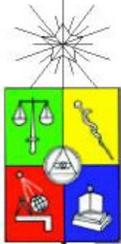




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Individual as Subject of international law in the International Court of Justice Jurisprudence

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INTRODUCTION

The debate about the situation of the individual in international law is as old as the international law itself. However it had never been outdated. From different doctrinaire positions, the situation of the individual as subject of law in the international sphere has been affirmed and rejected since the very beginning. A great deal of the debate has been owed to the lack of precision of the concept of subject of the international law itself. As we intend to analyze in this work the situation of the individual as subject of the international law in the jurisprudence of the Permanent Court of International Justice and International Court of Justice, we must first determine this concept.

Those who had the opportunity of studying the issue will have appreciated the existent differences among authors at specifying not only criteria determining the international subjectivity but also the way in which said criteria are applied.

The category “subjects of international law” is a purely theoretical construction, in respect of which there is no uniformity to determine neither what must be understood as such, nor how to fulfill eventual criteria suggested for that definition. There is no rule base on international law which may states that certain entities are subjects of the international law, and then enlist them. Neither there is a rule which directly establishes the required criteria to determine the subjectivity under international law.¹

A fundamental assertion in international law, about the characteristics of the international personality arises from the Advisory Opinion of the International Court of Justice on April 11th, 1949 in the case of Reparation for Injuries suffered in the Service of the United

¹ “*El derecho no puede prescribir en una norma jurídica que X es sujeto de derecho, porque carecería de sentido y sería irrelevante. Aún cuando un orden jurídico contuviera una norma que dijera que X es sujeto de derecho, X no sería sujeto si ese ordenamiento no le atribuyera, al menos, un derecho o una obligación. Las normas jurídicas no pueden imponer al jurista que considere sujeto a quien no es titular de ningún derecho ni de ninguna obligación*”. – Barberis, Julio A: *Los Sujetos del Derecho Internacional Actual*. Editorial Tecnos. Madrid. 1984, p. 27.

Nations (Reparation Case)². It has been an obligatory quotation for all authors dealing with the subjects of international law. According to the ICJ:

*“Accordingly, the Court has come to the conclusión that the Organization is an international person...What it does mean is that it is a subject of international law and **capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims**”.* (P.9) (Emphasis added)

In spite of the substantive elements underlying this important opinion, they have not been much analysed in the light of general international law applicable to the individual.

In chapter one, after a brief reference of the historical evolution of the international subjectivity, we shall precise the criteria for an international personality, and the theoretical approaches suggested to this respect. We will identify the different positions of authors about this subject, and the issues that have been most controvertial among them.

Once this conceptual precision is concluded we shall enter into the second stage of the work to analyse of the individual's international personality criteria according to the area of the International Court of Justice jurisprudence.³

A complete study of the international subjectivity of the individual in the current international practice would demand not only an analysis of the International Court of Justice jurisprudence, but also of the tribunals operating within the universal and regional human rights protection systems,⁴ the responsibility of the individual in the field of

² Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J Reports 1949, p. 174.

³ We use the concepts of international personality and international subjetivity as synonyms.

⁴ The First Optional Protocol to the International Convenant on Civil and Political Rights, the Convention Against Torture and Other Forms of Cruel and Inhuman Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, give to individuals the right to complain about violation of the protected rights. *“El gran legado del pensamiento jurídico de la segunda mitad del siglo XX, mediante la emergencia y evolución del Derecho Internacional de los Derechos Humanos, ha sido a mi juicio, el rescate del ser humano como sujeto del derecho tanto interno como internacional, dotado de capacidad juridica internacional.”*- Vote of the Judge A.A. Cancado Trindade, in the Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants OC-18/03 of September, 17. 2003. Requested by the United Mexican states.

international criminal law⁵ and the evolving areas of action of the individuals in the sphere of international investments and commercial disputes, according to the mechanisms adopted to settle disputes with States (e.g.: ICSID⁶).

Without prejudice to the reference that this work will make to these last study areas, we shall direct our análisis mainly to judgments and advisory opinions passed by the International Court of Justice and its predecessor, the Permanent Court of International Justice. We decided to focus the subject on the ICJ, having in mind the significance of its jurisprudente for the renewal of the general international law and to innovate in the field of doctrine. On the other hand, the limits of this work would be exceeded if a complete study were made comprising all fields where the individual has an international role. We will deal with this subject in a more limited way and give priority to the impact of jurisprudente for the international subjectivity of the individual.

This thesis aims at reflecting the contribution of the Court to the configuration of the international subjectivity of the individual, despite the lack of procedural capacity of the individual to bring disputes to the ICJ.

In the second and third chapters of this work, we will analyse two dimensions of the international personality of the individual before the Court:

⁵ In July 1998, the Statute for the establishment of the International Criminal Court was adopted. A full analysis of the topic would also cover the study of the work done by the tribunals of Nuremberg and Tokyo, and the Ad Hoc International Criminal Tribunals for the former Yugoslavia and Rwanda. *“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”* - Opening statement at the Nuremberg Trial of the Major War Criminals, the U.S. Chief Prosecutor, Justice Robert Jackson. See: Arzt, Donna E: “Participants in international legal relations”. In volume, Lori Fisler Damrosch: Beyond confrontation. 1995. P. 67.

⁶ *“Article 1: (2) The purpose of the Centre (Centre for Settlement of Investment Disputes) shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention; Article 25: (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. (2) “National of another Contracting State” means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute...but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute /.../”* – Convention on the Settlement of Investment Disputes Between States and Nationals of other States, submitted in Washington, March 18, 1965. Entered in force: October 14, 1966.

Firstly, we shall study the individuals as rights-holders and the defense of their rights before the International Court of Justice. In order to do so, we will mainly refer to the diplomatic protection and its evolution under recent judgments of the ICJ.

Secondly, in chapter three, we shall analyze the individual as duties-holders and the question of international responsibility. To such effect, we will study a series of controverted matters present at the moment of analyzing the responsibility of an individual for the violation of imperative rules of the international law in cases where individuals act as States' agents.

This last phenomenon has involved identifiable individuals before the International Court of Justice. And it has evolved along the years exposed to the notable influence of the regime of human rights in general international law since the Second World War. To the extent that a violation to human rights subject to an international protection regime involves a violation to the international law, it could also be brought to the International Court of Justice for decision, provided that the all elements of the ICJ competente are met. Considering that international human rights norms grant rights to individuals, it is sound to conclude that the international personality of individuals is not indifferent to the ICJ and its jurisprudence.

CHAPTER I

INDIVIDUALS AND THE CRITERIA FOR THE INTERNATIONAL PERSONALITY

I.1. General overview of the evolution of legal doctrines on international personality.

An analysis of the evolution of international law until present shows a progressive trend to the widen the list of its subjects.⁷ Originally, in the ideas of the so called “founding fathers” of the international law, Francisco de Vitoria, Francisco Suárez, Hugo Grotius, the existence of a universal community of individuals was sustained and the individual was identified as a reference point of rights and duties.⁸

Positivist theories flourished later in the XIX Century. These ideas were greatly inspired by Hegel’s philosophy, standing out the State figure and leaving the individual on a secondary stage. The consequence was that the status of subject of international law was mainly reserved for the State.

States assumed the monopoly of the rights and liabilities in the international area, while individuals depended completely on the State’s will, to which they were completely subjected.⁹ This stage, is identified with the classical international law, characterized by

⁷ “/.../ desde una concepción dinámica del Derecho Internacional, es preciso admitir que éste no conoce límites en cuanto a sus sujetos, pues las propias necesidades de la comunidad jurídica internacional en un momento dado pueden aconsejar o incluso exigir el investir de personalidad internacional a determinadas entidades. Así, al plantearse la cuestión de si las Naciones Unidas poseen o no capacidad para presentar una reclamación internacional contra un Estado/.../”- Manuel Díez de Velasco Vallejo: “Instituciones de Derecho Internacional Público”. Tecnos. Madrid. 1997, p. 213. In the same sense, Kelsen referred to the personal sphere of validity of international law: “/.../ the validity of international law knows no limits” – Hans Kelsen: “Principles of International Law”. Second Edition. Holt, Rinehardt and Winston, Inc. 1952, p. 180.

⁸ Francisco de Vitoria: “Relecciones Teológicas” (1538-1539); Francisco Suarez: *De Legibus ac Deo Legislatore* (1612); Hugo Grotius: “De jure belli ac pacis” (1625).

⁹ “The State was the God individual man had to serve by self-sacrifice, or, as Hegel put it: The march of God in the world, that is what the State is... in the 19th century and during the first decade of the 20th century, the personification of the state in international lawit had come to be associated with the assertion of unlimited rights of the State over the individual”- Nijman, Janne E: “The concept of international legal personality: an inquiry into the history and theory of international law”. Ed. Asser. The Hague. 2004, p. 115.

interstate relationships, where the individual was not considered as a subject of the international law but as mere object.¹⁰

Brierly has been identified as one of the first authors to *demystify*¹¹ the State's qualities, advancing an idea of the State, not as a person with its own and superior will, but as an institution.¹² Kelsen, on the other hand, had a purely normative concept of the State: "*The juristic person as an entity different from the so-called natural or physical person, the human individual, is a auxiliary concept of juristic thinking, an instrument of legal theory, the purpose of which is to simplify the description of legal phenomena...The state as a juristic person is the personification of a legal order constituting a legal community...The state as a community is not a biological, psychological, or sociological unit; it is, as a legal community, a specifically juristic unity.*"¹³ This conception of the State leads to an approach where its powers are limited so a revaluation of the individual is rendered possible.

Among authors who considered the States where the only subjects of international law, Anzilotti, Strupp and Triepel can be mentioned.¹⁴ A different perspective was taken by

¹⁰ "*Lamentablemente, las reflexiones y la visión de los llamados fundadores del derecho internacional, que lo concebían como un sistema verdaderamente universal, vinieron a ser suplantadas por la emergencia del positivismo jurídico, que sobre todo a partir del siglo XIX, personificó el Estado dotándolo de "voluntad propia", reduciendo los derechos de los seres humanos a los que el Estado a éstos "concedía". El consentimiento o la "voluntad" de los Estados (el positivismo voluntarista) se tornó el criterio predominante en el derecho internacional, negando jus standi a los individuos, a los seres humanos. Esto dificultó la comprensión de la sociedad internacional, y debilitó el propio Derecho Internacional, reduciéndolo a un derecho interestatal, no más por encima sino entre Estados soberanos*"- Vote of the Judge A.A. Cancado Trindade, in the Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants OC-18/03 of September, 17. 2003. Requested by the United Mexican states.

¹¹ Nijman, Janne E: "The concept of international legal personality: an inquiry into the history and theory of international law". Ed. Asser. The Hague. 2004.

¹² ".../ (Brierly) reduced the importance of the state and emphasized the significance of individual personality /.../"- Nijman, Janne E: "The concept of international legal personality: an inquiry into the history and theory of international law". The Hague. Ed. Asser. 2004, pp. 138 – 146.

¹³ Kelsen, H: "Principles of International Law". Second Edition. Holt, Rinehart and Winston, Inc. EEUU, 1966 pp. 181 -183.

¹⁴ ".../ "It is unthinkable" said Anzilotti that there may exist any subjects of international rights and obligations other than the States".- Criton G. Tornaritis, Q.C.: "*The Individual as a Subject of International law*". Nicosia, 1972, p. 17.

Scelle wo supported the international personality of individuals, highlighting that only individuals merited that status.¹⁵

The first important exception to the thesis that international law only allotted rights to sovereign States, came with the creation of the International Labor Organization (I.L.O), in 1919. With the acknowledgment of rights to workers, this organization would become a foundational step towards a universal system of human rights protection.

With the end of the Second World War, the creation of the United Nations concurred with the search for the establishment of a worldwide system to project the human rights of individuals, overcoming the vesting of dominating political and legal theories of the time.

New actors appeared in the international scenario: The number of States grew together with the decolonization processes and the international personality of International Organizations was fully acknowledged.¹⁶ The latter has been granted with limited or functional purposes, subjecting it to the frame of the statute or constitutive instrument:

“/.../ the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.”¹⁷

The admission of different actors in the international community breaks with the tradition of the classical international law, and the monopoly exercised by States. This implies that the doctrine had to start determining criteria for an international personality differentiating from those present in the statehood. In classical international law only the States were

¹⁵ Scelle, Georges: *“Précis de Droit des Gens. Principes et Systématique. Première Partie”*. Paris: Recueil Sirey, 1932.

¹⁶ *“/.../ it may be noted that in 1899 at the First Hague Peace Conference only 26 States were represented. This number was increased to 44 at the Second Hague Conference in 1907. The League of Nations had a representation of 45 original members with an addition of five (Afghanistan, Egypt, Ethiopia, Iraq and Turkey) who subsequently joined the Organization. The United Nations, on the other hand, which was founded in 1946 with 51 original members has already expanded to 159, and continues to expand steadily by the increasing claim of legal sovereignty by the dependent territories”*.- Menon, P. K: *“The Subjects of Modern International Law”*. Hague, YIL, 3 (1990), p. 30.

¹⁷ Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J Reports 1949, p. 174.

subjects of the international law. Accordingly, to be a subject of the international law it had to be a State, which on its turn fulfilled the requirements to enjoy an international personality.¹⁸

With the widening of the categories of subjects of international law, led by the creation of international organizations possessing international capacity, issues relating to the criteria of an international personality began to differentiate from the criteria applicable to the statehood;¹⁹

“The Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which is certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a “super-State”, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane.”²⁰

Moreover, with the human rights protection systems a renewed impulse was given to the consideration of the individual as subject of international law. These systems should grant direct rights to individuals, but caution must be employed in the analysis of the mechanisms established to defend individuals' rights.

Currently, an important participation of the individual in the international arena can be seen through its acting before human rights organizations, international criminal courts and international institutions for the settlement of disputes in investment matters. The trend towards the acknowledgement of an international subjectivity would seem in this way, favorable.

¹⁸ *“The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the others States”.* The Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1. (Emphasis added)

¹⁹ If we only consider as subjects of international law to those who meet all the elements and characteristics of States, would be impossible to conceive as subjects of international law to any other entity than States.

²⁰ Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J Reports 1949, p. 174.

I. 2. The criteria required for the international personality

“[T]he jurist is free to adopt the concept of subject he wishes; only, he must be consequent with it in its description of the law.”²¹

It may be said without fear of making a mistake that the study of the subjectivity or the international personality, shows like in other spheres of theory, the different conceptions of international law which have existed through history.

As of the first use of the term, which according to a research carried out by Nijman dates from Leibniz,²² the authors have theorized about the hierarchy of the international personality and the similarities and differences among them. Some authors have intended that, with the acceptance of a certain entity as subjects of international law an acting space would be recognized to this entity in the international arena.²³

From which an opposite process is produced: Instead of determining the international subjectivity on the base of the existent juridical reality, international subjectivity of an entity is proposed to acknowledge to it a specific space of action. This is due to a mistaken

²¹ *“/.../ el jurista es libre de adoptar el concepto de sujeto que desee; sólo debe ser consecuente con él en su descripción del derecho.”* - Barberis, Julio A: “Los Sujetos del Derecho Internacional Actual”. Buenos Aires. 1984, p. 24.

²² *“Leibniz was the first writer to use the term “international legal person” – or rather “persona jure gentium” – and he included it in the Praefatio to his Codex Iuris Gentium diplomaticus (1963).”* Nijman, Janne E: “The concept of international legal personality: an inquiry into the history and theory of international law”. The Hague. 2004, p. 29.

²³ *“Considering Leibniz desire to limit the arbitrary use of power and his intention to encapsulate all power in the universal natural law system, International Legal Personality was used to confirm and capture in a legal notion the ruler’s subjection to the law of nations. It was used to give sovereignty a counterpart in responsibility. Sovereignty was thus not only relative in the sense that it applied to those with a sufficient degree of force and related competences, but also in the sense that sovereign powers were externally restricted by the law of nations. By having International Legal Personality, rulers not only had powers or rights, but also the legal responsibility to use their authority in accordance with the law of nations as springing from justice. Those who possessed international personality had international powers, such as the right to wage war, the right to conclude treaties and the right to conduct international relations, but they also had the duty to use these rights in conformity with the law of nature and of nations. Consequently, the use of power was contained by law and any abusive, corrupt or arbitrary use of power was (in theory) prevented. By subjecting the sovereign powers to the ius natural et gentium they were obliged to use their power and authority justly; it legitimized their power and authority.”* - Nijman, Janne E: “The concept of international legal personality: an inquiry into the history and theory of international law”. The Hague. 2004. p. 79.

use of the international subjectivity, which disqualifies it as a proper tool of the science of law. International subjectivity of a specific entity, must be the consequence of the juridical reality described according to the criterion which, correctly specified, is to be used.

When the international subjectivity is not derived from a descriptive qualification, it may exceed the characteristics of the legal theory and turn to political philosophy or international relations.

Thence, the categorization of the international personality must be understood as a consequence of the international juridical reality described, based on a specific criterion, responding coherently to the description of international law as a system.²⁴ It is a fiction or an entelechy which eases the comprehension of the law.

From the study of the different conceptions on the international personality, it would seem utopist to develop a doctrine which could be able to exhaust all the criteria which determine the international personality of a subject.

Certainly, as we stated before, there will be not rule based on international law which states: The following entities are subjects of the international law proceeding then to enlist them. Or a rule which would directly state the requirements that a subject to international law must have.

The criteria which specify the existence of the international personality may change according to the authors' approaches. Although it may appear to be certain uniformity in respect of the requirements so as the individuals is entitled to rights and duties becoming a subject of the law, there is not coincidence among authors with respect to the scope of said entitlement. The same discrepancy is shown in relation to access to international courts or

²⁴ "(1) *International law as a legal system: International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time*" - Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, par. 251).

organizations to invoke rights and to be held responsible for duties, not to mention the possible participation in the law-creation process.²⁵ Despite the issue of participation in the law-creation process of international norms may appear, for example, as a determining criterion of the personality,²⁶ authors as Diez de Velasco and Cançado Trindade take a different view. Diez de Velasco says that: “[T]he contents of the international personality, in terms of capacity, is not the same in all subjects, so, for example, it would be wrong deny the status of subject of international law of the individual, on the only base of his incapacity to participate in processes of creation of international law”,²⁷ Cançado Trindade states that:“(e)arlier attempts to deny to individuals the condition of being a subject of international law on the ground that individuals lack some of the capacities which States have (such as, e.g. that of treaty-making), are definitively devoid of any meaning. At the domestic law level, not all individuals participate, directly or indirectly, in the law-making process, yet they do not thereby cease to be subjects of law. The doctrinal trend that attempts to insist on such a rigid definition of international subjectivity and that makes subjectivity conditional on the very formation of international norms and compliance with them, simply does not sustain itself. This argument cannot even be sustained at the level of domestic law, in which it is not required (and it never has been) that all individuals participate in the creation and application of the legal norms in order to be subjects (*titulaires*) of rights and to be bound by the duties emanating from such norms.”²⁸

²⁵ “Currently, however, individuals are widely recognized as subjects of international law. One question that arises logically from this recognition is if effect on the power of individuals to make international law, and specifically on their power to participate in the formation of customary international law./.../.” Ochoa Christiana: “*The Individual and Customary International Law Formation.*” Indiana University School of Law Bloomington, Legal Studies Research Paper Number 75. March 2007, p. 122.

²⁶ “/.../Rather than concentrating on the formal problem of what is a “subject” of international law, or who should enjoy “international legal personality”, we ask more functional questions: *Who should – and who, in effect, already does – enjoy rights and obligations under international law? Who should – and does – actually participate in the process of creating, making claims under, and enforcing international law?*”- Arzt, Donna E: “Participants in international legal relations”. In volume Damrosch, Lori Fisler: *Beyond confrontation.* 1995. p. 62

²⁷ “/.../ el contenido de la personalidad internacional, en términos de capacidad, no es el mismo en todos los sujetos, de modo que, por ejemplo, no sería correcto negar la condición de sujeto del Derecho Internacional al individuo basándose sólo en su incapacidad para participar en los procesos de creación de normas jurídicas internacionales”- Manuel Diez de Velasco Vallejo: *Instituciones de Derecho Internacional Público*. Tecnos. Madrid. 1997. p. 215.

²⁸ Cancado Trindade, Antônio Augusto: “*The Emancipation of the individual from his own State: The Historical Recovery of the Human Person as Subject of the Law of Nations*”. Human rights, democracy and the rule of law. 2007, p. 156. “/.../ la capacidad de participar en la elaboración de normas internacionales y

In the *Reparation for Injuries* case, the International Court of Justice pointed out to the fact that there were different to assess the existence of a subject of law in a complex international community:

*“The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States /.../.”*²⁹

As I have already mentioned, the subjectivity under international law may be object of an analysis of political science and philosophy. However, as Barberis states, referring to the individual subjectivity: *“In international law, the theme of the private person as a subject is not related to a philosophical analysis about the human being, it is rather more simple to examine the legal technical question to determine whether the international order contains norms that establish rights and duties intended to apply directly to private persons.”*³⁰

This sentence does not only give a conceptual precision, but it is also a guidance to this work where we will consider the international subjectivity from a descriptive perspective.

The task of finding the necessary legal precision is not easy. Let's examine for example a simple definition as the one suggested by Verdross. He defines as subjects of international law as *“/.../ those persons whose behavior is directly regulated by the international law.”*³¹

la aptitud para prevalecer directamente de ellas, no vendrían a constituir caracteres necesarios para la asignación de subjetividad jurídica internacional” – Moncayo, Vinuesa, Gutiérrez Posse: Derecho Internacional Público. Tomo I. Ed. Zavalia. Buenos Aires. 1999, p. 16.

²⁹ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J Reports 1949, p. 174. pp. 178-179.*

³⁰ *“En el derecho de gentes, el tema de la persona privada como sujeto no se relaciona con el análisis filosófico del ser humano, sino que se trata de algo más simple: el examen de una cuestión de técnica jurídica para determinar si el ordenamiento internacional contiene normas que establecen derecho u obligaciones cuyos destinatarios directos son personas privadas”- Barberis, Juli A: “Los Sujetos del Derecho Internacional Actual”. Buenos Aires. 1984, p. 160.*

³¹ *“/.../ aquellas personas cuyo comportamiento regula directamente el orden jurídico internacional” - Verdross, Alfred: “Derecho Internacional Público” 5ta Ed. Traducción de Antonio Truyol y Serra. 1982. p.*

The author uses a qualifying adjective to refer to the regulation made by the international law: it must be direct. This means that there may be subjects regulated either directly or indirectly by international law, but only the former would be subjects of international law. However before analyzing this approach focused on the difference between direct and indirect regulation, we must ask: what would the regulation of behavior by the international law consist of? This paper understand that the term “regulation” is translated in the sense of be rights or duties held by a person in a juridical system.

Whats does it mean to be a right or duty holder? Does it mean having access to legal remedies under international legal system and an entitlement to stand before an international court or tribunal? Can the exercise of actions before international organizations be accepted as criteria to be a rights-holder? To be a right-holder, is it necessary to have the capacity to enforce a judgment passed in a case where the individual was a party?

These matters may be originated in two comparative approaches: first, the approach referred to the situation of the individual and the State before international law; and secondly, the approach referred to the situation of the individual before the international law and before the domestic law. For example, if the analysis of the capacity to enforce the judgment of an international court is made, it will be clearly seen that it is a issue of comparative studies devoted to the individual before domestic and international law. That because, the weaknesses in the capacity to enforce international law, is a common issue between subject of international law, and as such it is not expressed as a valuable distinction criteria in international law between individuals and States.

The participation of the individual as a subject of international law, on the other hand, has been historically related to the consular and diplomatic protection, which implies different issues and problems. Among the most relevant ones there is the rule of nationality of the person who claims against a State and the consular protection of the nationals. This work will go back to this matter extensively in the following chapter to analyse the decisions of

the International Court of Justice in LaGrand³² and Avena³³ cases. At this stage, I will introduce these issues to analyse the concept of a rights-holder.

In the Mavrommatis case, the Permanent Court of International Justice, specified the main characteristics of diplomatic protection:

*“By taking up the case of one of its subjects and resorting to diplomatic action or international judicial proceedings on this 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. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant.”*³⁴

The decision is indicative of the classical frames of diplomatic protection as an institution of international law conceived as an inter-State order. In this sense, the diplomatic protection only allows the effective protection of rights or interests of the individuals under the legal fiction of considering them as interests or rights of the State that exercises the diplomatic protection.

This lack of independence between the action of the individual who may claim the breach of their rights founded in the international law, and the action of the State whose nationality

³² LaGrand (Germany v. United States of América), Judgment, I.C.J Reports 2001, p. 466.

³³ Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 12

³⁴ Mavrommatis Case, PCIJ Series A, No.2, Judgment of 30 August 1924, p. 12.

they enjoy, characterizes the debate about the individual as a subject of the international law. There is: the dissociation between the entitlement (*titularidad*) of rights and the mechanisms that the international law provides to act in their defense.

This circumstance has not prevented authors from considering individuals as subjects of international law. In this sense, Sir Hersch Lauterpacht stated in its work on International Law and Human Rights:³⁵ *“The position of the individuals as a subject of international law has often been obscured by the failure to observe the distinction between the recognition, in an international instrument of rights ensuring to the benefit of the individual and the enforceability of these rights at his instance. The fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them. Thus in relation to the current view that the rights of the alien within foreign territory are the rights of his state and not his own, the correct way of stating the legal position is not that the state asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere.”*

In an opposite position Kelsen referred to: *“/.../ (T)he view that seeks to effect a distinction between the procedural capacity of individuals and their status as subjects of international rights obscures this normal pattern of international law by the tendency to identify as rights any interests of individuals that are somehow protected by international law.”*³⁶

³⁵ Lauterpacht, H: “International Law and Human Rights”. London (1950), p. 27.

³⁶ Kelsen, H: “Principles of International law”. Second Edition. Holt, Rinehart and Winston, Inc. EEUU, 1966, p. 232

The rights that individuals enjoy at the international level, on the basis of treaties may have three ways of being exercised: a) a claim by an individual before national courts, when the rights acknowledged to the individual by a treaty have been incorporated in the domestic law; b) the claim by the State of the nationality of an individual by means of the diplomatic protection, which means that the State makes a claim based on the breach of a rule that protect its own rights, and c) the claim by an individual who invokes a treaty that grants a right and the possibility to have a direct access to an international court.

In the context of human rights, the right to have direct access to an international court, is contemplated in the European human rights protection system. In this sense the European Convention on Human Rights of 1950, following the reform of Protocol XI of 1998 states in article 34 that: *“Individual applications. The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”*

On the other hand, the duties-holder concept in international law is directly related to the development of principles and rules about the responsibility of the individual before international courts. Piracy,³⁷ slavery and genocide as crimes against humanity³⁸ are the most prominent examples identified as sources of responsibility of the individual under international law. The Nuremberg tribunal stated on the particular:

³⁷ *“Article 101: Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)”*. - United Nations Convention on the Law of the Sea of 10 December 1982.

*“The very essence of the Charter (of the International Military Tribunal) is that **individuals have international duties** which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”*³⁹
(Emphasis added)

The U.S. Chief Prosecutor, Justice Robert Jackson stated at the same time: *“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”*⁴⁰

In Verdross’ definition it is apparent that the author refers to the direct and indirect regulation by the international law. Subject of international law, in this criteria, are only them who are directly regulated by it. Barberis proposes a similar definition of international subjectivity: *“/.../ it will be considered as a subject of international law, to anyone whose conduct is provided directly by the law of nations, at least, as the content of a right or duty”* and about the direct regulation refers: *“/.../ it must be analysed in more detail what is meant being direct recipient of an international norms that provide a right or imposes a*

³⁸ *“Article 4: Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”* –Convention on the Prevention and Punishment of the Crime of Genocide. The 1996 Draft Code of the International Law Commission provides individual responsibility with regard to genocide, aggression, crime against humanity, war crimes and crime against United Nations and associated personnel. See. E.g. Shaw, Malcolm N: “International Law”. Fifth Ed. Cambridge 2003, pp 232 -241.

³⁹ Before Resolution 95 of the United Nations General Assembly of 1946, the rules of the Nuremberg Charter and the decision of the Tribunal are part of International Law.

⁴⁰ *Opening statement at the Nuremberg Trial of the Major War Criminals. See Arzt, Donna E: “Participants in international legal relations”. In volume Damrosch, Lori Fisler: Beyond confrontation. 1995. P. 67. It has also emphasized the expansion of individual activity in the field of international criminal law: “/.../the number of specific international crimes that can be committed by private individuals has increased form earlier categories to include, among others, the following: genocide; other crimes against humanity; apartheid; race discrimination; hostage-taking; torture; forced disappearance of persons; terrorism; terrorist bombings; financing of terrorism; aircraft hi-jacking; aircraft sabotage and certain other acts against civil aviation; certain acts against the safety of maritime navigation, including boatjacking; murder, kidnapping, or other attacks on the person or liberty of internationally protected persons; trafficking in certain drugs; slavery; and mercenarism”.- Paust, Jordan J.: The Reality of Private Rights, Duties, and Participation in the International Legal Process”, Michigan Journal of International Law, Vol. 25, p. 1240.*

duty. The holder of a right or obligation may not be who appear as such in the letter of a treaty, but who actually enforces the right or assumes the duty. If an organization appears as duty-holder or international right-holder by a treaty, but this duty or this right is effectively assumed by another entity, the first will lack international personality and shall be taken only as an organ of the latter, which is the real international subject.”⁴¹

The diversity in rights and duties that different entities hold in the international community, has raised issues of international law. Along this line, it is common to direct the discussion towards the privileged position that the States enjoy in international law, and to compare the individuals against this situation. The great disputes in formulating the concept of international subjectivity, do not end unfortunately with the election of one or other criteria, but in the way authors consider they have fulfilled their goals. Verdross’s definition about the international personality based on direct regulation, includes a criterion which allows the distinction between complete and partial subjects.

As this study specified it before, there are probably no major justifications to deny the quality of subjects of international law to those who are directly regulated by it, or not to consider as subjects of international law both, those who are regulated directly and indirectly. The different criteria derive from the theoretical characterization of international law as a clear and practical system. The election of a definition depends of the exclusive intention of each author. Therefore, there is not, a priori, an approach better or worse than another. What seems more important is the utility and clarity of the postulate.

A different criterion on the concept of subjectivity in international law is suggested by Rosalyn Higgins. The author adopts a different approach and revises the traditional concept of subject of international law. She advocates for a conceptual definition of

⁴¹ “/.../ se considera sujeto de derecho internacional a todo aquel cuya conducta está prevista directamente por el derecho de gentes, al menos, como contenido de un derecho o de una obligación /.../ se debe analizar más detalladamente qué se entiende por ser destinatario directo de una norma internacional que otorga un derecho o impone una obligación. El titular del derecho u obligación puede no ser quien figura como tal en la letra de un tratado, sino que es quien efectivamente hace valer el derecho o asume la obligación. Si una organización aparece como titular de una obligación o de un derecho internacional de un tratado, pero esa obligación o ese derecho es efectivamente asumido por otro ente, aquélla carecerá de personalidad internacional y será tenida solo como un órgano de este último, que será el verdadero sujeto internacional)”
- Barberis, Juli A: “Los Sujetos del Derecho Internacional Actual” Editorial Tecnos. Madrid. 1984 , p. 25

international law as a “decision-making process”, therefore, one should not find subjects or objects but “*participants in the international legal system*”:

*“It is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing various values. Determinations will be made on those claims by various authoritative decision-makers –Foreign Office Legal Advisers, arbitrary tribunals, courts. Now, in this model, there are no “subjects” and “objects”, but only participants. Individuals are participants, along with states, international organizations (such as the United Nations, or the International Monetary Fund (IMF) or the ILO), multinational corporations, and indeed private non-governmental groups.”*⁴²

Higgins rejects the positivist school’s approach to international law as a set of rules, and considers it a “*decision making processes*”, in the sense conceived by McDougal, Chen, and Lasswell. She concludes that there are no subjects or objects of international law, but participants, this implies the possibility that individuals being considered in such quality. This work does not pretend to introduce a critical analysis of the proposed category. However, it must be said that the category of “participants” is understandable in the context of a doctrinary construction which tries to give coherence to a determined conception of international law. Probably, the answer may result in a vague category of “subjects of international law” where a fine work of differentiation among the possible “participants” is necessary.

There is, however, another point in the study of the international subjectivity which deserves attention. Going back to the definition which gave place to our analysis: “subjects of international law are those persons who are directly regulate by the international law”,⁴³

⁴² Higgins, R.: “*Problems and process: International Law and how we use it*”. Oxford, Clarendon Press, 1994, p. 50.

⁴³ Verdross, Alfred: *Derecho Internacional Publico*, 5ta Ed. Translation of Antonio Truyol y Serra. 1982, p. 174.

or consider as such “/.../ to all those whose conduct is directly subject to international law, at least, as the content of a right or an obligation.”⁴⁴

These definitions highlight the juridical element of the category: the regulation or the preview of behaviour by the *international law*. To this respect, there is another element which is worth mentioning at this stage. Due to the fact, that the mere direct regulation by international law would not be enough to create a subject of international law, to distinguish from an object, the existence of a person, a subject, entitled to claim rights and to comply with duties imposed by international law, is necessary.⁴⁵

Which are the elements that characterize to a subject? The debate around this study favours to individuals as well as States. There is no doubt that the individual may fulfill the criteria of being “subject”, enjoying capacity for holding rights and duties. The controversial point for their consideration as subjects of international law, in any case, is the lack of direct regulation by the international law or the precarious quality of the rights acknowledged to them, but not their previous condition as subject. In the case of States, there is no doubt that they enjoy rights and hold duties directly regulated by international law, and that the concept or idea of State contains in itself the identification of an autonomous will, with inherent capacity to bear duties and to enjoy rights. Now, the debate regarding it, is identifying in which situations we refer to State, and as such, when we refer to “subject”, to determine in that previous precision its potentiality as subject of International Law by means of the direct regulation for this system. The same happens to situations such as international organizations, belligerent groups, National Liberation Movements, NGOs, and other sui generis cases where the debate is about the capacity or potential ability to behave as “subject” under general or special international legal frameworks.

However, it can be difficult to explain international subjectivity without referring to the regulation of international law. Effectively, as these cases are fictions created by the law, the will, and the regulation are closely related. This is because, a will can be difficult be

⁴⁴ “/.../ a todo aquel cuya conducta esta prevista directamente por el derecho de gentes, al menos, como contenido de un derecho o de una obligacion” Barberis, Juli A: “Los Sujetos del Derecho Internacional Actual” Editorial Tecnos. Madrid. 1984, p. 25.

⁴⁵ “No one can be the subject of a legal norm unless he is either an individual or a juristic person whilst the object of a norm may also be inanimate things” - Criton G. Tornaritis, Q.C.: “The Individual as a Subject of International Law”. Nicosia, 1972, p. 16.

thought without the regulation of the law. It may seem easy to consider that this reasoning supposes a circular analysis.⁴⁶

Although it could be thought from a philosophical or logical point of view in a hypothetical scenario that intended to give the law a later stage in regulation of a conduct which appeared at the beginning as the expression of a will not juridically categorized, in the analysis from the point of view of the law, the simultaneity between both, will and regulation, seems unavoidable. That is, because a will shall only have juridical effect if it is regulate by law.

It is in this plane where, in our opinion, it is exposed the idea of by Acquaviva for the identification of subjects of the international law.

The author expresses: *“/.../for an entity to be considered a subject of international law, the entity must be able to assert effectively that it is not subordinate to another authority; in other words, it must have the ability not to recognize any entity as a superior. Such a status-defined as sovereignty- is established through the analysis of that entity’s powers within the entity itself and, under certain circumstances, of its relations with other subjects of international law...in other words, subjects of international law were those entities superiorem non recognoscentes, able not to recognize any superior within the international community. This feature is at the basis of the fact that the international community is not structured as a hierarchical society, but rather as a community of (formal) peers.”*⁴⁷

The attribution of personality under international law only to those entities which do not acknowledge a superior authority links this doctrine directly with the theory of international responsibility. This is a domain in which international law has clearly shown an evolution in favor of the direct responsibility of the individual. Acquaviva’s theory emphasizes the importante of the concept of international responsibility for the existence of an international subjectivity and the relevant characteristic of any subject which is not being subject to one another:

⁴⁶ *“/.../ is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. This definition, though conventional, is unfortunately circular since the indicia referred to depend on the existence of a legal person”- Ian Brownlie, referring to the concept of subject of International Law in: “Principles of Public International Law”. 6th Edition. Oxford. 2003, p.47*

⁴⁷ Acquaviva, G: “Subject of International Law: A Power-Based Analysis”. *Vanderbilt Journal of Transnational Law* 3 (2005), pp. 345-396.

“One of the ways to gather evidence on effective authority by a subject is to shift the attention from issues of personality to issues of responsibility...An entity is not ultimately responsible when it is dependent on another to act, when it is not genuinely in control of its decisions, or when it derives its existence and powers for another entity’s authority. For the purposes of international law, it is not a subject.”⁴⁸

This study has already introduced the different elements which are part of the debate around the international subjectivity. Reviewing them, it is possible to identify different degrees of subjectivity:

- 1°- The existence of rights and duties granted by international law to a subject;
- 2°- Procedural capacity to claim rights or to be held responsible by international courts for infringement of international duties;
- 3°- Enforcement of a judgment or resolution passed by an international tribunal or court;
- 4° - Participation in the process of creation of international law.

As a summarial analysis of the doctrine shows, it is apparent that international law authors sustain different positions regarding the above mentioned categories and criteria. It can also be perceived that the acceptance of an international subjectivity of the individual in regimes of human rights has not been transposed to other spheres of international law. Therefore, it seems important to take into account the contribution made by the international jurisprudence from a not formalistic perspective to the characterization of international law subjects, and its relation to the role of the individual.

⁴⁸ *“The best way to understand if an entity is really *superiorem non recognoscens* and if it is indeed a subject of international law (whether the international community agrees to calling it “state” or not) is the fact that breaches emanating from its “organs” – considered in the broadest terms – are imputed to that entity, and not to others. Thus, although from a logical standpoint personality comes before responsibility, the latter is a means to carry out the complex empirical analysis needed to establish whether an entity is sovereign”* Acquaviva, G: “Subject of International Law: A Power-Based Analysis”. *Vanderbuilt Journal of Transnational Law* 3 (2005), P. 46-49. The idea of states international responsibility to determine the effects of the international personality is also expressed on other terms in Eustathiades y Wengler, see e.g. Eustathiades, Constantin: *“Les sujets du droit international et la responsabilité internationale, Nouvelles tendances”*, *Recueil des Cours de la Académie de Droit International*, vol. 84, 1953- III.

CHAPTER II

INDIVIDUALS AS RIGHT-HOLDERS AND THE DEFENS OF THEIR RIGHTS BEFORE THE INTERNATIONAL COURT OF JUSTICE

II.1 Active dimension of the international personality of the individual before the Permanent Court of International Justice and International Court of Justice

The Statute of the International Court of Justice establishes:

Competence of the Court. Art. 34:

“1. Only states may be parties in cases before the Court /.../”

The possibility that the individual should be a party to in disputes before the International Court of Justice is not a new debate, as the following quotation indicates:

*“The Committee of Jurist appointed by the League of Nations to draft the Statute of the Permanent Court of International Justice in 1920 considered the question of conferring upon individuals the procedural capacity for action before the Court. Professors Loder and De Lapradelle supported allowing individuals as parties before the Court, but both jurists met with strong opposition on this point”.*⁴⁹

Procedurally, the capacity of individual before the Court is currently limited to the role of witness or expert in particular cases.

Without prejudice to this rather limited role in interstate controversias, on several occasions the Court has been requested to decide on a dispute referring to the rights and duties which in accordance with the international legal order are directly related to the status of individuals.⁵⁰ In conjunction with the development of human rights regimes, the above

⁴⁹ Menon, P.K: “The Subjects of Modern International Law”, Hague Yearbook of International Law. 1990. p. 64.

⁵⁰ “Human rights issues, or other legal issues related to the rights of individuals, may appear among the claims or arguments by states appearing before the ICJ in contentious cases. As a classic case, reference can be made to the *Nottebohm* case which largely concerned the nationality of one named individual.” - Martin Scheinin: “The ICJ and the Individual” *International Community Law Review* 9 (2007) p. 125.

mentioned situation has occurred in cases where international law accords a legal protection or privilege directly applicable to an individual for his function or position.

The study of the judgments passed by the PCIJ or the ICJ intends to show the evolution of this matter within the international law framework, starting from the first decisions of the Permanent Court of International Justice denied the possibility that the international legal order granted directly rights and duties to individuals, and ending by the most recent jurisprudence of the Court where such a situation is accepted.

The second point to be addressed in this chapter refers to the evolution occurred in the field of the diplomatic protection. According to the analysis of the previous chapter, one of the criterion of the international personality sustained by the doctrine corresponded to the procedural capacity to claim in international stages. The Statute of the International Court of Justice precludes such capacity in the case of individuals. Therefore, from statutory point of view, individuals are not entitled to access to the ICJ.

To this respect, some doctrinal positions sustain that in recent decision of the International Court of Justice, the applicable criteria to the subjectivity of the individuals are being flexibilized indirectly by means of the recourse to the diplomatic protection. This phenomenon remains to be studied in depth so as to determine whether there is a trend in favor of an acknowledgement of the international personality of the individual. Therefore, it is interesting to assess whether the jurisprudence of the International Court of Justice is receptive to new criteria of international subjectivity.

To provide answers to these questions, this thesis will start studying some decisions or opinions of the Permanent Court of International Justice.

II. 2. Select Judgments and Advisory Opinions

The judgments and advisory opinions to be analyzed have been selected according to their relationship with the subject-matter of this thesis, that is, the subjectivity of the individual and the impact on it of international jurisprudence. The methodology to be used will be analytical and descriptive of the relevant features and will not intend to exhaust all possible sources of subjectivity.

II. 2. 1. The Mavrommatis Palestine Concessions. August 30th, 1924.- Permanent Court of International Justice⁵¹

The first case to be analyzed corresponds to the Mavrommatis Case, decided by the Permanent Court of International Justice, to which I have already referred to. This decision has served as a basis for a longstanding jurisprudence of the International Court of Justice, in the following sense:

“The International Court of Justice is in a very real sense the continuation of the Permanent Court of International Justice”.⁵²

The Mavrommatis Case has become an obligatory referente in the field of the diplomatic protection. The judgment of the Court delineates the characteristics of this institution.

The salient facts of this case were the following:

The Government of the Greek Republic submitted to the Permanent Court of International Justice a suit arising out of the alleged refusal on the part of the Government of Palestine and the Britannic Majesty’s Government (in its capacity as Mandatory for Palestine), since the year 1921, to recognize to their full extent the rights acquired by M. Mavrommatis, a Greek subject, under contracts and agreements concluded by him with the Ottoman authorities in regard to concession for certain public works to be constructed in Palestine. The application concluded with a request that the Court may be pleased to give judgment to the effect that the Government of Palestine and the Government of His Britannic Majesty, recognize to their full extent the rights acquired by M. Mavrommatis, and that the Government of his Britannic Majesty shall make reparation for the consequent loss incurred by said Greek subject. The Britannic Government filed a preliminary objection to the Court’s jurisdiction stating that the Court had no jurisdiction to entertain the case.⁵³

The Judgment:

“In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State – i.e. between M. Mavrommatis and Great Britain. Subsequently the Greek Government took up the case. The dispute then

⁵¹ Mavrommatis Case, PCIJ Series A, No.2, Judgment of 30 August 1924.

⁵² Phillip C. Jessup. “A Modern Law of Nations: An Introduction (Hamden, 1947), p. 147; “/.../the International Court of Justice is the legal successor to the Permanent Court of International Justice, and the jurisprudence of the latter remains pertinent and compelling to this day” - Rosalyn Higgins: “The ICJ, the ECJ, and Integrity of International Law” (2003) 52 ICLQ 1 at 3. See. Ole Spiermann: “International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary”. Series: Cambridge Studies in International and Comparative law. Cambridge University Press, 2005. Nro. 34.

⁵³ Mavrommatis Case, PCIJ Series A, No.2, Judgment of 30 August 1924, p.7.ss.

entered upon a new phase; *it entered the domain of international law, and became a dispute between two States.*"⁵⁴ (Emphasis added)

The judgment is illustrative of the classical conception of international law. This is, that international law provides mainly channels for the exercise of rights granted to the States and that it is through them, that the protection of individuals is envisioned.

The Permanent Court said:

“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. *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. The question, therefore, whether the present dispute originates in an injury to a private interest*, which in point of fact is the case in many international disputes, *is irrelevant* from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. The fact that Great Britain and Greece are the opposing Parties to the dispute arising out of the Mavrommatis concessions is sufficient to make it a dispute between two States within the meaning of Article 26 of the Palestine Mandate.”⁵⁵ (Emphasis added)

The Court precises the concept of diplomatic protection and recreates the conditions by means of which it can be exercised. Although this did not implied a denial of the right possessed by Mavrommatis himself (individual), the judgment confirms that the subject matter before the Court is an international issue that is directly related to a State’s own right. This does not need further comments as the judgment is perfectly clear. At the same time, the Court does not conceal that Mavrommatis had interests in the result of the controversy, but it does not transform the jurisdictional instance before the tribunal in a case where an individual right-holder is directly claiming the recognition or restoration of a right from a State.⁵⁶

⁵⁴ Mavrommatis Case, PCIJ Series A, No.2, Judgment of 30 August 1924, p.12.

⁵⁵ IBID, p.12. It identifies the origins of this institution in the notion of diplomatic protection by Emmerich de Vattel, who wrote in 1758: “*whoever ill-treats a citizen indirectly injures the State, which must protect that citizen*” - E de Vattel *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* vol 3 *Of War* (Carnegie Institution Washington 1916).

⁵⁶ “*It was deeply entrenched in a classic conception of international law, where the individuals would have no rights and international standing on the international legal plane*”- Enrico Milano, *Diplomatic Protection*

Immediately after this case, the Permanent Court of International Justice had another opportunity of expressing its opinion about the same institution. In this new case, an evolution of the jurisprudence can be perceived.

II. 2. 2. Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, against the Polish Railways Administration)⁵⁷

The saliente facts of this case were the following:

The Principal Allied and Associated Powers undertook to negotiate a treaty between the Polish Government and the Free City of Danzig under Article 104 of the Treaty of Versailles, in order to ensure to Poland the control and administration of the whole railway system within the Free City. It contains provisions to the effect that the Danzig railways shall be controlled and administered by Poland. Article 22 of the Convention stated: "Subsequent agreements to be concluded between Poland and the Free City ...shall settle... any questions relating to the retention of officials employees and workmen at present employed on the railways and to the maintenance of rights acquired by them, and questions relating to...all matters concerning the administration, exploitation and services /.../." Based on this Agreement between Poland and the Free City of Danzig (Beamtenabkommen), the Court was called to give an opinion about question relating to actions brought by Danzig officials for the recovery of pecuniary claims.⁵⁸

The Permanent Court gave the following Advisory Opinion:

"The point in dispute...: Does the Beamtenabkommen⁵⁹, as it stands, form part of the series of provisions governing the legal relationship between the Polish Railways Administration and the Danzig officials who have passed into its service (contract of service)? The answer to this question depends upon the intention of the contracting Parties. It may be readily admitted that, *according to a well established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individuals rights and obligations and enforceable by the national courts*".⁶⁰ (Emphasis added)

before the International Court of Justice: Refashioning Tradition?, Netherland Yearbook of International Law XXXV (2004), p. 87

⁵⁷ Jurisdiction of the Court of Danzig, Advisory Opinions, PCIJ Series B, No. 15, March 3rd, 1928.

⁵⁸ Jurisdiction of the Court of Danzig, Advisory Opinions, PCIJ Series B, No. 15, March 3rd, 1928.

⁵⁹Beamtenabkommen was the agreement which created a special legal régime governing the relations between the Polish Railways Administration and the Danzig officials, workmen and employees who have passed into the permanent service of the Polish Administration. Jurisdiction of the Court of Danzig, Advisory Opinions, PCIJ Series B, No. 15, March 3rd, 1928.

To the author of this study, the redaction of this paragraph is not clear. In it, the Court affirms and denies at the same time, the possibility of the creation of rights for the individual by means of a treaty. Coinciding with the previous sentence, the Court lays out the operative space of international law excluding individuals of the possibility of being directly subject to the rights and duties created by a treaty. Nevertheless, in the second part of the paragraph, the Court seems to take a different approach and instead of referring to the interest of private persons (Mavrommatis) which may coincide in certain cases with the rights of States, the Court states that by means of international agreements States can generate rules on rights and duties applicable to individuals, enforceable before national courts.

The about mentioned judgment and the advisory opinion provide an initial analysis of the Court on the matter of the subjectivity of individuals. In these cases, the Court does not support the existence of rights of individuals based on international law, due to dominant inter-state concept of international law at that time. Over time, the quality of right-holders will be acknowledged to the individual, and a new debate about the individual subjectivity will emerge in international law: the dissociation between entitlement to a right and the procedural means for its exercise.

It is apparent that the means through which the legal interests or rights of the individual will be protected in accordance with the competences of the International Court of Justice will be the diplomatic protection. The diplomatic protection implies this sort of fiction for the protection of the individual rights, being that the State claims against another State as if the State' rights itself have been violated.

Among its requirements, the diplomatic protection envisions the nationality of the individual, whose claim the State assumes, exercising the right to project granted by international law. This requirement, the nationality link, was enunciated by the International Court of Justice in the judgment we will see below.

II. 2. 3. Nottebohm Case (second phase), Judgment of April 6th, 1955⁶¹

⁶⁰ Jurisdiction of the Court of Danzig, Advisory Opinions, PCIJ Series B, No. 15, March 3rd, 1928.pp.17-18.

⁶¹ Nottebohm Case (second phase), Judgment of April 6th, 1955: ICJ. Reports 1955, p. 4.

The salient facts of this case were the following:

Nottebohm was born at Hamburg on September 16th, 1881. He was German by birth. In 1905 he went to Guatemala. He took up residence there and made that country the headquarters of his business activities. On October 9th, 1939, a little more than a month after the opening of the Second World War, Nottebohm submitted an application for naturalization in Liechtenstein. Guatemala, after having declared war to Germany, expelled Notebohm and retained the property that Notebohm had in the country. Relying on the nationality thus conferred on Nottebohm, Liechtenstein considered itself entitled to seize the Court based on a claim on his behalf. Guatemala, on the other hand, requested the Court “to declare that the claim of the Principality of Liechtenstein is inadmissible, and set forth a number of grounds relating to the nationality of Liechtenstein granted to Nottebohm by naturalization. The real issue before the Court was the admissibility of the claim of Liechtenstein in respect of Nottebohm.”⁶²

The Judgment of the Court stated that:

“In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.”⁶³

“/.../a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has *acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defense of its citizens* by means of protection as against other States.”⁶⁴ (Emphasis added)

“According to the practice of States, to arbitral and judicial decisions⁶⁵ and to the opinions of writers, *nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties*. It may be said to *constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State*. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.”⁶⁶ (Emphasis added)

⁶² IBID, p. 4.

⁶³ IBID, p. 21

⁶⁴ IBID, p. 21

⁶⁵ In that sense, Canevaro Case (“*Affaire Canevaro (Italy v. Peru)*” (1961) 11 RIAA 397,) of the Permanent Court of Arbitration is a direct antecedent of this judgment.

⁶⁶ IBID, p. 23

“/.../ the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that ***it is possible to regard the nationality conferred upon him as real and effective***, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.”⁶⁷ (Emphasis added)

“Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations-other than fiscal obligations-and exercising the rights pertaining to the status thus acquired. Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.”⁶⁸

The diplomatic protection appears then as simulated means of protection of rights or interests of individuals. It is worth mentioning that it may not be exercised in all the cases. The requirement of nationality has been asserted by the preceding judgment based on the necessity of a real and effective link between the individual and the State.⁶⁹ In this way the diplomatic protection is not a means of protection of individuals at every moment, as it is the case of the human rights regimes, but only in cases where the individual is national of the State which exercises it. The nationality element involves a high standard of reliance of the individual on the State so as to serve as a basis for the diplomatic protection.

Three characteristics of the diplomatic protection should be mentioned in this context. First, the individual is not supposed to participate in the different stages of the process;

⁶⁷ IBID, p. 26

⁶⁸ IBID, p. 26

⁶⁹ “This right is necessarily limited to intervention (by a State) on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.” - Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I. J., Series A/B, No. 76, p. 16.

secondly, it is the State exercising protection that determines the remedies to the wrong caused to the individual and consents to those; thirdly, the exercise of the diplomatic protection depends on the will of the State. I will refer to these points later.

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Currently, the strict definition of the elements of the diplomatic protection arising from the *Nottebohm's* jurisprudence has been subject to revision in subsequent cases to favour a wider application of this institution: *“/.../ If the existence of a genuine link were required in addition to nationality for the purpose of diplomatic protection, this would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire, or have acquired nationality by birth or descent from States with which they have a tenuous connection.”*⁷⁰ This is reflected in the project of the International Law Commission that deals with the possibility of diplomatic protection to people without nationality or who are refugees. Thus, article 8 of the Draft Articles on Diplomatic Protection states:

1. *“A State may exercise diplomatic protection in respect of a stateless person who, at the date of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.*
2. *A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.*
3. *Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.”*⁷¹

⁷⁰ Dugard, John: Diplomatic Protection, The Max Planck Encyclopedia of Public International Law, online edition, www.mpepil.com, visited on 1 February 2010.

⁷¹ *“Special forms of protection have also been recognized in the case of stateless persons, and special rules have also been provided under the Convention on the Nationality of Women for situations of change of nationality because of marriage as in respect of military service in cases of double nationality and other special situations. The situations examined evidence that the link of nationality has lost to an extent its rigor in the context of international claims.”*- Orrego Vicuña, F.: *“The Changing Approaches to the Nationality of claims in the context of Diplomatic Protection and International Dispute Settlement”*. International Center for Settlement of Investment Disputes: ICSID Review. 1986. 15 (2000) 1, p. 347.

With the emergence and further evolution of human rights regimes, it has been considered that the diplomatic protection would slowly lose its role, giving way to systems of protection of human rights that would contemplate in a more perfect form the interests of the individual, since this would not be subject to the will of the State exercising his own rights by diplomatic means or through international procedures, allowing at the same time the possibility to claim against the State the nationality. However, the lack of acknowledgement of a *locus standi* of the individuals in the most of the human rights judicial protection systems (with the exception of the European Court of Human Rights that contemplates the direct access of individuals), has determined that the diplomatic protection maintains its role. In a series of decision to be explained later, it will be observed that the use given to the institution and the debate generated therein are indicative of the important of the protection granted by the State.

II. 2. 4. LaGrand (Germany v. United States of América), Judgment, I.C.J Reports, 2001.⁷²

The direct precedent to this judgment was the case concerning the Vienna Convention on Consular Relations (Request for the Indication of Provisional Measures) (Paraguay v. USA), more known as Breard case. These judgments, together with the Avena Case (2004) constitute a group of judgment which consists of the same subject: the violation of art 36 of the Vienna Convention on Consular Relations by the United States, in cases of capital punishment. I will analyse the judgment passed on LaGrand and Avena cases where the following features can be found.

The salient facts of the case are:

The Federal Republic of Germany filed in an Application instituting proceedings against the United States of America for violations of article 5 and 36 of the Vienna Convention on Consular Relations. Germany alleges that the failure of the United State to inform to Karl and Walter LaGrand, german nationals, who were arrested, detained and sentenced by the state of Arizona, of their right to contact the German authorities. Germany further alleges that by breaching its obligations to inform, the United States also violated individuals rights conferred on the detainees by Article 36, paragraph 1 (a) and (b). The LaGrand's brothers were sentenced to capital punishment by the state of Arizona. Karl LaGrand was executed in February 1999, before the proceeding. Walter LaGrand's execution took place on March 3rd, 1999.⁷³

⁷² LaGrand (Germany v. United States of América), Judgment, I.C.J Reports 2001, p. 466.

Provisional Measures

“32. In a Order of 3 March 1999, the Court found that the circumstances required it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures...: a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order; b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.”⁷⁴

In its judgment, the Court affirmed that it could not accept the contention of the United States that Germany’s claim based on the individual rights of the LaGrand brothers is beyond the Court jurisdiction because diplomatic protection is a concept of customary international law. To this respect, the decision said:

“42. /.../ [T]his fact does not prevent a State party to a treaty, *which creates individual rights*, from taking up the case of one of its nationals and instituting international judicial proceeding on behalf of the national, on the basis of a general jurisdictional clause in such a treaty. Therefore the Court concludes that it has jurisdiction with respect to the whole of Germany’s first submission.”⁷⁵ (Emphasis added)

“75. *Germany further contends that “the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the Vienna Convention but also entailed a violation of the individual rights of the LaGrand brothers”*. Invoking its right of diplomatic protection, Germany also seeks relief against the United States on this ground. Germany maintains that the *rights to be informed of the rights under Article 36, paragraph 1 (b), of the Vienna Convention, is an individual right* of every national of a State party to the Convention who enters the territory of another State party. It submits that this view is supported by the ordinary meaning of the terms of Article 36, paragraph 1 (b), of the Vienna Convention, since the last sentence of that provision speaks of the “rights” under this subparagraph of “the person concerned”, i.e. of the foreign national arrested or detained. Germany adds that the provision in Article 36, paragraph 1 (b), according to which it is for the arrested person to decide whether consular notification is to be provided, has the effect of conferring an individual right upon the foreign national concerned. In its view, *the context of Article 36 supports this conclusion since it relates to both the concerns of the sending and receiving States and to those of individuals*. According to Germany, the travaux

⁷³ LaGrand (Germany v. United States of América), Judgment, I.C.J Reports 2001, p. 466

⁷⁴ IBID, para. 32

⁷⁵ IBID, para. 42

preparatoires of the Vienna Convention lend further support to this interpretation. In addition, Germany submits that the “United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live”, adopted by General Assembly resolution 40/144 on 13 December 1985, confirms the view that the rights of access to the consulate of the home State, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens.”⁷⁶ (Emphasis added)

“77. The Court notes that Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual’s detention “without delay”. It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State “without delay”. Significantly, this subparagraph ends with the following language: “The said authorities shall inform the person concerned without delay of his rights under this subparagraph” (emphasis added). Moreover, under Article 36, paragraph 1 (c), the sending State’s right to provide consular assistance to the detained person may not be exercised “if he expressly opposes such action”. The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (see *Acquisition of Polish Nationality*, Advisory Opinion, 1923, P.C.I.J, Series B, No.7, p. 20; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 8; *Arbitral Award of 31 July 1989*, Judgment I.C.J. Reports 1991, pp. 69-70, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, I.C.J. Reports 1994, p. 25, para. 51)/.../”⁷⁷

Based on the above mentioned provisions, “***the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in the Court by the national State of the detained person.*** These rights were violated in the present case.”⁷⁸ (Emphasis added)

At the hearings, “***Germany further contended that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right but has today assumed the character of a human right.*** In consequence, Germany added, “the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative”. The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, ***it does not appear necessary to it to consider the additional argument developed by Germany in this regard.***”⁷⁹ (Emphasis added)

⁷⁶ IBID, para. 75

⁷⁷ IBID, para. 77

⁷⁸ IBID, para. 77.

⁷⁹ IBID, para. 78.

The exercise of the diplomatic protection shows in a clear way the scope of protection granted to certain identifiable individuals. This is mainly the case of the adoption of provisional measure by the Court to protect fundamental rights of the individuals concerned. If the case had been conceived strictly as a case of violation of State's rights, the Court would not have been able to justify a measure in the case as matter of urgency.⁸⁰ These cases illustrate that the Court does not see necessary to remark that the diplomatic protection is exercised only to protect the States' rights and that it indifferent whether or not said rights coincide with the rights claimed by private persons.⁸¹ In the evolution of international law it is no longer a principle the non existence of right attributed to individuals. On the contrary, the change of mindset has opened the way to analysis based on the scope of the rights created by a treaty. This trend does not only acknowledge the existence of rights for individuals, but also contemplates them clearly in order to resolve the case, can be seen here.⁸²

Later, the Court accepted that the individuals were to be considered as rights-holders, taking into consideration art. 36 of the Vienna Convencion on Consular Relations, in spite the fact that this instrument does not refer to this category of principles.

⁸⁰“*All three request for provisional measures submitted to the Court by Paraguay, Germany and Mexico were intended to avoid prejudice of the states` rights, but it was more than clear the direct link with the preservation of the right to life of the detainees, which came into the dispute through the back door of the VCCR...The remedies (provisional measure) ordered in the final judgements in LaGrand and Avena also show the willingness of the Court to go beyond the mere protection of state interest and to protect the rights of the individual, and arguably its human rights.*”- Enrico Milano, Diplomatic Protection before the International Court of Justice: Refashioning Tradition? Netherland Yearbook of International Law XXXV (2004), pp. 132, 134.

⁸¹ “*In the LaGrand case, Professor Bruno Simma, appearing before the Court on behalf of the German Government, said that: it is difficult to see...why something which looks like an individual right, feels like an individual right and smells like an individual right should be anything else but an individual rights*”- Spiermann, O: The LaGrand Case and the Individual as a Subject of International Law”. Zeitschrift für öffentlches Recht (ZÖR). 58 (2003), p. 201.

⁸² “*Inevitably, the mechanisms of diplomatic protection have a privileged position in a judicial mechanism such as that of the ICJ, and they represent the most obvious strategy to seek legal protection before that Court for the individual's human rights/.../ in LaGrand the Court, for the very first time, recognizes, besides the specific rights of the state, both the existence of individual rights not of an economic or patrimonial nature conferred by an international treaty, in the specific case the right to notification under Article 36 of the VCCR; and the possibility for the state to act in diplomatic protection for the protection of those individual rights on the basis of a jurisdictional clause in the treaty itself /.../*”- Enrico Milano, Diplomatic Protection before the International Court of Justice: Refashioning Tradition?, Netherland Yearbook of International Law XXXV (2004), pp. 109 – 128.

Previously, the Interamerican Court of Human Rights had referred to this particular institution during the proceedings concerning the Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law:⁸³

“124: In other words, the individual’s right to information, conferred in Article 36 (1) (b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accosed.”⁸⁴

Certainly although this relation can be made between the right of individuals to inform their governments for the exercise of diplomatic protection on their favour, with the human right of due process, we believe it is necessary to make an explanation. The right that a national has according to article 36 (b) of the Vienna Convention must not be confused with the faculty that the State, to which he belongs, has to exercise such diplomatic protection or to refuse it. That is to say, the acknowledgement of the right of an individual to inform his State is not translated into the duties of the State to exercise diplomatic protection. At least, this obligation for the State does not arise from the international law.

Effectively, in the Draft Articles on Diplomatic Protection, first report, presented by J. Dugard to the International Law Commission, he expressed this discretionary criterion on the

⁸³ The Interamerican Court of Human Rights “/.../ fue efectivamente el primer tribunal internacional a advertir que el incumplimiento del artículo 36 (1)(b) de la Convención de Viena sobre Relaciones Consulares de 1963 se daba en perjuicio no sólo de un Estado Parte en dicha Convención sino también de los seres humanos afectados”- Vote of the Judge A.A. Cancado Trindade, in the Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants OC-18/03 of 17 September, 2003. The Opinion was requested by the United Mexican states.

⁸⁴ I/A Court H.R., The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, par. 124. See. Monica Feria Tinta: “Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case”. EJIL (2001), Vol. 12 No. 2, pp. 363-366.

part of the State to grant diplomatic protection. However, he stated certain limits to this discretion.⁸⁵ According to Article 4 of the project of the Commission stated:

“1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the state of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another state.

2. The state of nationality is relieved of this obligation if:

(a) the exercise of diplomatic protection would seriously endanger the overriding interests of the state and/or its people;

(b) another state exercised diplomatic protection on behalf of the injured person; and

(c) the injured person does not have the effective and dominant nationality of the state.

3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.”⁸⁶

The Commission considered that there was not enough international practice to sustain that the diplomatic protection was a duty of the State. Therefore, the right of the individual to inform his government, not guarantee that the State would grant later diplomatic protection.

In “Kaunda and Others v President of the Republic of South Africa”⁸⁷, the Constitutional Court of South Africa stated to this respect:

⁸⁵ Enrico Milano, *Diplomatic Protection before the International Court of Justice: Refashioning Tradition?*, *Netherlands Yearbook of International Law* XXXV (2004), p. 94

⁸⁶ Report of the ILC (52nd Session) Suppl 10, A/55/10, 158, 456 (2000). *“In introducing this article I fully acknowledged that it was proposed de lege ferenda as it had little state practice to support it. After an extensive debate on this proposal, in which the view was repeatedly expressed that diplomatic protection was not a human right, I had no alternative but to propose that the provision be not referred to the drafting committee – that is, to withdraw it – on the grounds that the general view was that the issue was not yet ripe for the attention of the Commission and that there was a need for more state practice and, particularly, more opinion juris before it could be considered. I greatly regret that this was necessary”* – Dugard, John: *Diplomatic Protection and Human Rights: The Draft Article of the International Law Commission*. *The Australian Yearbook of International Law*. 1966. 24 (2005), p. 80.

⁸⁷ *Kaunda and Others v. President of the Republic of South Africa*, (CCT 23/04), 2004 (10) BCCR 1009.

69. “There may thus be a duty on government, consistent with its obligation under international law, to take action to protect one of its citizens against a gross abuse of international human rights norm. A request to the government for assistance in such circumstance where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action.”⁸⁸
70. “There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstance on becoming aware of the breaches, the government may well be obliged to take an initiative itself.”⁸⁹
71. “Even in those countries where the constitution recognises that the state has an obligation to afford such protection, the ILC report suggests that there is some doubt as to whether that obligation is justiciable under municipal law.”⁹⁰
72. A court cannot tell the government how to make diplomatic interventions for the protection of its nationals./.../ 74. Although the exercise of the discretion can be tested for compliance with the constitution/.../”⁹¹

The acknowledgement of a right to demand diplomatic protection in favour of individuals, would obviously be an important element to support the subjectivity of those based on an indirect procedural capacity in the international arena. However, this acknowledgement is not consequent with the actual international practice which sees a discretionary faculty by the State in the exercise of diplomatic protection.⁹²

In the particular case of LaGrand, the domestic judgment aimed at the application of death penalty to the two indicted individuals. The judgment, however, provides elements to this

⁸⁸ IBID, para. 69

⁸⁹ IBID, para. 70

⁹⁰ IBID, para. 71

⁹¹ IBID, para. 72, 74

⁹² “The only true exception is probably represented by Germany, where the Constitutional Court has clearly stated the constitutional duty of diplomatic protection in favour of German nationals; but even in the German case the Federal Administrative Court has maintained that such a constitutional duty should be weighed against the discretionary power involved in the conduct of foreign affairs by the executive”. Enrico Milano, Diplomatic Protection before the International Court of Justice: Refashioning Tradition?, *Netherland Yearbook of International Law* XXXV (2004), p. 96.

study. It identifies individuals as a rights holders, and flexibilizes the fiction of diplomatic protection, considering it as a means of protection of individuals rights.

II.2.5 Avena and Other Mexican Nationals (Mexico v. United States of America)⁹³

Facts

Mexico asked the International Court of Justice to adjudge and declare, that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row , violated international legal obligations to Mexico, in its own right and in the exercise or its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the 1963 Vienna Convention on Consular Relations. The original claim related to 54 such persons, but as a result of subsequent adjustments to the claim, Mexico brought a claim for 52 individual cases.

The Judgment

“It would further observe that violations of the right of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State: and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b).”⁹⁴(Emphasis added)

*“124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention ; according to Mexico, this right, as such, is so fundamental that its infringement will ipso facto produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. **Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux preparatoires, support the conclusion that Mexico draws from its contention in that regard.**”⁹⁵ (Emphasis added)*

⁹³ Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 12

⁹⁴ IBID, para 40

⁹⁵ IBID, para 124

It results from the last paragraph, that the Court denies the character of human right to the right to notify or to inform to the consulate of the country of the nationality in the circumstances of the case. In spite of this, the Court acknowledges that a treaty of international law may directly create a right for an individual, as it had already stated in LaGrand Case.

The doctrine has referred to the growing strategy of the States in linking its claim to human rights:

*“There are probably three paramount reasons behind the choice of States to link human rights and diplomatic protection. The first one is that the standard of treatment for aliens is particularly determined by the law of human rights nowadays...The second reason is definitely a rhetorical one: states and world public opinion are nowadays so sensitive at accusations of violations of human rights that to present an individual right under a certain convention as a human right makes sure that the legal claim related to its violations carries with it a broader appeal and a broader political implication...The third reason is evident in the Breard, LaGrand and Avena and it has to do with the effectiveness of the remedies sought by the applicants. In all three cases, the applicant states in their request for provisional measures stated that the provisional measures were directed to prevent a prejudice to their right and the rights of their nationals”.*⁹⁶

At the same time, a flexibilization of the classical criteria which defined the diplomatic protection derives from this phenomenon, generating consequences for the defense of rights granted to individual by international law.

II.2.6 Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) Preliminary Objections. (May 24th, 2007)⁹⁷

Facts

⁹⁶ Enrico Milano, Diplomatic Protection before the International Court of Justice: Refashioning Tradition?, Netherland Yearbook of International Law XXXV (2004), pp. 122-123.

⁹⁷ *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) Preliminary Objections.* ICJ (May 24th, 2007)

Guinea filed an application to the International Court of Justice instituting proceedings against the Democratic Republic of the Congo for damage suffered by Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, allegedly unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years. Mr. Diallo had already been despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled. This expulsion, stated Guinea, came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State was a shareholder.

The Judgment of the Court stated the following:

39. “The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the “ILC”), “diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility” (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24). ***Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope ratione materiae of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.***”⁹⁸ (Emphasis added)

94. “In view of the foregoing, the Court cannot accept Guinea’s claim to exercise diplomatic protection by substitution. It is therefore the normal rule of the nationality of the claims which governs the question of the diplomatic protection of Africom-Zaire and Africontainers-Zaire. The companies in question have Congolese nationality. The objection as to inadmissibility raised by the DRC owing to Guinea’s lack of standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the two companies Africom-Zaire and Africontainers-Zaire is consequently well founded and must be upheld.”⁹⁹

96. ***“In view of all the foregoing, the Court concludes that Guinea’s Application is admissible in so far as it concerns protection of Mr. Diallo’s rights as an individual and his direct rights as associé in Africom-Zaire and Africontainers-Zaire.”***¹⁰⁰ (Emphasis added)

⁹⁸ IBID para. 39

⁹⁹ IBID para. 94

¹⁰⁰ IBID para. 96

This judgment is indicative of the acceptance of a link between the diplomatic protection and the regime of human rights, in part as a consequence of the influence of the regime of human rights in general international.¹⁰¹

Guinea, added to the strategy of its claim, as also did Germany and Mexico in the previously analyzed cases, the action in defense of the human rights of nationals, stating that violations of the Universal Declaration of Human Rights of 1948, the UN Covenant on Civil and Political Rights and the Declaration of the Rights of Man and Citizen, had occurred.

The acceptance of the diplomatic protection as a possible means of protection of the rights of the individual, does not only imply an advantage for the acknowledgement of the individual as subject of international law, but strengthens the exercise of his rights and improves the logic of certain necessary premises for the exercise of the diplomatic protection itself. For example, regarding the continuance of nationality rule: *“It was pointed out above that in the light of the State substituting its rights for those of the individual under the traditional approach to diplomatic protection, the requirement of continuance of nationality lacked legal logic.”*¹⁰²

However, in respect of this new valorization, one must be careful. As this paper have pointed out, the diplomatic protection presents various limitis as a means of protection of the individual. Its exercise depends mainly on the will of the State of the nationality. The

¹⁰¹ *“The evolution of human rights law and humanitarian law provisions has triggered a revolution in the interpretation of international law in other areas. We understand that, since there is no area of law that is not related to human rights, these rights have penetrated into all legal approaches (i.a. fight against terrorism, racial discrimination, economic, social, and cultural situations, indigenous peoples, investments, integration, etc.). Furthermore, with the gradual increase of human rights protections, a greater explicit presence of such interests is observed both in national and international legal systems. Increasingly, individuals strive to play a more active role in the implementation and enforcement of human rights standards, rather than a passive one as beneficiaries of rights and freedoms guaranteed by States. The individual becomes a sort of political power, with new a legal capacity for the independent realization of the rights and duties established by international law. This trend is emerging and is moving away from a purely state-centered approach to international law”* - Zlata: *Humanization of International Courts*. Academia Nacional de Derecho de Cordoba, aviable in www.acaderc.org.ar. p. 3 (This article was also published in Sosic, T (Coord) Liber Amigrum Prof. Bodizar Bakotic, Zagred. 2008.)

¹⁰² Orrego Vicuña, F.: *“The Changing Approaches to the Nationality of claims in the context of Diplomatic Protection and International Dispute Settlement”*. International Center for Settlement of Investment Disputes: ICSID Review. 1986. 15 (2000) 1. p. 347.

obligation of the States to exercise diplomatic protection, when required, has not been acknowledged in the international practice. Subjected to the same limits, in case of exercise of diplomatic protection the State counts on its own discretion to determine the reparation measures and the amounts of compensation. The individual does not take part in this process.¹⁰³ Finally, the diplomatic protection is not aimed at processing claims against the State of the nationality of the individual injured.

In this sense, the diplomatic protection cannot replace in any way the jurisdictional limits resulting from article 34 of the Statute of International Court of Justice. The lack of capacity of the individual to bring a claim before this court must be considered as part of the consensus of States. In relation to this assertion, one must take into account that in international law the consensus of the international community members, where the States are still the main actors, is of great importance. Nevertheless, slow progress can be made regarding the scope of State's sovereignty and its limits, preventing the fracture of the system.¹⁰⁴

Furthermore, the experience of the past, where the diplomatic protection appeared only as a means used by the most powerful countries, with the capacity to give to their citizens a high standard treatment, must not be ignored. This, situation may have been prejudicial to the

¹⁰³ “Una primera dificultad fue que el Estado otorgaba o negaba la protección diplomática a voluntad, influyendo en tal decisión las implicancias de tal reclamo en el contexto de sus intereses en las relaciones internacionales o diplomáticas. De esta manera, los derechos del individuo eran en el hecho subordinados a aquellos del Estado. Una segunda dificultad, asociada con lo anterior, era que el Estado controlaba el reclamo en todas sus etapas, incluso en la distribución de la indemnización final, que no necesariamente debía ser entregada al individuo afectado.”- Orrego Vicuña, F. IBID. (ongoing publication)

¹⁰⁴ “*Todo progreso en el orden internacional está condicionado a que los Estados, y de manera más general la sociedad, lo perciban como útil y complementario de su estructura nacional. No puede existir un progreso que se base en la imposición de intereses ajenos o en el antagonismo respecto de valores que cada uno sea dado en el contexto de sus tradiciones históricas y culturales. Una constante que puede observarse en la evolución del derecho internacional es que los Estados buscan salvaguardar legítimamente su autonomía*”. “*Esta autonomía se ha visto relativizada en el curso de la evolución que ha tenido lugar, pero ello lo ha sido con la aceptación de los propios Estados. Si se busca reducir esa autonomía contra la voluntad estatal, o mediante la utilización de mecanismos subrepticios, lejos de lograrse un progreso en el derecho internacional se causará una grave regresión*”. Orrego Vicuña, F.: “La Protección de los Derechos del Individuo en el Derecho Internacional: ¿Es la Selectividad compatible con la Universalidad?”. Anuario Colombiano de Derecho Internacional. ACDI. Vol. 2. Ed. Universidad del Rosario. Bogota. 2009. (ongoing publication)

States that did not have the capacity or the economical autonomy to exercise the same action.

In the future, the recourse to the diplomatic protection before the International Court of Justice to defend fundamental rights acknowledged to the individual may show an increasing acceptance by the international community of the role of States exercising protection. It will also be indicative of a growing acceptance of limits to the State sovereignty in the field of the rights of the individual. This acknowledgement constitutes a step forward towards the international subjectivity of the individual, as well as a new manifestation of the exercise of rights by the individual.

CHAPTER III

INDIVIDUALS AS DUTY-HOLDERS AND THEIR INTERNATIONAL RESPONSABILITY

III. 1. Passive dimension of the international personality of the individual before the International Court of Justice

The individual cannot be party to disputes before the Court. The Statute of the International Court of Justice prevents individuals from being parties to case brought before it. As a consequence, the Court, is not competent to determine the responsibility of an individual for the breach of a international duties, among the matters to which the Court is called upon to decide.¹⁰⁵ Notwithstanding this, the Court may be called to judge upon cases in which individuals' conduct is directly related to the responsibility of a State in accordance with international law, as a consequence of the attribution of said conduct to the State.

In some of these situations the International Court of Justice may be requested to analyze without exceeding its competence and the procedural rules, the status of individuals as duty-holders, and international responsibility issues. This chapter will deal with two situations characterized by the conduct of private persons acting as organs of a State. These situations are the following:

¹⁰⁵ Art. 36: "1. *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.* 2. *The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation /.../*". Statute of the International Court of Justice.

1.- When it is alleged before the International Court of Justice that a State has not complied with the imperative rules of international law (*ius cogens*). The Court, will have to investigate about the conduct of the organs of the State, and to consider elements that relate to the criminal responsibility of the individual who is acting on behalf of said organs; and

2.- When it is alleged that an individual who acts as an organ of a State, and is entitled to immunity of jurisdiction, has not complied with imperative rules of international law (*ius cogens*) and the International Court of Justice is called upon to decide a dispute between two States on the matter of the admissibility of said immunity of jurisdiction in the circumstances of the specific case.

The two cases are based on a common assumption, which is the recognition that individuals can be duty-holders subject to international responsibility in case of breach of an imperative rule of international law.

In the *Barcelona Traction Case*¹⁰⁶, the International Court of Justice pointed out the characteristics of the obligation considered as based on imperative norms under international law:

“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*;

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/.../”¹⁰⁷.

¹⁰⁶ *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J Reports 1970, p.3.

¹⁰⁷ *IBID*, para 3 and 4. In its 1996 Advisory Opinion on the *Legality of Use or Threat of Use of Nuclear Weapons*, the International Court of Justice stated the “intransgressible principles of humanitarian law” referring to this kind of norms.

In the “*Case Concerning the application of the Convention of Prevention and Punishment of the Crime of Genocide*”,¹⁰⁸ the Court had to determine the scope of its own jurisdiction regarding the obligations of individuals derived from alleged breaches of imperative rules of international law. Another case to be analysed is the “*Arrest Warrant Case*”,¹⁰⁹ where the tribunal was requested to intervene on a matter related to the jurisdiction of a foreign national courts with respect of an individual bestowed with immunity of jurisdiction. It is interesting to note that the international subjectivity of the individual seen from the perspective of his duties and responsibilities, appeared in the background of the matter submitted to the Court.

In chapter one this study dealt with the issue of “duty-holder” in international law and it was said that this concept was related to the possibility of being responsible for the breach of an international obligation.¹¹⁰ The international responsibility of the individuals is a longstanding concept that emerged in the field of criminal responsibility, namely in the field of piracy, crimes of war and crimes against humanity. There are number of international conventions that define as international crimes certain conducts committed by individuals. This is the case of the United Nations Convention on the Law of the Sea of 10 December 1982 for the crime of piracy, the Convention on the Prevention and Punishment of the Crime of Genocide¹¹¹ and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹¹², among others.

In case of breach of imperative rules of international law, it may arise a problem of distinguishing between the responsibility of the individual himself and the responsibility of

¹⁰⁸ *Case Concerning the application of the Convention of Prevention and Punishment of the Crime of Genocide*, 26 February 2007 (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. (parrafo)

¹⁰⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3

¹¹⁰ “It has long been held that the individuals were capable of violating international law, irrespectively of wheter their punishment was at the hands of the State or more recently of international Courts”.- Tornaritis, Criton. G: *The Individual as a Subject of International Law*. Nicosia, 1972. p. 34.

¹¹¹ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A, of the United Nations General Assembly on 9 December, 1948.

¹¹² Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46 of 10 December 1984. Entry in force June 26, 1987. http://untreaty.un.org/cod/avl/pdf/ha/catcidtp/catcidtp_e.pdf

the State for the act or omission of its organ. A court may be confronted to two responsibilities, States and individual responsibility.

Article 58 of the Draft on Responsibility of State for International Wrongful Acts, Report of the International Law Commission on the work of its fifty-third session, sets out to this respect:

“Individual responsibility: These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”

This provision features a duality of responsibilities, the eventual individual responsibility and the State’s own responsibility. On the other hand, article 25.4 of the Rome Statute of the International Criminal Court (1998)¹¹³, provides that: *“(n)o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”*

In the comments to article 58 of the Draft on State Responsibility, the International Law Commission says that: *“Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried out. Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them....The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.”*¹¹⁴

¹¹³<http://www.iccpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>

¹¹⁴ Comments of the International Law Commission to article 58 of the Draft Article on State Responsibility, reports of the fifty-seventh session, 2005.

Eventhough, the State and individual responsibilities can be considered separately, there is a close relationship between them, whenever the individual suspected of an international crime was taking an official position in the State. Thence, the grave breach of international law could be attributed to both subjects under certain circumstances. In cases like these, the Court should proceed to analyze the behaviour of the State's organs and the behaviour of individuals capable of acting on behalf of the State or under the cover of the particular organ in breach of international law.

III. 2. 1. Case Concerning the application of the Convention of Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).¹¹⁵

Facts

On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro" and with effect from 3 June 2006, the Republic of Serbia), in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

The Judgment

174. "The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs (a) to (e) of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III."¹¹⁶

179. "Accordingly, having considered the various arguments, the Court affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits

¹¹⁵ Case Concerning the application of the Convention of Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007 ICJ, Judgments, General List. 91

¹¹⁶ IBID, para. 174

any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.”¹¹⁷

“(5) Question whether the Court may make a finding of genocide by a State in the absence of a prior conviction of an individual for genocide by a competent court

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph (b), and complicity under Article III, paragraph (e); and, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. ***According to the Respondent, the condition sine qua non for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State’s responsibility.***¹¹⁸ (Emphasis added)

181. “The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity (paragraphs 209-210 below). ***Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.***¹¹⁹ (Emphasis added)

182. “Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. ***The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.***¹²⁰ (Emphasis added)

¹¹⁷ IBID, para. 179

¹¹⁸ IBID, para. 180

¹¹⁹ IBID, para. 181

¹²⁰ IBID, para. 182

383. “Finally, it should be made clear that, while, as noted above, a State’s responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.”¹²¹

384. “Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph (a), of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.”¹²²

465. “It will be clear from the Court’s findings above on the question of the obligation to punish under the Convention that it is satisfied that *the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide*, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.”¹²³

In the case at hand, while the International Court of Justice must decide on “civil” responsibility of the State, the International Criminal Court for Ex-Yugoslavia must decide on “criminal” responsibility of the individuals prosecuted for genocide.

¹²¹ IBID, para. 383

¹²² IBID, para. 384

¹²³ IBID, para. 465

Servia and Montenegro claim that the Convention on Prevention of Genocide only result in criminal responsibility. As States are not subject to this type of responsibility, the Convention could only give way to individual responsibility. This idea is supported by the votes of Judges Owada, Tomka, Skotnikov, Shi and Koroma to whom such Article was conceived as crime of individuals, and not of a State, so that the ICJ did not constitute a proper forum for determining the existence of a crime of genocide. The majority vote rejected this argument considering that the Convention generated responsibility directly to the States.¹²⁴

Scopes seem to be well delimited: civil liability for States, criminal responsibility for individuals. However, there is a problem when individuals who are suspicious of international responsibility acted as State agents at the time of breach of imperative rules of international law.

The only way to determine State responsibility is through an analysis of the behaviour of its organs.¹²⁵ The Respondent (Servia y Montenegro) claimed that a “*condition sine qua non for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State’s responsibility.*”¹²⁶ The Court concluded that *State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.*¹²⁷

¹²⁴ See e.g. Turns, David: “Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v. Serbia and Montenegro”. Melbourne Journal of International Law. Vol. 8. 2007.

¹²⁵ “/.../the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State” - Commentary of Chapter II, Report of the International Law Commission on the work of its fifty-third session. Point 2.

¹²⁶ Parr. 181 - Case Concerning the application of the Convention of Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Servia and Montenegro). 26 February 2007.

¹²⁷ Parr. 182 - Case Concerning the application of the Convention of Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Servia and Montenegro). 26 February 2007.

The strategy of the defendant and the divided opinions of the Judges show how individuals, as duty/liability holders, demand a distinction from the duties and liabilities of a State before the International Court of Justice.

If the State is responsible for the behaviour of peoples or groups of people, due to the absence or default of official authorities, that is a different scenario. In the latter case, there are two different behaviours to be analyzed: the behaviour of the one who commits the wrongful act and the behaviour of the one who allows such breach. The above better allows distinguishing individual liability and State responsibility. Unlikewise, in the previous hypothesis liabilities seem to be linked.

In cases of breach of imperative rules of the international law, there seems to be the rule that not only the State who carried out such acts by means of its organs but also the individuals who had acted within those organs should also be punished. In this situation, there is a fine line between the analysis of international State responsibility and the individual: *“/.../a customary international rule on international crimes that has evolved in the international community. The rule provides that, in case of perpetration by a state official of such international crimes as genocide, crimes against humanity, war crimes, torture (and I would add serious crimes of international, state-sponsored terrorism), such acts, in addition to being imputed to the state of which the individual acts as an agent, also involve the criminal liability of the individual. In other words, for such crimes there may co-exist state responsibility and individual criminal liability”*.¹²⁸

Article 41 of Draft Articles on State Responsibility provides: *“Particular consequences of a serious breach of an obligation under this chapter: 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. 3 **This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international***

¹²⁸ Cassese, A.: *“When May Senior State Officials Be Tried for International Crimes?. Some Comments on the Congo v. Belgium Case”*. EJIL 2002, Vol. 13 No. 4. p. 864

law.”(Emphasis added). The precision referred to in this Article shall supplement this line of reasoning.¹²⁹

If this point of view is accepted and it is considered that there has been an internationally wrongful act by a State through its organs, there would be a step forward in determining responsibility of individual who were in office. The foregoing without prejudice that the International Court of Justice is not the one called to determine this.¹³⁰

International Criminal Courts are the forums before which these individuals would be judged. They have no restriction to judge individuals as Head of State, Head of Government or Minister in Foreign Affairs. The above has been in article 27 of the Rome Statute of the International Criminal Court and in the Chapter of the International Military Tribunal at Nuremberg (art. 7), the Statute of the International Criminal Tribunal for the former Yugoslavia (art.7) and the Statute of the International Criminal Tribunal for Rwanda (art. 6).

The matter that it is going to be analyzed hereinafter is related to whether or not such judgments may be undertaken by national or foreign domestic courts.

III.2. 3. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)¹³¹

¹²⁹ In the comments the Commission referred: “/.../ paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.”

¹³⁰ “La dualidad sanción al Estado-sanción al individuo, tal como lo señaláramos en otros trabajos responde al criterio de que la “sanción internacional” al individuo es una forma de sanción “penal” al Estado responsable al sustraerle a su jurisdicción a un nacional y someterlo a juzgamiento, aún contra su voluntad... Creemos que en el caso de violaciones de normas imperativas de derecho internacional general, la gravedad de la conducta ilícita hace que la propia naturaleza del tipo de responsabilidad requiera una dimensión normativa propia, la de la doble sanción: la tradicional en su condición de ente jurídico y la penal a través de la sanción en la persona de los individuos, los que le son sustraídos a su jurisdicción. Si el Estado hubiese adoptado todas las medidas a su alcance para impedir o sancionar las violaciones a normas imperativas bajo su jurisdicción no hubiese incurrido en responsabilidad internacional y no hubiese cabido reclamación internacional al Estado ni al individuo.” – Zlata Drnas de Clément: “Responsabilidad internacional del Estado por violaciones a normas imperativas del derecho internacional”. Published in Llanos Mansilla, H y otros (Ed). Libro Homenaje al Profesor Santiago Benadava. Santiago de Chile, 2008, p. 10, available in www.acaderc.org.ar.

As stated above, diplomatic protection enjoys a renewed role when dealing with the position of individual as right-holders before the International Court of Justice, which is a situation that has been acknowledged by the latter.

Diplomatic protection and the immunity of jurisdiction are based on the same premises: the protection of State sovereignty. While the diplomatic protection defends the State sovereignty, especially State rights, immunities prevent that sovereignty hinders judgement of certain acts (functional immunities) or specific individuals (personal immunity), so that *par in parem non habet imperium* (equals have not authority over each other).

It is worth noting that both concepts, based on the same premise, have similar effects. Facing “*demands of emerging universal values*”¹³² or specific imperative rules of international law makes the framework within which they were conceived more flexible. Diplomatic protection increases its scope to the protection of individual rights, and immunities of jurisdiction restrict their scope to cases in which international crimes have been committed. Regarding the latter, immunities of jurisdiction, within the framework of State’s actions, do not have effect over the jurisdiction of international courts. However, whether jurisdiction over such crimes may be exercised by domestic or foreign courts is still a pending matter.¹³³

The Head of State and of Government, Ministers of Foreign Affairs, diplomatic and consular agents have certain immunities acknowledged by international law. Such immunities may be personal or functional.

Personal immunities are a “procedural defense”¹³⁴, granted to specific organs of State, usually Head of State and of Government, and Ministers of Foreign Affairs. These immunities protect those individuals before courts of a third State for any act, regardless of

¹³¹ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3

¹³² Cassese, A.: “*When May Senior State Officials Be Tried for International Crimes?. Some Comments on the Congo v. Belgium Case*”. EJIL 2002, Vol. 13 No. 4, p. 854.

¹³³ “It is increasingly recognized that the principle of universal jurisdiction is an attribute of the existence of crimes under international law.”- Brownlie Ian: “Principles of Public International Law”. Oxford. Sixth Edition. 2003. New York, p. 3.

¹³⁴ Cassese, A.: “*When May Senior State Officials Be Tried for International Crimes?. Some Comments on the Congo v. Belgium Case*”. EJIL 2002, Vol. 13 No. 4, pp. 863 -4.

whether it has been carried out as an agent of the State or as a private individual.

Immunities disappear once that individual ceases in his functions; since that moment they may be judged for acts undertaken while on duty.¹³⁵

In the Pinochet's decision, the House of Lords stated that immunity *ration personae* apply only to incumbent holders of office, and it expires as soon as their term in office ends.¹³⁶

On the other hand, functional immunities protect any State agent from foreign jurisdiction, in case of an "official act"; it *".../ is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state... it is a substantive defence"*.¹³⁷

Unlike personal immunities, functional immunities or *ratione materiae* persist, with respect to official acts, after the individual has ceased in his functions. The above is a consequence of the fact that such acts are not attributable to individuals, but to States. However, the State official may be judged at any moment for acts undertaken in his private capacity.

Facts

The dispute concerning an international arrest warrant issued on 11 April 2000 by a Belgian judge against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs was contrary to international law. Belgium contends that immunities accorded to incumbent Ministers for Foreign Affairs may in no case protect them where they are suspected of having committed war crimes or crimes against humanity. The DRC, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any

¹³⁵ Article 13 on the *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law's* resolution of the Institut de Droit International, states: "1. A former Head of State (or Heads of Government) enjoys no inviolability in the territory of a foreign State. 2. Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under International law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources. 3 Neither does he or she enjoy immunity from execution. /.../". Thirteenth Commission, Rapporteur: Mr. Joe Verhoeven.

¹³⁶ House of Lords, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent), Judgment of 24 March 1999.

¹³⁷ Cassese, A.: "When May Senior State Officials Be Tried for International Crimes?. Some Comments on the Congo v. Belgium Case". EJIL 2002, Vol. 13 No. 4, p. 863.

exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

The Judgment

49. “Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.”¹³⁸

53. “In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for example, Article 7, paragraph 2 (u), of the 1969 Vienna Convention on the Law of Treaties). In the performance of their functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence, to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that *chargés d'affaires* are accredited.”¹³⁹

54. ***“The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.”***¹⁴⁰ (Emphasis added)

¹³⁸ IBID, para. 49

¹³⁹ IBID, para. 53

55. ***“In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.*** Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.”¹⁴¹

58. “The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. ***It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.*** The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts. Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above. In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.”¹⁴² (Emphasis added)

¹⁴⁰ IBID, para. 54

¹⁴¹ IBID, para. 55

60. *“The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.”*¹⁴³ (Emphasis added)

61. *“Accordingly, the immunities enjoyed under International law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.*

First, *such persons enjoy no criminal immunity under international law in their own countries*, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, *they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.*

Thirdly, *after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.*

Fourthly, *an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.* Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.¹⁴⁴ (Emphasis added).

The decision refers to the immunity of jurisdiction and the breach of imperative rules of international law, so as to determine the possibility of judgement by foreign national courts.

¹⁴² IBID, para. 58

¹⁴³ IBID, para. 60

¹⁴⁴ IBID, para. 61

The solution, therefore, would determine the possibility of judge international responsibility of a given individual. _

The foregoing decision has been analyzed and criticized in respect with the acts that the Court has determined as susceptible of jurisdiction of national courts: Cassese shares the opinion that criticises this judgment and states that: *“It follows that, in the opinion of the Court, foreign ministers (and other state officials), after leaving office, may be prosecuted and punished for international crimes perpetrated while in office only if such crimes are regarded as acts committed in their “private capacity”, a conclusion that is hardly consistent with the current pattern of international criminality and surely does not meet the demands of international criminal justice.”*¹⁴⁵

The matter is related to what was studied in the Prevention of Genocide Case. In case of international crimes, there is both State responsibility, and individual responsibility. The latter may be subject to judgement regardless State immunities before international courts. Nevertheless, the possibility to judge such crimes is restricted before national or foreign courts.

According to the decision of the Court, in the case of Ministers of Foreign Affairs, Heads of State and Heads of Government, the acts that can be judged by foreign domestic courts are:

- Private acts, which may only be judged once the individual has left office.

Thus, the Court combines personal and functional immunities when analysing the situation of a Minister of Foreign Affairs before national and foreign courts.¹⁴⁶ While the individual is still in office the foreign national court is impeded to judge official or private acts due to

¹⁴⁵ Cassese, A.: *“When May Senior State Officials Be Tried for International Crimes?. Some Comments on the Congo v. Belgium Case”*. EJIL 2002, Vol. 13 No. 4, p. 860.

¹⁴⁶ *“/.../the Court’s failure to distinguish between immunities inuring to state officials with respect to acts they perform in their official capacity (so-called functional or *ratione materiae* immunities) and immunities from which some categories of state officials benefit not only for their private life but also, more generally, for any act and transaction while in office (so-called personal immunities)”*. Cassese, A.: *“When May Senior State Officials Be Tried for International Crimes?. Some Comments on the Congo v. Belgium Case”*. EJIL 2002, Vol. 13 No. 4. p. 862.

personal immunities. It is impeded to judge official acts carried out by them due to functional immunities as well, even when the individual had ceased in his functions.¹⁴⁷

The decision does not determine when an act has been carried out in “private capacity” or “official capacity”. Several questions arise as a result of the foregoing: e.g. Is the individual acting in this private capacity when acting beyond the limits of his official faculties? In order to answer that question it is pivotal to determine whether the individual acted on behalf of the State or in apparent public functions. Article 3 of the Draft Articles on State Responsibility of the International Law Commission, provides that: *“A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decision. For example, the award of the Mexico-United States General Claims Commission in the Mallen case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way. The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the Caire case excluded responsibility only in cases where “the act had no connexion with private individual. The case of purely private conduct should not be confused with that of an organ functioning as such but acting ultra vires or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7. In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.”*¹⁴⁸

¹⁴⁷ “/.../a more radical question to be raised is a follows: why should one confine trials by foreign courts to acts performed in a private capacity? Which international rules would exclude official acts?” Cassese, A.: *“When May Senior State Officials Be Tried for International Crimes?”. Some Comments on the Congo v. Belgium Case”*. EJIL 2002, Vol. 13 No. 4. p. 868.

¹⁴⁸ Comentario of art. 4 pto. 13, Report of the International Law Commission on the work of its fifty-third sesión.

The above is a noteworthy point when considering that in case of *ultra-vires*, the individual acted in his private capacity, and the sole possibility to determine international responsibility of the State would be based on the absence of official authorities.¹⁴⁹ In spite of it, it is difficult to imagine that a Head of State or Head of Government or a Minister of Foreign Affairs may carry out an international crime, acting in his private capacity without looking as an official act.

The Court made no difference in respect with the quality of the crime. Thus, it made no exception to the rule of immunity in international crime cases before domestic or national courts.

The European Court of Human Rights in “*Al-Adsani v. United Kingdom*”, followed the same reasoning. The Grand Chamber stated that international law has not yet accepted the approach that States no longer enjoy immunity before the courts of third States where acts of torture or other gross human rights violations are alleged.¹⁵⁰ The opposite approach was followed by the Greek Supreme Court in “*Voiotia Case*”¹⁵¹, as well as by the Italian Supreme Court in the “*Ferrini case*”¹⁵². In both of them the Courts stated that Germany had not right to sovereign immunity for serious violations of human rights carried out by German occupying forces during World War II.¹⁵³

¹⁴⁹ “It might, however, be objected that there is always the possibility of asserting the state’s responsibility for a wrongful omission, that is, for the conduct of other organs of the state who failed to prevent the officials from committing the genocide, torture, etc. or to punish them. However, it is unsatisfactory that a state should be called to account only for failing to prevent the commission on the crimes or for failing to punish the wrongdoers, and not be called to account for the crimes themselves.”- Spinedi, Marina: “State Responsibility v. Individual Responsibility for International Crimes: Tertium Nod Datur?”. *EJIL*. 2002. Vol 13 No. 4, pp. 895 – 899.

¹⁵⁰ See Markus Rau: “After *Pinochet*: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations - The Decision of the European Court of Human Rights in the *Al-Adsani Case*”. German Law Journal: www.germanlawjournal.com

¹⁵¹ Prefecture of Voiotia v. Federal Republic of Germany, Supreme Court (Areiros Pagos) case No. 11/2000, 4 May 2000. “Greek Court affirmed that the violation of *jus cogens* norms by Germany should be considered as an implied waiver of immunity” - De Sena, Pasquale y De Vittor, Francesca: *State Immunity and Human Rights: The Italian Supreme Court decision on the Ferrini Case*. *EJIL*, 2005, 16 (1), p. 96.

¹⁵² “*Ferrini v. Federal Republic of Germany*”. Corte di Cassazione (Sezioni Unite), judgment No 5044 of 6 Nov. 2003, registered 11 Mar. 2004.

¹⁵³ “Based upon a systematic interpretation of the international legal order, (the Italian Supreme Court) conducted a “balancing of values” between the two fundamental international law principles of the sovereign

The latter two decisions, although referring to State immunity, also underline values of State sovereignty and values expressed in imperative rules of international law that refer to international crimes. This analysis expresses a balance directly transferable to the study of individual immunities in case of international crimes.

The decision of the Court in Arrest Warrant Case, makes the following balance on values:

- When pursuing possible international criminals, it identifies the International Criminal Courts before which individual State immunities are not applicable; and
- When protecting State sovereignty, it maintains these individual immunities before domestic or foreign national courts, for acts carried out by these individuals in their official capacity.

Doctrines point out that the judgment derives from a demand of a new balance of values that gives way to a greater framework for persecution of international crimes. The above mentioned allows in these cases the exception of the rule of State immunities before foreign domestic courts.¹⁵⁴

equality of states and of the protection of inviolable human rights ...the Court held that the recognition of sovereign immunity to states acting in clear contrast with this system of values would surely be incompatible with a systematic and consistent interpretation of the international legal order” - De Sena, Pasquale y De Vittor, Francesca: State Immunity and Human Rights: The Italian Supreme Court decision on the Ferrini Case. EJIL, 2005, 16 (1), pp. 89 – 100.

¹⁵⁴ “/.../the ICJ’s obiter dictum, that Ministers of Foreign Affairs are immune for official acts even when they are no longer in office, is both not well reasoned and difficult to reconcile with the existing law of state immunity.” Spinedi, Marina: “State Responsibility v. Individual Responsibility for International Crimes: Tertium Nod Datur?”. EJIL. 2002. Vol 13 No. 4. P. 899. “A survey of the available sources showed that there is a strong tendency in international law to deny immunity to state officials who have committed core crimes. It has been argued that the best concretization of the existing state practice would be a rule shaped along the lines of the Pinochet decision. According to this rule, immunity *ratione personae* would grant effective protection (even) against prosecutions for core crimes. However, as immunity *ratione personae* is available only to incumbent holders of office, it ceases to protect them as soon as their term of office ends. Thereafter, these persons are protected only by immunity *ratione materiae*, which should be interpreted as providing no protection against core crimes prosecutions”- Wirth, S: “Immunity for Core Crimes?. The ICJ’s Judgment in the Congo v. Belgium Case”. EJIL (2002), Vol. 13 No. 4. P. 893. “/.../ the ICJ judgment in the DRC case was a setback, a step backwards, in the global fight against the worst atrocities”- Mbata B Mangu, André: “States’ rights versus human and peoples’ rights in international law: Sovereign immunity and universal jurisdiction before the International Court of Justice” - Stell LR 2004-3, p. 498.

The judgment of the Court limits the scope of individuals as international duty-holders, and gives precision to the concept of their international responsibility for international crimes. In spite of what the Court states about this, the lack and disparity of resolutions as well as of doctrinaire consensus, as shown in the Arrest Warrant Case, reflect that the consequences for international crimes or serious breaches of peremptory norms are mostly in a grey area of the international law, in a state which needs *development*.¹⁵⁵

Conclusion

After having pointed out the doctrinary discrepancy regarding the concept of international subjectivity, this work identifies four possible criteria for its attribution to a person or an entity:

1) The holding of rights and duties under international law; 2) the procedural capacity to claim rights or be responsible for those duties before international courts; 3) the possibility of enforcement or implementation of a judgment or resolution passed by an international court; 4) the participation in different processes of creation of international law.

Taking into account these criteria the analysis of the status of the individual as subject of international law on the basis of the jurisprudence of the Permanent Court of International Justice and the International Court of Justice shows the relevance of the two first categories. It means that in practice, the international jurisprudence has highlighted the rights and duties allocated to the individual under international law and the procedural capacity to claim said rights or being and bear responsibility accordingly.

This study has tried to assert how it is possible that in a gradual way, over time, due to the existence of new conditions in the international arena, the individual evolved from being

¹⁵⁵ See commentary of Art. 41. P. 13. Report of the International Law Commission on the work of its fifty-third session.

considered a mere object of law into a subject of international law, endowed with rights and duties under international law.

This paper has also pointed out that, in spite of the lack of procedural capacity of the individual to bring claims before the Court, there seems to be a way for him to put a claim in the international sphere, by means of the diplomatic protection, which is to some extent an instrument to protect human rights when there are no other direct mechanisms of protection. This development constitutes a factor to consider in all studies on the international subjectivity of the individual.

In the last section of this study, I had the opportunity to assess how close the link between a State and an individual can be whenever the responsibility for international crimes is at stake. The analysis of the subject matter by the International Court of Justice, under the heading of international responsibility of the State as well as the reduced role of immunities in the case of individuals subject to international criminal courts, shows this evolution.

The international order of human rights composed of several regimes and instruments that grants rights and impose duties directly to the individuals, this situation continues to influence the evolution of general international law, and it is also reflected in the jurisprudence of the International Court of Justice.¹⁵⁶ The confrontation of values between the State sovereignty and the universal respect of human rights, seems to lead to a promising and persistent trend for the consideration of the individual as a subject of

¹⁵⁶ *“Neither the Permanent Court nor the International Court of Justice are human rights courts as such. But their subject matter jurisdiction is without limitation and insofar as the violation of human rights is also a breach of international law the potential exists for human rights litigation in the World Court”*- Higgins, Rosalyn: *“The International Court of Justice and Human Rights”*. International Law: Theory and Practice, Essays in Honour of Eric Suy. Edited by Karel Wellens. Martinus Nijhoff Publishers. The Hague. 1998, p. 691. Other examples are *“Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136”*, where the Court analysed the Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and upheld its application together with human rights treaties in wartime. Likewise in the Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo) v. Uganda, Judgment of 19 Dec. 2005, General List No. 116, la Corte determined the violation by Uganda of the human right law (parr. 216). Currently, the case of: *“Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)”*, constitutes the first case brought before the ICJ on the basis of the United Nations Convention against Torture.

international law. The flexibilization of institutions of classical international law such as the diplomatic protection and the immunities of jurisdiction shows a limit to the State sovereignty favouring a greater participation of the individual in the international community.

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