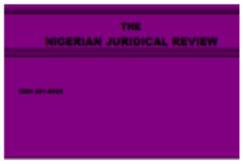

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INCLUSION OF INDIVIDUALS AS SUBJECTS OF INTERNATIONAL LAW

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Abstract

The classical notion of international law as a body of laws or rules that regulate the relations of States inter se is no longer sustainable. This paper is an attempt to appraise the inclusion of individuals as subjects of international law. It uses the doctrinal methodology. It makes the claim that the activities of individuals attract international judicial notice and produce certain consequences. Individuals now have rights and obligations under international law. As incumbents of rights under international law, individuals have some procedural capacity to protect these rights. Again as rights are corollary of duties, individuals could be held accountable before international courts when they are in default as regards their international obligations. Thus, officials of the State can no longer find shelter in the rubric of State capacity or official capacity to occasion gross violations of human rights and fundamental freedoms.

Keywords: Human rights and fundamental freedom, individuals, international crimes, objects, obligations, subjects of international law

1. Introduction

Traditionally, international law was seen as a body of rules that regulates the relations of States *inter se*. As international law was only concerned with the activities of States, it therefore means that only States had rights and obligations under that legal order.[1] Thus, international law assumed a state-centric position as other entities such as individuals were regarded as mere objects under that system of law. This special status accorded to individuals under international law meant that individuals had some obligations under international law and were subjected to the regulation of international law but had no rights directly flowing from that system of law.[2]

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[1] Heath Pickering, 'Why do States mostly Obey International Law' (4 February 2014), <https://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/> accessed 13 May 2023.

[2] C Giorgetti, 'Rethinking the Individual in International Law' [2018] 22(4) *Lewis and Clerk Review* 1095.

This notion of international law which is state–centered has been jettisoned for being too restrictive in so far as individuals were almost absent in the international legal order. A more holistic view of international laws is that which sees international law as a system of law or rules that regulates the activities of States and other entities such as international organisations, non-state actors and individuals in as far as their operations and activities are of concern to the international community. [3]

Again, the advent of international human rights has set aside this statist view of international law. This branch of law not only offers individuals some substantive rights but also offers them some procedural capacities to prosecute these rights. Now, the International Criminal Court (ICC) imposes certain obligations on individuals with the implication that individuals could be held accountable on the international arena upon default with regard to these obligations. The necessary implication of the above fact is that individuals are now subjects of international law and not mere objects.[4]

This paper is a modest attempt at appraising the inclusion of individuals as subjects of international law. It makes the claim that the era when states were seen as the only subjects of international law is over. This is more so as the activities of individuals attract international judicial notice. The paper finds that, the inclusion of individuals as subjects of the international law has the implication that individuals now enjoy certain rights and fundamental freedoms under international law. As rights are correlative of obligations, it follows that individuals have come to assume certain obligations under international law. An obvious consequence of this is the procedural capacity to prosecute those rights before international courts and the possibility of being held accountable before international courts and tribunals. This is indicative of individuals being recognized as subjects of international law.

2. Conceptual Analysis on the Meaning of Subjects of International Law

The concept of legal personality is recognized in most legal systems.[5] It refers to any entity whether human or not, individual or group of persons, real or imaginary. What is relevant is a determination whether such an entity is capable of bearing rights in accordance with the rules of a certain legal system.[6] An entity with this capability is regarded as having a legal personality in law. The element of obligation is implicit in what constitutes a legal person under the

[3] JG Starke, *Introduction to International Law* (10th edn, New Delhi: Aditya Books 1994) 3.

[4] George Manner, 'The Object Theory of the Individual in International Law' (July 1952) 46(3) *The American Journal of International Law* 428-449

[5] Mortimer NS Sellers, 'International Legal Personality' (2005), <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2144&context=all_fac> accessed 10 May 2023.

[6] JM Elegidio, *Jurisprudence* (Spectrum Law Publishing 2000) 227.

law, for right is a correlative of obligation and one cannot assume a right in a given legal system without a corresponding obligation. In other words, a legal person is an entity capable of bearing rights and obligations in a given legal system; it is an entity recognized by law as competent to be a party to a legal relationship.[7]

In international law, legal personality signifies an entity that has standing as a member of the comity of nations, possessing certain rights and obligations as a subject of international law.[8] Subjects of international law otherwise known as international persons are entities endowed with international legal personality, which is the capacity to bear rights and obligations under international low.[9] International persons are 'any entity capable of possessing rights and duties and endowed with the capacity to take certain types of action on the international plane'.[10] An entity which possesses international personality is regarded as an international person or a subject, as distinct from a mere object, of international law.[11]

There are four possible definitions for 'subject of international law': i) it possesses legal and protected interests under international law; ii) is an incumbent of rights and obligations under international law; iii) is capable of bringing an action under international law; and iv) is an entity with rights and obligations under international law and is capable of concluding agreements with states and international organizations.[12]

The only subject of international law which possesses all these capacities is the State. However, this does not mean that States are the only subjects of international law. All entities may not have the same capacity. Capacity in law implies personality but always it is capacity to do certain acts. This means that personality is another way of saying that an entity is endowed by international law with legal capacity.[13] Entity A may have capacity to do acts 1 and 2, but not act 3; while entity B may perform acts 2 and 3 but not act 1, and entity C may perform all the above mentioned acts.[14] In *The Reparation for Injuries Suffered*

[7] GW Paton and DP Derham (eds), *A Textbook of Jurisprudence* (Clarendon Press 1972) 391.

[8] RL Bledsoe and BA Boczek, *The International Law Dictionary* (Oxford: Cl10 Press Ltd 1987) 39.

[9] B Cheng, 'Subjects of International Law' in M Bedjaoui (ed), *International Law: Achievements and Prospects*, (MartinusNijhoff Publishers 1991) 23.

[10] T Hillier, *Source Book on Public International Law* (Cavendish Publishing Ltd 1998) 175.

[11] Hillier (n 10).

[12] Starke (n 3) 58.

[13] DJ Harris, *Cases and Materials on Public International Law* (6th edn, Sweet and Maxell 2004) 98.

[14] Harris (n 13).

in the Service of the United Nations (Advisory Opinion) (*the Reparation case*),[15] the International Court of Justice (ICJ) observed that in any legal system, the subjects of law are not necessarily the same in terms of their character or the scope of their rights, and their nature depends on the demands of the community. The demands of international existence have shaped the evolution of international law throughout its history, and instances of non-state institutions acting on the international level have already been seen as a result of the gradual expansion of state collective action. In June 1945, an international organization whose goals and values are outlined in the United Nations Charter was established as a result of this development.[16] However, international personality is essential to achieving these goals. That case gave recognition to the fact that international law has space for other international legal persons otherwise known as subjects of international law that may have rights and obligations at variance with those of States.[17] Hence, the ICJ in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons by a State in Armed Conflict*,[18] recognized the United Nations, an international organisation, as a subject of international law.[19] Again, in *Prosecutor* v *Simic*,[20] the court held that it is widely accepted that the International Committee of the Red Cross (ICRC), though a private (non-governmental) organisation under Swiss law has an international legal personality.

The significance of an entity being acknowledged as a subject of international law is that without international personality, it has no existence in international law. Thus, its actions will not receive recognition in international law, it lacks the capacity to initiate proceedings against any other subject of international law, and it cannot be held accountable under international law.[21] Besides these legal considerations, the acceptance of an entity as a subject of international law attracts political recognition from other subjects of international law.[22]

Traditional or classical international law regarded states as the only subjects of international law. This conception flows from the classic view of international law which sees international law as 'the body of customary law and conventional values which are considered binding by civilized States in their

[15] ICJ Rep. 1949, 174.
[16] United Nations, 'Maintain International Peace and Security', <https://www.un.org/en/our-work/maintain-international-peace-and-security> accessed 9 May 2023.
[17] Giorgetti (n 2).
[18] ICJ Rep. 1996, 226.
[19] R Portman, *Legal Personality in International Law* (Cambridge University Press 2010) 109.
[20] IT 95 – 9. Pt, Decision of 27 July 1999.
[21] A Kaczorowiska, *Public International Law* (4th edn, Routledge, 2010) 182.
[22] Kaczorowska (n 21).

intercourse with each other'.[23] For Oppenheim therefore, the only entity capable of being a subject of international law is the State, for according to him, the law of nations or international law is law between States only and exclusively.[24]

Attempts have been made to grasp at the meaning of a State. For Appodorai, 'When, a body of people is clearly organised as a unit for purposes of government, then it is said to be politically organised and may be called a body politic or state – a society politically organized.'[25] A State is therefore a political system of an association of human persons or a body of people who are politically organised.[26] This understanding of a State as a society politically organised underlines the main difference between a State and a society. Thus, the term society refers to all human associations irrespective of whether they are organised or not. A State must be politically organised. In other words, organisation for law is an essential ingredient for a State to exist.[27] Further, a State is part of the society. The society is thus wider than the State as the former is indicative of various social relationships which cannot be expressed via the State.[28] As far as modern conditions require, all the essential attributes or elements of a State are well settled. [29] Schwarzenbeger and Brown maintain that any entity that wishes to be considered a State must satisfy a minimum of three conditions namely: i) the entity must possess a stable government which is not dependent on any outsider country;[30] ii) the government must rule supreme within a territory which has more or less settled frontier[31] (*supremapotestas*); and iii) the government must exercise control over a certain number of people.[32] These conditions could be summarized as follows: A State must have the following qualifications, namely: a government that is independent, a territory and an identifiable population.

On the other hand, James Crawford identifies five exclusive and general legal attributes of States. Thus, i) in principle, States have full powers to perform, acts, conclude treaties on the international plane. This is another way of expressing the view that states are sovereign.[33] ii) In principle, States are

[23] This is Oppenheim's definition of International Law <www.legalbitesin/definition-international-law/> accesses 4 February 2022.
[24] Giorgetti (n 2) 1091.
[25] A Appdoraci, *The Substance of Politics* (11th edn, Oxford University Press 1974) 3.
[26] BA Garner (ed), *Blacks' Law Dictionary* (7th edn, West Group Publishing Co 1999) 1415.
[27] Appodorai (n 25) 13.
[28] Appodorai (n 25) 13.
[29] Starke (n 3) 95.
[30] Schwarzenbeger and brown, in Hillier (n 10) 183.
[31] Schwarzenbeger and brown, in Hillier (n 10) 183.
[32] Schwarzenbeger and brown in Hillier (n 10) 183.
[33] J Crawford, 'The Creation of States in International Law 1979' 32 in Hillier (n 10) 183.

exclusively competent as regards their internal affairs.[34] iii) In principle, States are not subject to compulsory international processes, jurisdiction or settlement; they must give their consent to such processes.[35] iv) In international law, states are equal; [36] and iv) finally, any derogation from these principles must be clearly established.[37] It is submitted that some of the elements of statehood as elaborated by Crawford are implicit in the ones enumerated by Schwarzenbeger and Brown. Thus, these two authors are in agreement that for an entity to be a State it must have sovereign powers to regulate persons and things within its domain and it must be independent.

However, the Montevideo Convention on the Rights and Duties of States 1933[38] outlines the traditional criteria for statehood. Accordingly, a State as an international person must have a permanent population, a defined territory, a government, and the capacity to enter into relations with other States. Although, the convention was only ratified by some Latin American States and the United States of America, and despite the fact that this definition does not bind other States except parties to the convention, these attributes of statehood have gained entrance into other documents which have included definitions of the State[39] and have now translated into customary international law.[40] A brief analysis of these attributes is undertaken *seriatim.*

The requirement of population indicates that States are aggregate of individuals living within a defined territory. Permanent population refers to a stable community. Hence, a State cannot exist without the element of population.[41] The qualification of permanent population does not suggest the absence of migration of people beyond territorial boundaries[42] or that the State must have a fixed number of populations.[43] What it does suggest is that there must be some population linked to the state on a more or less permanent basis and such population can be regarded in general context as those living in that State.[44] There is no limit as to the size of the population,[45] and the requirement of population is not affected because the inhabitants of a State are nomadic that is,

[34] Art 2(7) of the UN Charter 1945.
[35] Crawford (n 29).
[36] Crawford (n 29); Art. 2(1) of the UN Charter 1945.
[37] Art 2(1) of the UN Charter 1945; Crawford (n 29).
[38] Art 1.
[39] B Broms, 'States' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (MartinusNijhoff Publishers 1991) 44.
[40] M Dixon and R. McCorquodale, *Cases and Materials on International Law* (3rd edn, Blackstone Press Ltd 2000) 143.
[41] Kaczorowiska (n 17) 186.
[42] M Dixon, *International Law* (7th edn, Oxford University Press 2013) 119.
[43] Dixon (n 38).
[44] Dixon (n 38).
[45] Kaczorowska (n 17) 186.

moving in and out of the country.[46] There is also no requirement that the population must be homogenous or nationals of the State. It suffices that people live with some measure of permanence in the territory.[47]

Territory may be defined as 'a geographical area included within a particular government's jurisdiction, the portion of the earth's surface that is in a State's exclusive possession and control'.[48] In other words, territory is that portion of the earth surface that is subject to the sovereign authority of a State.[49] The territory of the State comprises the earth (land territory), portions of the sea (territorial waters and territorial seas) and air space which are subject to the authority of the State.[50] As regards territorial boundaries, there is no requirement in international law that the borders of a State must be absolutely settled. Rather, it is essential that the State is identified with a portion of the earth's surface[51] where it exercises sovereign authority to the exclusion of others. Again, the size of territory of a State is a non-issue, as there is no requirement in law as to the minimum size of a State's territory.[52] For instance, the territory of Monaco is less than 1.95km^2 and the size of the State of Vatican (Vatican City) is less than 0.5km.^{2} [53] However, the criterion of a defined territory is effective because it prevents groups of individuals who live without any defined territory from calming statehood just because they have set up a government.[54]

Government is '… the apparatus or machinery of the organisation vested with the authority to govern. It is that organ vested with political power to exercise effective and exclusive influence over a person or people within a given territory'.[55] An effective government therefore is the ability to effectively and independently exercise authority within its territory.[56] It is the capacity and ability to maintain a legal order throughout the territory of the State.[57] The existence of a government has both internal and external implications.

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[46] Kaczorowska (n 17) 187.
[47] Kaczorowska (n 17).
[48] Garner (n 22) 1484.
[49] A Cassesse, *International Law* (2nd edn, Oxford University Press 2005) 82.
[50] Cassesse (n 45) 81.
[51] Hillier (n 7) 184.
[52] Kaczorowiska (n 17) 187.
[53] M Craven, 'Statehood, Self-Determination and Recognition' in MD Evans, *International Law* (4th edn, Oxford University Press 2014) 219.
[54] Broms (n 35) 44.
[55] I Mackenzie, *Politics: Key Concepts in* Philosophy (Continuum 2009) 9.
[56] N Hobach, R Lefeber and Ribbelink, *Handboek Internationaal Recht* (Den Haag: Asser Press 2007) in AZ Zaded, *International Law and the Criteria for Statehood*: *The Sustainability of the Declarative and Constitutive Theories as the Method for Assessing the Creation and Continued Existence of State* (Tilburg: Published LLM Thesis, Faculty of Law, Tilburg University) 23.
[57] D Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 62-63.

Internally, the existence of a government indicates the capacity to be effective within a defined territory and exercise exclusive control over a permanent population.[58] Externally, it implies the ability to act independently on the international plane without being legally dependent on other States within the international legal system.[59] Therefore, for a State to operate on the international level, it must have a practical identity which is government.[60] The importance of effective authority is highlighted in *Island of Palmas*.[61] This case arose out of a dispute between the Netherlands and the United States of America. As a result of the Spanish–American War of 1898, Spain ceded the Philippines to the US by the treaty of Paris in 1898. In 1906, an official of the US visited the island which the US believed to be part of the territory ceded to her. He found to his greatest chagrin, a Dutch flag flying there. The two countries referred the sovereignty over the island to arbitration. The arbitrator Max Huber noted that Territorial sovereignty... includes the sole right to publicize a State's operations. This right has a corresponding obligation: the duty to uphold the rights of other States, particularly their rights to integrity and inviolability in peace and conflict, as well as the rights that each State may assert on behalf of its citizens abroad. The State cannot perform this obligation without exercising its territorial sovereignty in a way appropriate to the situation. Thus, based on continuous and peaceful display of effectivities and State authority, title to the sovereignty of the island was given to the Netherlands.[62]

The reference to capacity to enter into relations with other states implies independence. That is independence in law from the authority of a foreign State and thus, the capacity under its municipal law to enter into international relations with other States.[63] Any absence of such legal independence means that the entity in question is not an independent State. According to Shaw, 'The concern here is not with political pressure by one country over another, but rather the lack of competence to enter into legal relations. The difference is the presence or absence of legal capacity not the degree of influence that may affect decisions'.[64] Corroborating Shaw's position, Dixon opines that, there is bound to be some degree of dependence or influence in the relations among States and so the criteria of capacity to enter into relations with other States implies legal independence and not factual autonomy.[65] Hence, this fourth element is satisfied if a state is not subjugated under the sovereign authority of another State.[66]

[58] Mackenzie (n 51) 9.
[59] Mackenzie (n 51).
[60] Dixon (n 38) 120.
[61] (1928) 2 RIAA 829.
[62] Ibid.
[63] Harris (n 10) 105.
[64] MN Shaw, *International Law* (5th edn, Cambridge University Press 2005) 181.
[65] Dixon (n 38) 120.
[66] Dixon (n 38) 120.

Although it is generally accepted that a State may exert some political pressure on another State and by so doing influence the policies and conduct of that State, it may reach a point when factual dependence by one State upon another is so grave that it is really no more than a puppet State. This situation negates the element or criterion of independence.[67] Independence is first condition of statehood, thus, if a new State is no more than a satellite of the parent State, it cannot satisfy the primary condition of independence and accordingly is not entitled to recognition as a State.[68] Historically, this strict stance has eased to admit individuals as subjects of international law.

3. Historical Evolution of the Recognition of Individuals as Subjects of International Law

The point has been made that the old dogmatic view which sees States as the only subjects of international law is no longer maintainable.[69] A new trend gradually started taking place when States allowed individuals within their domain to play a limited role on the international arena. Thus, in 1928 the Permanent Court of International Justice (the PCIJ) recognised the possibility of individuals acquiring some rights and obligations through international agreements. In *Danzig Railway Officials Case*,[70] there was an agreement between Poland and Danzig as regards the conditions of employment of Danzig railway officials working on the polish rail system. The argument of Poland could be summarised as follows: Firstly, the international agreement created rights and duties between contracting parties only. Secondly, they contended that since the treaty was not incorporated into Polish law, it cannot create direct rights and obligations for individuals concerned. Lastly they claimed that any failure on the part of Poland to fulfill her international obligations arising from the agreement, she will be responsible only to the Free City of Danzig.

On the other hand, the Free City of Danzig argued that, though the agreement is international in form, it was intended by the contracting parties to constitute part of a series of provisions which created a legal relationship between the railway administration and her employees. This indicated a contract of service. They also contended that, it is the substance of the agreement and not the form that determines its legal character.[71]

After listening to the submission of both parties, the court held that the intention of the contracting parties reveals that the relations between the Polish railway

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[67] Harris (n 10) 108.

[68] Lauterpatch, 'Recognition in International Law' (1948) 26–29 in Harris (n 10).

[69] Gukiina Patrick Musoke, 'Subjects of International Law and the Theories Pursuant Thereto (October 2023) https://www.researchgate.net/publication/374976938_subjects_of_international_law_and_the_theories_pursuant_thereto> accessed 12 May 2023.

[70] (1928) PCIJ Rep series B No.15.

[71] (1928) PCIJ Rep series B No.15.

administration and the Danzig officials should be governed by the agreement, the provisions of which form part of the contract of service. Accordingly, the court came to the conclusion that, there is an exception to the general rule that individuals are not subjects of international law, and this arises only where the contracting parties show a clear and unambiguous intention that they have adopted an international agreement which created rights and duties for individuals.[72]

A significant progress was made in the recognition of individuals as capable of being international persons after the Second World War (WWII). Thus, there was a concerted effort to hold accountable all individuals who were involved in crimes against international law such as war crimes, crimes against the peace and crimes against humanity. This desire to prosecute and punish individuals who were regarded as major war criminals of the European axis culminated in the establishment of two tribunals, namely; International Military Tribunal at Nuremberg and International Military Tribunal for the Far East (the IMT and IMTFE respectively).[73]

The IMT was established on the basis of the London Agreement on 8 August 1945 to prosecute the Nazi war criminals.[74] The Charter of the tribunal is annexed to the London Agreement which forms an integral part of the agreement.[75] The Charter of the IMT expressly made individuals subjects of international law. In Article 7, the Charter clearly states that crimes against the peace, war crimes and crimes against humanity[76] are crimes falling within the jurisdiction of the tribunal and which attracts individual responsibility. This article therefore is unequivocal as regards the international personality of the individual since the individual could be answerable under international law. Further, in finding the accused guilty of crimes under the Charter, the tribunal declared that '[c]rimes 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 to be enforced'.[77]

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[72] (1928) PCIJ Rep series B No.15.

[73] United Kingdom of Great Britain and Northern Ireland, United States of America, France, Union of Soviet Socialist Republics, 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London, on 8 August 1945 UNTS 251, <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf> accessed 13 May 2023.

[74] United Nations Treaty Series <www.un.org/en/genocide/prevention/document/atrocity-crimes/Doc.2_charter of IMT 1945.pdf> accessed 4 December 2022.

[75] Art 2 of the London Agreement.

[76] Art 6 of the Charter of Nuremberg IMT.

[77] Judgment of the Nuremberg Military Tribunal 1946 (1947) 41 AJIL 172.

The IMTFE was not established by an international treaty or agreement.[78] After the United States of America dropped the second atomic bomb at Nagasaki which resulted in the surrender of Japan, the Supreme Commander of the Allied Powers, General MacArthur was granted authority to issue all orders as regards the implementation of the terms of surrender.[79] Based on this authority, he established the IMTFE and trials began in May 1946.[80] Relying on the precedent set by the IMT, the IMFTE indicted 28 Japanese military and civilian leaders for war crimes, crimes against the peace, and crimes against humanity.[81]

The provisions of the Nuremberg Charter may now be regarded as part of international law, as the principles of the Charter and the decisions of the tribunal were affirmed by the United Nations General Assembly in 1946.[82] Further, the General Assembly of the United Nations in a resolution,[83] asked the International Law Commission to codify or rather '… formulate the principles of international law recognised in the Charter of Nuremberg Tribunal and in the Judgment of the tribunal'.[84] The task of the International Law Commission was realized in 1950, when the Commission submitted a final formulation of the principles of international law embedded in the Nuremberg Charter and in the judgments of the tribunal, to the General Assembly.[85] The principles are as follows:[86]

(i) Any person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment.
(ii) The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
(iii) The fact that a person who committed an act which constitutes a crime under international law acted as head of State or responsible government official does not relieve him from responsibility under international law.

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[78] Office of the Historian, 'The Nuremberg Trial and the Tokyo War Crimes Trials (1945−1948)', <www.history.state.gov./milestones/1945-1952/nuremberg> accessed 2 October 2021.
[79] Office of the Historian (n 70).
[80] Facing History and Ourselves, 'The Tokyo Trials' <www.facinghistory/holoccust-and-human-behaviour/chapter-10/tokyo-trials> accessed 24 June 2022); R Cryer, 'International Criminal Law' in MD Evans (ed) *International Law* (4th edn, Oxford University Press 2014) 769.
[81] Facing History and Ourselves (n 72) 84.
[82] Shaw (n 59) 235; UNGA/RES/95 (I) (1946).
[83] UNGA/RES/177 (II) (1947).
[84] International Law Commission, 'Formulation of the Nuremberg Principles', <legal.un.org/ilc/guide/7_1.shtml> accessed 16 May 2022.
[85] International Law Commission (n 76).
[86] International Law Commission (n 76).

(iv) The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him.
(v) A person charged with a crime under international law has right to a fair trial on the facts and law.
(vi) Crimes punishable under international law are crimes against peace, war crimes and crimes against humanity.
(vii) Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in principle VI is a crime under international law.[87]

These principles as distilled from the Charter of the IMT and Judgment of the Tribunal, clearly demonstrate that there is recognition in international law that individuals have acquired certain rights and obligations. Individuals responsible for violation of these obligations are answerable before international tribunals or courts. This recognition of individuals as subjects of international law has been entrenched in the Rome Statute of the International Criminal Court 1998.

4. The International Criminal Court and the Recognition of Individuals as Subjects of International Law

The resolve to create an international criminal court that will have jurisdiction over the worst crimes that have shocked the conscience of the international community has a long history. Soon after the First World War (WWI) in 1919, the victors and Germany entered into a peace treaty signed at Versailles, which provided for the punishment of the major parties responsible for war crimes.[88] However, the international community reneged on this desire in creating a permanent criminal court on the grounds that it would be time consuming to establish one by treaty. As a panacea for such inability, two *ad hoc* international criminal tribunals (the IMT and the IMTFE discussed above) were created.[89] International criminal proceedings came to a halt after the creation of these tribunals until after the end of the Cold War.[90] During the Cold War, there was lack of interest in creating an international tribunal or calling to accountability people implicated in serious breaches of international law.[91] In the almost four

[87] International Law Commission (n 76).
[88] Art 227 of Treaty of Versailles which provided for the prosecution of the German Emperor, William II of HolenZollen for a supreme offense against international morality and sanctity of treaties.
[89] 'International Criminal Court', <lawijrank.org/pages/1377/international-criminal-courts.html> accessed 8 October 2022.
[90] Cryer (n 72) 770.
[91] J Rehman, *International Law* (2nd edn, Edinburgh: Pearson 2010) 722.

decades that followed, trials of such breaches were conducted within domestic courts.[92] Instances of such trial include: the infamous Eichmann trial in Israel in 1961, Klaus Barbie in France in 1983, Paul Touvier trial in France in 1994, Finta in Canada in 1994, and Andrei Sawonuik in 1999 in the United Kingdom.[93] An attempt was also made to create an International War Crimes Tribunal in the Former East Pakistan to hold individuals responsible for genocide and crimes against humanity accountable.[94] These attempts at establishing international tribunals during this period were frustrated primarily due to Cold War politics and selfishness of the permanent members of the Security Council.[95]

However, there was a change of attitude in the early 1990s which saw the establishment of two *ad hoc* tribunals. Antonio Cassese has offered an illuminating insight into this change of attitude. For him, the end of the Cold War saw the dissipation of the animosity that had engulfed international relations for a long time.[96] Thus, this relative optimism saw a reduction of mistrust and mutual suspicion between the West and the East.[97] Further, there was an uncommon agreement among the five permanent members of the Security Council of the United Nations which enabled this organ to fulfill its functions in a more effective way.[98]

The end or breakdown of the bipolar war and heightened prospects for peace during this era saw a concerted international response as regards the humanitarian crisis in the Balkans. This paved way for the major powers to pursue a common purpose.[99] The result was the establishment of the International Criminal Tribunal for Yugoslavia[100] (ICTY) and the International Criminal Tribunal for Rwanda[101] (ICTR). The ICTY was established by the Security Council pursuant to its power under Chapter VII of the Charter of the United Nations. The ICTY was empowered to prosecute individuals responsible for gross violations of international humanitarian law committed in the territory of the former Yugoslavia from 1 January 1991 to a date to be determined by the Security Council upon restoration of peace.[102] On the other hand, the ICTR was

[92] Rehman (n 83).
[93] Rehman (n 83).
[94] Rehman (n 83).
[95] Rehman (n 83).
[96] Cassese (n 45) 454.
[97] Cassese (n 45) 454.
[98] Cassese (n 45) 455.
[99] L Barnet, 'The International Criminal Court: History and Role' <Lop.Parl.ca/sites/publicwebsite/default/en-ca/reaserachpublications/20021E> accessed 8 June 2022.
[100] Security Council pursuant to Resolution 827 (1993).
[101] Security Council pursuant to Resolution 955 (1994).
[102] Arts 2-5 of the Statue of ICTY.

established by the Security Council acting under its Chapter VII powers. The ICTR had jurisdiction to prosecute persons implicated for the crimes of genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and nationals of Rwanda implicated for genocide and other such violations committed in the territory of neighboring States from 1 January 1994 to December 1994.[103]

The most important development in the establishment of a permanent international court after the creation IMT and IMTFE is perhaps the creation of the International Criminal Court (the ICC).[104] The treaty creating the court known as the Rome Statute was adopted in 1998 in a diplomatic conference also called the United Nations Conference on Plenipotentiaries on the establishment of an ICC held from 15 June to 17 July 1998 in Rome.[105] In that conference 120 States adopted the Rome Statue.[106] This came into force on 1 July 2002.[107]

Article 1 of the Statute establishes the court as a permanent institution which shall exercise jurisdiction over individuals who are implicated for the worst crimes of international concern as stated in the Statute. The jurisdiction of the ICC is somehow limited. The court has jurisdiction over the most serious crimes which are of concern to the global community. These crimes are genocide, crimes against humanity, war crimes and the crime of aggression.[108] A combined reading of Articles 12 and 13 of the Rome Statute 1998 is to the effect that the court can only assume jurisdiction if a state becomes a party to the statute thereby accepting the jurisdiction of the court. Secondly, the alleged crime must have been committed in the territory of a State party or the accused person is a national of a State party to the Statute. Lastly, the court can also exercise jurisdiction over nationals of a State who is not yet a party to the Statute in so far as the crime was committed in the territory of a State that had ratified the Statute.[109] Further, the Security Council is empowered pursuant to Chapter VII of the Charter of the United Nations to make a referral with regard to non-State parties.[110]

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[103] SC/RES/955 (1994).

[104] Cryer (n 72) 772.

[105] Human Rights Watch, 'International Criminal Court', <www.hrw.org/topic/international-justuce/international-criminal-court> accessed 11 September 2021.

[106] Human Rights Watch (n 97).

[107] International Criminal Court, 'Rome Statue of the International Criminal Court' <www.icc-cpi.int/resource-library/document/rs-eng.pdf> accessed 12 July 2022.

[108] The jurisdiction of the court over the crime of aggression was activated on 17 July 2018. *See* Barnet (n 91); International Criminal Court, 'Assembly of State Parties', <asp.icc-cpi.int/en_menus/asp/crimeofaggression/Pages/default.aspx> accessed 8 April 2022.

[109] Cassese (n 45) 457.

[110] SN Anya, 'Optimizing the Role of the International Criminal Court in Global Security' [2011-2012] 10 *The Nigeria Juridical Review* 202.

The effort to establish the international personality of individuals culminated in the establishment of the ICC. The statute creating the court recognises individual criminal responsibility in article 25.[111] Article 25(1) provides that the court shall exercise jurisdiction only over natural persons, while Article 25(2) replicates the rule or norm of individual criminal responsibility.[112] However, the crux of Article 25 is seen in paragraph (3)(a-d), thus: commissioning, ordering, instigating, aiding and abetting are regarded as modes of participating in the crimes prohibited under the Rome Statute 1998. While paragraph (3)(e and f) provides for incitement to genocide and attempt.[113] Thus, any individual who, with the requisite intention commits, orders, solicits or induces, aids or abets, attempts any of the crimes listed in the Rome Statute 1998 is criminally responsible severally and jointly where such crimes are committed in conjunction with others. Article 25 therefore lays emphasis on the criminal responsibility of individuals or natural persons as different from the responsibility of States or other juridical persons.[114]

In *Prosecutor* v *Lubanga Dyilo,*[115] the accused became the first person to be convicted by the ICC. Thus, on 14 March 2012, Mr Lubanga was convicted of committing as a co-perpetrator, war crimes comprising enlisting and conscripting children under the age of 15 years into the Patriotic Force of the Liberation of Congo. He also used them to participate actively in hostilities in the event of an armed conflict not of an international character. This is punishable under Article 8(2)(e)(vii) of the Rome Statute. Again in *Prosecutor* v *Germain Katanga*,[116] the accused was found guilty of one count of crime against humanity and four counts of war crimes committed on 24 February 2003, during attack in the village of Bogoro, in the Democratic Republic of Congo (DRC). He was sentenced to a total of 12 years in prison on 23 May 2014.

The existence of a permanent international criminal court which exercises jurisdiction over individuals accused of gross atrocities against international law is testament to the fact that individuals have come to acquire some degree of international personality. In other words, individuals are seen as subjects of

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[111] G Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', <www.legal-tool.org/doc/f50d22/pdf/> accessed 9 December 2022.

[112] Werle (n 103).

[113] Werle (n 103).

[114] AC Damgaard, 'Individual Criminal Responsibility for Core International Crimes, Selected Pertinent Issues', (Berlin Springer 2008) 73 in AS Stockman, 'Individual Criminal Responsibility in International Criminal Law: the Quest for Diminished Responsibility as a New Defense Mechanism (LLM Thesis, Ghent University 2016-2017) <lib.urgent.be/fultext/rug01/002/349/623/rugo01-002349623-2017-000LAC.pdf> accessed 2 October 2022.

[115] Trial Chamber II, Case No ICC-01/04-01/06.

[116] Trial Chamber II, Case No ICC-01/04/07.

international law. [117] This goes to show that, the creation of the ICC is a major progress in punishing individuals accused of gross violations of international law as regards human rights.[118] One obvious implication of this is that individuals have come to be recognised as having a large measure of international personality, which illustrates a change in the perception of international law, as international law is no longer seen as a body of laws that regulates only the relations of States. [119]

5. Impact of the Recognition of Individuals as Subjects of International Law

After WWII, the two tribunals set up by the allied forces had a tremendous impact on the international community with regard to human rights. There was a renewed consciousness for the promotion and protection of human rights and fundamental freedoms. The primary factor was the belief held by all the victorious powers that the Nazi aggressiveness and crimes were the result of a perverse philosophy founded on complete disdain for human dignity. The declaration of some fundamental criteria of respect for human rights at all levels was one way to stop a recurrence of these atrocities.[120] It is therefore safe to conclude that these developments especially after WWII and the judgments of the Nuremberg and Tokyo tribunals have led to the conclusion of many international instruments conferring certain obligations on the individuals at the international level.[121]

It was after WWII that the United Nations was formed. The constituent instrument of the organisation called the Charter made abundant references to human rights and fundamental freedoms.[122] The preamble to the Charter for instance, makes a strong and indeed robust commitment in human rights and fundamental freedoms, in the dignity and worth of the human persons, in the equal rights of all, nations inclusive. The Charter in Article 55 consecrates the universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, language, sex or religion.[123] Thus, one of the purposes of the United Nations, as contemplated by the founding fathers, was the promotion and protection of individual rights.

However, the first major manifesto after the Charter of the United Nations 1945 as regards the international legal promotion and protection of human rights was

[117] Dixon (n 38) 129.
[118] Dixon (n 38) 129.
[119] Dixon (n 38) 129.
[120] Cassese, 'Individuals' in Bedjaoui (n 45) 115.
[121] Robert H Jackson Centre, 'The Influence of the Nuremberg Trial on International Criminal Law', <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> accessed 12 May 2024.
[122] Arts 1, 13, 55, 56, 62, 68 of the Charter.
[123] Art 1(3) of the Charter.

the Universal Declaration of Human Rights[124] (the UDHR) 1948. It is significant that the adoption and proclamation of rights outlined in the UDHR 1948 resulted in the globalisation of human rights. As human rights became a global affair, its promotion and protection became a yardstick for measuring and censuring the behaviour of States in international fora.[125] Thus, the observance of human rights has become the condition precedent for full international legitimacy and participation in international relations.[126]

The UDHR 1948 was consummated by obligations consecrated in the form of treaties, namely: the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 Covenant on Economic, Social and Cultural Rights (ICESCR).[127] The objective of these international instruments was to give a clear legal force and more precision to the UDHR, and to actualise mechanism or procedure for monitoring the implementation of human rights therein.[128] The UDHR and these two covenants constitute the international bill of rights.

The successes recorded by the international bill of rights were followed up at the regional level by three major regional human rights instruments, namely: the European Convention on Human Rights 1950 (the European Convention), the American Convention on Human Rights 1969 (the American Convention) and the African Charter on Human and Peoples' Rights 1981 (the African Charter).[129] One common element in all these legal instruments is the promotion and protection of the rights of individuals at the regional level. In other words, these instruments have detailed provisions on substantive individual rights and fundamental freedoms. The European Convention for example, has three sections. Section 1 presents a description and definition of individual and fundamental rights enshrined in the convention.[130] The rights provided in the convention have been elaborated by a number of additional protocols.[131] The American Convention and the African Charter are similar to the European Convention, though there are notable differences. These instruments did not

[124] Dixon and McCorquodale (n 36) 190.
[125] Cassese (n 45) 375.
[126] Cassese (n 45) 375.
[127] United Nations, 'The Foundation of International Human Rights Law', <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> accessed 12 May 2024.
[128] N Rodley, 'International Human Rights' in MD Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 788.
[129] The European Convention on Human Rights came into force in 1953, the American Convention on Human Rights came into force in 1978, the African Charter on Human and Peoples' Rights came into force in 1986.
[130] Rehman (n 83) 185.
[131] Rehman (n 83) 185.

only provide for individual rights and fundamental freedoms, they also conferred on individuals some degree of procedural capacity.[132]

In this regard, the European Convention in section II provides for the establishment of a court known as the European Court of Human Rights (the European Court).[133] The European Court is competent to receive applications from any person or group of individuals claiming to be victims of violations by one of the contracting parties as regards the rights and fundamental freedoms guaranteed in the European Convention or additional protocol thereto.[134] In *Klopcovs* v *Latvia*'[135] the applicant was born in Riga. Sometime in 2005 he was detained in the Riga central prison pending trial. From June till around August, the prison administrators in Riga controlled and stopped the applicant's correspondence addressed to private persons and institutions. The applicant complained to the prisons administrators as regards the conduct of prison administrators in Riga that is, controlling and stopping his correspondence. The ministry of justice found the actions of the Riga central prison administration and the answers given by the prisons administration as lawful. The applicant brought an action against the ministry of justice before the administrative courts. Later the prisons administration joined the proceedings.[136]

The administrative district court found the actions of the Riga central prison administration unlawful but rejected the applicant's claim for pecuniary and non-pecuniary damages. An appeal to the Administrative Regional Court saw the decision of the court of first instance quashed and remitted to the same court. The court again retained its first decisions. The applicant appealed against the judgment as regards the claim of damages but the court did not accept his appeal as it was done out of time. However, the appeals of the opposing parties were accepted. The Administrative Regional Court held that the actions of the Riga central prison administration were unlawful in so far as they failed to inform the applicant about the reason for controlling and stopping his letters. However, the court dismissed the remaining part of the applicant's claim. On further appeal, the Supreme Court on 26 October 2012 upheld the judgment of the Administrative Regional Court. The cassation complaints of the prison's administration and applicant who disagreed with the conclusions of the appellate court were dismissed.[137]

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[132] Burns H Weston, Robin A Lukes, Kelly M Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20(4) *Vanderbilt Journal of International Law* 586-637.

[133] Arts 19-50 of the European Convention 1950.

[134] Arts 19-50 of the European Convention 1950; Art 34.

[135] (2020) ECHR 147 <www.bailli.org/recent-decisons-eu.html> accessed 7 August 2022.

[136] Ibid

[137] Ibid.

Dissatisfied with the final decision of the Senate of the Supreme Court, the applicant approach the European Court complaining that the length of time of the proceedings was inconsistent with the 'reasonable time' requirement as contained in Article 6(1) of the European Convention 1950. After listening to the arguments of both sides and the objections raised by the respondent government of Latvia, the European Court held that i) the applicant's complaint with regard to length of proceeding is admissible; ii) the Government of Latvia violated Article 6(1) of the European Convention 1950; and iii) the respondent State is to pay the applicant within three months, the sum of one thousand Euros plus tax chargeable in respect of non-pecuniary damage.[138]

Although the European Convention 1950 allows for individual applications to the European Court, such applications must be in tandem with the admissibility criteria.[139] Hence, individual applications may be declared inadmissible if local remedies remain unexhausted, the application is anonymous, the application is inconsistent with the provisions of the European Convention 1950, is manifestly ill-founded, an abuse of process and so forth.[140]

The significance of the European Court with regard to individual applications is that it provides European citizens a forum that goes beyond municipal or national court authority for determination of cases.[141] In circumstances where their human rights and fundamental freedoms as guaranteed under the European Convention 1950 are violated, individuals subject to Article 35 of the European Convention can bring individual application to the European Court.[142] At times, the competence granted by the European Convention to individuals to transcend national law, causes revision of such law in order to be consistent with rights protected under the European Convention 1950.[143] Thus, the signatory nations of the European Convention 1950 granted the European Court the legal and binding authority to determine cases that affect their nationals and other persons subject to their jurisdiction.[144]

In *X and Y* v *Bulgaria*,[145] the first applicant and VD lived together as a couple from 2009 onwards. In 2010 they had a child together, who is the second applicant. In 2012, they had another child. The first applicant brought the application on behalf of both applicants. Both applicants live in Pleven, a city in Bulgaria. When the first applicant and VD separated in 2012, she left the flat

[138] Ibid.
[139] Rehman (n 83) 221.
[140] Art 35 of European Convention 1950; Dixon (n 38) 368.
[141] BH Weinstein, 'Recent Decisions from the European Court of Human Rights', <www.asil.org/insights/volume/5/issue/6/recent-decisions-european-court-human-rights accessed 7 November 2022.
[142] Weinstein (n 127).
[143] Weinstein (n 127).
[144] Weinstein (n 127).
[145] (2020) ECHR 109.

where she lived with VD and the children and went to live with her parents in their apartment, taking the younger child with her. The first applicant contested that she was subjected to psychological, emotional and financial abuse by VD while they lived together. After their separation, VD made it difficult for her to live with the second applicant as she had limited contact with the second applicant. VD also made no effort to bring the child to the apartment where she lived as agreed, and made her to wait endlessly and in vain for hours in the city for him to bring the child.[146]

VD contended that he never objected to the two applicants spending time together but was only worried about the wellbeing of his elder child. According to him, he repeatedly invited the first applicant to return to live with him, without success. Meanwhile the first applicant filed custody proceedings against VD which was successful, but VD was to have extensive contact with the second applicant. On appeal by both parties in May 2014, the Pleven District Court upheld the lower court's judgment as regards custody. However, the contact rights of VD were limited. On further appeal, the Supreme Court of cassation dismissed an appeal by VD on two points of law and the judgment of the Pleven District Court became final.[147]

In spite of the final decisions of the courts, VD repeatedly prevented the first application from enjoying her custodial rights. All attempts by the bailiff to make VD handover the second applicant to the first applicant were unsuccessful. On a charge for criminal non-compliance, the prosecution service terminated the proceedings for lack of an offence and notified the first application on 12 April 2018. Previous attempts by VD in proceedings for a charge of custody were unsuccessful.[148]

Sequel to action of the prosecution service, the first applicant filed an application to the European Court complaining that they have been unable to live together and enjoy the contact rights as determined by the courts. This is a breach of Article 8 of the European Convention which guarantees right to private and family life, home and correspondence.[149] After listening to the objections and arguments of the parties, the court dismissed the government preliminary objection on non-exhaustion of local remedies. The court held that the government was in breach of Article 8 of the European Convention with regard to both applicants. Award of damages was also made in favour of the applicants. The claim for just satisfaction of the applicants was dismissed.

[146] (2020) ECHR 109.
[147] (2020) ECHR 109.
[148] (2020) ECHR 109.
[149] Art 8(2) of the European Convention 1950, which prohibits government inference with the exercise of the right stated in Art 8(1), unless in accordance with the conditions stipulated under subsection 2 of Art 8.

On its part, the American Convention 1969 did not only provide for substantive rights and fundamental freedoms for individual, it also provides for mechanisms for the protection of those rights. Thus, the American Convention 1969 established an Inter-American Court of Human Rights (the inter-American Court).[150] However, individuals from the States that have accepted the jurisdiction of the court have no direct access to the inter-American Court. The Inter-American Commission of Human Rights must first consider the case; thereafter, such case may be referred to the Inter-American Court either by the Commission or the State concerned.[151] In *Gelman v Uruguay*,[152] Maria Gracia Iruretagoyena de Gelman was detained in Buenos Aires, Argentina by Uruguay and Argentinian military commandos in 1976. At the time of her detention, she was pregnant. She was then transferred to a detention facility in Montevideo Uruguay, when she was delivered of a baby. Subsequently, Gelman was forcefully disappeared and her daughter was taken from her and given to a Uruguayan family under 'Operation Condor'. This is a system of arbitrary detention, torture, execution and forceful disappearance carried out by the authorities of Uruguay. In December 1986, the Uruguayan government made an amnesty law, which eliminated the possibility of investigating, trying and sanctioning military and police officers who committed human rights violation prior to May 1985.[153] The Inter-American Court found that the Uruguayan Government violated the American Convention and other relevant legal instruments as regards right to life, juridical personality, to family, personal liability, to a name and so forth. The court also awarded financial compensation to the victims and asked the government to make some reparations in the form of public acknowledgment of international responsibility of the offence and an undertaken of non-repetition.[154]

Similarly, the African human rights system offers a better procedural capacity to the individual when compared to the American system. In this regard, the African Court of Human and People's Rights (the African Court) was established in 1998.[155] The jurisdiction of the African Court is stated in Article 3,[156] which is the interpretation and application of the African Charter 1981, the protocol establishing the African Court and any other relevant human rights instruments ratified by the State Parties to the African Charter 1981. Among the entities who have access to the African Court are individuals subject to the

[150] Chapter VIII of the American Convention 1969.
[151] Rodley (n 118) 815.
[152] *Merits and Reparations*, Judgment Int-Am. Ct. H.R series C No 221 (24 February 2011) <iachr.lls.edu/cases/gelman-v-uruguay> accessed 8 October 2022.
[153] *Merits and Reparations* (n 152).
[154] *Merits and Reparations* (n 152).
[155] Protocol to the African Charter, which came into force in 25 January 2004; *see* African Charter, 'Welcome to the Africa Charter', <www.africa-court.org/en/> accessed 8 February 2022.
[156] Protocol to the African Charter.

approval or consent of their States. In the absence of this procedure, it has been the practice of the African Commission on Human and Peoples' Rights (the African Commission) to accept communications from individuals. Thus, for the African Commission, the term 'other communications' in Article 55(1) of the African Charter 1981 is elastic enough to accommodate individual communications.

Thus, in *Purohit and Moore* v *The Gambia*,[157] a communication was filed before the African Commission by two mental health advocates named Ms H. Purohit and Mr P Moore on behalf of mental patients at a psychiatric department in the Gambia and existing as well as future mental patients detained under the Mental Health Acts of the Republic of the Gambia. The complaint was that the provisions of the Lunatic Detention Act of the Gambia and the way in which mental patients were treated violated various provisions of the African Charter 1981, especially the right to health. The complainants also alleged that the Act did not provide safeguards for patients who were suspected of insanity during their diagnosis, certification and detention or any remedy for erroneous detention. It was alleged that there was not in existence any provision for an independent examination, management and living conditions within the unit itself. The Commission found that the Gambia had violated an array of rights guaranteed in the African Charter and made a pronouncement that States are under an obligation pursuant to Article 16 of the Charter to take positive steps and judiciously apply their available resources in ensuring that the right to health is fully realised in all its aspects without discrimination.

Further, the African Court delivered its first judgment in *African Commission on Human and Peoples' Rights* v *Libya.*[158] In that case, the African Commission approach the court on behalf of Saif Gadhafi, a Libyan national detained in a secret location. He had no access to his family, friends and lawyer. There was no charge filed against him. The African Commission alleged that the victim's life was in danger and his physical integrity and health were exposed to risk and irreparable harm, thus a violation of his rights as guaranteed under Articles 6 and 7 of the African Charter 1981, which relate to the right of every individual to liberty and security of his person, as well as the right to have one's cause heard. This was due to the fact that the detained was deprived his fundamental rights, as he was continuously kept in secret detention since 19 November 2011, without the possibility of getting himself assisted by a lawyer of his choice. Among other prayers, the applicant requested the Court to rule that Libya has violated Mr Gadhafi's rights protected under Articles 6 and 7 of the African Charter. In her ruling the Court agreed with the African Commission that the measures taken by the Libyan authorities amounted to a violation of Mr

[157] Communication No 241/2001 (2003); AHRLR 96 (ACHPR 2003).
[158] App. No 002/2013, Judgment (3 June 2016).

Gadhafi's rights as guaranteed under Articles 6 and 7 of the African Charter 1981.

The mechanism put in place by the Protocol to the African Charter with regard to the procedural capacity of the individual to access the African court has however been overtaken by the establishment of the African Court of Justice and Human Rights.[159] The Protocol on the Statute creating the African Court of Justice and Human Rights was adopted by the African Union in 2008. By virtue of the Protocol, the African Court of Human and Peoples' Rights and the Court of Justice of the African Union have been substituted and merged into a single court called the African Court of Justice and Human Rights[160] (the African court). Entities entitled to have direct access to the African Court include a staff of the African Union on appeal in a dispute, but subject to the terms and conditions stipulated in the staff rules and regulations of the African Union and individuals.[161] This is an improvement on the provisions of the Protocol to the African Charter with regard to access to the court. Under the present arrangement, individuals have direct access to the African Court and are not subjected to the limitations stated under the African Charter 1981 whereby individuals were allowed to have access to court subject to the approval and consent of their states.[162]

In summary, the acknowledgement that individuals have rights and fundamental freedoms as guaranteed under these notable regional cum international instruments, and the fact that they have procedural capacity to prosecute these rights in international courts is indicative of the fact that individuals have some degree of international personality. This translates to the fact that they are subjects of international law. However, this is not to say that they are equal to States which are regarded as primary subjects of that legal system.

6. Conclusion

The changing environment of the international community has warranted the inclusion of certain entities such as individuals as having some degree of international personality. In classical international law, states were seen as the only subjects of international law. Though individuals have few obligations arising from customary international law, they were seen as objects of that legal system benefiting from its protection.[163] However, in contemporary international law individuals are now recognised as having international legal

[159] Rehman (n 82) 231−232.
[160] Rehman (n 82) 231−232.
[161] Arts 29 and 30 of the Statute annexed to the Protocol.
[162] Protocol to the African Charter, Arts 5(3) and 34(6).
[163] Protocol to the African Charter, Arts 5(3) and 34(6).

personality[164] hence subjects of international law. Individuals possess some rights and obligations derived either from customary international law or from treaty law. They also have some procedural capacity to prosecute these rights before international courts. Again, as entities recognised as subjects of international law, individuals can be answerable before international courts for violations of international criminal law. Thus, the inclusion of individuals as subjects of international law has contributed to the progressive development of that system of law as State authorities can no longer hide under the rubric of official capacity to perpetrate gross atrocities of human rights violations. However, this is not to say that the status of individuals under international law is comparable to that of the State.

[164] Cassese (n 45) 150.