential grounds, that the scope for abusing such a right argues strongly against its creation. In essence, therefore, the against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.', Harris, *Cases and materials on international law*, p.918.

Article 25
Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) Does not seriously impair an essential interest of the individual or individuals towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) The international obligation in question excludes the possibility of invoking necessity; or
   (b) The State has contributed to the situation of necessity.

Part two - Content of the international responsibility of a State

Chapter I - General principles

Article 31
Reparation[401]

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.
3. Reparation may be claimed individually and where appropriate collectively, by the direct victims, the immediate family, dependants or other persons or groups of persons connected with the direct victims.[402]

Article 32
Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

The human rights and humanitarian norms which every State has the duty to respect and to ensure respect for, are defined by international law and must be incorporated and in any event made effective in national law. In the event international and national norms differ, the State shall ensure that the norm providing the higher degree of protection shall be applicable.[403]

Article 33

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[401] *Chorzow Factory* case (Merits), PCIJ, Series A, No. 17 (1928), p. 47: "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of international tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

[402] Article 6 from Basic Principles And Guidelines On The Right To Reparation For Victims Of Gross Violations Of Human Rights And Humanitarian Law, E/CN.4/Sub.2/1996/17.

[403] Article 3 from ibid.

Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to an individual, to several individuals, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any State or entity other than an individual.

Chapter II - Reparation for injury

Article 34
Forms of reparation

1. In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparations may take any one or more of the forms mentioned below, which are not exhaustive:[404]
2. Every State shall make known, through public and private mechanisms, both at home and where necessary abroad, the available procedures for reparations.[405]

Article 35
Restitution

Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights and humanitarian law. Restitution requires, inter alia, restoration of liberty, family life, citizenship, return to one's place of residence, employment of property.[406]
A State responsible for an internationally wrongful act is under an obligation to make restitution, provided and to the extent that restitution:

a. Is not materially impossible;
b. Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation and rehabilitation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. Compensation shall be provided for any economically assessable damage resulting from violations of human rights and humanitarian law, such as[407]:
   (a) Physical or mental harm, including pain, suffering and emotional distress;
   (b) Lost opportunities including education;
   (c) Material damages and loss of earnings, including loss of earning potential;
   (d) Harm to reputation or dignity;
   (e) Costs required for legal or expert assistance.

[404] Article 7 from ibid.
[405] Article 8 from ibid.
[406] Article 12 from ibid.
[407] Article 13 from ibid.

Rehabilitation shall be provided and will include medical and psychological care as well as legal and social services.[408]

Article 37
Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
   Satisfaction and guarantees of non-repetition shall be provided, including, as necessary:

   (a) Cessation of continuing violations;

   (b) Verification of the facts and full and public disclosure of the truth;

   (c) An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim;

   (d) Apology, including public acknowledgement of the facts and acceptance of responsibility;

   (e) Judicial or administrative sanctions against persons responsible for the violations;

   (f) Commemorations and paying tribute to the victims;

   (g) Inclusion in human rights training and in history textbooks of an accurate account of the violations committed in the field of human rights and humanitarian law;

   (h) Preventing the recurrence of violations by such means as:

   (i) Ensuring effective civilian control of military and security forces;

   (ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

   (iii) Strengthening the independence of the judiciary;

   (iv) Protecting the legal profession and human rights defenders;

   (v) Improving, on a priority basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

2. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured Individual or any person or entity in relation to whom reparation is sought.

[408] Article 14 from ibid.

Part three - The implementation of the international responsibility of a state

Chapter I - Invocation of the responsibility of a State

Article 42
Invocation of responsibility by an injured State
A Individual is entitled as an injured Individual to invoke the responsibility of a State if the obligation breached is owed to:
a. That Individual individually; or
b. A group of Individuals including that Individual, and the breach of the obligation:
(i) Specially affects that Individual; or
(ii) Is of such a character as radically to change the position of all the other Individual to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured Individual
1. An injured Individual which invokes the responsibility of a State shall give notice of its claim to that State.
2. The injured Individual may specify in particular:
   (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
   (b) What form reparation should take in accordance with the provisions of Part Two.

Article 46
Plurality of injured Individuals
Where several Individuals are injured by the same internationally wrongful act, each injured Individual may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47
Plurality of responsible States
1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
   (a) Does not permit any injured Individual to recover, by way of compensation, more than the damage it has suffered;
   (b) Is without prejudice to any right of recourse against the other responsible States.

Article 48
Invocation of responsibility by a State other than an injured Individual

1. No other Individual than an injured Individual is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
   (a) The obligation breached is owed to a group of Individual including that Individual, and is established for the protection of a collective interest of the group;
2. Any Individual entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
   (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
   (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured Individual or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured Individual under articles 43, 44 and 45 apply to an invocation of responsibility by a Individual entitled to do so under paragraph 1.

Chapter II – Countermeasures

Article 49
Object and limits of countermeasures

1. Any State may only take countermeasures on behalf of the injured Individual against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 54
Measures taken by States other than the home State of an injured Individual
This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Part four - General provisions

Article 55
Lex specialis

1. These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.
2. A State engaged in an unlawful use of force is liable for any damage, whether material or moral, inflicted upon any individual.
3. For a State engaged in an unlawful use of force, the following rule shall apply: in a case of conflict between the Minimal Bill Of Rights and the applicable *lex specialis* law, the law providing a higher threshold of protection, with a set of rights which are non-derogable, shall have priority.

Commentary:
In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court remarked:

"the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."[409]

The Court reaffirmed this in its judgment in the 2004 Wall Advisory Opinion.[410] In this judgment, the court remarked:

"As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[411]

Thus the court affirmed that "the test of what is an arbitrary deprivation of life... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." It is thus possible that the *lex specialis* rules might produce a lower standard of protection than the Minimal Bill of Rights. For instance, article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms permits a derogation from the right to life in the case of "lawful acts of war". Article 55(3) of these Articles makes unlawful the taking of lives during unlawful

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[409] I.C. J. Reports 1996 (I), p. 240, Para. 25.

[410] Para. 105-106

[411] The 2004 Wall Advisory Opinion, Para. 106

This was reaffirmed by the court the case of *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda*), ICJ Reports (19 December 2005), at Para. 216: "The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory…It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories."

armed conflicts by the aggressor State. In this case, one should apply the rules that confer the widest protection upon individuals when confronted with an act on the part of a State engaged as the aggressor in an unlawful armed conflict.

In the existing rules of armed conflict, there is no distinction between the unlawful use of force and self-defence in conformity with the Charter of the United Nations. Paragraph 3 in these Articles specifies that a state shall be liable for all the damages it causes to individuals in cases of unlawful use of force. [412]

Part five – The Minimal Bill of Rights

Commentary:
The articles in the Minimal Bill of Rights are not exhaustive.
Article 60

1. The rights specified in this Bill of Rights entail a legal obligation for each State to respect those rights.
2. The obligations of this Bill of Rights shall be binding upon States at all time and everywhere, within their metropolitan territory, the territories under their control and jurisdiction, and outside the territories under their control and jurisdiction [413]
3. This rule is without prejudice to article 22.

Article 61
1. All peoples have the right of self-determination[414]. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[415]

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[412] The creation of the United Nations Compensation Commission (UNCC) suggests that paragraph 2 and 3 of these Articles might already be a part of international law. The UNCC, created to resolve Gulf War claims against Iraq, which invaded Kuwait unlawfully, combined elements of diplomatic protection with 'some degree of leeway for individuals to assert their rights on their own account.' Randelzhofer and Tomuschat, "Foreword," p.VIII. Individuals have standing before the Commission. Randelzhofer, "The legal position of the individual under present international law," p.240.

[413] Formulation almost identical to Lauterpacht, *International law and human rights*, p.317.

[414] "At its twenty-second session, the Commission proposed the following examples as cases denominated as international crimes:
(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.", ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, 2001, p.113.

[415] Article 1 International Covenant On Civil And Political Rights.

2. All individuals, being part of a distinct people, have the individual right of self-determination.
3. All States, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall refrain from obstruction of the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Commentary:
The right to self-determination is considered a group right[416]. The U.N. Human Rights Committee rejects for instance individual claims their right of self-determination has been violated.[417] Paragraph 2 is a departure from that idea, giving individuals and individual right to self-determination and standing in The International Courts.

Article 62
1. Every human being has the inherent right to life. No one shall be arbitrarily deprived of his life.[418]
2. Countries which have not abolished the death penalty cannot impose it outside their national territory. Territories administered by States, such as occupied, Non-Self-Governing and Trust Territories, are deemed to be territories outside the administering State's national territory for the purposes of this article.

Article 63
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[419]

Article 64
1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.[420]
2. No one shall be held in servitude.[421]

Article 65
1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[422]
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.[423]
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to

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[416] "I have very serious doubts as to whether this right can be regarded as justiciable. Let us take the example of the so-called "TRNC," the Turkish part of the Island of Cyprus. The Turkish Cypriots discuss the issue of self-determination but agree that such a right could hardly be enforced by an international body.", Trechsel, "A World Court for Human Rights?," p.at 40.
[417] See for instance A/42/40 at 401-402:"..the author, as an individual, cannot claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article I of the Covenant, which deals with rights conferred upon peoples, as such."
[418] Article 6(1) International Covenant On Civil And Political Rights.
[419] Article 7 ibid.
[420] Article 8(1) ibid.
[421] Article 8(2) ibid.
[422] Article 9(1) ibid.
[423] Article 9(2) ibid.

trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.[424]

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[425]
5. Anyone who has been the victim of unlawful arrest or detention shall have a right to compensation enforceable in the national and the Supranational Courts named in Part Six of these Articles.[426]

Article 66

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[427]
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[428]
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:[429]
    a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
    c. To be tried without undue delay;
    d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
    e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
    g. Not to be compelled to testify against himself or to confess guilt.
3. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.[430]
4. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[431]

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[424] Article 9(3) ibid.
[425] Article 9(4) ibid.
[426] Article 9(5) ibid.
[427] Part of Article 14(1) ibid.
[428] Article 14(2) ibid.
[429] Article 14(3) ibid.
[430] Article 14(5) ibid.
[431] Article 14(6) ibid.

5. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[432]

Article 67
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.[433]
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.[434]

Article 68
Everyone shall have the right to recognition everywhere as a person before the law.[435]

Article 69
Nothing in the constitution and legislation of any State or Federal State shall relieve that State of the obligations of this Bill of Rights.

Part Six – Implementation

Article 70
1. The obligations of this implementation of the articles shall be binding upon States.
2. The decisions of the Local Supranational Courts, the Regional Supranational Courts and the International Court of Justice shall be binding upon all States.
3. All States shall implement and enforce the decisions of the Local Supranational Courts, the Regional Supranational Courts and the International Court of Justice.
4. The jurisdiction of the International Courts named in these articles is compulsory.
5. No state may invoke sovereign immunity from the jurisdiction of the Supranational Courts enacted in these Articles.

Article 71
1. Every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights have been violated. The right to a remedy against violations of human rights and humanitarian norms includes the right of access to national and international procedures for their protection.[436]
2. Every State shall create Local Supranational Courts adjudicating in accordance with these Articles and other rules of International Law conferring individual rights.
3. The Local Supranational Courts shall be considered as independent of, and function independently of, national jurisdiction and legislation.
4. All Individuals may be parties in cases brought before the Local Supranational Courts.

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[432] Article 14(7) ibid.

[433] Article 15(1) ibid.

[434] Article 15(2) ibid.

[435] Article 16(1) ibid.

[436] Article 4 from Basic Principles And Guidelines On The Right To Reparation For Victims Of Gross Violations Of Human Rights And Humanitarian Law, E/CN.4/Sub.2/1996/17. See also article 5: "Every State shall provide for universal jurisdiction over gross violations of human rights and humanitarian law which constitute crimes under international law."

Article 72

1. A system of Regional Supranational Courts shall be created for the purpose of adjudicating appeals following on from the courts created by the power of article 71.
2. Admittance to the Regional Supranational Courts shall be evaluated by a Commission created for that purpose.
3. All Individuals may be parties in cases brought before The Regional Supranational Courts.

Article 73

1. The International Court of Justice shall adjudicate appeals following on from the Regional Supranational Courts enacted in article 72.
2. The statute of the International Court of Justice shall be modified accordingly.
3. All Individuals may be parties in cases before the International Court of Justice.

Article 74

Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations.[437]

Article 75

Every State shall make readily available to competent authorities all information in its possession relevant to the determination of claims for reparation.[438]

Article 76

Decisions relating to reparations for victims of violations of human rights and humanitarian law shall be implemented in a diligent and prompt manner.[439]

[437] Article 9 from ibid.

[438] Article 10 from ibid.

[439] Article 11 from ibid.

8. Literature

Advisory Committee of Jurists. *Documents presented to the Committee relating to existing plans for the establishment of a permanent court of international justice*. The Hague1920.

Advisory Committee of Jurists. "Procès-Verbaux of the Proceedings of the Committee (16 June-24 July 1920, with Annexes)." The Hague: Van Langenhuysen, 1920.

EHCR 21 November 2001. *Al-Adsani v. the United Kingdom*

UKHL 26 13 June 2007. *Al-Skeini and Others v the Secretary of State for Defence*.

"The American Convention of Human Rights of November 22, 1969."

American Law Institute. *Restatement of the law, the foreign relations law of the United States*. Rev. and enl. ed. 2 vols. St. Paul, Minn.: American Law Institute Publishers, 1987.

J.B. Attanasio. "Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts Symposium Issue: The Interaction between National Courts and International Tribunals." 28 *N.Y.U. J. Int'l L. & Pol.* 1 (1995).

C. Audard. "Cultural Imperialism and 'Democratic Peace'." In *Rawls's law of peoples: a realistic utopia?*, edited by R. Martin and D.A. Reidy, xvi, 322 p. Malden, MA: Blackwell Pub., 2006.

"AUSTRALIAN AMENDMENTS AND PROPOSED ADDITION TO DRAFT TREATIES - STATEMENT BY DR. HERBERT EVATT - FIRST DELEGATE OF THE AUSTRALIAN DELEGATION - FOR RELEASE 3 P.M. 21st AUGUST - 1946.".

"Australian Archive Document: AA: A432, 1947/725, III."

W. Bain. *Between anarchy and society: trusteeship and the obligations of power*. Oxford: Oxford University Press, 2003.

E.K. Bankas. *The state immunity controversy in international law: private suits against sovereign states in domestic courts*. 1st ed. Berlin; New York: Springer, 2005.

EHCR 12 December 2001. *Bankovic and Others v. Belgium and 16 Other Contracting States*.

BBC-News. "Turkey compensates Cyprus refugee." http://news.bbc.co.uk/2/hi/europe/3257880.stm.

N. Bentwich. "Statelessness Through The Peace Treaties After The First World-War." 21 *Brit. Y.B. Int'l L.* 171-76 (1944).

W.S. Blackstone, and W.H. Browne. *Commentaries on the laws of England in one volume together with a copious glossary of writers referred to, and a chart of descent of English sovereigns*. St. Paul: West Pub. Co., 1897.

T.v. Boven. "Basic Principles And Guidelines On The Right To Reparation For Victims Of Gross Violations Of Human Rights And Humanitarian Law, E/CN.4/Sub.2/1996/17." 1996.

C.A. Bradley. "The Costs Of International Human Rights Litigation." 2 *Chi. J. Int'l L.* 457 (2001).

T. Brennan, L. Epstein, and N. Staudt. "Economic Trends and Judicial Outcomes: A Macrotheory of the Court." 58 *Duke L.J.* 1191-230 (40) no. 7 (2009).

W.J.J. Brennan. "International Due Process and the Law Comments." 48 *Va. L. Rev.* 1258 (1962).

I. Brownlie. "The Individual before Tribunals Exercising International Jurisdiction." 11 *International & Comparative Law Quarterly* 701-20 no. 03 (1962).

J.W. Bruegl. "Right to Petition an International Authority, The." 2 *Int'l & Comp. L.Q.* 542 (1953).
R. Brunet. *La garantie internationale des droits de l'homme d'après la Charte de San Francisco*. Genève: Grasset, 1947.
A. Buchanan. "Taking the Human out of Human Rights." In *Rawls's law of peoples: a realistic utopia?*, edited by R. Martin and D.A. Reidy, xvi, 322 p. Malden, MA: Blackwell Pub., 2006.
T. Buergenthal. *Implementation, compliance and effectiveness: proceedings of the 91st annual meeting, April 9-12, 1997*. Washington, DC: American Society of International Law.
A.A. Cançado Trindade. "The consolidation of the procedural capacity of individuals in the evolution of the international protection of human rights: present state and perspectives at the turn of the century." 30 *Colum. Hum. Rts. L. Rev.* 1-27. no. 1 (1998).
A.A. Cançado Trindade. "The Emancipation of the Individual from his Own State: the Historical Recovery of the Human Person as Subject of the Law of Nations." In *Human rights, democracy and the rule of law: liber amicorum Luzius Wildhaber*, edited by S. Breitenmoser, 151-71. Zürich etc.: Dike etc., 2007.
A.A. Cançado Trindade. "The procedural capacity of the individual as subject of international human rights law: recent developments." In *Karel Vasak amicorum liber: les droits de l'homme à l'aube du XXIe siècle = los derechos humanos ante el siglo XXI = human rights at the dawn of the twenty-first century.*, 521-44, 1999.
J. Cassidy. "Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights Articles." 9 *Deakin L. Rev.* 533 (2004).
R.N. Chowdhuri. *International mandates and trusteeship systems; a comparative study*. The Hague: M. Nijhoff, 1955.
C.Q. Christol. "Remedies for Individuals under World Law." 56 *Nw. U. L. Rev.* 65 (1961).
G. Clark, and L.B. Sohn. *World peace through world law; two alternative plans*. 3d ed. Cambridge: Harvard University Press, 1966.
C.J. Colombos. "International Prize Court, The First Day's Proceedings." 30 *Int'l L. Ass'n Rep. Conf.* 29 (1921).
"Commentary." In *State responsibility and the individual: reparation in instances of grave violations of human rights* 231-42, 1999.
"CONCLUSIONS of a Meeting of the Cabinet held at 10 Downing Street, S.W. 1, on Thursday, 18th January, 1951, at 11 a.m., Council of Europe. Convention on Human Rights. (Previous Reference: CM . (50) 68th Conclusions, Minute 2 (4).) CAB 128/19/0/0004 ".
"Convention (XII) relative to the Creation of an International Prize Court. Adopted: October 18, 1907."
"Convention for the establishment of a Central American Court of Justice, signed in Washington 20 December 1907."
W.B. Cowles. "Review of the United Nations Charter and the Adjudication of International Claims." 48 *Am. J. Int'l. L.* 460-64 no. 3 (1954).
A. D'Amato. "International Law and Rawls' Theory of Justice Faculty Comment." 5 *Denv. J. Int'l L. & Pol'y* 525 (1975).
K. Das. "Some reflections on implementing human rights." In *Human rights: thirty years after the Universal Declaration: (1979), P. 131-157.*, 1979.
A. de Zayas. "International Court of Human Rights, An Part Two: Papers and Reports from the Eighth and Ninth Nordic Seminars on Human Rights: IV: Background Papers for the Seminars." 61-62 *Nordic J. Int'l L.* 267 (1992).
A. Devereux. *Australia and the birth of the International Bill of Human Rights, 1946-1966*. Annandale, N.S.W.: Federation Press, 2005.

The Central American Court of Justice 6 March 1909. *Dr. Pedro Andrés Foenos Diaz v. The Government of the Republic of Guatemala*,(1909).
J.R. Dugard. *First report on diplomatic protection (U.N.-doc A/CN.4/506)*2000. "E/CN.4/153."
ECHR. "Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 ".
T.O. Elias. "International Institutions and Machinery of Implementation in the Field of Human Rights." *U.N. Doc A/Conf.32/L.3* (1968).
T.O. Elias, and R. Akinjide. *Africa and the development of international law*. 2nd rev. / and rev. by Richard Akinjide ed. Dordrecht etc.: Nijhoff, 1988.
Permanent Court of Arbitration 17 December 1999. *Eritrea-Yemen, Award of the Arbitral Tribunal in the Second Stage - Maritime Delimitation*.
C.C.J. Ferguson. "United Nations Human Rights Covenants: Problems of Ratification and Implementation, The Panel: The United Nations Human Rights Covenants: Problems of Ratification and Implementation." 62 *Am. Soc'y Int'l L. Proc.* 83-96 (1968).
F. Francioni. *Access to justice as a human right*, The collected courses of the Academy of European law. New York: Oxford University Press, 2007.
T.M. Franck. *Fairness in international law and institutions*. Oxford New York: Clarendon Press; Oxford University Press, 1995.
A.H.M.v. Ginneken. *Historical dictionary of the League of Nations*, Historical dictionaries of international organizations series; no. 23. Lanham, MD etc.: Scarecrow Press, 2006.
A.H.M.v. Ginneken. *Volkenbondsvoogdij: het toezicht van de Volkenbond op het bestuur in mandaatgebieden 1919-1940*. Utrecht: Rijksuniversiteit Utrecht, 1992.
A.J. Goldberg. "Need for a World Court of Human Rights, The Closing Address." 11 *Howard L.J.* 621 (1965).
D. Gorman. "Liberal Internationalism, the League of Nations Union, and the Mandates System." 40 *Canadian Journal of History* 449 (29) no. 3 (2005).
W.P. Gormley. *The procedural status of the individual before international and supranational tribunals*. The Hague: M. Nijhoff, 1966.
C. Guthrie, J.J. Rachlinski, and A.J. Wistrich. "The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice." 58 *Duke law journal* 1477-530 (54) no. 7 (2009).
H.D. Hall. *Mandates, dependencies and trusteeship*. Washington: Carnegie Endowment for International Peace, 1948.
E.I. Hambro. "Individuals before International Tribunals." 35 *Am. Soc'y Int'l L. Proc.* 22 (1941).
D.J. Harris. *Cases and materials on international law*. 5th ed. London: Sweet & Maxwell, 1998.
R. Higgins. "Conceptual Thinking about the Individual in International Law." 24 *N. Y. L. Sch. L. Rev.* 11 (1978).
T. Hobbes, and J.C.A. Gaskin. *Leviathan*, Oxford world's classics. Oxford; New York: Oxford University Press, 1998.
M.O. Hudson. "Central American Court of Justice, The." 26 *Am. J. Int'l L.* 759 (1932).
M.O. Hudson. *The Permanent court of international justice, 1920-1942*. New York: The Macmillan company, 1943.
EHCR 8 July 2004. *Ilaşcu and Others v. Moldova and Russia*.
ILC. "ILC Draft Articles on Diplomatic Protection with commentaries, A/61/10, 2006." 2006.
———. "ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, 2001." 2001.
International Commission of Jurists. "Resolution of Rio." 1962.
"International Covenant On Civil And Political Rights."

International Law Association. "Statement Of Principles Applicable To The Formation Of General Customary International Law, London Conference." (2000).
P.C. Jessup. *A modern law of nations: an introduction*. New York etc.: Macmillan, 1948.
UKHL 26 *Jones v. Saudi Arabia*,(2006).
"Judgment of the International Military Tribunal." http://avalon.law.yale.edu/subject_menus/judcont.asp.
"Judicial Decisions Involving Questions of International Law." 3 *Am. J. Int'l L.* 729 (1909).
G. Kaeckenbeeck. *The international experiment of Upper Silesia: a study in the working of the Upper Silesian Settlement, 1922-1937.* London etc.: Oxford University Press, 1942.
M.T. Kamminga. *Inter-state accountability for violations of human rights*, Pennsylvania studies in human rights. Philadelphia: University of Pennsylvania Press, 1992.
I. Kane, and A.C. Motala. "The Creation of a New African Court of Justice and Human Rights." In *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2006*, edited by M.D. Evans and R. Murray, 406-40. Cambridge, UK; New York: Cambridge University Press, 2008.
I. Kant, P. Kleingeld, J. Waldron, M.W. Doyle, and A.W. Wood. *Toward perpetual peace and other writings on politics, peace, and history*, Rethinking the Western tradition. New Haven: Yale University Press, 2006.
A. Kjeldgaard-Pedersen. "The Evolution of the Right of Individuals to Seise the European Court of Human Rights." *Journal of the History of International Law, Vol 12, No. 2, pp. 267-306* (2010).
J.K. Kleffner. "Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure." 15 *Leiden journal of international law* 237-50 (14) no. 1 (2002).
ECHR 6 May 2003. *Kleyn v The Netherlands*.
L. Kopelmanas. "Custom as a Means of the Creation of International Law." 18 *Brit. Y.B. Int'l L.* 127 (1937).
M.S. Korowicz. "Problem of the International Personality of Individuals, The." 50 *Am. J. Int'l L.* 533 (1956).
L. Kutner. "A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights." 4 *Tul. L. Rev.* 417 (1954).
H. Lauterpacht. *International law and human rights*. [Hamden, Conn.]: Archon Books, 1968.
ECHR 1 July 1961. *Lawles v. Ireland*.
A.P. Llamzon. "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice." 18 *European Journal of International Law* 815-52 no. 5 (2007).
EHCR 18 December 1996. *Loizidou v. Turkey*.
A.V. Lowe, and M. Fitzmaurice. *Fifty years of the International Court of Justice: essays in honour of Sir Robert Jennings*. Cambridge; New York: Grotius Publications; Cambridge University Press, 1996.
D.B. Magraw. "Louis B. Sohn: Architect of the Modern International Legal System." 48 *Harvard international law journal* 1-17. no. 1 (2007).
G. Manner. "Object Theory of the Individual in International Law, The." 46 *Am. J. Int'l L.* 428 (1952).
G. Marston. "United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950, The." 42 *Int'l & Comp. L.Q.* 796 (1993).
K. Mbaye. "Human Rights and Rights of Peoples: Introduction." In *International law: achievements and prospects*, edited by M. Bedjaoui, lx, 1276 p. Paris; Dordrecht; Boston Norwell, MA: UNESCO; M. Nijhoff Publishers;, 1991.

M.S.L. McDougal, Harold D. Reisman, W. Michael. "World Constitutive Process of Authoritative Decision, The." 19 *J. Legal Educ.* 253 (1966).
P.K. Menon. "International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine, The." 1 *J. Transnat'l L. & Pol'y* 151 (1992).
P.K. Menon. "States, International Organizations and Individuals as Subjects of International Law." 20 *Korean J. Comp. L.* 97 (1992).
T. Meron. "Human Rights-Effective Remedies: Remarks." 77 *Am. Soc'y Int'l L. Proc.* 397-404 (1983).
T. Meron. *The humanization of international law*, Hague Academy of International Law monographs. Leiden; Boston: Martinus Nijhoff, 2006.
J. Morsink. *Inherent human rights: philosophical roots of the universal declaration*, Pennsylvania studies in human rights. Philadelphia: University of Pennsylvania Press, 2009.
J. Morsink. *The Universal Declaration of Human Rights: origins, drafting, and intent*, Pennsylvania studies in human rights. Philadelphia: University of Pennsylvania Press, 1999.
H. Mosler. "The Protection of Human Rights by International Legal Procedure." 52 *Geo. L. J.* 800 (1963).
J.O. Murdock. "International Judicial Organization." 69 *Annu. Rep. A.B.A.* 373 (1944).
A. Nollkaemper. *Kern van het internationaal publiekrecht*. 3e grondig herz. dr ed, Boom juridische studieboeken. Den Haag: Boom Juridische uitgevers, 2007.
C.A. Nørgaard. *The position of the individual in international law*. Copenhagen: Munksgaard, 1962.
M. Nowak. "Eight Reasons why we need a World Court of Human Rights." In *International Human Rights Monitoring Mechanisms*, edited by G. Alfredsson, 697-706, 2009.
D.P.O. O'Connell. "Sedentary Fisheries and the Australian Continental Shelf." 49 *Am. J. Int'l L.* 185 (1955).
C. Ochoa. "The Individual and Customary International Law Formation." 48 *Va. J. Int'l L.* 119 (2007).
"Official Documents; Soviet Union Accepts Compulsory Jurisdiction of ICJ for Six Human Rights Conventions." 83 *Am. J. Int'l L.* 457 (1989).
F. Orrego Vicuña. "Individuals and non-state entities before international courts and tribunals." 5 *Max Planck Yearbook of United Nations Law* 53-66. (2001).
F. Patel. "The Writ Stops Here: No Habeas for Prisoners Held by U.S. Forces in Afghanistan." 14 *ASIL Insight* no. 13 (2010).
C. Paulson. "Compliance with Final Judgments of the International Court of Justice since 1987." 98 *Am. J. Int'l L.* 434-61 no. 3 (2004).
J. Paulsson. *Denial of justice in international law*, Hersch Lauterpacht memorial lectures. Cambridge, UK ; New York: Cambridge University Press, 2005.
J.J. Paust. "The Complex Nature, Sources and Evidences of Customary Human Rights." 25 *Ga. J. Int'l & Comp. L.* 147 (1995).
J.J. Paust. "Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward." 18 *Tulane Journal of International & Comparative Law* (2010).
L.C. Percival. "Article I Torture Courts: Can Administrative Law Serve as a Constitutional Means of Compensation and Deterrence?" *SSRN eLibrary* (2010).
A. Postiglione. "Need For An International Court Of The Environment " http://www.biopolitics.gr/HTML/PUBS/VOL8/html/Postiglione.htm.
"Protocol On The Statute Of The African Court Of Justice And Human Rights." 2009.
A. Randelzhofer. "The legal position of the individual under present international law." In *State responsibility and the individual: reparation in instances of grave violations of human rights* 231-42, 1999.

A. Randelzhofer, and C. Tomuschat. "Foreword." In *State responsibility and the individual: reparation in instances of grave violations of human rights*, edited by A. Randelzhofer and C. Tomuschat, XIII, 296. The Hague etc.: Nijhoff, 1999.
J. Rawls. *The Law of Peoples: with "The Idea of Public Reason Revisited."*. Cambridge, Massachusetts: Harvard University Press, 1999.
J. Rawls. *Political liberalism*, The John Dewey essays in philosophy no. 4. New York: Columbia University Press, 1993.
J. Rawls. *A theory of justice*. Rev. ed. Cambridge, Mass.: Belknap Press of Harvard Univeristy Press, 1999.
W.M. Reisman. "View from the New Haven School of International Law, The Jurisprudence of International Law: Classic and Modern Views, The." 86 *Am. Soc'y Int'l L. Proc.* 118 (1992).
L. Reydams. "The Rise and Fall of Universal Jurisdiction." In *Handbook Of International Criminal Law*, edited by W. Schabas and N. Bernaz. London: Routledge, 2010.
A.H. Robertson. "First Case before the European Court of Human Rights: Lawless v. The Government of Ireland, The Note." 36 *Brit. Y. B. Int'l L.* 343 (1960).
L.S. Schapiro. "European Court of Human Rights, The Note." 2 *U.W. Austl. Ann. L. Rev.* 65 (1951).
M. Scheinin. "Proposed Optional Protocol to the Covenant on Economic, Social, and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform - without Amending the Existing Treaties, The United Nations and Regional Human Rights Systems: Recent Developments." 6 *Hum. Rts. L. Rev.* 131 no. 1 (2006).
S.M. Schwebel. *Justice in international law: selected writings of Stephen M. Schwebel*. Cambridge; New York: Grotius Publications, 1994.
J.B. Scott. *The proposed court of arbitral justice; letter of James Brown Scott to the Netherland Minister of Foreign Affairs, dated January 12, 1914, with accompanying documents concerning the establishment of the court of arbitral justice*1915.
M.N. Shaw. *International law*. 6th ed. Cambridge, UK; New York: Cambridge University Press, 2008.
A.-M. Slaughter, and D. Bosco. "Plaintiff's Diplomacy." 79 *Foreign Aff.* 102 (15) no. 5 (01 09) (2000).
L.B. Sohn. "New International Law: Protection of the Rights of Individuals Rather Than States, The." 32 *Am. U. L. Rev.* 1 (1982).
L.B. Sohn. "Panel I: Regionalism and International Law: The Most-Favored-Nation Clause in a Changing World: Discussion." 54 *Am. Soc'y Int'l L. Proc.* 192 (1960).
L.B. Sohn. "Proposals for the Establishment of a System of International Tribunals." In *International trade arbitration: a road to world-wide cooperation*, edited by M. Domke, 311. New York: American Arbitration Association, 1958.
L.B. Sohn. "Sources of International Law III: The Status and Future of the Customary International Law of Human Rights." 25 *Ga. J. Int'l & Comp. L.* 399 (1995).
B. Stephens. "Individuals enforcing international law: the comparative and historical context." 52 *DePaul L. Rev.* 433-72. no. 2 (2002).
O. Svarlien. "International Law and the Individual." 4 *J. Pub. L.* 138 (1955).
B. Swart. "The European Convention as an Invigorator of Domestic Law in the Netherlands." 26 *Journal of Law and Society* 38-53 no. 1 (1999).
F.R. Tesón. *A philosophy of international law*, New perspectives on law, culture, and society. Boulder, Colo.: Westview Press, 1998.
F.R. Tesón. "The Project of Reconfiguration: How Can International Law Be Reconstituted: Remarks." 94 *Am. Soc'y Int'l L. Proc.* 78-79 (2000).

C. Tomuschat. "Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law." In *State responsibility and the individual: reparation in instances of grave violations of human rights*, edited by A. Randelzhofer and C. Tomuschat, XIII, 296. The Hague etc.: Nijhoff, 1999.

S. Trechsel. "International Implementation Of Human Rights In The 21St Century." *KEIO LAW REVIEW* 120-42 (1993).

S. Trechsel. "A World Court for Human Rights?" 1 *Nw. U. J. Int'l Hum. Rts.* 3 (2003).

E.W. Tucker. "Has the Individual Become the Subject of International Law." 34 *U. Cin. L. Rev.* 341 (1965).

"U.N.-doc. A/CN.4/96; International Law Commission, "International Responsibility," Report by F. V. Garcia-Amador, Special Rapporteur.".

"U.N. doc. A/C.6/L.493."

"U.N. doc. E/CN.4/366."

"U.N. doc. E/CN.4/AC.1/27."

G. Ulfstein. "Do we need a World Court of Human Rights?" In *Law at War: the Law as it was and the Law as it should be: liber amicorum*, edited by O. Engdahl, P. Wrange and O. Bring, 261-72. Leiden etc.: Nijhoff, 2008.

"The United Nations Convention on Jurisdictional Immunities of States and their Property 2004."

"Universal Declaration of Human Rights." 10 December 1948.

"Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948)."

E.d. Vattel, B. Kapossy, and R. Whatmore. *The law of nations, or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns, with three early essays on the origin and nature of natural law and on luxury*, Natural law and enlightenment classics. Indianapolis, IN: Liberty Fund, 2008.

"Vienna Convention on the Law of Treaties, 1969."

C.G. Weeramantry. *The World Court, It's conception, Constitution and contribution*.

J.H. Whitfield. "How the Working Organs of the European Convention Have Elevated the Individual to the Level of Subject of International Law." 12 *ILSA J. Int'l L.* 27 (1988).

Q. Wright. "Human Rights and Charter Revision." 296 *Annals of the American Academy of Political and Social Science* 46-55 (1954).

R. Wright. "Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights." 24 *Berkeley J. Int'l L.* 463 (2006).

"Yearbook of the International Law Commission: 1962 , vol. II A/CN.4/145."