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UNIVERSITY OF AMSTERDAM

TREATIES AND INDIVIDUALS: OF BENEFICIARIES, DUTY-BEARERS, USERS, AND PARTICIPANTS

Ilias Plakokefalos

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Chapter 21

Treaties and Individuals: **Of Beneficiaries, Duty-Bearers, Users, and Participants**

Ilias Plakokefalos

I. Introduction

The place of the individual in the international legal order is a controversial and complex issue. The debates around the position international law adopts, or should adopt, regarding the individual have taken many shapes and forms over the years. It is true that most steps that have been taken towards the inclusion of the individual in the international legal order can be traced in treaty law. It is equally true that there has not been a consistent stance of international law towards the identification of a place for the individual. The individual may be seen – and is primarily seen – as a *beneficiary* of international law since he or she is accorded protection (either directly or indirectly) through a number of instruments. They may also be seen – more recently – as *users* of international law. In broad terms, the former term denotes an individual being granted a ‘mere benefit’ by international law, in particular by means of an international treaty, while the latter signifies the creation of a ‘substantive (legally enforceable) right’.¹ Whether in the future the individual will also be treated as a *participant*, ie as an actor rather than a recipient of benefits or substantive rights, remains to be seen. Before going into the substance of these terms, and of the role of the individual in the law of treaties, a few preliminary steps are required in order to delineate the topic.

First, this chapter will only deal with individuals and not with groups of individuals (eg NGOs or rebel groups) or corporate actors.² The analysis will be focused on the

¹ See further sections IV and V below. See, for a similar distinction recently A Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 AJIL 45, 60.

² On corporate actors see the chapter by **M Karavias in this Handbook**.

individual person, and on their relationship with and position in the law of treaties. Second, the chapter will not confine itself to an analysis of the position of the individual strictly within the law of treaties, solely looking at what the Vienna Convention on the Law of Treaties (VCLT)³ has to say on the topic. It will also incorporate an analysis of the position of the individual within a number of special treaty regimes.

The following section of this chapter (II) addresses the discussion in international law on subjects and international legal personality. It demonstrates that while an appraisal of this discussion is essential in order to proceed to the analysis of the position of the individual in the law of treaties, there is nothing that prevents a study of the position of the individual in a manner that is detached from the debate on the doctrine of subjects. The next section (III) is devoted to determining the position of the individual according to the law of treaties *stricto sensu* (ie the VCLT and relevant customary law). There is little – if any – material on the topic. However, the doctrine of subjects of international law is informed by the practice adopted – among other things – in specific international treaties and special treaty regimes, which are discussed in subsequent sections. Moreover, the doctrine of subjects forms the starting point for any discussion of the individual.⁴ At the same time it provides for a conceptual basis for the analysis that follows. So the issue of subjects will be discussed at the outset, in order to provide the necessary background, and will then be taken up at the end of this chapter as a possible topic for further research.

The next step (section IV) is to trace the route of the individual within international law from beneficiary to user to participant. The individual as beneficiary is studied first, focusing on the variations of such a position of the individual in the various treaty regimes under international law. A similar exercise is then undertaken with respect to the individual as user (section V). The concluding section (VI) seeks to set

³ Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁴ Most treatises of the issue do involve at least a preliminary discussion of the issue of subjecthood. The examples range from J Spiropoulos, 'L'Individu et le Droit International' (1929) 30 *Recueil des Cours* 191 to K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP, 2011).

a research agenda for the future, focusing on the individual as a participant in treaties, on the relationship between the place of the individual in the law of treaties on the one hand and the individual within treaties on the other, and on the bearing that the developments regarding the position of the individual with respect to treaties may have on the doctrine of subjects and legal personality.

II. Subjecthood, Legal Personality, and the Legal ‘Capacity’ of Individuals

All law regulates human behaviour, and international law is no exception.⁵ Individuals are at the epicenter of international law as they are at the epicenter of municipal law. This may be harder to witness in international law than it is in municipal law; yet, a closer look reveals that during the twentieth century many international treaties have been concluded with an eye on the individual. The rise of human rights treaties is an obvious example. Even before the rise of human rights, however, international humanitarian law gave special attention to the individual.⁶ International environmental law was also initially geared towards the individual, albeit in a broad manner and not in the sense of according it rights or imposing on it duties.⁷ International economic law has offered numerous examples of a special focus on the individual as well.⁸ In all these canonical areas of international law we find

⁵ H Kelsen, ‘Théorie Générale du Droit International Public, Problèmes Choisis’ (1932) 42 RCADI 117, 145-146.

⁶ Early humanitarian treaties did not confer any rights on the individual but they had provisions that sought to protect her, see for instance Hague Convention IV Respecting the laws and Customs of War on Land (18 October 1907 entered into force 26 January 1910) 25 CTS 277.

⁷ The first collective declaration of states pertaining to international environmental law, the Stockholm Declaration of 1972, was clearly anthropocentric. This can be clearly seen from its full title, Stockholm Declaration on the Human Environment, UN Doc. A/Conf.48/4 and Corr.1, 1972. As environmental awareness grew, less anthropocentric approaches were followed (see for example Rio Declaration on Environment and Development, UN Doc. A/Conf.151/5/Rev.1, 1992). This does not mean that the individual stopped being at the center of very important treaties, such as the Aarhus Convention, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (25 June 1998 entered into force 30 October 2001) 2161 UNTS 450.

⁸ Even though international economic law is, admittedly, focused more on legal rather than natural persons.

instruments that provide, with infinite variations in scope and content, for the protection of the individual. This is in line with the more general trend that has been traced in modern international law: that of an 'inward trend' in the directionality of norms.⁹ Next to 'outward-looking' international obligations, which seek to regulate the conduct of States as between themselves and on the international plane exclusively, many modern international obligations are actually 'inward looking', requiring the State to take particular conduct within the domestic legal order.¹⁰ Such inward looking norms are most likely to be seen as 'benefiting' individuals, and as susceptible of being 'used' by them, in an attempt to control the exercise of State power.¹¹ In the final analysis, all law is addressed to individuals, though sometimes mediated through a legal entity, be it the State, the international organization, a corporation, and the like.

The Permanent Court of International Justice (PCIJ) authoritatively indicated that States may conclude treaties that confer rights directly to individuals. In its advisory opinion on the *Jurisdiction of the Courts of Danzig*¹² the PCIJ held that

[i]t 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.¹³

Despite the controversy surrounding the case, the opinion serves as a clear indication that, no matter what the prevailing doctrine on subjects holds, States are free to conclude treaties that do indeed create rights and obligations for individuals. Individuals thus have the legal capacity to enjoy rights and incur obligations and, moreover, to seek enforcement of those rights, if a treaty so allows. The extent of the rights and obligations will also be dictated by the treaty.

⁹ See A Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of LA Intl & Comp L Rev* 133, 138–142, with further references.

¹⁰ See *ibid.*

¹¹ See eg, Roberts, 'Clash of Paradigms...' (n 1) 45–46:

¹² *Jurisdiction of the Courts of Danzig (Pecuniary claims of Danzig Railway Officials who have Passed into the Polish Service, Against the Polish Railways Administration)*, PCIJ 1928 Series B, No 15, 17–18.

¹³ *Ibid.*

It was the PCIJ that also made clear the distinction between benefitting the individual by bestowing rights upon it, and enabling it to have recourse to a procedure (judicial or otherwise) in order to enforce these rights. It observed that ‘it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself’.¹⁴

The literature on the position of individuals in international law takes usually – if not always – as its starting point the doctrine of subjects.¹⁵ This can be easily explained. Before discussing the individual in public international law, one must first position the individual within the system. States are the paradigmatic subjects of international law. Any other entity, including individuals, is not self-evidently a subject of that law. The idea that the individual is a subject of international law is certainly not novel. In one sense, it formed a reaction by part of the literature to the hardcore positivist views on international law of the early 20th century. Anzilotti was vehemently opposed to any idea that the individual could be a subject of international law.¹⁶ Kelsen and Lauterpacht both objected to this strict approach, despite coming at it from different angles. Kelsen claimed that individuals are both authorized and obligated by international law, albeit indirectly.¹⁷ Lauterpacht for his part stated that ‘there has been an increasing realization that the direct subjection of individuals to the rule of international law is an essential condition of the strengthening of the ethical basis of international law’.¹⁸

¹⁴ *Peter Pázmány University*, Judgement, PCIJ 1933 Series A/B, No 61 at 231. See further below, sections IV and V.

¹⁵ See Spiropoulos, ‘L’Individu...’ (n 4); A Orakhelashvili, ‘The Position of the Individual in International Law’ (2000-1) 31 *Cal W Intl L* 241-76; E Roucounas, ‘Facteurs Privés et Droit International Public’ (2002) 299 *Recueil des Cours* 23, 23-40; A Bianchi, ‘The Fight for Inclusion: Non-State Actors and International Law’ in U Fastenrath, R Geiger, DE Khan, A Paulus, S von Schorlemer and C Vedder (eds), *From Bilateralism to Community Interest: Essays in honour of Bruno Simma* (OUP, 2011) 40.

¹⁶ D Anzilotti, *Corso di Diritto Internazionale* (Vol 1, Cedam Padova, 1955) 113.

¹⁷ H Kelsen, *Pure Theory of Law* (M Knight tr, The Lawbook Exchange Ltd 2009/University of California Press Brekeley and Los Angeles, 1967) 325.

¹⁸ H Lauterpacht, ‘The Subjects of the Law of Nations’ (1947) 63 *LQR* 438, 526-7.

Despite, or perhaps because of, the wealth of literature on the topic¹⁹ there is no uniform definition of the concept of subjecthood and no clear picture of its relationship with the (cognate) concept of international legal personality. According to the prevailing view, the terms ‘subject’ and ‘international legal personality’ denote the same thing and may be used interchangeably.²⁰ There is also the view that subjects of international law are actors that possess all attributes of legal personality (ie they can bear obligations and enjoy rights, they can pursue these rights internationally in their own name, they can be held responsible for breaches of their obligations, and they can participate in law making).²¹

Regardless of the correct view on the definition of these concepts, a third concept may be used to connect those of subjects and international legal personality: the concept of ‘capacity’. Capacity is a concept that may be employed to give content to the concepts of both subjecthood and international legal personality. The International Court of Justice (ICJ) defined the international legal person in terms of its capacity to possess rights and obligations and to bring corresponding claims at the international level.²² Similarly, both editions of the Max Planck Encyclopedia of International Law define legal personality in terms of the capacities the actor in question possesses.²³ Capacity then seems to inform the content of the notions of both subjecthood and international legal personality. In other words, it is the range of any given entity’s capacity (ie the

¹⁹ See among many others the works cited in n 2 and 15 above, as well as eg PK Menon, ‘The Subjects of Modern International Law’ (1990) 3 Hague Ybk Intl L 30-86; B Cheng, ‘Introduction to Subjects of International Law’ in M Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff, 1991) 23-40; the essays in R Hofmann (ed), *Non-State Actors as New Subjects of International Law* (Duncker & Humblot, 1998); the essays in T Skouteris and A Vermeer-Künzli (eds), *The Protection of the Individual in International Law: Essays in Honour of John Dugard* (CUP, 2007); R MacCorquodale, ‘The Individual and the International Legal System’ in A Bianchi (ed), *Non-State Actors and International Law* (Ashgate, 2009) 121-146 as well as the many references therein.

²⁰ H Mosler ‘Subjects of International Law’ in R Bernhard (dir) *Max Planck Encyclopedia of International Law* (1984) 442, 443.

²¹ Lauterpacht, ‘The Subjects...’ (n 18) 438.

²² *Reparations for Injuries Suffered in the Services of the United Nations*, ICJ Rep 1949, 174, 177-179.

²³ Mosler, ‘Subjects of International Law’ (n 20) 442; C Walter, ‘Subjects of International Law’ in R Wofrum (dir) *Max Planck Encyclopedia of International Law* (OUP, 2012) available at <www.mpepil.com>.

attributes of international legal personality the entity possesses) that will determine whether that entity is a subject or not, and to what extent. Therefore, the question whether an individual is a subject or whether an individual possesses legal personality is unhelpful and misleading. Rather, the crucial point is the extent of the legal capacity the individual may be endowed with under international law, and specifically, for the purposes of this chapter, under certain treaty regimes. This allows one to discuss the legal capacity of individuals under treaty law without having to determine whether the individual is a 'subject' or has 'international legal personality'. One reading of the *Reparation for Injuries* Advisory Opinion, which refers to an entity (the UN) possessing 'a large measure of international legal personality', may be seen as supporting this position. The notion of international legal personality (and thus of subjecthood) is presented in the Opinion as a relative notion, in the sense that the more attributes of international legal personality one has, the more of a 'subject' one is. The extent of one's 'subjecthood', 'legal personality', or – better – 'capacity' will further depend on the particular treaty regime within which an entity operates: eg an individual may not be a subject in general international law, but may be so within the context of the European Convention of Human Rights, or a particular Bilateral Investment Treaty (BIT), or the ICSID Convention.²⁴

This detachment of capacity from subjecthood and legal personality has the advantage of sidestepping the rather dated discussion on whether capacity needs to satisfy some minimum requirements as to content in order to lead to the establishment of personality.²⁵ However, one crucial distinction must be reiterated. In keeping with the idea of (variable) capacity, there is a difference between the capacity to hold rights and the capacity to enforce those rights before judicial, quasi-judicial or administrative bodies, national or international. Rights of individuals not coupled with the capacity of such individuals to seek enforcement of said rights in their own name can be further divided into two categories. On the one hand these (individually unenforceable) rights can be purely aspirational, such as the right to a healthy life in

²⁴ See eg, A Tzanakopoulos 'Denunciation of the ICSID Convention under the General International Law of Treaties' in R Hofmann and CJ Tams (eds) *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos, 2011) 75, 89 with further references.

²⁵ Mosler, 'Subjects of International Law' (n 20).

harmony with the nature as enshrined in Principle 1 of the Rio Declaration,²⁶ or the rather elusive concept of the right to food.²⁷ On the other hand, they may be rights that, in order to be enforced, must be taken up by a State, usually the State of nationality of the individual, through the mechanism of diplomatic protection.²⁸

The issue, therefore, turns, inevitably, to the scope of the capacity individuals are endowed with under treaty regimes. In examining the scope of an individual's capacity within specific treaty regimes, we can determine whether the individual is merely affected by the law as a 'reflex', ie the individual is meant simply as a 'beneficiary' of the regime (the scope of the individual's legal capacity merely extends to being accorded individually unenforceable rights) or, similarly, the regime imposes duties on the individual; as a 'user' (the scope of legal capacity extends to being able to bring claims at the international level); or as a 'participant' (the scope of legal capacity allows the individual to be a treaty party).

To sum up, the point of departure for this chapter is that individuals may have different capacities to act in various circumstances and under various international legal regimes (or canonical areas). The analysis that follows looks at the capacities individuals have been endowed with by means of international treaties. In this way, a differentiation between the individual as a beneficiary or duty bearer, the individual as a user, and the individual as a potential participant will be reflected more accurately.

III. Capacity of Individuals under the General Law of Treaties

The customary law of treaties, as reflected in part in the Vienna Convention on the Law of Treaties of 1969, does not permit individuals to enter into treaties with States.

²⁶ Rio Declaration, (n 7).

²⁷ On the right to food see *Report by the Special Rapporteur on the Right to Food, Olivier de Schutter*, 14 January 2013 A/HRC/22/50/Add.3.

²⁸ On diplomatic protection see Articles on Diplomatic Protection, *Official Records of the General Assembly, Sixty-first Session, Supplement No.10* (A/61/10). See also, *Avena and Other Mexican Nationals (Mexico v United States of America)*, ICJ Rep 2004, 12; *LaGrand Case (Germany v United States of America)*, ICJ Rep 2001, 466.

This is a capacity that is reserved for States, at least under the terms of the VCLT, or to international organizations to the extent that the Vienna Convention on the Law of Treaties between States and International Organizations 1986 reflects customary law and the constitutive instrument of the relevant international organization so allows. Individuals are still able to enter into agreements with States, under general international law or under specialized treaty regimes,²⁹ which are sometimes called ‘transnational contracts’ or are given other designations, but which do not constitute treaties under general international law.³⁰

The general law of treaties does not directly accord any other capacity to individuals. Whatever references are made to individuals, and whatever capacities are accorded to them, are in their guise as representatives of States, and are thus subsumed in the capacity accorded to the State. An obvious example is Article 7 VCLT, which provides for the individuals who have the capacity to represent a State for the purposes of concluding a treaty.³¹

However, the general law of treaties, and the VCLT in particular, are still important with respect to the position of the individual in relation to the law of treaties. Even though they do not accord individuals any capacities directly, they perform an ‘enabling’ function: by not prohibiting the allocation of rights under treaties to entities other than States, they confirm that treaties may be used to accord legal capacity to individuals. In fact this is as close to explicit as it gets in the VCLT: Article 60(5) disappplies the general right of States to terminate or suspend a treaty for material breach in the case of provisions ‘relating to the protection of the human person contained in treaties of humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties’.³²

²⁹ See below section V regarding the provisions of the UN Convention on the Law of the Sea on prospecting in the Area.

³⁰ See below section VI regarding these ‘transnational contracts’.

³¹ See also Articles 1(c) and 8 VCLT.

³² See generally B Simma and CJ Tams ‘Article 60 – Convention of 1969’ in O Corten and P Klein (eds) *The Vienna Conventions on the Law of Treaties – A Commentary* (OUP, 2011) 1351, 1366–1368 (paras 42–47).

While the VCLT denies individuals the capacity of being a ‘third party’,³³ the provision of Article 60(5) seems to elevate them to quasi-third parties,³⁴ in the sense that treaties of a humanitarian character bestow on individuals something akin to ‘acquired rights’, ie rights that cannot be retracted as a response to a serious breach of the treaty by another State. This can be coupled with the protection offered by Article 60(1)-(3), which makes it very difficult for States to terminate or withdraw on account of breach from treaties which are not meant to be operating in ‘bilateral constellations’ – ie primarily treaties which involve human rights ‘pledges’, rights pledged to those within the jurisdiction of the State assuming the relevant obligations.³⁵

States are then free, under the law of treaties, to accord individuals whatever legal capacity they wish to, by means of treaties between them, even if they are less free to retract rights or benefits already bestowed.³⁶ Depending on the capacity that such treaty regimes accord to individuals, the latter may be qualified as mere ‘beneficiaries’, as actual ‘users’, and perhaps even as ‘participants’: not only of the specialized treaty regime, but even of the law of treaties itself, as we shall come to see. These issues are now taken up in turn.

IV. Reflexes: The Individual as ‘Beneficiary’ and ‘Duty Bearer’

1. Beneficiaries

The conclusion of human rights treaties in the last 60 to 70 years did not introduce any technical novelties regarding the position of the individual in international law. It was the sheer number and scope of human rights treaties that made all the difference. On the global level, the International Covenant on Civil and Political Rights³⁷

³³ The term being reserved to states, see Article 1(h) and section 4 VCLT.

³⁴ See also C Chinkin, *Third Parties in International Law* (Clarendon Press, 1993) 13–15, 120 seq.

³⁵ See Simma and Tams, ‘Article 60...’ (n 32) 1367 – 1368 (para 45).

³⁶ But see Chinkin, *Third Parties* (n 34) 121 – 122.

³⁷ International Covenant on Civil and Political Rights (16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

(ICCPR), the International Covenant on Economic Social and Cultural Rights³⁸ (ICESCR), the Convention on the Elimination of Racial Discrimination³⁹ (CERD), the Convention on the Rights of the Child,⁴⁰ the Convention on the Elimination of Discrimination Against Women⁴¹ (CEDAW) are fine examples of an ever increasing number of instruments that accord benefits to the individual. On the regional level, the European Convention on Human Rights and Fundamental Freedoms⁴² (ECHR), the American Convention on Human Rights⁴³ (ACHR), and the African Charter on Human Rights and People's Rights⁴⁴ also create a number of rights that strengthen the protection of the individual.

The legal capacity of the individual differs according to the precise terms of each of the aforementioned instruments. This serves as a reminder of the position taken in this chapter that it is capacity that determines the exact position of the individual. For example, at the danger of stating the obvious, an individual has to be a woman to benefit from CEDAW or a child to benefit from the Convention on the Rights of the Child. Capacity then is accorded by some of these instruments to specific individuals only. Other treaties, like the ICCPR, award certain capacities to *all* individuals within the jurisdiction of the parties. Finally, the scope or extent of the legal capacity accorded by these instruments also differs (on which point see further section V). But in the first instance, what is clear is that individuals are the beneficiaries of the obligations assumed by States through the relevant treaties.

³⁸ International Covenant on Economic Social and Cultural Rights (19 December 1966, entered into force 3 January 1976) 993 UNTS 3.

³⁹ International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

⁴⁰ Convention on the Rights of the Child (20 November 1989, entered into force 2 September 1990).

⁴¹ Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979 entered into force 3 September 1981) 1249 UNTS 13.

⁴² European Convention for the Protection of Human rights and Fundamental Freedoms (adopted 2 November 1950, entered into force 3 September 1953) 87 UNTS 103.

⁴³ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1980) 1144 UNTS 331.

⁴⁴ African Charter on Human rights and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58.

The protection of aliens, which pre-dates human rights instruments, has also been translated into treaties that accord benefits to the specific individuals making 'investments' in States other than their State of nationality, ie 'foreign investors'.⁴⁵ The customary rules of protection of aliens have spurred significant litigation before international tribunals concerning individuals. Both PCIJ and ICJ decisions have dealt with the protection of aliens.⁴⁶ BITs as well as inter-State trade agreements have provided for a more detailed and precise layer of protection of the individual concerning her economic activities in the host States. It must be stressed that there is nothing in most bilateral investment treaties that denies protection to individual persons.⁴⁷ Granted, these treaties are usually concluded with the corporate actor in mind, yet it is clear that individual persons may (and do) also benefit from them as long as they qualify as 'investors'.

In international environmental law there have been increasing efforts so as to offer protection to individuals regarding the degradation of the environment. Besides broad, aspirational provisions,⁴⁸ there have been a limited number of instruments that do indeed bestow benefits or rights on individuals. The most striking example is the Århus Convention,⁴⁹ which puts the individual center stage regarding its procedural rights in decision-making processes on environmental matters. Besides environmental treaties, environmental protection has become increasingly prominent in human rights instruments. The European Social Charter for example includes a provision on the right to a healthy working environment.⁵⁰ This right has been used to tackle broader

⁴⁵ AL Marriott, 'Bilateral Investment Treaty Arbitration in the Early 21st Century' in MA Fernández-Ballesteros, D Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010) 807; R Dolzer, C Schreuer, *Principles of International Investment Law* (OUP, 2012) 1-4.

⁴⁶ There is ample case law on this issue ranging from *Mavrommatis Palestine Concessions*, Judgement, PCIJ 1924 Series A, No 2 to *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, ICJ Rep 2010, 639.

⁴⁷ PM Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in PM Dupuy, F Francioni and EU Petersmann, *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 45.

⁴⁸ See n 26, 27.

⁴⁹ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (25 June 1998, entered into force 30 October 2001) 2161 UNTS 450.

⁵⁰ European Social Charter (3 May 1996, entered into force 1 July 1999) 163 CTS, Articles 2(4), 3.

environmental issues that are connected with the working environment.⁵¹ The applicants in the *Marangopoulos Foundation Complaint*, for example, did not limit themselves to claims constrained by the contours of Articles 2(4) and 3 of the European Social Charter. Instead, they made broader claims regarding the inadequacy of environmental assessments and of monitoring conducted by the government in the whole region,⁵² and regarding the impact of the choice of lignite in the energy sector.⁵³ Nevertheless, it must be admitted that on the actual level of protection environmental treaties could possibly accord individuals more ‘focused’ – as opposed to ‘aspirational’ – rights than they currently do.⁵⁴

International humanitarian law (IHL) is, along with human rights, the domain which has the protection of the individual at the very core of most of its rules. The difference from human rights is that most of humanitarian law provisions are not framed as endowing the individual with rights.⁵⁵ They are framed as obligations upon States to protect individuals, without a corresponding individual right necessarily being conferred to the individuals themselves.⁵⁶ A number of exceptions, however, can be found in the third and fourth Geneva Conventions.⁵⁷ These pertain to procedural rights of protected persons, such as the right to petition or the right to a fair and regular trial.⁵⁸ The same is true for the Additional Protocols to the Conventions.⁵⁹

⁵¹ *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, Complaint No. 30/2005.

⁵² *Ibid*, para 29.

⁵³ *Ibid*, paras 33-36.

⁵⁴ There is significant literature on this topic. For a recent account see A Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) EJIL 613.

⁵⁵ Parlett, *The Individual in the International Legal System* (n 4) 178-183.

⁵⁶ *Ibid*.

⁵⁷ Geneva Convention III Relative to the treatment of Prisoners of War (12 August 1949 entered into force 21 October 1950) 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (12 August 1949 entered into force 21 October 1950) 75 UNTS 287.

⁵⁸ Parlett, *The Individual in the International Legal System* (n 4) 183.

⁵⁹ *Ibid*, 189-190.

Finally, the International Labour Organization (ILO), whose work is rarely mentioned in this connection,⁶⁰ places great emphasis on the individual in most of its conventions. Still, like the conventions on humanitarian law, most ILO instruments impose obligations on States to take appropriate measures for the protection of workers and the abolition of forced and child labour. In some instruments, however, there are clearly defined rights of workers. In the Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively for example, it is stipulated that the workers shall enjoy adequate protection against anti-union discrimination.⁶¹ Still, while most conventions do not confer individual rights in the sense that Article 36(2) of the Vienna Convention on Consular Relations was found to do in *LaGrand*,⁶² they seek in any event to protect the individual in a diverse range of situations relating to work conditions.

Overall, since the end of the Second World War there has been a significant body of conventions that seek to protect the individual. This is done by imposing obligations upon States parties to adopt certain conduct with respect to individuals within their jurisdiction, which may sometimes result in bestowing the individual with an individual right (irrespective of whether this can be pursued in the individual's own name at the international level). Human rights instruments most clearly result in such accordance of individual rights. The presence of the State however, cannot be underestimated. The body of rights as they emerge from the conventions is heavily controlled by States, either through the choice of subject matter or through the choice of scope of application of the relevant instruments, geographical or otherwise.

2. *Duty Bearers*

Besides benefitting from protection that treaties afford them, individuals also bear obligations under international treaty law. The Nuremberg tribunals marked a very

⁶⁰ The ILO has adopted 189 Conventions and 202 Recommendations so far. This body of work is extremely significant.

⁶¹ Convention concerning the Application of the Principles of the right to Organize and to Bargain Collectively (No.98) (1 July 1949, entered into force 18 July 1951) 96 UNTS 257.

⁶² See n 28.

important point in the treatment of the individual in international law.⁶³ The trials established that an individual might be personally responsible under international law for a number of international crimes. Even before Nuremberg, international law envisaged the criminal responsibility of the individual for particular crimes such as piracy.⁶⁴ It was only after Nuremberg however that specific treaty arrangements provided for the individual criminal responsibility.

First of all, the Geneva Conventions⁶⁵ and their Additional Protocols⁶⁶ lay the ground for the responsibility of individuals under international criminal law. Common Article 3 provides for the prohibition of a number of acts against members of armed forces that have laid down their arms and those who are placed *hors de combat* due to wounds, sickness or detention. Moreover, Articles 50 of the first Geneva Convention, 51 of the second, 130 of the third, and 147 of the fourth define the grave breaches against persons protected by each of the Conventions; Articles 49 of the first Convention, 10 of the second, 129 of the third, and 146 of the fourth provide that the High Contracting Parties are under an obligation to enact legislation so as to provide penal sanctions for the persons that commit such grave breaches. Alternatively, the parties shall extradite these persons to another party. Apart from the Geneva

⁶³ On the importance of the Nuremberg Tribunals see K Parlett, 'The Individual and Structural Change in the International Legal System' (2012) 1(3) Cambridge J Intl and Comp L 60, 71.

⁶⁴ It has been questioned in the past whether piracy was indeed an international crime, as Spiropoulos, among others claims, see Spiropoulos, 'L'Individu...' (n 4), 229. An alternative view is that the crime of piracy merely gave states universal jurisdiction to prosecute it under their own laws against piracy, see Lauterpacht, 'The Subjects...' (n 18) 441-2.

⁶⁵ Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949 entered into force 21 October 1950) 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949 entered into force 21 October 1950) 75 UNTS 85; Geneva Convention III Relative to the treatment of Prisoners of War (12 August 1949 entered into force 21 October 1950) 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (12 August 1949 entered into force 21 October 1950) 75 UNTS 287.

⁶⁶ Protocol I Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977 entered into force 7 December 1978) 1125 UNTS 3; Protocol II Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977 entered into force 7 December 1978) 1125 UNTS 606.

Conventions, the Genocide Convention also provides, as its title suggests ('Convention on the Prevention and Punishment of the Crime of Genocide'), that genocide is a crime under international law that the contracting parties are under an obligation to prevent and punish.⁶⁷

These examples show that it is clear and well established that individuals also have the capacity to bear obligations under international criminal law. The interesting point in the case of international criminal law is that the capacity to have rights/bear obligations and the capacity to bring a claim in the enforcement of these rights or to be prosecuted for violation of the obligation at the international level may not be found in the same convention. The crime of genocide or the grave breaches as defined in the Geneva conventions were envisaged as crimes that would be prosecuted under national law. The re-appearance of the individual on the international criminal justice scene, after Nuremberg, took place in quite unorthodox manner. In the early 1990s, the UN Security Council established two ad hoc international criminal tribunals, for the crimes committed in former Yugoslavia (ICTY) and for those committed in Rwanda (ICTR).⁶⁸ The statutes of both tribunals establish individual criminal responsibility.⁶⁹ The ICTY statute stipulates that the tribunal has power to prosecute persons that have committed grave breaches of the Geneva Conventions, the crime of genocide, violations of the laws and customs of war and crimes against humanity.⁷⁰ The ICTR statute on the other hand posits that the tribunal may prosecute the crime of genocide, crimes against humanity and breaches of Common Article 3 of the Geneva Conventions.⁷¹

It is clear that the Statutes of the Tribunals make direct reference to the Geneva Conventions, establishing an international judicial process for the prosecution of the

⁶⁷ Convention on the Prevention and Punishment of the Crime of Genocide (1 January 1948 entered into force 12 January 1951) 78 UNTS 277, Article 2.

⁶⁸ UNSC Resolution 827, S/RES/827 of 25 1993, Resolution 955, S/RES/955 of 8 November 1994.

⁶⁹ ICTY Statute available at

<http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>, Article 7 ICTY, ICTR

<<http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf>> Statute, Article 6.

⁷⁰ ICTY Statute, Articles 2, 3, 4, 5.

⁷¹ ICTR Statute, Articles 2,3,4.

crimes stipulated therein. The Statutes also make reference to the crime of genocide using the definition and phraseology of, but without making direct reference to, the Genocide Convention. A similar pattern is followed in the Statute of the International Criminal Court (ICC). The ICC is the first permanent jurisdiction to administer international criminal justice, and was founded by the Treaty of Rome in 1998.⁷² Articles 6–8 of the Statute posit that the ICC has jurisdiction to prosecute the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Again, Article 8, in defining war crimes, makes explicit reference to the grave breaches as defined in the Geneva Conventions. While human rights instruments may provide both for the capacity to hold rights and for the capacity to seek enforcement of those rights in the same instrument or in protocols to that instrument, international criminal law has developed in a different way. International crimes have been codified in or created through treaties different from those that provide for the prosecution of these crimes at the international level. The statutes of the international criminal tribunals have drawn directly from such former treaties in order to substantiate the tribunals' jurisdiction *rationae materiae*.⁷³

V. The Individual as 'User'

It is mainly human rights treaties that have championed the capacity of the individual to bring international claims in its own name against a State before an international court or treaty body. As stated, the capacity to hold rights does not necessarily go hand-in-hand with the capacity to enforce these rights at the international level. This is confirmed by the fact that not all treaties which endow the individual with one type of capacity (to hold rights) also endow it with the other (to bring an international claim). However, most human rights instruments do contain a process for seeking international enforcement of the rights therein guaranteed. This process may sometimes involve recourse before an international court or tribunal, or it may also take the form a complaints process before human rights treaty bodies that do not qualify as judicial organs.

⁷² Rome Statute of the International Criminal Law (17 July 1998 entered into force 1 July 2002) 2187 UNTS 3.

⁷³ The statutes also draw from custom but this falls outside the scope of this chapter.

As far as judicial procedures are concerned, the ECHR, most prominently, offers the full range of capacities to individuals to pursue their human rights claims against the member States of the Council of Europe.⁷⁴ The American Convention on human rights also accords individuals a right to recourse before the Inter-American Court of Human Rights,⁷⁵ as does the Protocol to the African Charter that establishes an African Court of Human and People's Rights.⁷⁶ It must be noted, however that individuals were not accorded access to these tribunals directly and unequivocally from the outset. Rather, this happened through a long incremental process that involved the adoption of additional protocols,⁷⁷ or the exercise of judicial activism,⁷⁸ or both. Even so, the States parties to these conventions retain some powers as to the proceedings.⁷⁹

Turning to human rights treaty bodies, the Human Rights Committee of the ICCPR can hear individual claims and provide an opinion.⁸⁰ Similar proceedings exist for the Committee for the Elimination of All Forms of Racial Discrimination.⁸¹ The optional protocol to the ICESCR also breaks new ground in providing for an individual complaint procedure relating to the economic, social, and cultural rights protected by that Covenant.⁸²

⁷⁴ Protocol No. 11 to the Convention for the Protection of Human rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (11 May 1994, entered into force 1 November 1998) ETS No.5.

⁷⁵ Rules of the Court available at <<http://www.corteidh.or.cr/reglamento.cfm>> Article 25.

⁷⁶ Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (9 June 1998, entered into force 25 January 2004) OAU Doc. OAU/LEG/EXP/AFCHR/PROT (III) Article 5(3).

⁷⁷ See AA Cançado Trindade, *The Access of Individuals to International Justice* (OUP, 2011) 37-47.

⁷⁸ Ibid.

⁷⁹ Especially in the context of the American and African Conventions, see Articles 25 and 5 of the Rules of the Court and the Protocol to the Convention respectively.

⁸⁰ 1966 Optional Protocol to the 1966 International Covenant on Civil and Political Rights (16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁸¹ CERD, Article 14.

⁸² Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, A/RES/63/117, on 10 December 2008. The Protocol entered into force on 5 May 2013. See also Provisional Rules of Procedure under the Optional Protocol to the International Covenant on

BITs also normally allow individuals who qualify as investors to bring claims against host States in various arbitral fora. However, since it is corporations that usually take advantage both of the protection and the corresponding right to bring claims, the majority of awards concern disputes between States and corporate entities rather than individuals.

International environmental law does not offer individuals any similar avenues for recourse before international bodies. However, the phenomenon of bringing what can be termed ‘essentially environmental claims’ before human rights courts is not unknown. In these claims, individuals seek to rely on human rights provisions in order to protect what is in essence an interest or a right that is in the instance more closely connected to environmental factors than to human rights pure and simple.⁸³

The discrepancy between the capacity to hold rights under international environmental law and the capacity to exercise these rights on the international level should not be exaggerated. It is the nature and content of the rights enjoyed by individuals under international environmental law that makes a difference. Broad, aspirational environmental protection would be hard to translate into an internationally enforceable right, especially given the fact that, unlike human rights or investment protection, environmental values and rules are rather more recent.⁸⁴ Moreover, most environmental problems are more easily resolved through concerted action among States rather than by way of individual enforcement.⁸⁵ In contrast to

Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-13 November 2012), E/C.12/49/3.

⁸³ See for example, *Lopez Ostra v Spain*, Decision of 9 December 1994, Series A No 303, 53, §24 ; *Tatar v Romania*, Requete No. 67021/01, 06/07/2009. On the jurisprudence of the Court on environmental matters see L Loucaides, ‘Environmental Protection Through the Jurisprudence of the European Convention on Human Rights’ (2005) 75 *BYBIL* 2005 249. Investment law has also been used by applicants in order to further environmental claims, either directly or incidentally, see J Viñuales, ‘Foreign Investment and the Environment in International Law: An Ambiguous Relationship’ (2009) 80 (1) *BYBIL* 244.

⁸⁴ See n 6.

⁸⁵ Environmental law has mainly evolved through multilateral environmental agreements (MEAs) that do not include an option for enforcement through individual recourse to courts. MEAs typically impose

environmental values, and closer to human rights, concrete protection of investors in a bilateral setting also more easily lends itself to judicial dispute settlement.

On a more general note, there is an effort, mainly by scholars but also in practice, to see that environmental values or investment protection are dressed up in a human rights gown. Indeed, there are increasing efforts to address the protection and preservation of the environment not only as a collective goal, but also as the ‘fait générateur’ of individual environmental rights.⁸⁶ Similarly, there has been an effort to read rights of investors under international law as human rights.⁸⁷ Human rights come into investor-State disputes on the other end of the spectrum as well. That is, States have started bringing ‘human rights defences’ against investor claims.⁸⁸ This could lead to broader protection of either the investor or the State in terms of both substance and procedure. The investor’s rights would not be limited to property-related rights but could extend to a right to private life, for example.⁸⁹ Similarly, the State would be in a position to defend its conduct on the basis that it was complying with its obligations to protect human rights. In much the same vein, some human rights could be read broadly enough so as to incorporate aspects of environmental protection.⁹⁰ In terms of procedure, protection of the environment could be ‘incorporated’ in a human rights agenda that can find its way before courts such as the ECtHR. The same is true for investors’ rights in cases where bringing a claim before an arbitral tribunal would not be possible or desirable for the claimant. This tendency to read environmental

obligations on states, coupled with reporting and implementation criteria, which are often reviewed by the bodies of the relevant agreements. While some instruments contain provisions for the participation of the public in environmental decision making (see eg Espoo), these are the exception rather than the rule.

⁸⁶ See n 83.

⁸⁷ See M Karavias in this Handbook; EU Petersmann, ‘Human Rights and International Economic Law’ (2012) 4(2) Trade Law and Development 283, 297-300.

⁸⁸ B Simma, ‘Foreign Investment Arbitration: a Place for Human Rights?’ (2011) 60 ICLQ 573; N Klein, ‘Human Rights and International Investment Law: Investment Protection as Human Right?’ (2012) 4(1) Goettingen J Intl L 200.

⁸⁹ Of course, this is of no great practical importance in the case the investor is an individual. The individual in this case would benefit from the human rights protection anyway but not in his capacity as an investor. On the human rights benefits of corporations see M Karavias, in this Handbook.

⁹⁰ See n 83.

protection or investor protection in human rights could indeed have a broadening effect on the content of human rights, investor rights or on the scope of environmental protection. So it could be said that the 'model' of international human rights protection is being 'rolled out' in other areas of international law, gradually transforming the individual from a mere beneficiary to an actual user of international treaty law.

In any event, the discrepancy between holding a right and having the capacity to bring an international claim regarding that right is still generally visible in international law. Most procedures that involve individuals are controlled either by States or by inter-State bodies, and the outcome of complaints procedures rarely has direct effect. States remain the principal players in the enforcement game. Nevertheless, the progress achieved over the past forty years in terms of access of individuals to international justice is remarkable. Given the incremental nature of that progress, there is reason to believe that such access will continue to expand. It seems that the capacity to enforce rights will grow both in terms of substance (more rights will be internationally 'actionable') and in terms of process (more fora will be available to hear individual complaints).

Treaties, then, may create not mere benefits for individuals, but substantive rights which can be claimed on the international level. In being given the capacity to claim in its own name, the individual is upgraded from a mere 'beneficiary' to an actual 'user' of the treaty (regime), employing the treaty to achieve protection of rights at the international level. But such capacity to claim internationally is not necessary for the individual to be seen as a 'user' of treaties: the same can be said even if the treaty does not allow for claims to be brought by the individual on the international level. First, States do not restrict the reach of international law to the international level. They create rights and processes that individuals can directly enjoy on the domestic level. Second, individuals themselves become more assertive of their rights, again on the domestic level. This apparent evolution, however slow, uneven, or haphazard it may be, brings the individual closer to the epicenter of international law.

Indeed treaties may allow individuals to 'use' them domestically: this is the case when, for example, a treaty establishes an 'individual' right even if it does not allow

for an international claim to be brought by the protected individual. Such rights, the ICJ confirmed, are accorded by Article 36(2) of the Vienna Convention on Consular Relations,⁹¹ as well as probably by other treaties not usually regarded as establishing rights of individuals. The right can then be invoked before the domestic court, and the individual can ‘use’ it to control governmental action. Taking this thought further, the many ‘inward looking’ obligations that States assume by means of concluding treaties may be seen as giving individuals a basis on which to challenge governmental conduct, even regulatory conduct.⁹² Inter-State treaties then are used by the individual to challenge State conduct by requesting judicial review under domestic public law.⁹³ This is of course subject, to a large extent, to the peculiar regulation of the domestic legal system regarding the ‘domestication’ of international law,⁹⁴ but the position in international law is clear: a treaty, even if not a ‘rights’ treaty, may actually grant individual rights which require implementation at the domestic level. The individual thus should be able, at least under international law, to ‘use’ it domestically.

There are examples of treaty regimes where States have clearly provided for individuals to be able to ‘use’ the treaty on the domestic level. The Åarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is a good example.⁹⁵ The Convention defines the ‘public’ as meaning any natural or legal person.⁹⁶ Under Article 4, it envisages that the ‘public’ can request and obtain information on environmental matters. Article 6 posits that the ‘public’ may participate in the decision making process through the submission of comments. Finally, Article 9 provides for access to justice: if any person considers that they did not receive the information they requested or that they were not allowed to participate under the provisions of the

⁹¹ *LaGrand and Avena*, (n 28).

⁹² See Tzanakopoulos, ‘Domestic Courts in International Law...’ (n 9) 138-42 with further references.

⁹³ Cf Roberts, ‘Clash of Paradigms...’ (n 1) 45–46 for a similar thought.

⁹⁴ See Tzanakopoulos, ‘Domestic Courts in International Law...’ (n 9) 147-150 for further analysis.

⁹⁵ For an analysis of the convention see M Fitzmaurice ‘Note on the Participation of Civil Society in Environmental Matters: The 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters’ (2010) 4 Human Rights and Intl L Discourse 47.

⁹⁶ Article 2(4).

treaty, they have a right of review of the relevant decisions either before a court or another independent body established by law.

The Convention on Civil Liability for Oil Pollution (CLC) and the related Fund Convention⁹⁷ are two other examples where the individual may actually use international law on the domestic level. The CLC provides that the owner of a ship that causes oil pollution damage shall provide compensation.⁹⁸ While there is no direct reference to who can be a claimant, the preamble and Articles 1(2) and 3(4) make it clear that the claimant can be an individual. The individual is mentioned also in the Fund Convention, which provides for an additional layer of compensation in case the shipowner cannot fulfill the obligation to compensate under the CLC. Article 4(1) posits that the Fund shall provide compensation to '[...] any person suffering pollution damage if such person has been unable to obtain full and adequate compensation'. These conventions envisage a direct claim by the individual against the shipowner or the Fund.⁹⁹ Further, they also provide for access to justice through an obligation on States parties to establish the jurisdiction of their domestic courts to hear cases arising within the ambit of the conventions.¹⁰⁰

These instruments go beyond the granting of rights to individuals. They engage them in the domestic decision-making processes as fully as possible or they provide them with access to compensation if they are victims of environmental damage. To some extent they do away with the intermediary steps that involve the presence of the State and they allow international law to be directly used by the individual. Of course it is still States that are under the obligation to provide for the framework in which these

⁹⁷ International Convention on Civil Liability for Oil Pollution Damage (adopted 27 November 1992, entered into force 30 May 1996) 973 UNTS 3; Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971, (adopted 27 November 1992, entered into force 30 May 1996) 1110 UNTS 57, IMO, LEG/CONF.16 of 2 Dec. 1992

⁹⁸ CLC Article 3.

⁹⁹ Fund Convention, Article 4, see also IOPC Fund, Claims Manual, Edn. 2008, 17, available at <http://www.iopcfunds.org/uploads/tx_iopcpublishations/2008_claims_manual_e.pdf>.

¹⁰⁰ CLC Article 9(2); Fund Convention, Article 7(2).

rights will be exercised.¹⁰¹ Still, these provisions confer a capacity on the individual to use international law against the State, and even against other individuals.

There are also subtle ways for individuals to employ treaty law as a defence. Recently, a Greek court of First Instance was faced with a situation where number of immigrants escaped from a detention center. The conditions in the detention were truly appalling, and the immigrants were actually in fear of their health and lives. All of them were later apprehended. They were charged with the crime of ‘escape’ under Greek criminal law. They pleaded in defence that the conditions of their detention were so appalling as to violate a number of rights guaranteed under the ECHR. The Court, in a striking decision, in effect accepted that ECHR rights may be entered as criminal law defences.¹⁰²

Use of treaty law, and indeed use of the law of treaties, may actually occur in an even more subtle manner: the law of treaties in and of itself does not, as we saw, accord any specific capacities to the individual—at most it leaves States free to do so through the treaties they conclude.¹⁰³ However, individuals may ‘use’ the law of treaties itself before international and domestic courts in order to determine the existence, scope, and content of treaty obligations allegedly binding on States and applicable to the facts of the case before the court. In this connection, individuals may ‘use’ the parts of the law of treaties regarding, eg, intertemporal law, treaty conclusion, the rules of interpretation, and even reservations. A clear example of the latter instance could be the *Belilos* case before the ECtHR:¹⁰⁴ where the individual has access to a court (individual or domestic) and an international treaty obligation is at play on the facts, the individual will be able to ‘use’ the law of treaties to argue about the character of a

¹⁰¹ This is obvious not only from Article 9(2) of the CLC which provides that contracting parties shall ensure that their courts have jurisdiction. Contracting parties shall also, for example, control the procedure of issuing an insurance certificate for the shipowner (Article 7). The Fund Convention provides for instance that contracting parties shall recognize the Fund as a legal person (Article 2(2)) and also that the contributions to the Fund are made through the contracting parties (Article 10(1)).

¹⁰² See A Tzanakopoulos, ‘Greek Court Acquits Immigrants who Escaped appalling Detaining Conditions’ 12 January 2013, EJIL: Talk! Report available at <<http://www.ejiltalk.org/immigrants-who-escaped-appalling-detention-conditions-acquitted/>>.

¹⁰³ See section III above.

¹⁰⁴ *Belilos v Switzerland* (10328/83) [1988] ECHR 4 (29 April 1988).

particular ‘statement’ of the State, to establish that it is a reservation, and to discuss its effects on the obligation binding on the State under the relevant treaty.

VI. Beyond Users? Individuals as ‘Participants’

The preceding section mapped out the ways in which the individual appears in the international legal order in relation to international treaties. The individual has the capacity to hold rights and to bear obligations and also has the capacity to bring claims, as well as to be prosecuted before international courts, tribunals, and treaty bodies. These capacities are not concurrent. They rather occur in a ‘mix-and-match’ fashion according to the specific treaty regimes. This happens because all of these capacities are filtered through the activities of the States. States and not individuals conclude treaties and decide upon the rights conferred on individuals. States and not individuals set up international courts that have jurisdiction to hear cases brought by individuals. What is more, States do not provide for general rights, obligations, or procedures for individuals. They set up treaty regimes with a specific scope of application *rationae personae* and *rationae materiae*. Similarly, the courts that may entertain claims by individuals are limited by their statutes or their constitutive treaties. To sum up, there is no international law of treaties applicable to individuals in general, as there is no international court with general jurisdiction that can entertain cases brought by or against individuals.

This lack of cohesion regarding the place of individuals in international law leaves them either included in or excluded from the ambit of rights, obligations, and processes, depending on the particular treaty regime. States determine such inclusion or exclusion.¹⁰⁵ There are, however, signs that this pattern is not settled. In a number of situations, as we saw, individuals are upgraded from mere beneficiaries to users of international treaty law, and indeed so even on the domestic level. Could it be that we are now moving beyond the individual as a user, to a stage where the individual will be seen as a fully-fledged participant in international treaty law?

¹⁰⁵ This terminology is borrowed from Bianchi’s paper on individuals (‘The Fight for Inclusion...’ n 15). Inclusion means inclusion of an entity in the system as a subject/actor, see p 46.

There have been voices in the literature that suggest that the individual should not be seen any longer as an actor that simply bears a number of capacities depending on treaty law. Roucounas has suggested that under the UN Convention on the Law of the Sea¹⁰⁶ the individual, among other actors, has become a user of that body of law.¹⁰⁷ The existence of a – largely undefined – category of ‘users of the sea’ was affirmed by the ITLOS Seabed Disputes Chamber. In its Advisory Opinion, the SBDC stated that among the parties that can bring a claim before it are the ‘users of the sea’.¹⁰⁸ Perhaps Roucounas can be interpreted to mean that, as a ‘user of the sea’, the individual should become a participant in the law of the sea, at least in its treaty aspect.

Higgins has used the term ‘participants in the international legal system’; in this she included individuals.¹⁰⁹ Higgins distanced herself from the mainstream literature claiming that

the notion of “subjects” and “objects” has no credible reality, and, in my view, no functional purpose. We have created an intellectual prison of our own choosing and then declared it to be an unalterable constraint.¹¹⁰

DP O’Connell wrote, almost sixty years ago, that ‘[t]he individual as the end of community is a *member* of the community, and a member has status: he is not an

¹⁰⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1834 UNTS 397.

¹⁰⁷ Roucounas, ‘Facteurs Privés..’ (n 15). See also E Roucounas, ‘Effectiveness of International Law for the Users of the Sea’ (2004-2005) VIII/IX *Cursors Eumediterraneos Bancaja de Derecho Internacional* 869. Roucounas does not define what a user in the law of the sea is. He states however that the users can be private or public as well as real or fictitious and generally he refers as a user to anything, from the ship and its crew to the state, see *ibid* at 872.

¹⁰⁸ ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, (ITLOS Advisory Opinion) (available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>, para179.

¹⁰⁹ R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 50.

¹¹⁰ *Ibid*, 49.

object’.¹¹¹ What O’Connell points out is that the individual is in fact a member of the international community. He contends that ‘[i]f personality is no more than a sum of capacities, then he (the individual) is a person in international law, though his capacities may be different from and less in number and substance than the capacities of a State’.¹¹²

These authors make some far-reaching statements, and yet they do not offer any definite answers. How is the individual transformed from a mere beneficiary of treaty law to a user, and beyond that to a ‘participant’ or a ‘member of the community’?

As far as ‘users’ are concerned, section V demonstrated that States control to what extent they will allow ‘use’ of treaty regimes by individuals, whether at the international or the domestic level. But individuals also play a role in pushing for the evolution of their own status as ‘users’ by seeking to employ inward looking treaty norms to challenge and control governmental action. Much the same applies perhaps for the notion of ‘participants’: the Aarhus Convention seems to have allowed individuals to become participants in decision-making processes regarding environmental matters.

Another area of law where the individual can be seen as a participant is international investment law. First, the individual must be a party to a transnational contract with a host State. To the extent that the contract is governed – wholly or partly – by international law,¹¹³ the individual can be seen as participating in the international legal order.¹¹⁴ This is certainly not the place to analyse the thorny question of so-called ‘internationalized contracts’, ie contracts between States and individuals subject to international law; however, a few remarks are in order. There are two main strands in the literature regarding the existence of internationalized contracts.

¹¹¹ DP O’Connell, *International Law* (2nd edn, Stevens & Sons, 1970) 108.

¹¹² Ibid.

¹¹³ On this point see the chapter by Karavias in this Handbook.

¹¹⁴ Charles Leben considers the individual as a limited subject of international law in the field of international investment law, if there is a clause in the internationalized contract that grants access to an international tribunal, see C Leben, ‘La Théorie du Contrat D’État e L’Évolution du Droit International des Investissements’ (2003) 302 RCADI 197, 309.

According to one view, internationalized contracts do not exist. They are merely a theoretical device invented so as to ensure protection to the investor without due regard to the interests of the host State.¹¹⁵ It is clear that if this view is followed, the individual cannot be seen as a participant. According to the prevailing view however, the contract can indeed be internationalized if there is a choice of law provision indicating international law as the governing law of the contract.¹¹⁶ In this case, both parties – the individual and the State – assume obligations under international law. The breach of international obligations, even by an individual, entails necessarily the individual's *international* responsibility. A contract, an (internationalized) agreement thus elevates the individual from a user to a fully-fledged participant in the international legal system.

This capacity of the individual (to participate) is however marginally exercised. It is corporate entities and not individuals that nowadays conclude most internationalized (mostly investment/concession) contracts.¹¹⁷ If the fact that there are rather few instances where international law is the only law governing the contract is also taken into account, it seems that the role of individuals as participants is indeed minimal.

While the individual as participant is a rather exceptional phenomenon, it signifies that the next step, the next upgrade, is possible using the traditional devices of treaty law: States may grant even more capacities to individuals, and individuals may seek to use treaties to claim or consolidate such capacities.

¹¹⁵ M Sornarajah, *The International Law on Foreign Investment* (3d edn, CUP, 2010) 289-299.

¹¹⁶ On this point see, FA Mann, 'The Law Governing State Contracts' 21 (1944) BYBIL 21; P Weil, 'Droit International et Contrat D'Etat' in *Mélanges Offerts à Paul Reuter: le Droit International, Unité et Diversité* (Pedone, 1981) 549; Leben, 'La Théorie du Contrat D'État...' (n 114) 252-263. It is indeed rare that parties to such contracts choose international law as the exclusive governing law. More often than not they opt for the law of the host state in combination with general applicable principles of international law, see Sornarajah, *Foreign Investment* (n 115) 278. The default provision of the ICSID Convention (Article 42) also opts for a mixed body of law governing the contract: the law of the host state and such rules of international law as may be applicable, see Convention on the Settlement of Investment Disputes between States and National of Other States (18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

¹¹⁷ Sornarajah, *Foreign Investment* (n 115) 60.

VII. Conclusion: An Agenda for Research

This chapter has explored the position of the individual in the law of treaties. The first claim of the chapter is that there is no need to enter into a discussion of the concept of personality of the individual in the international legal order. It is more accurate to see the individual as endowed with different capacities: a capacity to hold rights and to enforce these rights, a capacity to bear obligations, and so forth. After a brief look into the role of the individual in the VCLT, the chapter examined the individual as a beneficiary and a bearer of obligations, as a user, and finally as a participant. The practice in the law of treaties leads to the conclusion that States often endow individuals with rights (and with the capacity to enforce those rights) while at the same time the individual can be a bearer of international obligations (usually under international criminal or international humanitarian law). These aspects of the role of the individual in the law of treaties are rather unproblematic, despite the slow development of the law in most of these areas.

More interesting, and therefore more problematic, are two other roles of the individuals. The individual has used international law either directly, when endowed by States with the power to bring claims in international fora, or indirectly, when invoking international treaty law before domestic courts. While there are some moves that suggest that more and more international fora will be open to individuals, the second way the individuals use international law is more subtle and, possibly, less controlled by States.

The individual as a participant, on the other hand, appears more in the scholarly debate than in the practice of international law. This may change in the future, but for the time being is more of a fascinating theoretical possibility than concrete reality.

The matter of individuals as ‘users’ of and ‘participants’ in treaty law certainly requires more attention and analysis; a number of questions remain. Is there a real tension between States that wish to keep individuals under their control and individuals that seek to escape that control? Could it be that States have conceded what is absolutely necessary (eg direct access to regional human rights courts) but

they safeguard their primacy under any other aspect of international law? Or could it be that we are witnessing the first signs of wider individual participation, dictated by, among other things, the realities of a highly interconnected international legal order? All these questions merit closer attention and analysis. They constitute an agenda for future research regarding the individual in international treaty law.