

EMERGENCE OF THE INDIVIDUAL AS AN INTERNATIONAL JURISTIC ENTITY: ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS

JULIE CASSIDY*

[In this article it is contended that state practice, as evidenced in the declarations of the judiciary and the many treaties and conventions guaranteeing human rights, reveals a consensus of opinion acknowledging the individual to be an international juristic entity. So extensive is this practice that it could be seen as marking the emergence of a new customary international norm; or at least a general principle of international law, yet to crystallise into a custom; acknowledging the individual as the beneficiary of international rights. This is important for individuals and minority groups because if they possess international rights independently of the State, enforcement of their rights will no longer depend on the interests of the State. Where the State is often the offender of human rights, international law will not effectively confer any real rights unless the individual is so recognised as an international juristic entity.]

International law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man.[#]

* Associate Professor, School of Law, Deakin University. The author wishes to thank Mr Andrew Norman Sykes for his assistance in updating references contained in this article.

[#] Hersch Lauterpacht, *International Law and Human Rights* (1950) 70.

I INTRODUCTION

The decisions of the United States courts in the 1980s in *Filartiga v Pena-Irala*¹ and *Forti v Suarez-Mason*² revived interest in the place of the individual in international law. In these decisions the courts rejected the traditional theory that confines international law to relations between States and held the plaintiffs, and implicitly all individuals, to have certain fundamental international legal rights, enforceable independently of the State. This rejection of the traditional theory marked an important breakthrough for human rights and has been subsequently followed in a series of cases.³

The traditional theory denies both the existence of any fundamental individual international rights and the possibility of these rights being created. It also denies individuals the procedural capacity required to enforce international law.⁴ In fact it is suggested that it is because of the lack of this procedural capacity that individuals cannot be the direct beneficiaries of international rights.⁵ Thus under the traditional approach, individuals and minority groups must rely on their State, normally the offender, to enforce 'their' rights. Whether they enjoy the benefits of international protection will, therefore, depend upon the 'good nature' of the State and its willingness to act for the aggrieved individual.

If, however, individuals and minority groups possess international rights independently of the State, enforcement of their rights will no longer depend on the interests of the State. It is contended that in the context of human rights the recognition of rights held by the individual independently of the State that are enforceable by either / both the aggrieved individual or other States is crucial. Where the State is often the offender of such human rights, international law will not effectively confer any real rights unless the traditional view is rejected. It is contended in this article that the alternative theories that recognizes the individual as a juristic entity should be adopted

¹ *Filartiga v Pena-Irala* 630 F 2 d 876 (1980).

² *Forti v Suarez-Mason* 672 F Supp 1531 (N.D. Cal 1987). Note, while the court in this case refers to the *Alien Tort Statute*, discussed below, as the 'vehicle' for its application of international law to the plaintiff's case, it is clear from the judgment that the court is applying international law principles that exist independently of the statute. As the court stated in *Kadic v Karadzic* 70 F 3d 232 (1995) 238, there 'is no federal subject-matter jurisdiction under the *Alien Tort Act* unless the complaint adequately pleads a violation of the law of nations ...'. In this regard the courts in *Filartiga v Pena-Irala* 630 F 2 d 876 (1980), 881 and *Kadic v Karadzic* 70 F 3d 232 (1995) 238 note that it is international law at the time of the decision, not 1789 when the statute was first enacted, that it applies to the Plaintiff's claims. See also *Kadic v Karadzic* 70 F 3d 232 (1995) 238-239. Thus it will be seen that the courts in these cases went on to recognise that the individual is a relevant entity to enforce international laws that have their source outside of the statute.

³ See, for example, *Abebe-Jira v Negewo* 72 F 3d 844 (1996); *Aldana v Fresh Del Monte Produce Inc.* 305 F Supp 2d 1285 (2003); *Paul v Avril* 812 F Supp 207 (S.D. Fla. 1993); *Kadic v Karadzic* 70 F 3d 232 (1995); *Hawa Abdi Jama v United States INS* 22 F Supp 2d 353 (1998).

⁴ In the absence of international rights, they cannot possess a requisite interest, and thus *locus standi*.

⁵ Hans Kelsen in his *Principles of International Law* (2nd ed, 1966) makes this point.

It is contended that the decision in *Forti v Suarez-Mason*,⁶ the earlier determinations upon which the Court relied, and its subsequent acceptance in other judicial pronouncements⁷ provide further evidence of an ever increasing acceptance of the individual as an international juristic entity. State practice, as evidenced in the declarations of the judiciary and the many treaties and conventions guaranteeing human rights, reveals a consensus of opinion acknowledging the return of the individual to the international arena. So extensive is this practice that it could be seen as marking the emergence of a new customary international norm; or at least a general principle of international law, yet to crystallise into a custom, acknowledging the individual as the beneficiary of international rights.⁸

Moreover, it is suggested the traditional doctrine is neither theoretically correct, nor true to the origins of international law. The works of some of the earliest international law jurists show that it was unintended for international legal theory, as originally conceived, to be confined to States. The alternative views examined in the course of the article sit more comfortably with modern state practice and international consciousness. Ultimately, at least in the context of international human rights, the established traditional theory is no longer established.

Such a development can prove significant for many non-State entities. For decades calls have been made for redress for breaches of the international human rights of aboriginal peoples of Australia.⁹ Despite calls for the recognition of aboriginal sovereignty,¹⁰ these peoples are not recognized domestically or internationally as having sovereign rights, nor recognised by the international community as States.¹¹

More recently, the media has highlighted the alleged human rights abuses of the detainees held at the US military camps in, *inter alia*, Guantanamo Bay, Cuba. For example, in some cases detainees have been held for years without being charged of any offence,¹² arguably contrary to, *inter alia*, customary international

⁶ 672 F Supp 1531 (N.D. Cal 1987).

⁷ See, for example, *Abebe-Jira v Negewo* 72 F 3d 844 (1996); *Aldana v Fresh Del Monte Produce Inc.* 305 F Supp. 2d 1285 (2003); *Paul v Avril* 812 F Supp. 207 (S.D. Fla. 1993); *Kadic v Karadzic* 70 F 3d 232 (1996); *Hawa Abdi Jama v United States INS* (1998), 22 F Supp. 2d 353.

⁸ Also possibly conferring procedural capacity in certain contexts.

⁹ See for example Barbara Hocking (ed), *International Law and Aboriginal Human Rights* (1988) viii-x, xx, 76-77 and 99. See also *Commonwealth v Tasmania* (1983) 46 ALR 625, 737. See further Barbara Hocking (ed), *International Law and Aboriginal Human Rights* (1988) and Julie Cassidy, 'Sovereignty of Aboriginal Peoples' (1998) 9(1) *Indiana International and Comparative Law Review* 65 in regard to the interrelationship between international law and aboriginal human rights.

¹⁰ See Cassidy, *ibid*.

¹¹ Note, sovereignty and Nationhood need not coincide. The latter is dependent upon the sovereign being recognised by the international community as being a State with international legal personality. See Julie Cassidy, 'The Enforcement of Aboriginal Rights in Customary International Law,' (1993) 4(1) *Indiana International and Comparative Law Review* 59. See further Select Committee on Constitutional and Legal Affairs, *Two Hundred Years Later* (1983).

¹² In regard to the Australian detainees, Mr David Hicks has only just been charged after more than two years in detention and Mr Mambough Habib continues to be held for more than two years without charge. See Daryl Williams, 'Camp X-Ray Inmates in Legal No-man's land' *The Australian*, 13 March 2003; Senator Linda Kirk, 'David Hicks has been detained at Guantanamo Bay US Military base in Cuba without charge for over a year'

law's prohibition against arbitrary imprisonment.¹³ In regard to the five British nationals who were recently released from the Guantanamo Bay military camps, despite reports to the contrary,¹⁴ on their release they were not charged by the British authorities¹⁵ and the latter government has stated that it is expected that no such charges will be made.¹⁶ There have also been allegations of torture of the detainees, including the Australian,¹⁷ British¹⁸ and Afghan¹⁹ detainees²⁰ contrary to customary international law's prohibition against the same.²¹ The US Defence Department has approved personnel forcing detainees to 'strip naked and subjecting

Media Release, 17 March 2003; 'Orange-clad prisoners waited for death in Cuba', *The Age* (Melbourne), 14 June 2004. In regard to the five British nationals that were relatively recently released from Guantanamo Bay military camp, these persons had been held for more than two years without any charges being brought against them by the United States authorities: 'At-a-glance: Guantanamo Bay Britons' *BBC News, World Edition*, 9 March 2004.

¹³ See *Rodriguez-Fernandez v Wilkinson* 505 F Supp 787 (D Kan 1980) 800; *Forti v Suarez-Mason* 672 F Supp 1531 (N.D. Cal 1987) 1541. Labor Senator for South Australia, Senator Kirk, noted in a Media Release *ibid* that 'Guilty or not, David Hicks cannot be kept in indefinite detention without charge. To do so is a fundamental breach of human rights'.

¹⁴ CNN reported on 9 March 2004 that the detainees had been taken into police custody and charged upon their return to England: 'Gitmo men arrested upon UK return.' Available on-line at: <<http://www.cnn.com/2004/WORLD/europe/03/09/gitmo.uk>>

¹⁵ 'Q&A: Guantanamo Bay – British Cases' *BBC News UK edition*, 9 March 2004; Fergus Shiel, 'Ex-detainees allege Habib and Hicks abused', *The Age* (Melbourne), 5 August 2004.

¹⁶ 'Guantanamo Britons' legal status' *BBC News UK edition*, 9 March 2004.

¹⁷ See the allegations of United States based Australian lawyer Mr Richard Bourke: Ben Knight, 'Claims of Torture in Guantanamo Bay' *ABC AM*, 8 October 2003. See also the comments of Australian lawyer Mr Stephen Kenny regarding the abuse of Mr David Hicks through, *inter alia*, sleep deprivation, bright lights and loud noise: Penelope Debelle and Brendan Nicholson, 'Hicks abused by US Military: Lawyer', *The Age* (Melbourne), 14 May 2004; Penelope Debelle, 'Hicks was abused: lawyer', *The Age* (Melbourne), 21 May 2004. A former detainee of Guantanamo Bay asserts he saw Mr Hicks being beaten by US officials: Penelope Debelle, 'Hicks was abused: lawyer', *The Age* (Melbourne), 21 May 2004; Marian Wilkinson and Brendan Nicholson, 'Pentagon to report on treatment of Hicks, Habib', *The Age* (Melbourne), 22 May 2004. See also Megan Shaw, 'PM rejects claims by Hicks, Habib', *The Age* (Melbourne), 17 May 2004; Shiel, above n 15. A British detainee who was recently released from Guantanamo Bay asserts he saw Mr Habib being tortured: Penelope Debelle, 'Hicks was abused: lawyer', *The Age* (Melbourne), 21 May 2004; Shiel, above n 15. See also Marian Wilkinson and Brendan Nicholson, 'Pentagon to report on treatment of Hicks, Habib', *The Age* (Melbourne), 22 May 2004; Penelope Debelle, 'Hicks' letters stop in 2003', *The Age* (Melbourne), 14 June 2004. Both the Foreign Minister, Alexander Downer, and the Prime Minister, John Howard, have denied the claims of abuse: Penelope Debelle and Brendan Nicholson, 'Hicks abused by US Military: Lawyer', *The Age* (Melbourne), 14 May 2004; Meagan Shaw, 'PM rejects claims by Hicks, Habib', *The Age* (Melbourne) 17 May 2004. Similarly, the Pentagon deny the allegations: Shiel, above n 15.

¹⁸ Rosa Prince and Gary Jones, 'My Hell in Camp X-Ray', *The Mirror*, 12 March 2004; Elham Asaad Buara, 'Guantanamo Bay detainees allege torture', 179 *The Muslim News*, 26 March 2004; Hasan Suroor, 'Guantanamo Bay Britons allege torture', *The Hindu*, 14 March 2004; 'Guantanamo Briton was tortured', *BBC News UK edition* 12 March 2004; Jane Sutton, 'Guantanamo detainees refuse panel', *The Age* (Melbourne), 6 August 2004; Shiel, *ibid*. See also Shaw, *ibid*.

¹⁹ 'Guantanamo Bay Prisoners Complain of Year Long Torture by US Military', *Global Policy Forum*, 26 March 2003.

²⁰ See also Henry Porter, 'America's dirty torture secret', *The Guardian*, 10 September 2003.

²¹ See *Filariga v Pena-Irala* 630 F 2 d 876 (1980), 885; *Forti v Suarez-Mason* 672 F Supp 1531 (N.D. Cal 1987), 1541. Note also that if the allegations are true the abuse would also be contrary to the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and *Universal Declaration of Human Rights*.

them to loud music, bright lights and sleep deprivation²² and using dogs to intimidate prisoners.²³ The Defence Secretary Donald Rumsfeld asserts that all authorised methods of interrogation comply with the Geneva Conventions.²⁴ This is clearly not the case from the 'interrogation rules of engagement' documentation that has since been released into the public.²⁵ This claim is also not shared by all members of the US Congress.²⁶ That the Defence Secretary Donald Rumsfeld also asserted in February 2002 that the detainees might not be entitled to the protection of the Geneva Conventions²⁷ suggests that the treatment of detainees at Guantanamo Bay might not accord with international law.²⁸ Similarly, US Justice Department advice that torturing al-Qaeda detainees at Guantanamo Bay could be legally justified²⁹ also suggests that a legal basis was being sought for conduct that breached international law. The allegations of abuse are also supported by claims by the then Commander of the Abu Ghraib prison in Iraq, Brigadier-General Karinski, that the abuse in Abu Ghraib followed from intentions from higher authorities in the US military to 'Gitmo-ise' the Iraq prison.³⁰ As detailed below the allegations of torture in Abu Ghraib can no longer be questioned and thus the suggestion is that this is the style of interrogation is practiced in Guantanamo Bay.³¹ In this regard it is relevant to note that the Pentagon has announced that it has widened its inquiries to include Guantanamo Bay.³²

Even more recently the world has been shocked by images of abuse of Iraqi prisoners by United States military personnel running the Abu Ghraib prison in Iraq which

²² 'Pentagon 'approved stripping of inmates', *The Age* (Melbourne), 10 May 2004; Shiel, above n 15. In this regard see the 'Interrogation Rules of Engagement' released to public media: Julian Borger, 'Rumsfeld approved 'harsh' interrogation', *The Age* (Melbourne), 13 May 2004.

²³ Borger *ibid.* See also Shiel *ibid.*

²⁴ Charles Aldinger, 'Rumsfeld in Iraq as abuse row grows', *The Age* (Melbourne), 14 May 2004. See also Shiel, *ibid.*

²⁵ Borger, above n 22. See also Julian Coman and Greg Miller, 'New leaks to link Bush team to abuse', *The Age* (Melbourne), 14 June 2004 regarding approved interrogation techniques that do not comply with the Geneva Conventions.

²⁶ Aldinger, above n 24; Borger, *ibid.* Deputy Defence Secretary Paul Wolfowitz has also admitted that US interrogation techniques might violate the Geneva Convention: Marian Wilkinson, 'Jail tactics broke rules, says Wolfowitz', *The Age* (Melbourne), 15 May 2004. This view is also shared by the no. 2 military officer at the Pentagon, General Peter Pace: Marian Wilkinson, 'Jail tactics broke rules, says Wolfowitz', *The Age* (Melbourne), 15 May 2004. See also Seymour Hersh, 'Torture at Abu Ghraib: how the 'good guys' went bad', *The Age* (Melbourne), 8 May 2004.

²⁷ Anne Applebaum, 'Exposed: Bush's willing torturers', *The Age* (Melbourne), 7 May 2004; Aldinger, *Ibid.* See also Sutton, above n 18.

²⁸ See Aldinger, *Ibid.*

²⁹ Marian Wilkinson, 'White House was told torture could be justified', *The Age* (Melbourne), 9 June 2004.

³⁰ Jeffery Smith and Josh White, 'Torture jail chief shifts blame', *The Age* (Melbourne), 13 May 2004. See also in this regard David Johnston, 'Rumsfeld 'approved' harsh prison tactics', *The Age* (Melbourne), 17 May 2004.

³¹ See the details of the Red Cross memorandums into the interrogation practices at Guantanamo Bay in Scott Higham, 'Orange-clad prisoners waited for death in Cuba', *The Age* (Melbourne), 14 June 2004.

³² Marian Wilkinson, 'Pentagon reveals deaths in Custody', *The Age* (Melbourne), 6 May 2004. See also Coman and Miller, above n 25.

have been detailed in television and print media.³³ There have also been recent revelations of deaths in the prison believed to be at the hands of, *inter alia*, US personnel.³⁴ While the Defence Secretary Donald Rumsfeld has asserted that the abuse was 'technically different' from torture,³⁵ many, particularly those who were subject to the abuse,³⁶ would disagree.³⁷ There are also allegations of Iraqis being detained in the prison without charge.³⁸ US soldiers allegedly involved in the abuse have been indicted for, *inter alia*, conspiracy, dereliction of duty, cruelty and maltreatment, assault and indecent acts with another.³⁹ Criminal investigations are also

³³ The images of abuse were screened on US television on *60 Minutes II* and certain images were in turn printed in local Australian newspapers: 'American soldiers charged in Iraqi prisoner abuse scandal' *The Age* (Melbourne), 30 April 2004; 'Guantanamo chief to take over Bagdad prison', *The Age* (Melbourne), 1 May 2004.

³⁴ Wilkinson, above n 32; Serrano, 'Hooded and under duress, an Iraqi dies', *The Age* (Melbourne), 21 May 2004; Marian Wilkinson, 'General flags more abuse prosecutions', *The Age* (Melbourne), 21 May 2004; Will Dunham, 'Prison abuse not systematic: US Army' *The Age* (Melbourne), 24 July 2004; 'Detainees 'kicked, abused'', *The Age* (Melbourne), 30 July 2004; Josh White, 'US general concedes some abuse was torture', *The Age* (Melbourne), 27 August 2004. There have also been allegations of six British soldiers causing the death of an Iraqi prisoner while in military custody: Peter Fray, 'Up to six British soldiers face charges over beating death of detainee' *The Age* (Melbourne), 17 May 2004. See also 'Detainees 'kicked, abused'', *The Age* (Melbourne), 30 July 2004.

³⁵ Wilkinson, above n 32. Note, however, that members of the US Congress who have viewed the images have referred to them as 'sadistic torture': Aldinger, above n 24. As noted above, Rumsfeld also asserts that all authorised methods of interrogation comply with the Geneva Conventions: Aldinger, above n 24. This is clearly not the case from the 'interrogation rules of engagement' documentation that has since been released into the public: 'Borger, above n 22. See also Coman and Miller, above n 254 regarding approved interrogation techniques that do not comply with the Geneva Conventions. This claim is also not shared by all members of the US Congress: Aldinger, above n 24; Borger, above n 22. A Pentagon report released on 25 August 2004 has also confirmed the view that some abuse amounted to torture: White, above n 34.

³⁶ Mr Hayder Sabbar Abd, who has asserted he was the naked Iraqi prisoner in certain published photos, refers to the treatment in the prison as 'torture': Ian Fisher, 'Former prisoner too ashamed to return home', *The Age* (Melbourne), 6 May 2004.

³⁷ The Red Cross has agreed, asserting it is 'tantamount to torture': Mark Forbes and Marian Wilkinson, 'Australia told of Iraqi prisoner abuses last year', *The Age* (Melbourne), 12 May 2004. See also Applebaum, above n 27; Marian Wilkinson, 'Abu Ghraib photos show dead Iraqis, torture and rape', *The Age* (Melbourne), 14 May 2004; Aldinger, above n 24; Hersch, above n 26; Andrew West and Phillip Hudson, 'Abuse probe requested' *The Age* (Melbourne), 23 May 2004. It is unnecessary to reiterate the specific accounts of abuse. It is sufficient to recall the images of the simulated electric torture of a hooded prisoner who was made to stand on a box and who was told that if he fell off he would be electrocuted and the naked prisoner threatened and then attacked by guard dogs. See Hersch, above n 26; Scott Higham and Joe Stephens, 'Secret detainee statements reveal savagery of Abu Ghraib', *The Age* (Melbourne), 22 May 2004; White, above n 34. There are also assertions that prisoners were stripped, searched and then made to stand or kneel for hours: Scott Higham and Joe Stephens, 'Secret detainee statements reveal savagery of Abu Ghraib', *The Age* (Melbourne), 22 May 2004; White, above n 34. Sleep deprivation also seems to be an admitted interrogation tactic: Daryl Williams, 'General apologises for 'appalling' abuses', *The Age* (Melbourne), 7 May 2004; Hersch, above n 26. See the definition of torture in article 1(1) *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

³⁸ Mr Hayder Sabbar Abd, who has asserted he was the naked Iraqi prisoner in certain published photos, said that during the six months he was in the prison he was never interrogated nor charged: Fisher, above n 36. See also Aldinger, above n 24. See also Julian Borger, 'Insider tells of 'cooks, truck drivers' used to interrogate' *The Age* (Melbourne), 8 May 2004; Hersch, above n 26.

³⁹ 'American soldiers charged in Iraqi prisoner abuse scandal', *The Age* (Melbourne), 30 April 2004; 'Guantanamo chief to take over Bagdad prison' *The Age* (Melbourne), 1 May 2004. Specialist Jeremy

underway in regard to the abovementioned deaths of prisoners in the prison.⁴⁰ In response to these breaches of international law, Lieutenant-General Ricardo Sanchez, the top US commander in Iraq, has ordered new training on, *inter alia*, the requirements of the Geneva Conventions.⁴¹ British soldiers may also be charged for their abuse of Iraqi prisoners.⁴²

Thus the issue is not one of mere theory. If such individuals have international rights that have been violated and the traditional theory has been rejected by state practice there are avenues through which damages may be pursued against the United States government.⁴³

II TRADITIONAL PLACE OF THE INDIVIDUAL IN INTERNATIONAL LAW⁴⁴

Traditionally, international law is seen as primarily concerned with the rights and duties of States, seemingly to the exclusion of the individual. The individual is an 'object', not a 'subject' of international law. International law only operates on the individual indirectly through the State; international responsibility is owed to the State. Thus any rights or obligations imposed by international law are 'enjoyed' through an exercise of a right held by the State of which the individual is a national,⁴⁵ not by virtue of the individual's international status. In fact in the absence of citizenship, the individual has no legal significance in the international arena. Even the international rights and duties apparently operating directly on pirates and slaves, technically are still the rights and duties of the State, not these individuals.

Both the Permanent Court of Justice and the International Court of Justice adopted this position. In the *Nottebohm case*,⁴⁶ the International Court of Justice stated:

Sivits was recently convicted of three of four charges: Luke Baker, 'First US prison soldier gets jail for abuse', *The Age* (Melbourne), 20 May 2004.

⁴⁰ Wilkinson, above n 32.

⁴¹ 'Guantanamo chief to take over Bagdad prison', *The Age* (Melbourne), 1 May 2004.

⁴² 'Decision pending on two British abuse cases', *The Age* (Melbourne), 12 May 2004.

⁴³ Particularly through the Human Rights Commission and through the United States legal system via, *inter alia*, the *Alien Tort Statute*, discussed below. In regard to the ability of individuals to lodge a complaint with the Human Rights Commission see further <<http://www.unhchr.ch/html/menu2/2/special-complaints.htm>>

⁴⁴ Lassa Oppenheim exemplifies the advocate of the traditional viewpoint. He states: 'Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. This means that the Law of Nations is a law for the international conduct of States, and not their citizens ... An individual human being ... is never directly a subject of International Law ... But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations': *International Law* (1905) 18, 344.

⁴⁵ Under the traditional theory, nationality is a precondition to an exercise of jurisdiction by a court redressing a wrong suffered by an individual.

⁴⁶ ICJ Reports 1955, 4.

As the Permanent Court of International Justice has said and has repeated, '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 rights to ensure, in the person of its subjects, respect for the rules of international law.'⁴⁷

These sentiments were recently echoed in *Bosnia and Herzegovina v Yugoslavia*.⁴⁸

Under the traditional theory, before any international rights or duties may be enjoyed by or bind individuals they must be transformed into municipal rights and duties. In the positivists' eyes, it is only when these legal rights or duties have been 'transformed' into municipal law, and thus are no longer international rights and duties, that they may be 'enjoyed' by individuals.

This traditional denial of individual rights is closely connected with the international principle confining a State's interest in a breach of international law to disputes directly involving that State or its national. Traditionally, only the State whose nationals have been affected by the transgression can seek to rectify the wrong. As Story J pressed in the *La Jeune Eugenie*⁴⁹ case, as no other State has an interest in the breach, no other can object to the violation. A breach of the law of Nations is not an injury against all States; it solely concerns the State injured.⁵⁰ A parallel may be drawn with private wrongs in municipal law:

[We] are all familiar with the distinction in the municipal law of all civilized countries, between private and public rights and the remedies for the protection or enforcement of them. Ordinary injuries and breaches of contracts are redressed only at the instance of the injured person, and other persons are not deemed entitled to interfere. It is no concern of theirs.⁵¹

This author noted, however, that not every breach of municipal law is treated in this way:

On the other hand, certain flagrant wrongs the prevalence of which would threaten the order and security of the community are deemed to be everybody's business ... [robbery or assault]. Every citizen is deemed to be injured by the breach of the law because the law is his protection, and if the law be violated with impunity, his protection will disappear ...⁵²

⁴⁷ Ibid.

⁴⁸ *Bosnia and Herzegovina v Yugoslavia, Preliminary Objections*, 1996 I.C.J. 595, 692.

⁴⁹ Fed. Case No. 15,551. (Mass, 1822).

⁵⁰ Ibid.

⁵¹ Elihu Root, 'The Outlook for International Law', Am. Soc. Inst. L. Proc. (1915) 29.

⁵² Ibid.

However, the traditional theory draws no distinction between private wrongs and breaches of international law concerning all States and all individuals. Thus in the past under this traditional approach nobody except the particular States affected by the breach of international law had a right to object. As a corollary, aggrieved individuals could not call upon other States to save them from breaches of their human rights. It will be seen below that today there are emerging principles, such as the doctrine of humanitarian intervention and customary international laws prohibiting torture and genocide, that undermine this traditional approach.

Clearly this traditional approach was and is inappropriate. If international law is to be truly binding, at the very least, breaches that threaten the peace and order of the international community should be seen as a violation of the rights of each State comprising that international community. Moreover, at least in the context of human rights, for the sake of effectiveness international law should, if it has not already made the transition, recognise the individual as an international juristic entity and thus a 'subject' of international law. This need for effective international legal regulation has forced even positivists to recognise entities other than States⁵³ to be subject to international law.

Furthermore, there are a number of flaws in the reasoning underlying the traditional theory. As Jessup⁵⁴ points out, if international responsibility was based on the idea that it is the State which is injured when its national is injured, any consequent compensation would reflect the importance of the individual to the State. This is not supported by judicial practice. Compensatory orders reflect the personal loss to the individual, not the indirect loss to the State.⁵⁵ Nor can positivists ignore that in many jurisdictions, including Australia, customary international law is part of the 'law of the land' even in the absence of formal transformation into municipal law.⁵⁶ Individuals can enforce their international legal rights in the municipal arena even without the express transformation of these international rights into municipal law. In such cases it is apparent, international law can bind individuals directly.

Writers loyal to the positivist doctrine have tried various manipulations and created many exceptions in a bid to reconcile these facts with the basic tenets of the traditional theory. Ultimately the admission of so many exceptions must undermine the very foundations of the traditional theory itself, and it may be more appropriate to simply reject it in favour of a more practical and effective doctrine.⁵⁷

⁵³ Bodies such as the United Nations, colonies and the Holy See are subject to international law.

⁵⁴ Phillip C Jessup, 'Subjects of Law of Nations' (1947) 45 *Michigan Law Review* 383, 389.

⁵⁵ For example the decisions in *Forti v Suarez-Mason* 672 F Supp 1531 (N.D. Cal 1987) and in *Filartiga v Pena-Irala* 630 F 2 d 876 (1980).

⁵⁶ Note, the Australian judiciary rarely explicitly refers to this principle. In *Mabo v Queensland* (1992) 107 CLR 1, 42 Brennan CJ recognised that 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.' See also *Re McKerr* [2004] UKHL 12; [2004] All ER (D) 210 (Mar), paras 51 and 54 and the United States cases considered later in this article including *Forti v Suarez-Mason* 672 F Supp 1531 (N.D. Cal 1987).

⁵⁷ Peter Pavel Remec, *The Position of the Individual in International Law* (1960) 8.

III HISTORICAL BASIS OF INTERNATIONAL LAW

Nor is the traditional view of international law true to its 'roots.' The jurists of centuries gone by, who provided international law with its foundations, acknowledged the individual as an international juristic entity. International law was not a code restricted to relations between States. Rather it was a common set of norms that could fairly be applied to persons from different legal systems engaging in international relations. These international laws applied directly to relations between individuals,⁵⁸ as well as between individuals and States and States only. It was not until Vattel expressly confined the law of Nations to relations between sovereign States⁵⁹ that the exclusion of the individual was considered. Thus the traditional view limiting international law to these abstract entities was to an extent a positivist invention.

Historically, the terms 'international law' and 'law of Nations' are derived from the Roman '*jus gentium*.'⁶⁰ These were equitable laws of nature used to determine rights as between individuals belonging to different parts of the Empire. This code was a rational generalisation of the laws recognised by the different peoples of the Mediterranean area,⁶¹ which could be fairly applied to all the individuals living within the Empire.

Similarly, Vitoria⁶² saw the law of Nations as being no more than the law of nature, rules derived from 'natural reason',⁶³ based on the natural fellowship existing amongst all persons.⁶⁴ This law applied to all individuals engaging in international relations, whether they were sovereigns, ministers for foreign relations or merchants having contact with other States. Moreover, these people were bound by such laws in their individual capacity, not as representatives of the State. International law as originally conceived was a law of persons, not a law of Nations.

Nor did Grotius⁶⁵ confine international law to States. The code of *jus gentium* supplemented the law of nature and provided a legal system regulating all international relations, whether they are between individuals or States. The object of his study,⁶⁶ was essentially⁶⁷ to provide a 'well ordered presentation'⁶⁸ of the 'common law among Nations,'⁶⁹ not the 'law of Nations.' The subject of his treatise was the

⁵⁸ For example, merchants.

⁵⁹ *The Law of Nations*, chap iii, 166-171.

⁶⁰ Remec above n 57, 25.

⁶¹ *Ibid*.

⁶² Ernest Nys (ed) *Francisci de Vitoria, De Indis et de Ivre Belli Relectiones* (1919) (extracted from the original publication in 1557).

⁶³ *Ibid* 151.

⁶⁴ Quoted by Remec, above n 57, 27. It was on the basis of this fellowship that he sought to impose upon the Spaniards an international obligation to respect the rights of indigenous Indian persons.

⁶⁵ Hugo Grotius, *De Iure Belli ac Pacis Libri Tres* (1646 ed) in *Classics of International Law* (1913).

⁶⁶ '*Jus illud, quod inter populos plures out populorum rectores intercedit*,': *ibid*.

⁶⁷ Only when he was dealing with 'lawful war' between sovereigns did he confine his study to States.

⁶⁸ Grotius, above n 65, 21.

⁶⁹ *Ibid* 20.

'controversies among those who are not held together by a common bond of municipal law.'⁷⁰ Clearly his study was not confined to States. He was concerned with the law governing actions of individuals outside the bounds of their municipal legal systems. While he recognised the special status of sovereigns, he made no attempt to limit international law to States or representatives of the State.⁷¹

With the passage of time the meaning of phrases such as '*jus inter gentes*,' '*inter populos*' and '*gentium inter se*' were corrupted and confined to States. Despite the intentions of their authors,⁷² words such as '*gens*,' '*gentes*' and '*natio populos*' lost their true meaning and more and more they were used to designate the State as a juristic entity.⁷³ These new meanings slowly became entrenched in international legal writing. In 1738 Charles-Irenee Castel de Saint-Pierre used the phrases '*droit entre nations*' and '*droit public entre nations*' in his *Ouvrages Politiques*. Later again, Vattel declared the law of Nations, *droit des gens*, to apply to the affairs of States and sovereigns, expressly confining its operation to the rights and obligations of States.⁷⁴ From this point on, but not without some divergence, it was generally accepted that international law did not directly bind individuals.⁷⁵

In recent decades, however, there has been a gradual shift towards re-accepting the individual as an international juristic entity, at least in certain contexts such as human rights. International law has come full circle, recent practices evidencing the return of the individual into the international arena. Today the traditional premises underlying the exclusion of the individual are no longer immutable principles of international law and practice. International law, like all legal systems, has its background and roots in the society it governs.⁷⁶ As the needs and values underlying that society change, so too should the governing legal system. Thus, as a corollary of changing concerns in the international community, international law has changed and developed. Two consequent changes relate directly to the place of the individual in the international arena, extending to individuals international rights and obligations.

First, it is being appreciated⁷⁷ that ultimately individuals alone are the subjects of international law. 'The subjects of international law are like the subjects of national law - individual human beings.'⁷⁸ The 'duties and rights of States are only the duties and rights of the [persons] who compose them.'⁷⁹ This is now being ac-

⁷⁰ Ibid, i, 1, 1, 37; quoted by Remec, above n 57, 28-29.

⁷¹ Remec, above n 57, 29.

⁷² See Remec's analysis of a number of works and the intentions of their authors: Ibid 29-30.

⁷³ Remec, above n 57, 29.

⁷⁴ Emer de Vattel, *Le Droit des gens, ou principes de la loi naturelle, appliques a la conduite et aux affaires des nations et des souverains*, (1758 ed), reprinted in *The Classics of International Law* (1916).

⁷⁵ See George Manner, 'The Object Theory of the Individual in International Law' (1952) XLVI *American Jurist* 428.

⁷⁶ Phillip C Jessup, *A Modern Law of Nations* (1952) 1.

⁷⁷ See for example Hugo Krabbe, *The Modern Idea of the State* (1922).

⁷⁸ Kelsen above n 5, 194.

⁷⁹ John Westlake, *Collected Papers* (1914) Vol II, 78.

cepted by the courts and tribunals applying international law. As one tribunal noted:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals ... these submissions must be rejected ... 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.⁸⁰

Second, the interest all States have in the observance of international law and the preservation of international peace is being accepted. Increasingly breaches of international law are seen as directly concerning all States, not only those physically affected by the violation.⁸¹ As a result of this shared concern with humanity, international law has moved into the so-called 'domestic' arena and with increasing vigour defended the right of all States to intervene where international peace is threatened.

The evolution of the individual as a separate independent juristic entity and the acceptance of the international community's legitimate interest in the observance of international law are particularly well established in the context of human rights. The theories and state practice supporting this recognition is considered in the next two parts of this article. On the theoretical level, the views of perhaps the two most important advocates for recognising individual rights in the international arena, Kelsen and Lauterpacht, will be examined and possible alternatives proffered for consideration.

IV KELSEN: THE INDIVIDUAL AS THE ULTIMATE ACTOR

Kelsen begins his analysis of legal norms by stressing that 'law' is by definition the regulation of human conduct.⁸² A responsibility not directed towards an individual and not involving the execution of a sanction by an individual, would not in his eyes be a 'legal' responsibility. The traditional doctrine excluding the individual from the international legal arena is consequently untenable to Kelsen.⁸³

The State is only a juristic entity, like a company, created by law. In international law, as in company law, ultimately the individual is the subject of the legal rights

⁸⁰ The International Military Tribunal, judgment of 30 September, 1946, quoted by Hersch Lauterpacht, *International Law and Human Rights* (1950) 4.

⁸¹ W E Hall, *A Treatise on International Law* (1889), quoted by Viscount Sankey LC *In Re Piracy Jure Gentium* (1934) AC 586, 592.

⁸² Kelsen above n 5, 180. Confer *Bosnia and Herzegovina v Yugoslavia, Preliminary Objections* (1996) ICJ 595, 774-775.

⁸³ *Ibid.*

and responsibilities conferred on the State. This only differs from strict individual legal responsibility in so far as international rights are acquired by the individual in the capacity of a member of a territorial unit. In the international arena the individual is bound to act, or enjoy certain rights, in the name of the community to which he or she belongs.⁸⁴ Again the point is clearer if a parallel is drawn with corporate responsibility:

Duties and rights of a corporation are duties and rights of individuals in their capacity as members or organs of the corporation. The statement that a corporation has certain duties and certain rights does not mean that the duties and rights in question are duties and rights of a juristic person and consequently not the duties and rights of individuals. On the contrary, they are duties and rights of individuals, but of individuals in their capacity as members or organs of the corporation.⁸⁵

Juristic entities created by law cannot be said to be the only 'subjects' of a legal order. As juristic entities can only act through individuals, if such juristic entities are involved, individuals must also be subject to the legal order. The rights and duties of a State are ultimately the rights and duties of these individuals. There is, therefore, no real difference between national and international law. Both confer rights on individuals; international law conferring these upon individuals indirectly and collectively in their capacity as members of a State.

Even from a purely practical perspective, when a State is obliged to act, in reality this means the organ competent under national law⁸⁶ to regulate the matter is bound by international law to perform the requisite acts.⁸⁷ Similarly, when a State has an international right this really means certain persons are empowered to act upon and, if required, enforce that right in an international tribunal.⁸⁸ While the State is sanctioned if this organ fails to act, ultimately the sanction or reprisal will either directly or indirectly affect the individual(s) belonging to the State.⁸⁹ International sanctions only differ from municipal punishments in so far as responsibility is determined in the former case collectively, while in the latter case on an individual basis.

Kelsen defines a 'subject' of international law in terms of ability to exercise the procedural capacity required to bring a claim before an international tribunal, rather than the mere possessor of interests protected by international law. It is in this regard that Kelsen and Lauterpacht disagree. As individuals traditionally lack procedural capacity to enforce international rights, or only possess this ability as

⁸⁴ Hans Kelsen, *Hague Recueil* (1926) Vol 14 231, 239.

⁸⁵ Kelsen above n 5, 181.

⁸⁶ Kelsen therefore places the power of determining who enjoys these rights with the national legislature. Unless a particular individual has been so accorded this 'capacity,' strictly speaking that person is not subject to international law. This is so, he says, irrespective of the fact that a treaty or convention may have been implemented specifically to protect the rights of certain individuals: *Ibid* 221.

⁸⁷ *Ibid* 195.

⁸⁸ *Ibid* 221.

⁸⁹ *Ibid*.

representatives of the State, they are not 'subjects' of international law within Kelsen's strict definition.⁹⁰ Not even an international tribunal can enforce an individual's rights independently of the State. Enforcement must be undertaken by States and will therefore depend upon whether the State's interests warrant such steps.⁹¹ According to Kelsen, the State's power to act and enforce international law is not a 'duty' to protect the rights of the individual. It is a 'right' which the State may freely exercise. As any apparent 'rights' held by individuals are always dependent upon the State exercising its 'right,' individuals are personally 'subjects' of international rights only in an imperfect sense. A customary international law protecting the basic human rights of all individuals would not, in Kelsen's eyes, give such individuals international legal rights. In accordance with the traditional theory, technically it is not the individual, but the State that Kelsen sees as having the right to see these rights respected.

While Kelsen's reasoning is convincing, subsequent developments in the international arena reflect a growing acceptance of the individual as the subject of fundamental international rights, and, at times, enjoying the procedural capacity needed to enforce such rights. In the context of human rights, the constraints imposed by the traditional theory should be seen as the exception, not the rule in international practice. As noted above, this practice has been so extensive in recent decades that it may evidence the emergence of a new customary norm accepting the individual as an international juristic entity. This extension of the international status of individuals has its roots in the works of Lauterpacht.

V ESTABLISHMENT OF THE INDIVIDUAL AS A JURISTIC ENTITY

A *Lauterpacht and the Status of the Individual*

Lauterpacht holds an arguably healthy scepticism of the State's reliability as the protector of individual rights:

For human dignity and considerations of unity alike rebel against the idea of the State as the sole guardian of the interests of man... [I]t is inadmissible that the State should claim, in the conditions of the modern world, that it is the best instrument for protecting all these interests and that it is entitled to exclude from this legal sphere individuals and non-governmental bodies which may be created for that purpose. As within the State, so also in the international sphere the paramount danger arises when, in the words of John Stuart Mill in an eloquent concluding passage of his essay on Liberty, the State 'instead of calling forth the activity and the powers of individuals and bodies ... substitutes its own activities for theirs.' The

⁹⁰ Ibid 233.

⁹¹ Ibid.

administrative convenience resulting from the exclusive competence of the organs of the State in the international arena ... may be bought at the high price of stifling the individual...⁹²

Lauterpacht believes the traditional theory's exclusion of the individual to be 'obsolete,' 'unworkable'⁹³ and an inaccurate representation of the present legal position. The traditional theory involves a dangerous and unacceptable lowering of legal standards:

To assert that duties prescribed by international law are binding upon the impersonal entity of States as distinguished from the individuals who compose them and who act on their behalf is to open the door wide for the acceptance, in relation to States, of standards of morality different from those applying among individuals. Experience has shown that 'different' standards mean, in this connection, standards which are lower and less exacting. ... [U]pon final analysis it is difficult to escape the conclusion that unless legal duties are accepted as resting upon the individual being, they do not in practice - nor, to some extent, in law - obligate anyone.⁹⁴

B *The Importance of Procedural Capacity*

Further, Lauterpacht believed international legal status did not depend on the ability to enforce international rights. While Kelsen saw the ability to enforce international rights to be necessary, Lauterpacht believed an inability to enforce rights did not deprive the individual of the status of a 'subject' of the international law vesting that right.⁹⁵ '[T]he capacity to possess ... rights does not necessarily imply the capacity to exercise those rights oneself.'⁹⁶ According to this view, when a State enforces an international human right, it is not asserting its own right but the right of the individual, who in many circumstances lacks procedural capacity to enforce this right in the international arena.

There is no reason why the ability to enforce a right affects or determines whether an individual can be the 'subject' of that international right. Whether individuals are subjects of international norms and whether they have, in addition, the legal capacity to enforce those rights are two separate questions that must be answered pragmatically by reference to the legal instruments governing the particular circumstances. The governing international norms may only confer legal rights on the individuals or it may also give them procedural capacity. Whether both substantive and procedural rights have been given must be ascertained from the inten-

⁹² Lauterpacht, above n 80.

⁹³ Ibid 6.

⁹⁴ Ibid 5.

⁹⁵ Ibid 27.

⁹⁶ *Peter Pazmany University Case*. Series A/B, No 61, 231.

tion of the particular positive international norm, unaffected by preconceived notions as to the traditional status of the individual in international law.

C *Flexibility of International Law*

Yet can international law, based on the traditional exclusion of the individual, change and so accommodate the individual? To a large extent this will depend upon the flexibility and adaptability of the principles of international law. There appears nothing inherent in international law preventing the extension of the international legal order to the individual and it is contended that international law not only allows, but requires, these changes.

International law is designed to provide for the harmonious interrelationship of the members of the international community. What is required to maintain this order has varied with the passing of time. As needs have changed, international law has changed⁹⁷ and with these changes the very structure of the international legal system has developed and modified.

In recent years, the protection of the individual and the international community's collective interests in such have grown in importance and increasingly this importance has come to be reflected in substantive and procedural international law. The denial of the individual's international status is seen as a grave over-emphasis of 'the importance of the political relations of States at the expense of the activities of men as human beings.'⁹⁸ As Politis observed:

[F]ormerly the sovereign state was an iron cage for its citizens from which they were obliged to communicate with the outside world, in a legal sense, through very close-set bars. Yielding to the logic of events, the bars are beginning to open. The cage is becoming shaky and will finally collapse. Men will then be able to hold free and untrammelled communication with each other across their respective frontiers.⁹⁹

The world is increasingly being seen as a collective of individuals rather than a community of States.¹⁰⁰ A number of writers believe that this is leading to 'the disappearance of the State as we know it ... [and] international law [being] either wholly absorbed into a general body of law or [its] separate existence [preserved, but] only as a branch of a general system.'¹⁰¹ With time, it is said, traditional inter-

⁹⁷ 'The existence of rules of international law governing relations between States and foreign individuals is not inconceivable, but their existence has not been proved and, if it should be proved, the contents of the rules will necessarily differ from those rules which concern relations between sovereigns': Feilchenfeld, *Public Domain and State Succession* (1931) 582.

⁹⁸ James Dunn, *The International Rights of Individuals* (1941) 35 Am. Soc. Int. L. Proc. 14, 16-17.

⁹⁹ Nikoloas Sokrates Politis, *The New Aspects of International Law* (1928) 30 - 31.

¹⁰⁰ The preamble of the Charter of the United Nations opens with the phrase 'We the peoples' of the United Nations.

¹⁰¹ John Williams, *Chapters on Current International Law and the League of Nations* (1929) 20.

national law will be replaced by 'world law, or to use a fine Roman expression, *jus gentium, le droit des gens*, the law of the World Commonwealth.'¹⁰²

There is nothing in the structure of international law preventing these changes. As Lauterpacht noted, international law is not a rigid framework of legal principles, but rather a structure designed to accommodate the concerns of the international community. The original superficial framework was, in Lauterpacht's eyes, 'no more than a form of words - or at most, a generalization of a past period of emotivity ... [T]he way is open, in this respect, to such beneficent changes as the moral sense of mankind, the necessities of international peace and the enduring purposes of the law of nations may require.'¹⁰³ International law is not an unyielding body of law, but rather a system of norms ever changing and adapting to coincide with the needs of the international community. One of the most pressing needs in the twenty first century is the protection of human rights.

VI STATE PRACTICE AND THE INDIVIDUAL IN INTERNATIONAL LAW

Great inroads have been made into the established doctrine and further developments are constantly emerging. State practice reveals that today, in many respects, individuals enjoy the status of an international entity. As stated above, the 'established' doctrine is no longer established.

The relevant practice can be divided up into a consideration of three distinct movements; first, the creation of international laws recognising the fundamental rights of individuals held independently of the State, second, the direct conferral of procedural capacity upon individuals and third, the acceptance of each State's interest in the maintenance of order in the international arena.

A Fundamental Individual Rights

1 Grotius and Humanitarian Intervention

The acceptance of fundamental individual rights can be traced back to the rather dubious doctrine of humanitarian intervention, found in the works of jurists dating back to Grotius.¹⁰⁴ This doctrine allowed States to intervene when a State maltreated its own subjects in a fashion shocking the conscience of mankind.¹⁰⁵

¹⁰² Salvador de Madariaga, *Aspects of Modern International Law* (1939) 20.

¹⁰³ Lauterpacht, above n 80, 4-5.

¹⁰⁴ Grotius, above n 65 ii, 14, 8, 385.

¹⁰⁵ In accordance with this doctrine, in 1860 France occupied parts of Syria and policed the coast to prevent the recurrence of the massacres of Maronite Christians.

The doctrine of humanitarian intervention was only a small part of Grotius' general acceptance of the rights of individuals in international law. He believed individuals had certain fundamental international rights, held independently of the State. These rights included 'natural' inherent rights and rights conferred under municipal law.¹⁰⁶

While Grotius generally did not allow individuals to protect their rights by using force against the sovereign State, he offers a number of important exceptions to this rule. An individual, he said, may make war against a sovereign 'who openly shows himself the enemy of the whole people' by seeking to destroy them.¹⁰⁷ This notion has its modern equivalent in the crime of genocide. Grotius also extends the right of self-defence to individuals seeking to prevent acts of 'atrocious cruelty,' either against an individual or minority group.¹⁰⁸ Similarly, if the State unjustly denies the rightful claims of subjects or injures them, it appears Grotius allows these individuals to make war against the sovereign.

The effectiveness of this right to make 'just war' depends, however, upon the military strength of the aggrieved. For this reason Grotius also allowed other States to intervene on behalf of individuals so precluded from vindicating these transgressions.¹⁰⁹

Grotius believed these human rights to be of such international importance that they warranted threatening the international legal order to ensure their respect. A ruler who endangered 'public tranquillity'¹¹⁰ by choosing to infringe individual rights commits an unjust and unlawful breach of the laws of nature. Such a breach legitimated intervention by another State. Even in the absence of the sophisticated modern day modes of international regulation, in this way international law provided for the protection of individual rights.

The doctrine of humanitarian intervention was, however, generally honoured in theory, not practice. The doctrine has been used so infrequently that its existence has been doubted.¹¹¹ States justify their inaction by pointing to the apparent conflict between intervention and the maintenance of world peace. While it could be suggested that peace is 'more endangered by tyrannical contempt for human rights than by attempts to assert, through intervention, the sanctity of human personality,'¹¹² this ratiocination generally provided the basis for state practice.¹¹³

Nevertheless, the doctrine of humanitarian intervention does evidence a long term acceptance of fundamental individuals rights, held independently of the State,

¹⁰⁶ Grotius, above n 65, i, 4, 11, 157. For example by killing the peoples so that it may colonise their lands.

¹⁰⁷ Ibid i, 4, 7, 150.

¹⁰⁸ Ibid i, 4, 11, 157.

¹⁰⁹ Remec, above n 57, 216.

¹¹⁰ Ian Brownlie, *Principles of Public International Law* (2nd ed, 1973).

¹¹¹ J G Starke, *An Introduction to International Law* (7th ed, 1972) 65.

¹¹² Brownlie, above n 110.

¹¹³ Or more accurately, inaction.

which could be protected by entities other than the aggrieved national's own government. Further, the doctrine negates the positivists' suggestions that inherent restrictions in international law prevent it from protecting individual rights.

2 *Immediate applicability of international law to individuals*

In more recent years individual rights have been guaranteed by methods other than humanitarian intervention. Increasingly the judiciary, in particular, has recognised and enforced the rights and responsibilities of individuals in international law. Since the late 1800's it has been appreciated that in certain circumstances international law binds the individual immediately, not just mediately.¹¹⁴ Pirates, for example, are not as the positivists suggest 'objects' of international law. The international law authorising States to capture and punish pirates *jure gentium* imposes a legal duty directly upon these individual pirates.¹¹⁵ It is hard to see how the power to apprehend pirates is a 'right' enjoyed by the State.¹¹⁶ The only 'right' the State has is to act or abstain.

The Nuremberg trials provide another striking example of the ability of individuals to be bound by international law. This issue was squarely raised when the Allies sought to prosecute individual Ministers and military officials for the atrocities that occurred during the conflicts of the Second World War. The traditional objections to such prosecutions were ultimately disregarded and, pursuant to an international agreement, international tribunals were established in Nuremberg and Tokyo to try these individuals.¹¹⁷ These International Military Tribunals were given jurisdiction to find persons individually responsible for certain international crimes:

Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹¹⁸

In the judgment of the Nuremberg International Tribunal in 1946¹¹⁹ the court rejected the suggestion international law was solely concerned with the actions of States:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further,

¹¹⁴ Hans Kelsen, *Peace Through Law* (1944) 76.

¹¹⁵ Starke, above n 111, 65.

¹¹⁶ *Ibid* 66.

¹¹⁷ Article 6 para (c) of the *Charter of the International Military Tribunal* annexed to the agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed on 8 August 1945, (See 30.AJ (1945) Supp pp 258-60).

¹¹⁸ Article 6 of the *Charter of the International Military Tribunal*.

¹¹⁹ Brownlie, above n 110, 546. See also the Judgment of the Tokyo International Tribunal in 1948.

that where the act in question is an act of State, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as upon States has long been recognized...the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorising action moves outside its competence under international law.¹²⁰

It affirmed that the guilty individuals could no longer hide behind the abstract structure of the State, stating, as noted above, that breaches of international law are committed by persons and such persons must be punished under international law.¹²¹

These principles were subsequently adopted by the International Law Commission of the United Nations and formulated into the *Draft Code on Offences against the Peace and Security of Mankind*, now representing accepted general international law.¹²² Other examples of documents recognising individual responsibilities under international law include Article VI of the *Convention on the Prevention and Punishment of the Crime of Genocide*¹²³ and the *Geneva Conventions of 1949*. Under Article IV of the *Convention on the Prevention and Punishment of the Crime of Genocide 1948* individuals, 'whether they are constitutionally responsible rulers, public officials or private individuals,' can be tried with the crime of genocide by national or international courts.¹²⁴

3 *The conferral of individual rights by treaties*

The turning point in international practice was, however, the decision of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Danzig Case*.¹²⁵ The Permanent Court authoritatively declared that treaties could confer international rights on individuals; rights recognisable and enforceable in international courts. While the Court accepted that generally treaties only created rights

¹²⁰ Quoted by Starke, above n 111, 67.

¹²¹ In a unanimous resolution the General Assembly, affirmed on 11 December 1946 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.'

¹²² United Nations General Assembly Off Rec. 3rd Sess Resolution 174 (A/180) (1948) (Bee 45.A.J. (1951) Supp. 7).

¹²³ Or attempted genocide or conspiracy, incitement or complicity to genocide.

¹²⁴ Act with intent to destroy in whole or in part national, ethnical, racial or in religious groups.

¹²⁵ Advisory Opinion No. 15 Ser B, No. 15, 17-21.

and duties between the contracting States,¹²⁶ it was open to contracting States to create and confer enforceable international rights on individuals if they so wished:

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 individual rights and obligations and enforceable by the National Courts.¹²⁷

That intention was found in the case before the Court and the Danzig officials protected by the specific treaty were allowed to proceed against Poland for breach of an international employment agreement. This case established there to be nothing inherent in international law preventing the direct conferral of rights upon individuals. To be effective, international law often so requires.

It could be suggested all this case establishes is that international law does not automatically extend directly to individuals. The judgment does not, however, necessarily imply this negative proposition. Even if the Court believed international law could apply immediately to individuals, the court still had to determine whether the intention of the particular instrument or law before them was to confer rights on individuals or States. This was what the Court was seeking to ascertain in the *Danzig Case*. There is no indication that the Court believed their determination to be revolutionary and certainly did not intend to deny the individual status in the international arena.

Even if the Court believed international law could only extend to individuals where there were express words or necessary intentment, in the case of international human rights, there would be a strong case to argue that there is a necessary implication that such treaties and customs extend to individuals and minority groups. Were this otherwise, these laws would not be effective.

Perhaps more importantly, even if these limitations can be found in the *Danzig case*, subsequent developments have since strengthened the place of the individual in international law. Some of these developments are considered in the next part of this article.

4 *Fundamental Human Rights in International Law*

Over the years, there have been many treaties and conventions recognising the fundamental rights of individuals in international law. The Covenant of the League of Nations provided just one mechanism members utilised for the creation of a system of interlocking treaties protecting the rights of minority groups. These treaties included clauses protecting the life and liberty of the subject peoples, the free exercise of religion, prohib-

¹²⁶ Starke, above n 111, 66. Unless their terms were incorporated into municipal law.

¹²⁷ Advisory Opinion No. 15 Ser B, No. 15, 17.

iting discrimination on the grounds of language, race or religion, asserting equality before the law and protecting civil and political rights. Nationals were to enjoy freedom of organisation for religious and educational purposes and, in certain circumstances, the State was to provide for elementary instruction of children in their native language.¹²⁸ While, except in the case of Upper Silesia, there was no right of individual petition for breaches of these rights, in practice the Council did receive and consider such petitions which were in turn finally dealt with by the Permanent Court of International Justice.

It was in the *Charter of the United Nations*, however, that the individual was first truly acknowledged as the subject of international rights, fundamental to human freedom. The horrors of the Second World War and fears for the repetition of such heinous crimes spurred an increased concern for the rights of individuals. The *United Nations Charter* provides an important declaration of these basic human rights and establishes a broad basis for further development in this area of international protection. In the preamble members 'reaffirm faith in fundamental human rights, in the equal rights of men and women ...'. Article 1 defines the purposes of the United Nations to include co-operating to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. These articles are supported by more specific protections. For example Article 55 states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations...the United Nations shall promote... higher standards of living, full employment, and conditions of economic and social progress and development ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.

Article 56 obliges all members to take steps towards the 'achievement of the purposes set forth in Article 55.'

While there is no universal agreement as to the exact meaning of the human rights guaranteed under the Charter, indisputably it guarantees at least a bare minimum of basic fundamental individual rights and is now considered binding customary international law. As binding customary international law, it flows into the municipal legal system of countries becoming enforceable legal protections.

The Mandate system¹²⁹ and the establishment of Trust territories under the Charter provide further notable developments towards the protection of individual rights. 'The mandate was created, in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of

¹²⁸ This system of protection was quite successful. The Permanent Court required equality in fact not just law: See the *Minority Schools in Albania* PCIJ, See A/B No. 64, 18 (1935); *Polish Nationals in Danzig* PCIJ, See A/B No. 44 .28 (1932). Further, the League guaranteed the rights and the clauses could not be altered without the consent of the Council.

¹²⁹ Established by the League of Nations.

civilization.¹³⁰ Similarly, under the trustee system, the administering authority¹³¹ was obliged to promote self-government and independence and to respect the fundamental human rights and freedoms of these peoples.¹³² Such territories were supervised by the Trusteeship Council or the Security Council¹³³ who received and considered petitions from the inhabitants of the territories relating to possible breaches.¹³⁴ In practice, the General Assembly vigorously enforced these rights, particularly the right of self-determination.¹³⁵

The activities of more specialised bodies supplement the general work of the United Nations. The International Labour Organisation, for example, has undertaken a great deal of work towards protecting certain fundamental individual rights. These rights include freedom of association, freedom from discrimination in employment and forced labour and the provision of social security.¹³⁶

In a bid to clarify the content of the Charter, in 1948 the General Assembly adopted the *Universal Declaration of Human Rights*.¹³⁷ This specified with greater precision the obligations of member States, so that 'Members [could] no longer contend that they do not know what human rights they promised in the Charter to promote.'¹³⁸ While the Declaration was not intended to be binding¹³⁹ upon members of the General Assembly, its provisions echo accepted considerations of humanity.¹⁴⁰ It provides an authoritative definition of basic human rights; 'a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.'¹⁴¹ The Declaration creates an expectation that certain international standards will be maintained and with the passage of time and the establishment of state practice has become recognised as laying down rules binding upon the States. In this way it has provided evidence of, and helped crystallize, emerging principles of customary international law recognising individual human rights in international law.¹⁴²

¹³⁰ *International Status of South West Africa* ICJ Reports (1950) 125.

¹³¹ Article 76 of the *United Nations Charter*.

¹³² Brownlie, above n 110, 550.

¹³³ Chapter XI and XIII of the Charter and Article 83 respectively.

¹³⁴ The former also had power to send out visiting missions to ensure that individual rights were not being infringed.

¹³⁵ See the *Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960*.

¹³⁶ Unions, employer organisations and Member States can make complaints to the International Labour Organisation. If necessary a commission of inquiry will consider the matter and its findings can then be referred to the International Court of Justice.

¹³⁷ Ian Brownlie, *Basic Documents in Human Rights* (2nd ed, 1981) 132.

¹³⁸ Loius B Sohn, 'A Short History of United Nations Documents on Human Rights' in *The United Nations and Human Rights*, 18th Report of the Commission to Study the Organization of Peace (1968).

¹³⁹ It was intended to be the first step towards a convention; a binding treaty.

¹⁴⁰ *Corfu Channel Case (Merits)* I.C.J. Rep (1949) 4, 22.

¹⁴¹ Memorandum of Office of Legal Affairs, U.N. Secretariat, 34 U.N. ESCOR, Supp (No 8) 15, U.N. Doc E/cn 4/1/610 (1962).

¹⁴² While no machinery is expressly provided for dealing with violations of the Declaration, the organs of the United Nations have taken it upon themselves to supervise and investigate compliance with its provisions.

The Universal Declaration of Rights has itself been supplemented by further declarations and conventions protecting individual rights in international law. Two significant covenants protecting individual and minority rights are the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.¹⁴³ These came into force in 1976 when the requisite number of ratifications were obtained.¹⁴⁴

The provisions of the *Covenant on Economic, Social and Cultural Rights* are detailed, including the protection of the right to work and to an adequate standard of living. These rights are extended to all individuals, prohibiting all discrimination without qualification.¹⁴⁵ Parties to the treaty undertake 'to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.'¹⁴⁶

The *International Covenant on Civil and Political Rights* details the rights of individuals in international law with more specificity and provides stronger machinery for supervision. Each party to the Covenant undertakes to ensure all the rights enumerated in the instrument to all individuals within its territory without any distinction on the basis of 'race, colour, sex, language, religion, political ... national or social origin, property, birth or other status.'¹⁴⁷ As with the *Covenant on Economic, Social and Cultural Rights*, parties must report on the measures adopted by the State in an effort to comply with the Covenant. The Covenant also provides a complaints procedure allowing a party to formally submit a complaint regarding another party's non-compliance.¹⁴⁸

Under the *Optional Protocol to the Covenant*, individuals who believe their rights under the Covenant have been violated, having exhausted domestic remedies, may complain to the Human Rights Committee. The 'charged' State must submit to the Committee 'written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.' The Committee is then required to forward its opinion to both the State and individual concerned. The Covenant thereby provides individuals, not only international rights, but an ability to enforce those rights.

The protection of individual rights has also been undertaken on a regional basis. The *European Convention for the Protection of Human Rights and Fundamental Free-*

¹⁴³ These were adopted on 16 December 1966. Brownlie, above n 137, 349, 365 and 894.

¹⁴⁴ Thirty-five ratifications or accessions were required. See further the Office of the High Commissioner for Human Rights website, <www.unhcr.ch>.

¹⁴⁵ The only exception relates to guaranteeing economic rights in developing States, where governments have a discretion to determine the extent they will extend such rights to non-nationals.

¹⁴⁶ Article 8. Included in this duty is the obligation to submit reports on the State's progress in relation to matters dealt with by the instrument.

¹⁴⁷ Article 2, paragraph 1.

¹⁴⁸ Brownlie above n 110, 556. Once bilateral attempts at conciliation have failed and domestic remedies have been exhausted, the Human Rights Committee may pass the matter onto a conciliation commission who will attempt to resolve the dispute.

doms,¹⁴⁹ its protocols, and the *European Social Charter*¹⁵⁰ provide a comprehensive European Bill of Rights.¹⁵¹ Those States party to the Convention undertake to secure to all persons in their jurisdiction the rights and freedoms provided for under the treaty. These rights have been precisely defined in the instruments. Furthermore, in certain jurisdictions these treaties have been seen as self-executing and, therefore, automatically incorporated into national law.¹⁵²

Another hallmark in establishing the individual as an international juristic entity was the creation of the Commission of Human Rights in 1946, through which individual rights can be enforced. The Commission investigates possible breaches of human rights¹⁵³ and has adopted the responsibility of preparing international documents such as the *Universal Declaration on Human Rights*, the *Convention on the Political Rights of Women*, the *Convention on the Rights of the Child*, and the publication of the *Yearbook on Human Rights*.¹⁵⁴ Through these means it has had a great influence on international practice relating to individual human rights. Other important legal documents and protections include the principle of self determination,¹⁵⁵ the *Declaration on the Granting of Independence to Colonial Countries and Peoples*¹⁵⁶ adopted by General Assembly in 1960, the *Declaration of Principles of International Law Concerning Friendly Relations* adopted in 1970¹⁵⁷ and the *International Convention on the Elimination of all forms of Racial Discrimination*.

These documents' recognition of the individual as the beneficiary of international rights evidences that there is nothing inherent in the structure or essence of international law preventing it dealing with individuals as 'subjects.' These instruments therefore add further support to the existence of a new customary international norm according the individual juristic identity in international law. If this is established, aggrieved individuals will now enjoy their own rights and will no longer need to rely on the 'good will' of their governments for justice.

¹⁴⁹ Signed on 4 November 1950, entered into force on 3rd September 1953. In regard to amendments of this Convention see Registry of the European Court of Human Rights, February 2003, <<http://www.echr.coe.int/Convention/webConvenENG.pdf>>. See also *Human Rights Act 1998* (UK) that is a legislative enactment of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

¹⁵⁰ Signed on 18 October 1961, entered into force on 26 February 1965.

¹⁵¹ Brownlie, above n 110, 557.

¹⁵² The general protections provided for in the Convention are, however, qualified to an extent by articles 15 and 17. Article 15, for example, allows derogation from obligations 'in time of war or other public emergency threatening the life of the nation.' No derogation can be made, however, of article 2 (right to life), 3 (torture and inhuman punishment), 4(1) (slavery or servitude) and 7 (retrospective punishment). In this way the Convention recognises the existence of certain basic inalienable human rights.

¹⁵³ Brownlie, above n 110, 554.

¹⁵⁴ *Ibid* 555.

¹⁵⁵ See in particular the General Assembly Resolution 637A (VII) of 16 December 1952 recommending that 'the State Members of the United Nations shall uphold the principle of self determination of all peoples and nations.'

¹⁵⁶ Resolution 1514 (XV).

¹⁵⁷ Resolution 2625 (XXV).

5 *Recognition of Individual rights in International Law by the United States Judiciary*

These developments are further supported by the state practice of certain States, particularly decisions of the United States courts. It will be seen that the discussion of the place of the individual in international law in this jurisdiction has been significant and has been facilitated by the *Alien Tort statute* that extends to the United States' domestic courts jurisdiction to enforce the 'law of nations.'

The United States judiciary has enforced the international legal rights of individuals in their municipal arena; perhaps in response to similar developments in the international arena. This growing appreciation of the place of the individual in international law was adverted to by Kaufman J in the leading case *Filartiga v Pena-Irala*:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights ... Spurred by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behaviour. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made.¹⁵⁸

In response to 'the true progress that has been made' the municipal courts have begun to accept the individual as possessing certain enforceable fundamental international rights. *Filartiga v Pena-Irala*¹⁵⁹ was one such case. The plaintiff (Dr. Filartiga), a citizen of Paraguay, brought an action in the United States courts against another citizen of Paraguay¹⁶⁰ for torturing and killing his son. This was, the plaintiff argued, in violation of the 'law of nations' within the terms of the *Alien Tort Statute, 1789*.¹⁶¹ The plaintiff had sought to enforce his rights under the municipal laws of Paraguay. As a result of these actions, however, his attorney was arrested and his life threatened by the local police. Consequently, it was crucial for the plaintiff to establish the existence of international legal rights enforceable independently of the State.¹⁶²

-After a consideration of the works of respected jurists, the general practice of the States of the world, and important international documents including the *United Nations Charter*, the *Universal Declaration of Human Rights*, the *American Convention on Human*

¹⁵⁸ *Filartiga v Pena-Irala* 630 F 2 d 876 (1980).

¹⁵⁹ *Ibid.*

¹⁶⁰ The defendant was in the United States on a visitor's visa that had expired. When the plaintiff's son was killed, the defendant was the Inspector General of Police in Asuncion, Paraguay.

¹⁶¹ 28 USC, 1350 (1976). This gave the district courts original jurisdiction over any 'civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

¹⁶² These facts were in direct contradiction to the submissions of the defendant's counsel: *Filartiga v Pena-Irala* 630 F 2 d 876 (1980), 879, fn 5. Given the possible importance of the outcome the Court requested the Justice and State Departments to file *amicus* briefs.

Rights and the *International Covenant on Civil and Political Rights*,¹⁶³ the Court held such torture to 'violate universally accepted norms of the international law of human rights.' This was 'regardless of the nationality of the parties'¹⁶⁴... [as] the torturer has become ... *hostis humani generis*, an enemy of all mankind.'¹⁶⁵ The Court found virtually all States accepted in principle, if not in practice, certain 'basic international human rights and obligations owed by all governments to their citizens'¹⁶⁶ and one of these rights was freedom from torture:

[I]nternational law confers fundamental rights upon all people vis-à-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.¹⁶⁷

This international right was held by the individual, not his/her State, and consequently the Court could order the defendant pay the plaintiff damages. It appears the Court of Appeal appreciated the significance of its decision:

Our holding today, giving effect to a jurisdictional provision¹⁶⁸ enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.¹⁶⁹

-In the same year, the decision in *Filartiga* was followed in another landmark case, *Rodriguez-Fernandez v Wilkinson*.¹⁷⁰ The petitioner was a Cuban seeking admission into the United States as a refugee. The Immigration and Naturalization Service detained him pending his deportation back to Cuba. On the basis of his criminal record, the Immigration and Naturalization Service determined Rodriguez-Fernandez to be an excludable alien and ordered him to be deported. Cuba, however, refused to accept Rodriguez-Fernandez. The Immigration and Naturalization authorities responded by simply detaining him in a maximum-security federal penitentiary. The petitioner sought his release, arguing his indefinite detention was not only unconstitutional, but also in violation of customary international law human rights.

Initially, the existence of such international human rights was crucial to Rodriguez-Fernandez's case, for the District Court held an excluded alien could not invoke the protection of the United States Constitution. As Rogers J declared, 'the machinery of

¹⁶³ Ibid 882-884.

¹⁶⁴ Ibid 878.

¹⁶⁵ Ibid 890. The fact that some governments in fact condoned torture as a legitimate part of official police practice 'did not', the Court said, 'strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.'

¹⁶⁶ Ibid 884, quoting the *Country Reports on Human Rights* (1979).

¹⁶⁷ Ibid 885. Emphasis added.

¹⁶⁸ *The Alien Tort Statute* is only a jurisdictional statute; it does not confer substantive rights, these are conferred by international law.

¹⁶⁹ Ibid 890.

¹⁷⁰ 505 F Supp 787 (D Kan 1980).

domestic law utterly fails to operate to assure [Fernandez] protection.¹⁷¹ The petitioner, therefore, depended upon the guarantees contained in customary international law - the only remaining source of legal protection. Further, as it was evident that his own government would not come to his aid, he had to establish that this international right was held by him in his capacity as an individual, not as a State representative.

-The United States government argued there were no legal constraints upon their treatment of this prisoner, asserting that they could detain him for the rest of his life.¹⁷² On appeal, the Court of Appeal point out the absurdity of this assertion:

[s]urely Congress could not order the killing of Rodriguez-Fernandez ... on the ground that Cuba would not take [him] back and this country does not want [him].¹⁷³

The District Court adopted an approach similar to Kaufmann J in *Filartiga*. After examining modern developments in conventional international law, the works of legal scholars and the practice of the members of the international community,¹⁷⁴ the Court concluded the petitioner was protected by a customary international human rights norm prohibiting arbitrary imprisonment.¹⁷⁵ In passing Rogers J remarked that it was strange that the United States, which 'preaches incessantly about the superiority of its own system as a bulwark for human rights,'¹⁷⁶ sought to deny the basic rights of this individual:

No country in the world has been more vocal in favor of human rights. It would not befit our history as a guarantor of human rights for our own citizens, to decline to protect unadmitted aliens against arbitrary governmental infringement of their fundamental human rights.¹⁷⁷

The Court found all individuals to have certain customary international legal rights, enforceable in the municipal courts even without the support of the individual's government. The essence of the decision therefore lies in the assertion that, even in the absence of constitutional guarantees and domestic legal rights, individuals have certain basic human rights protected by customary international law.

- The United States Court of Appeal affirmed the District Court's order to release Rodriguez, however, on different grounds. The Court held even an excluded alien to be enti-

¹⁷¹ Ibid 795.

¹⁷² The statute upon which the government sought to rely provided for the deportation of aliens 'unless the Attorney General ... concludes that immediate deportation is not practicable or proper': 8 USC, 1227 (1976); it makes no reference to detention.

¹⁷³ 654 F 2 d 1382, 1387.

¹⁷⁴ 505 F Supp 787 (D Kan 1980), 795 ff; citing *Filartiga v Pena-Irala* 630 F 2 d 876 (1980) as authority for using these sources of international law.

¹⁷⁵ Ibid 800.

¹⁷⁶ Ibid 799.

¹⁷⁷ Ibid 799.

tled to the constitutional protection from arbitrary imprisonment.¹⁷⁸ In interpreting these provisions, the Court of Appeal turned to international law for assistance. The content of the concept of 'due process', the Court said, is not static, changing with 'current notions of fairness'¹⁷⁹ and international law provided an appropriate source of such notions of fairness. Customary international law acted as a 'kind of *Zeitgeist*, which informs or inspires the notion of due process of law, and against which that notion had to be measured.'¹⁸⁰

From this examination the Court found that 'individuals are entitled to be free of arbitrary imprisonment' and the government's actions were, therefore, in breach of both customary international law and the provisions of the United States Constitution. Rodriguez-Fernandez was released from prison on August 7, 1981; free for the first time in thirteen years.¹⁸¹

The decision in *Filartiga* was subsequently followed by the United States District Court in *Forti v Suarez-Mason*.¹⁸² This case involved claims by the Argentinian plaintiffs against an Argentinian general for the unlawful acts of his subordinates. These acts of torture, murder and arbitrary imprisonment¹⁸³ were, it was argued, in breach of an international human rights norm within the terms of the *Alien Tort Statute*.¹⁸⁴

-The District Court rejected the defendant's suggestion that 'the law of Nations extends only to relations between sovereign states',¹⁸⁵ and therefore excluded the plaintiff's case. The Court found the suggestion to be unsupportable 'at least so far as it concerns individual injuries under the international law of human rights.'¹⁸⁶ There were certain international human rights individuals enjoyed, enforceable independently of the State, and these included the freedom from torture, murder and arbitrary imprisonment. These international rights of the plaintiff had been infringed by the defendant and his subordinates and therefore had to be compensated.

The principles of the *Filartiga* decision and the application of international law to individuals were extended in the case of *Kadic v Karadzic*.¹⁸⁷ Two groups of victims from

¹⁷⁸ 654 F 2 d 1382, 1387.

¹⁷⁹ Ibid 1388, citing the *Universal Declaration on Human Rights* and the *American Convention on Human Rights*.

¹⁸⁰ Steven Schneebaum, 'International Law as a Guarantor of Judicially-Enforceable Rights: A Reply to Professor Oliver' (1981) 4 *Houston Journal of International Law* 65, 76.

¹⁸¹ *Miami Herald*, 13 August 1981, 1 col 1; cited by Schneebaum, above n 180, 77.

¹⁸² *Forti v Suarez-Mason* 672 F Supp 1531 (ND Cal 1987).

¹⁸³ The plaintiffs' family had been taken from the international airport in Buenos Aires and imprisoned. One of their brothers was murdered and their mother had not been heard of since the abduction. While five of the brothers were released after six days, one of the plaintiffs was held captive for four years.

¹⁸⁴ 28 USC1350 (1982).

¹⁸⁵ *Forti v Suarez-Mason* 672 F Supp 1531 (N.D. Cal 1987) 1540. The defendant sought to rely upon the court's statement in *Dreyfus v Von Finck* 534 F 2 d 24, 30-31 (2 d Cir) that the law of Nations deals 'with the relationship among Nations rather than individuals.'

¹⁸⁶ Ibid 1540; citing *Filartiga v Pena-Irala* 630 F 2 d 876 (1980) and *De Sanchez v Banco de Nicaragua*, 770 F 2 d 1385, 1396 (5th Cir 1985).

¹⁸⁷ *Kadic v Karadzic* 70 F 3d 232 (1995). See also *Hawa Abdi Jama v United States INS* 22 F Supp 2d 353 (1998).

Bosnia-Herzegovina brought actions under the *Alien Tort Claims Act* 1988 for breaches of customary international law. The claims stemmed from atrocities committed by persons under the military command of Karadzic during a genocidal campaign in the course of the Bosnian civil war.¹⁸⁸ These acts included 'brutal acts of rape, forced prostitution, forced impregnation, torture and summary execution.'¹⁸⁹ Karadzic was the self-proclaimed president of an unrecognised Bosnia-Serb State, referred to as 'Srpska'.¹⁹⁰ Thus, in contrast to *Filartiga*, a person who was not acting under the authority of a recognised State committed the violations.

Newman CJ recognised that this factual difference from *Filartiga* gave rise to issues that had not previously been determined under the Statute.¹⁹¹ These included, first, whether the law of nations be violated by persons not acting under the authority of a (recognised) State and second, whether such violations include 'genocide, war crimes, and crimes against humanity.'¹⁹² In regard to these issues, Karadzic argued that the plaintiffs could not allege violations of international law because 'such norms bind only states and persons acting under color of a state's law, not private individuals.'¹⁹³ In turn, Karadzic asserted, *inter alia*, he was not a 'state actor.'¹⁹⁴

Newman CJ rejected the suggestion that the law of nations was confined to State actors, asserting that 'certain forms of conduct violate the law of nations whether undertaken by those acting under auspices of a state or only as private individuals.'¹⁹⁵ Newman CJ cited the laws of piracy as an early example of international law applying to an individual under the principle of '*hostis humani generis* (an enemy of all mankind).'¹⁹⁶ While such persons act 'without ... any pretense of public authority' they are subject the law of nations.¹⁹⁷ Later examples Newman CJ cites are the prohibition of the slave trade, genocide, war crimes and other violations of international humanitarian law.¹⁹⁸ These offences of 'universal concern' are capable of being committed by non-State actors.¹⁹⁹

The Court found that the earlier decision in *Tel-Oren v Libyan Arab Republic*²⁰⁰ had not rejected the application of international law to any private action.²⁰¹ To the contrary, Newman CJ found that in the course of the judgment the court in that case reiterated the examples of piracy and slave trading as early examples of a 'handful of crimes to which the law of nations attributes individual responsibility.'²⁰² The court in that case had

¹⁸⁸ Ibid 237.

¹⁸⁹ Ibid 236-237.

¹⁹⁰ Ibid 236-237.

¹⁹¹ Ibid 236.

¹⁹² Ibid.

¹⁹³ Ibid 239.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid 239-240.

¹⁹⁹ Ibid 240.

²⁰⁰ 726 F2d 774 (1984); 470 US 1003 (1985).

²⁰¹ *Kadic v Karadzic*, 70 F 3d 232 , 2400 (1995).

²⁰² 726 F 2d 774 (1984) 795, quoted in *Kadic v Karadzic*, Ibid.

merely concluded that the specific violation of torture in that case was not within 'the limited categories of violations that do not require states action.'²⁰³

In regard to this latter point, Newman CJ went on to consider which of the subject claims could be categorised as actionable violations of international law by a non-State actor. The court concluded they were under the headings genocide²⁰⁴ and war crimes.²⁰⁵ War crimes may include murder, rape, torture and arbitrary detention.²⁰⁶ While official torture and summary execution are prohibited by international law,²⁰⁷ unless they are in the course of genocide or war crimes, they only violate international law when 'committed by state officials or under color of law.'²⁰⁸ While in this case some of the alleged acts of rape, torture and summary execution fell within the plaintiffs' claims of genocide and war crimes, in regard to those that did not it had to be determined whether they were committed by state officials or under color of law.²⁰⁹ As to the first point, Newman CJ concluded that customary international human rights law prohibited official torture without distinguishing between recognised or unrecognised States.²¹⁰ Thus that Srpska was not a recognized State did not prevent Karadzic acting as an 'official' of that State for the purposes of identifying violations of international law.²¹¹ As to whether Karadzic acted under 'color of law', Newman CJ noted that this test was satisfied when an individual 'acts together with state officials or with significant state aid.'²¹² Newman CJ believed it had been sufficiently alleged that Karadzic acted under 'color of law' in so far as it was claimed that he acted in concert with the former State of Yugoslavia; working with such official or with State aid.²¹³

The decision provides strong evidence of the evolution of international law to extend more and more to the acts of individuals. International law had expanded well beyond the ancient concept of '*hostis humani generis*' to include the atrocities alleged to have been committed by military leaders such as Karadzic. Such persons are not be saved from international law liability simply because they are an individual, not a State, and/or that they are not an official of a recognised State. Thus the significance of these cases lies in their evidence of a growing appreciation of the place of individual human rights in domestic and international law; an appreciation which echoes more general contemporary developments in international human rights outlined above. Their true importance can be found in this historical context - as declarations of the increasing concern felt throughout the world for the rights of individuals. They are reactions to the traditional view of the place of the individual in international law and a recognition of the inappropriateness of this theory today.

²⁰³ Ibid.

²⁰⁴ Ibid 241-242.

²⁰⁵ Ibid 243.

²⁰⁶ Ibid 242.

²⁰⁷ Ibid, citing *Filartiga v Pena-Irala* 630 F 2 d 876 (1980) 885.

²⁰⁸ Ibid 243.

²⁰⁹ Ibid 244.

²¹⁰ Ibid 245.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

There are numerous reasons underlying this growing acceptance of the individual in the international arena. Lauterpacht lists them as including:

the recognition of the individual as a subject of international rights, the acknowledgement of the worth of human personality as the ultimate unit of all law; the realization of the dangers besetting international peace as the result of the denial of fundamental human rights; and the increased attention paid to those already substantial developments in international law in which, notwithstanding the traditional dogma, the individual is in fact treated as a subject of international rights... [T]here has been an enhanced realization of the fact that the direct subjection of the individual to the rule of international law is an essential condition of the strengthening of the ethical basis of international law and of its effectiveness in a period of history in which the destructive potentialities of science and the power of the machinery of the State threaten the very existence of civilised life.²¹⁴

These developments reflect the changing needs of the international community and thus a change in the nature and function of international law. Traditionally the individual did not feature highly in this legal system. Today, however, to be effective and workable, international law must regulate the individuals who constitute States. An international law disregarding the fact that ultimately individuals make up and are the 'State,' is bound to be artificial.²¹⁵ There is a growing tendency to take this into account²¹⁶ and the development of the individual as an international entity is just one change reflecting this new train of thought.

B *Procedural Capacity of Individuals*

Yet has this extension of substantive international rights held by individuals led to similar developments in the context of procedural rights? Past limitations²¹⁷ upon the procedural capacity of individuals have tended to obfuscate the true place of the individual in the broad context of international law. Jurists hold out existing restrictions as evidence of the inability of individuals to be 'subjects' of international law. As noted above, some argue that it is because individuals cannot be 'subjects' of international law, they cannot be accorded the requisite standing to enforce international law. In this way the traditional theory has hampered developments towards the acknowledgement of this entity in international law.

As noted earlier, however, the traditional theory is based on rather circuitous reasoning and lacking in any true logical foundation. Nevertheless, tradition places a formidable

²¹⁴ Above n 80, 62.

²¹⁵ *Ibid* 63.

²¹⁶ *Ibid*.

²¹⁷ And to a large extent, still existing restrictions.

barrier before the acceptance of the individual and its rebuttal is therefore central to the successful promotion of the individual as an international juristic entity.²¹⁸

The following discussion of the international procedural capacity of individuals should be qualified, however, by recalling that the question of substantive rights and procedural capacity are two independent questions. While procedural capacity is crucial to the practical implementation of international legal rights, it is not essential to the existence of that legal right. The two questions are not theoretically interdependent. Treaties, for example, have often appeared to protect the rights of minorities²¹⁹ while denying these peoples any formal right to enforce these benefits. Traditional theorists would suggest this is because the treaties have created rights and duties only between the signatory States, not the individuals affected by its terms. This is not, however, a logical corollary and an unnecessary over emphasis of the importance of the State in international law. It is not illogical, therefore, for international law to give individuals legal rights, while confining the capacity to enforce such rights to States. Procedural capacity and the possession of substantive rights are two entirely distinct questions.

Most importantly, however, the law and practice governing the procedural capacity of individuals has not been static. Gradually it has come to be accepted that in certain contexts the individual is also capable of exercising the same procedural rights as States. As early as the 1800s, bodies such as the European Commission of the Danube²²⁰ and the Central Commission for the Navigation of the Rhine²²¹ dealt directly with individuals. Limited rights were also given to individuals under the Conventions of 8 September 1923, between the United States of America and Mexico establishing a General Claims Commission.²²² While the relevant governments filed all documentation concerning the dispute, these governments could appoint individuals to place their claims before the Commission. Moreover, when the matter involved an injury to an individual, the States were bound to hand over to the aggrieved individual any amount awarded by the Commission.²²³

On other occasions the individual has been given complete independent procedural capacity. For example, Articles 297 and 304(b)(2) of the *Treaty of Versailles* gave nationals of the Allied Powers the right to bring personal actions for compensation

²¹⁸ Above n 80, 55-56.

²¹⁹ For example the minorities Treaties concluded after the First World War.

²²⁰ Established under the Treaty of Paris of March 30, 1856.

²²¹ Established under Article 109 of the Final Act of Vienna of 1815.

²²² See Lauterpacht, above n 80, 83-90.

²²³ See *American-Mexican Claims Bureau, Inc, v Morgenthau, Secretary of the Treasury*, Annual Digest, 1938-1940, Case No. 106. See also the decisions of Parker J cited by Lauterpacht, above n 80, 49 who held that when an award is made on a specific claim 'the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant.' 'While the Nation's absolute right to control a private claim espoused by it is necessarily exclusive, because of the national interest that may be or become involved, nevertheless the private nature of such claim continues to inhere in it and the claim only in a very restricted sense becomes a national claim': Opinions of Van Vollenhoven, Umpire, United States and Mexico General Claims Commission, in the *William A Parker case* (1925 - 1926) Case No. 178 and in the *North American Dredging Company of Texas case* Case No. 179.

against the German State.²²⁴ While such individuals could utilize the assistance of a government agent, this was not mandatory. Similarly, under Articles 4 and 5 of the *Hague Convention XII of 1907* individuals were given direct access to the International Prize Court.

Individuals belonging to any of the five Central American Republics could bring an action in the Central American Court of Justice²²⁵ against a government for the 'violation of treaties or conventions, and other cases of an international character' even without the approval of their own governments.²²⁶ The mixed arbitral tribunals²²⁷ set up under the peace treaties of the First World War heard claims from individual citizens against nationals and governments of the defeated States. Individuals were given full procedural capacity before this body. As the Court reaffirmed in *Steiner and Gross v Polish State*:

The Convention conferred in unequivocal terms jurisdiction upon the Tribunal irrespective of the nationality of the claimants, and, the terms of the Convention being clear, it was unnecessary to add to it a limitation [ie as to procedural capacity] which did not appear from its wording.²²⁸

Over a ten-year period they heard many cases brought by individuals enforcing their international rights.

Citizens of the United States could bring claims before the Mixed Claims Commission, seeking compensation from Germany for injuries incurred as a consequence of war and to enforce debts owed to them by German citizens.²²⁹ The damages awarded reflected the personal loss of the claimant, not the loss to the State.²³⁰

Examples of individuals being given procedural capacity to appear before international bodies are numerous. *The Convention on the Settlement of Matters arising out of the*

²²⁴ Lauterpacht, above n 80, 50.

²²⁵ The Central American Court of Justice only dealt with five cases brought by individuals. Four were held to be outside the Court's jurisdiction because internal remedies had not been exhausted, while the fourth was decided against the individual. Nevertheless, the scheme evidences an appreciation of the existence of individual rights that the individual has independent authority to enforce.

²²⁶ '[P]rovided that the remedies which the laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown.'

²²⁷ One such example was the Arbitral Tribunal of Upper Silesia, established by the *German-Polish Convention of 15 May 1922*. Individuals could submit claims to the Tribunal against their own government and foreign States.

²²⁸ Articles 16 to 24 of the Convention, which set out the procedural requirements for bringing a claim before the Tribunal, made no distinction between government representatives and private individuals as parties to disputes.

²²⁹ *Annual Digest 1927-1928*, Case No 188.

²³⁰ Established under an agreement of 10 August 1922 between the United States of America and Germany.

²³⁰ Brownlie, above n 110, 564. These treaties do not give the individual full procedural capacity. Rather the government concerned designates agents and counsel to present oral and written arguments to the Commissioner, the action generally being brought by these persons on behalf of the individual.

War and the Occupation,²³¹ entered into after the Second World War, also gave citizens and corporations of the States and Territories referred to in the accompanying Charter direct access to its machinery. Certain individuals could appeal directly to the European Coal and Steel Court of Justice established in December 1952.²³² In 1958 this Court was superseded by the Court of Justice of the European Communities, to which individuals and corporations could appeal on the same basis as States.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, considered earlier, is enforced by three organs, the European Commission of Human Rights, the Committee of Ministers of the Council of Europe and the European Court of Human Rights. The procedural status of the individual before these bodies is quite complex and will not be detailed. The main point to stress is that in certain circumstances, petitions to these bodies could be received directly from individuals.²³³

These examples reveal to differing extents both an acceptance of the existence of substantive individual rights in international law and an appreciation that there is nothing in the very structure of international law preventing individuals from also possessing the procedural capacity needed to enforce these rights.

C Ability of States to Act on Behalf of Non-Nationals

These developments have been complemented by a further line of reasoning relaxing the rule as to nationality of claims. The traditional rule confining the enforcement of claims to the State whose national was 'violated' has been rejected and, increasingly, the interest all States have in the preservation of international peace has been accepted. As a consequence, the ability to enforce international rights and obligations has been extended in many occasions to other States. Particularly in the context of human rights, by allowing so-called 'non-interested' parties to enforce these rights, these protections are more effectively ensured.

As noted above, while traditionally no State has a right to infringe international law and thereby injure another State, such a breach is seen as only affecting the particular injured State. Another State may not, therefore, make diplomatic representations on behalf of an aggrieved individual who is not its national. As the Permanent Court of International Justice explained:

²³¹ Signed on 26 May 1952 with the German Federal Republic.

²³² Signed 18 April 1951; came into force 25 July 1952. Those individual who could directly appeal included:

1. individuals who have acquired or regrouped rights or assets;
2. buyers whose interests are impaired;
3. persons who are directly interested in the result of action taken by the High Authority; and
4. persons fined by the High Authority of the Community for a breach of the treaty's obligations.'

²³³ See in particular, Article 25 and Article 26.

the rule of international law ... is that in taking up the case of one of its nationals ... a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention 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. Where the injury was done to the national of some other State no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.²³⁴

Today, however, nationality no longer provides the only link between the individual and the State. Increasingly the traditional theory is being abandoned and, as a result of the 'interdependence' of the members of the international community,²³⁵ the 'right' of action has been extended to all States. Membership in the international community is seen as involving a correlation of rights and duties, including the right to see that the rules of international law, designed for mutual well-being, are observed.²³⁶

This has been acknowledged in key decisions of the United States judiciary. Kaufman J noted in *Filartiga v Pena-Irala*:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights... In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.²³⁷

The members of the international community 'have made it their business, both through international accords and unilateral action, to be concerned with domestic

²³⁴ *Panevezys - Saldutiskis Railway Case*, PCIJ, A/B No. 76 p16 (1939). Note further that a State does not incur international responsibility where 'a subject of the claimant State suffers damage as a corollary or result of an injury which the defendant State has inflicted upon one of its own nationals or upon an individual of a nationality other than that of the claimant country, with whom the claimant is united by ties of relationship': *The United States of America on behalf of Dickson Car Wheel Company v The United Mexican States* (1930 - 1931), General Claims Commission, United States and Mexico 175, 191 (1931).

²³⁵ Jessup, above n 54, 403.

²³⁶ *Ibid.*

²³⁷ *Filartiga v Pena-Irala* 630 F 2 d 876 (1980) 890.

human rights violations...'²³⁸ Similarly, in 1977 President Carter declared in his address to the United Nations that '[a]ll the signatories of the United Nations have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of the citizens is solely its own business.'²³⁹ At the eighth conference of American States, the Republics pledged their belief that '[e]ach State is interested in the preservation of world order under law, in peace with justice, and in the social and economic welfare of mankind.'²⁴⁰ Article 11 of the *Covenant of the League of Nations* similarly declared 'any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League ...'

The notion of community interest can also be found in the *United Nations Charter*. Under Article 34, the 'Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute ...'. Article 35 also empowers any member of the United Nations to bring any such dispute to the attention of the Security Council or the General Assembly. Similarly under Articles 1 and 5 of the Rome Statute of the International Criminal Court the newly established International Criminal Court is given jurisdiction over the 'most serious crimes' of concern to the 'internal community as a whole.' In turn, the Court has jurisdiction over crimes of genocide, crimes against humanity, war crimes and crimes of aggression: Article 5. Reflecting its underlying premise that some crimes affect all members of the international community, procedurally crimes do not need to be referred to for prosecution by a signatory State. The crime can be referred to the Prosecutor by a State Party or the United Nations Security Council or the Prosecutor itself may initiate investigations into a crime under Article 15: Article 13. Thus, if the Prosecutor complies with the requirements under Article 15, the impetus for prosecution can rest with the Prosecutor rather than a signatory State. Moreover, the recognition of the right of victims to make representations as part of the Article 15 procedure indicates that such international crimes are not perceived as solely crimes against signatory States, but also the international community as a whole and, in particular, aggrieved individuals.

It is in circumstances such as these, where the State enforcing the international law is not connected with the aggrieved individual by nationality, that it becomes clear the State is not enforcing its own right. It is enforcing the substantive right of the individual and thereby securing its own interest in maintaining order in the international arena. Again these examples show there is nothing inherent in the nature or structure of international law preventing individuals possessing international legal rights and enjoying the ability to enforce those rights. There is no basic rule of international law prohibiting an individual possessing this procedural capacity. Whether an individual has direct access to a court/tribunal will merely depend upon

²³⁸ Ibid 885, 889. See also *Bosnia and Herzegovina v Yugoslavia, Preliminary Objections*, 1996 ICJ 595 at 774-775; *Kadic v Karadzic*, 70 F 3d 232, 240 (1995); *Re McKerr* [2004] UKHL 12; [2004] All ER (D) 210 (Mar)), para 51.

²³⁹ Ibid 885, fn 24.

²⁴⁰ *Report of the Delegation of the United States of America to the Eighth International Conference of American States*, Dept. of State Pub. 1624 (1941) 191.

the machinery governing the particular case. The question will turn on the terms of the relevant procedural instrument, not substantive international law or inherent deficiencies of international law.

The developments outlined above reveal an increasing appreciation of the need to recognise and accept the independent individual procedural capacity. So extensive is this acceptance that it too could be seen as evidencing a new principle of customary international law allowing individuals direct access to international tribunals.

There are many advantages in accepting individuals as having independent procedural capacity. Most importantly, private individuals would be provided with a remedy, even when their own State refuses to bring a claim on their behalf. Further, stateless persons,²⁴¹ otherwise without recourse to justice, would have a right of action. Compulsory judicial settlement and the other methods of ensuring the maintenance of international protections that have proven to be ineffective would no longer be needed. This would also remove much friction from the international arena. Individuals could bring claims directly against offending States, removing the dispute from the international political arena. As Lauterpacht notes, '[a]t present the espousal of a claim by the State tends to impart to the complaint the complexion of political controversy and unfriendly action.'²⁴² This would be avoided if the individual could act independently of the State.

Over the decades these advantages have been appreciated and international bodies have come to accept the individual's right to bring actions against, not only foreign States, but their own State. Such practice is now well established, yet still fails to be supported by the procedural requirements of the most important international court, the International Court of Justice.

D *The International Court of Justice*

Bearing the above developments in mind, Articles 2, 34 and 62²⁴³ of the *Statute of the International Court of Justice*, precluding individuals from bringing actions before it, appear to be excessively rigid and outdated. Their reflection of the traditional theory places an unnecessary constraint²⁴⁴ upon legal adjudication and stand in stark contrast to international state practice today.

Article 34, paragraph 1 of the statute of the Court provides only 'States may be parties in cases before the Court.'²⁴⁵ This constraint prevents individuals or minor-

²⁴¹ Persons barred for some reason under the rules as to nationality of claims.

²⁴² Lauterpacht, above n 80, 52.

²⁴³ According to Article 2 'matters which are essentially within the domestic jurisdiction of any State' are reserved from interference. Article 62 allows a State to request permission to intervene but only if it considers it has an interest of a legal nature which may be affected by the decision in the case.

²⁴⁴ Lauterpacht, above n 80, 52.

²⁴⁵ While the status of the individual was considered by the Committee which initially drafted the statute, only two of the ten members favoured extending *locus standi* to individuals: Brownlie, above n 110, 560.

ity groups from bringing an action before the Court unless they can establish they have retained their character as a sovereign State.²⁴⁶

The possible injustice that could stem from these procedural constraints has been acknowledged by organs of the United Nations who have on occasion resolved to forgo their procedural rights and/or utilise a special pre-trial procedure allowing individuals to take a more active part in the dispute.²⁴⁷ An example of such a pre-trial arrangement can be found in the steps taken by the Council of the League of Nations on 14 December 1939.²⁴⁸ The Council allowed the complainants to lodge representations with the Secretariat and within a certain time the Secretary General was required to furnish the complainants with a 'statement of the point of view of the League.' The complainants could then make further submissions if they wished in reply to this statement. All these documents were ultimately passed on to the International Court of Justice with a request for an advisory opinion. In this way, despite the procedural constraints before the complainants, their views were placed before the Court.

In time, the League actually renounced its right to present written and oral submissions when the same right was not given to petitioners. The Council did 'not wish to have greater opportunities of furnishing information to the Court than the petitioners themselves.'²⁴⁹ Strictly, however, the Court is still bound by the limitations set out in the statute and prevented from receiving written or oral submission from bodies other than States.²⁵⁰

VII CONCLUSION

Traditional constraints upon the individual in international law should not be seen as a greater barrier than they are in reality. They must be seen in their modern day context, where they have often been modified and at times completely rejected. In recent decades there has been a return to the principles advocated by the founders of international law; *The United Nations Charter* perhaps marking the turning point in international practice by transforming the individual from an 'object' of international benevolence into a 'subject' of international rights.²⁵¹

²⁴⁶ The dominant government could nevertheless still raise the matter on behalf of these people. Strangely the Australian Select Committee on Constitutional and Legal Affairs seemed to assume that the Australian Government would assist the Australian Aboriginal people bring such a claim: *Two Hundred Years Later* above n 11. Alternatively, the United Nations could initiate proceedings for an advisory opinion: see Article 33 *Statute of International Court of Justice*. In the latter case, the consent of the government would not be required: see the *Western Sahara case* (1975) ICJ, 4 and the *Interpretation of Peace Treaties Case Advisory Opinion* ICJ Reports (1950) 65.

²⁴⁷ Brownlie above n 110, 561.

²⁴⁸ *In the Matter Concerning the Former Officials of the Governing Commission of the Saar Territory*.

²⁴⁹ Shabtai Rosenne, *The Law and Practice of the International Court* (1965) 737.

²⁵⁰ *United Nations Administrative Tribunals case*, ICJ Reports (1954) 47; ICJ Pleadings, 397.

²⁵¹ Lauterpacht, above n 80, 4.

Such modern day state practice provides strong support for the existence of a new customary international law recognising the individual as an international juristic entity, with international rights and procedural capacity. Even if international law does not as yet recognise the individual as possessing such procedural capacity, international practice suggests States are at least obliged to acknowledge and enforce individual rights. If as a matter of practice States acknowledge the existence of individual rights and act on the behalf of aggrieved individuals, it could be that States are now obliged to respect and enforce these international rights on the behalf of individuals. In this case, it would be trite to try to argue, as positivists do, that these rights are no longer the individual's just because it is the State that ultimately has the power of enforcement.

Given the state of developments in this area of international law, at least in the context of human rights, the existence of certain fundamental individual rights, held independently of the State, should be acknowledged. These international laws must, to be effective, be given this special character. As individuals and minority groups lack the voting power needed to ensure that their rights are respected by the State, their future existence depends on these protections being enforceable independently of the State.

Finally, if the above state practice has not as yet crystallized into a binding customary international norm, it nevertheless provides a strong basis for further developments towards the acceptance of the individual in international law. There is no rule of international law, or anything inherent in the structural basis of international adjudication, precluding an individual from directly acquiring rights under international customary law. International law is a flexible system of law which has for centuries adapted and changed to complement the needs of the international community. It is not a rigid body of unchangeable archaic notions glorifying State sovereignty. Given this flexibility, there is nothing to prevent further developments recognising the individual as a 'subject' of international law and acknowledging the collective interests of all States. As outlined in this article, we are more than half way there, and there seems nothing to prevent the establishment of a broader basis for international rights and adjudication.