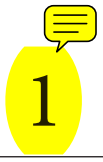
PART 1

Governance and the Law



The *Dramatis Personae* of International Law in the Era of Globalisation

Rethinking International Legal Personality

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I. Introduction

The historical period in which contemporary international law finds itself is by many dubbed as the era of globalisation. All known difficulties in identifying dates or moments of rupture in the flow of time notwithstanding,[1] it can be said to have begun with the end of the Cold War associated with the fall of the Berlin Wall. It has been a period of profound revision of balances of the structural notes characteristic of the international system[2] and of the international law governing it. These transformations are so numerous and have such significant impacts that they may be equated with true paradigm shifts[3] in the way in which the international system and international law are structured. The era of globalisation may therefore be seen as a new moment in the course of history in general, and in the history of the international system and international law in particular.[4]

[1] R Aron, 'Evidence and Inference in History' (1958) 87(4) *Daedalus* 11.

[2] S Hoffmann, 'International Systems and International Law' (1961) 14 (1) *World Politics* 205.

[3] T Kuhn, *The Structure of Scientific Revolutions* 3rd edn (Chicago, University of Chicago Press, 1996).

[4] I have previously looked into aspects of the subject: P Canelas de Castro, 'Globalisation and its Impact on International Law: Towards an International Rule of Law?' (2005) 20(9) *Boletim da Faculdade de Direito da Universidade de Macau* 223; P Canelas de Castro, 'Globalização e Direito Internacional: Rumo ao Estado de Direito nas Relações Internacionais?' in Faculdade de Direito da Universidade de Coimbra, *Nos 20 Anos do Código das Sociedades Comerciais. Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier*, vol III (Coimbra, Coimbra Editora, 2007) 759–824; P Canelas de Castro, 'Direito Internacional na Era da Globalização: Mudanças de Paradigmas no Sistema Internacional e na Ordem Jurídica Internacional' in AC Nascimento Gomes, B Albergaria and M Rodrigues Canotilho (eds), *Direito Constitucional. Diálogos em Homenagem ao 80º. Aniversário de J.J. Gomes Canotilho* (Belo Horizonte, Forum, 2021) 929–1014.

The purpose of this chapter is to identify some of the most important changes experienced in international law regarding the international system that it governs, particularly the actors recognised to stand as legal subjects in the domain – the *dramatis personae* of the international legal order – and to reflect on their significance.

Naturally, transformations of the magnitude that we associate with this era of globalisation are not unprecedented, and they gain greater clarity, in terms of both content and meaning, when contrasted with other profound changes that have taken place in periods of humanity's journey, in which the end of one era and the beginning of another have also been registered.

This was notably the case with the end of the Thirty Years' War in 1648 through the conclusion of the Peace Treaties of Münster and Osnabrück.[5] These established the international system dubbed the Westphalia Model.[6] This was also the case with the Congress of Vienna in 1815.[7] This event not only sealed the failed attempt by Napoleon I to establish an international order based on new legitimacies and the hegemonic power of France, but also opened up a new international system in which, increasingly and structurally, international cooperation between sovereign states gradually took root and sometimes even began to appear in the institutionalised form. This was also the case again in the twentieth century, first with the impetus provided by the establishment of the League of Nations.[8] In an era of 'great expectations', the first signs of a new world were established, particularly because the relationship between individual state initiatives and the representative organisation of all states was altered, and also because a world less resigned to the fate of conflicts and wars was envisaged, albeit in an unrealistic way.[9] This cardinal change culminated later with the order established after the Second World War and the constitution of the United Nations (UN).[10] Thereafter, states took up a fundamental obligation to conduct non-violent international relations, committing to positive cooperative, peaceful and secure relations for the well-being of their peoples and individuals. Moreover, they have done so in

[5] A Hobza, 'Questions de droit international concernant les religions' (1924) 4(5) *Recueil des Cours* 377, 379; L Gross, 'The Peace of Westphalia' (1948) 42 *AJIL* 20, 41; A Nussbaum, *A Concise History of the Law of Nations* (New York, Macmillian Company, 1954).

[6] J Delbrück and R Wolfrum, *Völkerrecht*, vol I/1, 2nd edn (Berlin, Walter de Gruyter, 1989) 2–21; WG Grewe, *The Epochs of International Law* (Berlin, Walter de Gruyter, 2000).

[7] C Webster, *The Congress of Vienna, 1814–1815* (London, Bells & Son, 1950); F Münch, 'Vienna Congress' (2000) IV *Encyclopedia of Public International Law* 1286, 1289.

[8] P Gerbet, VY Ghebali and MR Mouton, *Société des Nations et Organisation des Nations Unies* (Paris, Richelieu, 1973); C Parry, 'League of Nations' (1997) III *Encyclopedia of Public International Law* 177, 186.

[9] R Bernhardt, WK Geck, G Jaenicke and H Steinberger, *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschensrechte. Festschrift für Hermann Mosler* (Berlin, Springer, 1983); H-U Scupin, 'History of the Law of Nations: 1815 to World War I' (1999) II *Encyclopedia of Public International Law* 767, 793.

[10] C Tomuschat (ed), *The United Nations at Age Fifty: A Legal Perspective* (Leiden, Brill, 1995); JA Frowein, 'United Nations' (2000) IV *Encyclopedia of Public International Law* 1027, 1043.

an increasingly institutionalised way, epitomised by the constitution of the UN. It is this order that is fundamentally constitutive of another model of the organisation of the international society, as an alternative to the Westphalian Model,[11] and that, in the wake of the work other authors, can be called[12] the Model of the Charter of the United Nations,[13] we see 'deepening' and even gaining new structural features with the movements that have been taking place since the final decade of the twentieth century. Unlike the previous processes of transformation of the international system, those of the present era of globalisation are now more generally and immediately visible, making the world 'shrink' into the form of a global village,[14] perhaps because this is also the era of the omnipresence of new information and digital technologies[15] which allow for assessments of reality in real time across all spaces. The impacts of globalisation are also very tangible on the international system and on the law that is dedicated to it, particularly by transforming the role and status of the traditional actor in the international system – that is, the state.[16]

This chapter draws on the 'law in context' approach and the attention paid to the new actors and forms of global governance resulting from globalisation, including the identification of and interplay between the different sites of governance that

[11] P Canelas de Castro, *Mutações e Constâncias do Direito da Neutralidade* (Coimbra, Universidade de Coimbra, 1994) 198; P Canelas de Castro, 'De quantas Cartas se faz a paz internacional?' in Antunes Varela, D Freitas do Amaral, J Miranda and JJ Gomes Canotilho (eds), *Ab Uno Ad Omnes, 75 Anos da Coimbra Editora* (Coimbra, Coimbra Editora, 1999).

[12] Canelas de Castro, *Mutações* (n 11); A Cassese, *International Law*, 2nd edn (Oxford, Oxford University Press, 2005).

[13] Tellingly, the Charter shall be qualified by some as the constitution of the contemporary international community. *cf* C Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241(IV) Recueil des Cours 217; P-M Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 *Max Planck Yearbook of United Nations Law* 1; R St J Macdonald, 'The Charter of the United Nations as a World Constitution' in MN Schmitt (ed), *International Law across the Spectrum of Conflict: Essays in Honour of Professor LC Green on the Occasion of His Eightieth Birthday* (Newport, RI, US Naval War College, 2000) 263–300; P-M Dupuy, 'Ultimes remarques sur la "constitutionalité" de la Charte des Nations Unies' in R Chemain and A Pellet (eds), *La Charte des Nations Unies, constitution mondiale?* (Paris, Pédone, 2006).

[14] A notion coined by Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto, University of Toronto Press, 1962) 31; M McLuhan, *Understanding Media: The Extensions of Man* (New York, McGraw-Hill, 1964).

[15] See M McLuhan, *The Medium is the Message: An Inventory of Effects* (New York, Bantam, 1967). For the projection of these suggestions into the digital revolution (the World Wide Web only appeared three decades after McLuhan's first works), see P Levinson, *Digital McLuhan: A Guide to the Information Millenium* (London, Routledge, 1999); P Pernthaler, 'Die Globalisierung als Herausforderung an eine modern Staatslehre' in H Schäfer (ed), *Staat, Verfassung, und Verwaltung. Festschrift anläßlich des 65. Geburtstages von Prof. Dr.Dr.h.c. Friedrich Koja* (Vienna, Springer, 1998) 69; P Dicken, *Global Shift: Transforming the World Economy*, 3rd edn (London, Guilford Press, 1998) 141; C Engel, 'Das Internet und der Nationalstaat' in K Dicke (ed), *Völkerrecht und internationales Provatrecht in einem sich globalisierenden internationalen System- und Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (Heidelberg, CF Müller, 2000) 325–425.

[16] Reflection on the mutations of the state – the main legal subject of this order – and beyond the scope of this chapter and are addressed in the works listed in n 4 above.

Francis Snyder, to whom this study is dedicated, so proficiently pursued.[17] The identification of the distinctive features of globalisation constitutes a key step in this study. We will then analyse and evaluate the fundamental changes and structural impacts of globalisation on international law in relation to that core issue of any legal order which pertains to the subjects whose legal personality it recognises. Finally, we will make some considerations about the significance of these shifts in the context of an international legal order in a state of flux.

II. Globalisation: A Brief Characterisation of the Contemporary Horizon

Globalisation begins by differentiating itself from the important transformations that took place after the Second World War. While signifying a closer relationship between various agents of international relations, and primarily states, these can still be reduced almost exclusively to forms of internationalisation.[18] It is a reinforced internationalisation, more intense, even institutionalised, but still internationalisation, since it remains fundamentally based on the relationship between the dominant state structures, or those international organisations (IOs) that have the states as their members, establish relations with them or regulate them. Internationalisation concerns cooperative activities between state actors on a level that transcends state borders, but that are ultimately still fundamentally under their control.[19] This can still be said to occur with IOs, where states pursue their goals and functions together.[20] In contrast, globalisation is linked not only to states' relations, but also to the numerous relationships established by, fundamentally, individuals and groups of individuals – ie, non-state actors. The concept seeks to capture, in addition to relations between states which remain predominant, all those variegated, polygonal relations between individuals or human groups, which

[17] Amongst the rich bibliography by Professor Francis Snyder over decades of illuminating and impactful scholarship, see, early on, F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *MLR* 19; F Snyder, 'The Gatekeepers: The European Courts and WTO Law' (2003) 40 Common Market Law Review 313; 'Gouverner la mondialisation économique' (2003) 54 *Droit et Société* 435; F Snyder, 'Economic Globalisation and the Law in the 21st Century' in A Sarat (ed), *The Blackwll Companion to Law and Society* (New York, Blackwell, 2004); F Snyder, 'L'Union européenne et la gouvernance de la mondialisation: La traduction du droit de l'OMC en droit communautaire' in *L'intégration européenne au XXIème siècle* (Brussels, Bruylant, 2004); F Snyder, 'Les sites de gouvernance' in L Boisson de Chazournes and R Medhi (eds), *Une société internationale en mutation: quells acteurs pour une nouvelle gouvernance*? (Brussels, Bruylant, 2005) 299; and F Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (Oxford, Hart Publishing, 2010).

[18] U Hingst, *Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge* (Berlin, Duncker & Humblot, 2001); J Delbrück, 'Das Staatsbild im Zeitalter wirtschaftsrechtlicher Globalisierung' (2002) 11, https://opendata.uni-halle.de/bitstream/1981185920/76441/1/BeitraegeTWR_3.pdf.

[19] J Delbrück, 'Globalisation of Law, Politics, and Markets: Implications for Domestic Law – A European Perspective' (1993) 1 *Indiana Journal of Global Legal Studies* 10, 11.

[20] A Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Berlin, Duncker & Humblot, 2007).

are interwoven independently of those that occur within the state framework or between states. These relations may be of an economic or cultural nature, they may concern information or products, they may relate to damages to the environment, as well as they may result from the flows throughout the world of people, goods, services, capital, ideas and even pathogens and diseases.[21]

From this departing point derives that the definition of globalisation is not easy. This is partly because globalisation is a multifaceted, hybrid phenomenon, which makes it somewhat elusive for integration into well-defined taxonomic categories. Even only one manifestation of globalisation, political globalisation (albeit a central one),[22] is itself an expression of this multiplicity: it denotes the evolution of the ordering of human communities, previously almost exclusively a result of the state, towards a much more multifaceted process, comprising other levels of public authority (eg, IOs) and in which other actors, which were traditionally seen as private and lacking intervention in the governance procedures of communities, ultimately also interact in the pursuit of public objectives and the fulfilment of public tasks.[23] It therefore appears wiser to approximate this complex reality by attempting *ab initio* to seek a pluri-comprehensive, all-embracing, holistic concept.[24] Any notion of globalisation will certainly have to refer to a set of processes. Some of these processes – eg, mass migrations, global terrorism, climate change, depletion of the ozone layer, global diseases and pandemics[25] – can be considered objective, while others have a more pronounced subjective nature.

From another angle, globalisation is not only an objective phenomenon of the global interconnection of various areas of life, with a growing number of non-state actors, with the concurrent growing political and economic power of cross-border influence and profound changes in social and political integration, but is also a volitional act. It can also be understood as a politically determined process, as a

[21] E Richter, *Zerfall der Welteinheit: Vernunft und Globalisierung in der Moderne* (*Theorie und Gesellschaft*) (Frankfurt am Main, Campus, 1992); W Weidenfeld, 'Abschied von der alten Ordnung, Europa im Umbruch' in O Kimminich, A Klose and L Neuhold (eds), *Mit Realismus und Leidenschaft, Ethik im Dienst einer humanen Welt, Festschrift für Valentin Zsifkovits zum 60, Geburtstag* (Graz, Schnider, 1993); W Schäfer, 'Globalisierung: Entmonopolisierung des Nationalen?' in H Berg (ed), *Globalisierung der Wirtschaft: Ursachen – Formen – Konsequenzen* (Berlin, Duncker & Humblot, 1999) 9; W Bonß, 'Globalisierung unter soziologischen Perspektiven' in R Voigt (ed), *Globalisierung des Rechts* (Baden-Baden, Nomos, 1999/2000) 39; U Hingst, *Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge* (Berlin, Duncker & Humblot, 2001) 106ff. See also J Habermas, 'Die postnationale Konstellation und die Zukunft der Demokratie' in J Habermas, *Die postnationale Konstellation. Politische Essays* (Frankfurt am Main, Surkamp, 1998) 101.

[22] Other manifestations can be aggregated conceptually into clusters, making it possible to also speak of economic globalisation, social globalisation, cultural globalisation and ecological globalisation. See D Held, A McGrew, D Goldblatt and J Perraton (eds), *Global Transformations: Politics, Economics and Culture* (Stanford, Stanford University Press, 1999); MB Steger, *Globalisation: A Very Short Introduction* (Oxford, Oxford University Press, 2003).

[23] J Delbrück, 'Transnational Federalism: Problems and Prospects of Allocating Public Authority beyond the State' (2004) 11(1) *Indiana Journal of Global Legal Studies* 33.

[24] Gomes Canotilho, 'Principios y "nuevos constitucionalismos": el problema de los nuevos principios' (2010) (7)(14) *Revista de Derecho Constitucional Europeo* 324, 329.

[25] Delbrück (n 19).

deliberate rather than organic strategy[26] of governmental and non-governmental actors. This is particularly so in economic globalisation, where its agents appear committed to the results of liberalisation, privatisation and deregulation of markets, to various degrees.[27] Even though such efforts have also been pursued in other times, contemporary globalised transnational relations, particularly in the commercial or financial fields, are qualitatively different for taking place in minimal time and without state borders appearing to matter. In particular, it can be seen that, in this context, multinational companies play a decisive role, as they seem to be able to relocate their industrial units in jurisdictions that offer them the best operating environment because they have more favourable tax burdens, or because production costs are lower, or because there are other advantages that make the investments of these companies more profitable. Financial transactions can also be made expeditiously. In the same way, the effects of any economic crisis can be immediately felt, also allowing for quick reactions.[28] For their part, state governments see the effective possibility of controlling these multinational companies' operations or these financial flows as being greatly reduced.[29]

Additionally, globalisation is a subjective phenomenon, a perception that political, economic, social, cultural and ecological processes are less rooted in states. In this way of perceiving the contemporary world, globalisation introduces a difference in relation to the previous experience of international cooperation: in the latter, the perception was that IOs were still a kind of *longa manus* of the states, an extension to solve problems or find ways of responding to radical state aspirations. International dynamics were still pursued on behalf of states and in order to respond to their interests. Today, however, in the era of globalisation, when phenomena like global warming, climate change and environmental crises are in play, the perceived need is for responses in accordance with common values or options, a common interest of humankind. Even when rooted in a particular space, political, economic, social, cultural, environmental and legal dynamics often share so many common elements with identical processes in other spaces that it is possible that may be seen as not specific to a territory, but instead as requiring the mobilisation of other (non-state) actors and means. The process of responding to such political challenges corresponds to the concept of global governance,[30]

[26] O Höffe, *Demokratie im Zeitalter der Globalisierung* (Munich, CH Beck, 1999) 9.

[27] This is what is generically blamed on certain leading states, such as the US, and international financial organisations (the International Monetary Fund and the World Bank), with the 'Washington Consensus' (*cf* J Williamson, 'What Washington Means by Policy Reform' in J Frieden et al (eds), *Modern Political Economy and Latin America* (London, Routledge, 2000)) as well as powerful multinationals.

[28] D Held, A. McGrew, D Goldblatt and J Perraton, *Global Transformations: Politics, Economics and Culture* (Stanford, Stanford University Press, 1999) 149.

[29] P Canelas de Castro, 'Empresas multinacionais e Direito Internacional – notas introdutórias sobre um regime emergente' in IC Tong et al (eds), *Estudos em Homenagem ao Professor Doutor Augusto Teixeira Garcia* (Coimbra, Almedina, 2023).

[30] B Zangl and M Zürn, 'Make Law, Not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance' in B Zangl and M Zürn (eds), *Verrechtlichung. Baustein für Global Governance*? (Bonn, Dietz, 2004) 15 represent this by the formula 'governance by, governance with, and governance without government'.

multilayered governance, or governance in network,[31] in a more inclusive process of decision-making not only of states and states within multilateral institutions, but also one in which precisely non-state actors at a global scale or scope of action often play a relevant role.

Globalisation can thus be broadly understood as the process or processes of 'deterritorialisation' of a myriad of political, economic and social relationships involving national and international actors, both public and private, including individuals, in a global interrelationship of such actors in space and time, in which a common good or public interest of humankind is recognised and sometimes pursued. From another perspective, one can speak of denationalisation or destatisation[32] in relation to the control over a whole range of relations that it no longer mediates or ensures. In such a context, by contrast, the individual will no longer be understood as an element of a state,[33] but rather as a 'global being', a member of a heterogeneous world society.[34]

By contrast, it is also important to note that globalisation does not imply a world government, a world state superpower. Nor does it imply the corresponding transformation of international law into a law of the world or a cosmopolitan law of global citizenship[35] with Kantian resonances,[36] as has been more recently projected by Jürgen Habermas. Nor does globalisation always have to be perceived as a (uniformly) universal phenomenon; rather, it is recognised that the processes of

[31] EO Czempiel, 'Governance and Democratization' in JN Rosenau and EO Czempiel (eds), *Governance without Government* (Cambridge, Cambridge University Press, 1992) 250; JN Rosenau, 'Governance, Order, and Change in World Politics' in JN Rosenau and EO Czempiel (eds), *Governance without Government* (Cambridge, Cambridge University Press, 1992) 1ff; B Kohler-Koch, 'Die Welt regieren ohne Weltregierung' in C Böhret and G Wewer (eds), *Regieren im 21. Jahrhundert zwischen Globalisierung und Regionalisierung* (Wiesbaden, Springer, 1993) 121ff; D Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, Stanford University Press, 1995) 73ff; JCV de Roberts, 'Governance: An Opportunity?' in EE Harris and JA Yunker (eds), *Toward Genuine Global Governance*: *Critical Reactions to 'Our Global Neoghborhood'* (Westport, Praeger, 1999) 35ff; B Zangl and M Zürn, 'Make Law, Not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance' in Zangl and Zürn (eds) (n 30) 12ff; Emmerich-Fritsche (n 20).

[32] In German literature, the concept of *Entstaatlichung* is used for phenomena that transcend the framework of the hitherto dominant state order. See J Delbrück, 'Zur Entwicklung der internationalen Rechtsordnung' (1998) 16(2) *Sicherheit und Frieden* 67.

[33] S Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge, Cambridge University Press, 1996); AK Lindblom, *Non-governmental Organisations in International Law* (Cambridge, Cambridge University Press, 2005) 12, who speaks of the 'diffusion of state power'. Both underline a trend towards a gradual (relative) decline in the capacity and status of states, namely in the supply of the public goods necessary for meeting the challenges of the present time, such as human rights, the environment, and instruments of global governance.

[34] See T Wobbe, 'Konzepte der Weltgesellschaft' in T Wobbe, *Weltgesellschaft* (Bielefeld, Transcript, 2000) 9ff; R Stichweh, *Die Weltgesellschaft: Soziologische Analysen* (Frankfurt am Main, Suhrkamp, 2000), 7ff; N Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp, 2002).

[35] On this tradition in international law and its ethical-philosophical and jusnaturalist origins, as well as its refraction in contractualist, rationalist theories and Habermasian discourse ethics, see Emmerich-Fritsche (n 20).

[36] Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (Darmstadt, Konigsberg, F Nicolovius, 1983); *Die Metaphysik der Sitten. Rechtslehre* (Darmstadt, Weischedel, 1983) 7, especially 475ff.

globalisation have different expressions, intensities and impacts in different regions of the world, as they do in different human universes and fields of human activity.

Regardless of the difficulties in characterising such a plural and complex set of phenomena, what seems relevant is that globalisation affects the contemporary international system, the actors therein and even the structure, lending them new characteristics. Likewise, globalisation imports profound, intense and extensive impacts on the normative structure of international law. In particular, it seems to imply profound changes with regard to the seat and forms of use of public authority and the capacity to provide public goods for the various social and human groupings, so much so that the traditional contrasts between the national and international domains sometimes no longer seem appropriate. Several authors[37] suggest that this new constellation of post-national forms[38] of exercising authority and guaranteeing public goods requires a new type of regulation, a new kind of international law. The different social context to some extent seems to call for a substantive constitutional inspiration and meaning, with (constitutional) multilevel expression and involving 'constitutional' or 'constitutional substitutes' of contents and forms. Generally speaking, globalisation thus calls for a reconstruction of international law that no longer roots it (or grounds it only) in equating the state as the sole authority or legal subject and in the subsequent traditional and rigid boundaries between the 'domestic' domain of the state and the domain of the international,[39] where international law, fundamentally or even exclusively, appears as the space of relations between states. In using constitutional language and constitutional dogmatic tools, and integrating the functions proper to a public authority, such globally 'constitutionalised'[40] international law would become capable of better 'apprehending' this new contextual reality, namely by denoting it in other normative terms. A starting point in such a reconstruction of international law pertains to the central question of the recognition of the actors of the system, with their universe becoming more plural and complex.

III. The Impact of Globalisation on the Core Issue of Legal Subjectivity in International Law: The Recognition of New Subjects of International Law

Globalisation thus affects a very broad spectrum of political, economic, social and cultural activities at the international, transnational and supranational levels, as well as at the domestic, national level. It also affects international law. One of its

[37] Emmerich-Fritsche (n 20) 1062.

[38] J Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in J Habermas (ed), *Der gespaltene Westen* (Frankfurt am Main, Suhrkamp, 2004).

[39] D Anzilotti, Corso di Diritto Internazionale Lezioni Tenute Nell'universita di Roma Nell'anno Scolastico 1922–23 (Introduzione-I Soggetti-Gli Organi), 3rd edn (Rome, Atheneum, 1929).

[40] See section IV below.

most important impacts on the international legal order pertains to the core issue of subjectivity, ie, who is recognised to have legal personality.

It is symptomatic that, faced with globalisation, international legal doctrine, although with initial resistance and certainly some 'delay' in relation to the reality of an international system that had visibly become more plural and richer as to the participation therein, has felt the need to revisit the perennial question[41] of international legal personality. The driver was to determine whether other actors, in addition to the 'consecrated' ones, should be recognised and whether they ascended to the status of subjects within the international legal order.[42]

A subject of law is opposed to an object of law,[43] primarily because it has international legal personality and the aptitude or ownership of rights and obligations in the respective legal order. This, in our understanding, necessarily implies the relativity of the subjects of international law to the concrete terms of the international legal order. The ensuing problem of including new subjects in the normative system is therefore answered in historically situated terms, in relation to the concrete stage of development of this legal order, itself a function of the normative expectations, needs and consensus obtained in the particular human community.[44] We understand that the International Court of Justice (ICJ) has authoritatively sustained a similar conclusion when, in its Opinion of 1949 on the question of *Reparations for Injuries Suffered in Service of the United Nations* (*Reparations for Injuries*), it stated that 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights and their nature depends upon the needs of the community'.[45]

[41] This alleged historical omnipresence derives from the centrality of the problem in the international legal order. See M Cosnard, 'Rapport introductif' in SFDI, *Le sujet en droit international, Colloque du Mans* (Paris, Pédone, 2005) 3.

[42] There is no necessary coincidence between the question of legal personality (a person has legal personality if he or she is the holder of rights and the addressee of duties in international law: *cf* A Verdross and B Simma, *Universelles Völkerrecht. Theorie und Praxis*, 3rd edn (Berlin, Duncker & Humbolt, 1984) 221–22; K Hailbronner, 'Der Staat und das Einzelne als Völkerrechtssubjekte' in WG Vizthum (ed), *Völkerrecht* (Berlin, De Gruyter, 1997) 180) and the question of legal subjectivity, but the notions are related. If the condition of subject supposes personality, the reverse does not seem to be true: personality is the aptitude to be a subject of law. This doctrine is, however, contested by some, who instead sustain that the notions respect the same reality and that the terms are synonymous and can be used interchangeably; see, eg, C Dominicé, 'La personnalité juridique dans le système du droit des gens' in J Makarczyk (ed), *Essays in Honour of Krzystof Skubiszewski: Theory of International Law at the Threshold of the 21st Century* (Dordrecht, Kluwer, 1996) 148. The problem becomes even more complex when these notions are related to that of international legal capacity, as is partly the case in the historic *dictum* of the ICJ in its 1949 advisory opinion on the issue of *Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ Rep 179.

[43] In the positivist, orthodox doctrine of international law, in which this law is of states and for states, individuals, by contrast, appear as the *object* of international law. See G Manner, 'The Object Theory of the Individual in International Law' (1952) 46 *AJIL* 428.

[44] JE Nijman, The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law (The Hague, TMC Press, 2004).

[45] Reparations for Injuries (1949) ICJ Rep 179.

In practice, the question only arises with regard to secondary subjects of law,[46] since the state has been and remains the uncontested primary subject[47] from the origins of international law.[48] However, since the international legal order does not provide a uniform normative answer to this issue, since it does not contain a list of subjects who possess international legal personality, the concrete responses will be determined in accordance with the theoretical perspective on international law that is adhered to[49] and the concrete content taken from readings of positive law at any given time. Although not resolving the issue once and for all, the ICJ's case law contributes to this in the historic *Reparations for Injuries* advisory opinion by highlighting the criteria of the titularity of rights and obligations and the capacity to avail oneself of these rights by way of international proceedings as relevant indicators. The doctrine, although divided, seems to equally point to several vectors: the subject of international law is the addressee of the norms which enshrine rights or obligations in accordance with the international legal source.[50] To the preceding criterion, the requirements of the capacity to exercise rights and fulfil obligations are sometimes also added;[51] namely the capacity to create norms of international law[52] and to submit claims to adjudicatory bodies. There even seems to be a tendency, of a more liberal and 'gradualist' nature,[53] to equate diverse forms of participation in the construction or even application of the international legal order, namely in legal proceedings, with the qualification as a subject of international law.

[46] H Mosler, 'Subjects of International Law', (1988) VIII *Encyclopedia of Public International Law* 442.

[47] The dogma of the state as the subject of international law, unceasingly proclaimed by doctrine, has also been affirmed by international jurisprudence. Thus, the Permanent Court of International Justice (PCIJ) in the judgment of the *Lotus* case stated that 'international law governs relations between independent States'. Case Series A no 10 *France v Turkey* (the case of the *S.S. 'Lotus'*) [1927] PCIJ 18.

[48] Hence, Cosnard suggests that the question of international legal subjectivity only really emerged at the beginning of the twentieth century, when the exclusivity of the state started to be challenged: Cosnard (n 41).

[49] A-LVaurs-Chaumette, Les sujets du droit international pénal: vers une nouvelle définition de la personnalité juridique internationale? (Paris, Pédone, 2009) 2.

[50] M Siotto Pintor, 'Les sujets du droit international autres que les Etats' (1932) 41 *Recueil des Cours* 278, 279; D Anzilotti, *Cours de droit international public* (Paris, LGDJ, 1999); J Combacau and S Sur, *Droit international public*, 8th edn (Paris, Montchrestien, 2008) 316.

[51] CT Eustathiades, 'Les sujets du droit international et la responsabilité internationale – nouvelles tendances' (1953) 84(3) *Recueil des Cours* 414; F Sudre, *Droit international et droit européen des droits de l'homme*, 8th edn (Paris, Presses Universitaires de France, 2006); P-M Dupuy and Y Kerbrat, *Droit international public*, 11th edn (Paris, Dalloz, 2012).

[52] P Weil, 'Le droit international en quête de son identité' (1992) 237 *Recueil des Cours* 122; C Dominicé, 'La personnalité juridique dans le système du droit des gens' in J Makarczyk (ed), *Essays in Honour of Krzystof Skubiszewski: Theory of International Law at the Threshold of the 21st Century* (The Hague, Kluwer, 1996) 171; G Distefano, 'Observations éparses sur les caractères de la personnalité juridique Internationale' (2007) *Annuaire français de Droit international* 117.

[53] R Higgins, *Problems and Process: International Law and How We Use it* (Oxford, Oxford University Press, 1994) 5; I Rossi, *Legal Status of Non-governmental Organisations in International Law* (Leuven, Lirias, 2009) 369–370.

A. International Organisations

At the start of the era of globalisation, it is safe to say that, in addition to sovereign states[54] and a few more traditionally recognised subjects of international law, such as the Holy See[55] and the Order of Malta,[56] IOs were also already firmly entrenched[57] as subjects of international law.[58]

However, they have a different status from that of the state: they appear as derived and functional subjects of international law.[59] The recognition of these new, derived and functional actors of international law finds its sociological foundation in the fact that intergovernmental IOs have become institutionalised and independent, relatively stable centres of international policy making.[60] Naturally, in terms of their origin, IOs are the product of the creation of states, resulting from their individual political will. In particular, it is the states that in the IO's founding treaty, define its goals and powers. This fact, hyperbolised by the realist school of international relations, even led it to deny that IOs may constitute independent political actors. In this line of thought, IOs are instead presented as mere instruments of powerful states, which, by this means, pursue their national

[54] Brierly, one of the best-known jusinternationalists for generations of students of international law, still defined international law as 'the body of rules and principles of action which bind civilised states in their relations with other states'. *cf* J-L Brierly, *The Law of Nations*, 6th edn (Oxford, Oxford University Press, 1963). The criteria set out above for identifying the condition of subject of international law also seems to be based on the state, as if reserving the condition of subject to the state. Hence, many say that it has full legal personality (see, for example, P-M Dupuy and Y Kerbrat, *Droit international public*, 11th edn (Paris, Dalloz, 2012) 233). Others present it as an original and primary subject, connatural or innate to the law system (see C Dominicé, 'La personnalité juridique dans le système du droit des gens' in J Makarczyk (ed), *Essays in Honour of Krzystof Skubiszewski: Theory of International Law at the Threshold of the 21st Century* (The Hague, Kluwer, 1996) 171). However, it should be noted that this 'favouring' of the state also implicitly opens up the possibility that other actors may have a personality (albeit minor) and so they also stand as subjects of law, albeit secondary subjects.

[55] HF Köck, 'Holy See' (1995) II Encyclopedia of Public International Law 866–69.

[56] J Cremona, 'Malta, Order of' (1999) III *Encyclopedia of Public International Law* 280.

[57] T Margueritte and R Prouvèze, 'Le droit international et la doctrine saisis par le fait: la diversification des sujets du droit international sous l'effet de la pratique' (2016) *Revue québécoise de droit international* 163 argue that there is 'almost unanimity' in affirming the personality of IOs, attributing it to the fact that IOs derive from the will of the states, thus not calling into question sovereignty as the traditional foundation of international law.

[58] However, this does not imply that in contemporary international law there are no grey areas regarding the status of IOs. Instead, these uncertainties may be illustrated by the works of the International Law Commission (ILC) on the international responsibility of IOs. *cf* (2011) II *Yearbook of the International Law Commission* 2. Similarly, inconsistencies in their treatment as subjects of international law by international judicial bodies may be noted – for example, by the European Court of Human Rights in *Behrami and Behrami v France* and *Germany and Norway* App Nos 71412/01 and 78166/01 (decision of the Grand Chamber, 2 May 2007).

[59] R Bindschedler, 'International Organisations, General Aspects' (1995) II *Encyclopedia of Public International Law* 1299.

[60] F Seyersted, Objective International Personality of Intergovernmental Organisations: Do Their Capacities Really Depend upon Their Constitutions? (Copenhagen, Krohns Bog Trykkeri, 1963).

power interests.[61] In reality, however, through the action of their organs, IOs gradually asserted themselves as autonomous centres of deliberation and independent decision making. In the actual dynamics of life, IOs thus take part in modern international relations, asserting themselves vis-a-vis individual member states. This equally became a fact in legal terms, as, for instance, the ICJ's Advisory Opinions *Reparations for Injuries* and *Legality of the Threat or Use of Nuclear Weapons* denote, explicitly recognising IOs as subjects of international law.[62] IOs' decisions are not merely the sum of the member states' acts of will; they constitute autonomous legal acts directly attributable to the organisations as institutionalised entities.[63] These acts, which often translate into law making at the international level,[64] may be binding on all IO member states[65] and even on those which did not contribute to their adoption.[66]

B. Individuals

Naturally, already before individuals came to be widely recognised as legal subjects of international law prior to and as a result of globalisation, some internationalists at the theoretic-dogmatic level had been exploring avenues contrary to the dominant paradigm of state-centred legal subjectivity. In their works, it is the individual who is the main subject of international law. This was the case, in particular, with the sociological school of international law, of Nicolas Politis and Georges Scelle,[67] in the period between the two World Wars. Subsequently, after the Second World War, this trend is also visible in Hersch Lauterpacht's works[68] and, following the same basic idea that international legal rules and international institutions are deeply rooted in the particular socio-cultural characteristics of certain communities, those

[61] HJ Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (New York, Knopf, 1948); HJ Morgenthau, 'Political Limitations of the United Nations' in GA Lipsky (ed), *Law and Politics in the World Community* (Berkeley, University of California Press, 1953) 150; W Link, *Die Neuordnung der Weltpolitik. Grundprobleme globaler Politik an der Schwelle zum 21. Jahrhundert* (Munich, CH Beck 1998) 114.

[62] Reparations for Injuries (1949) ICJ Rep 179; Legality of the Threat or Use of Nuclear Weapons (1996) ICJ Rep 226.

[63] C Tietje, 'The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture' (1999) 42 *German Yearbook of International Law* 35ff; E Klein, 'Die Internationalen und supranationalen Organisationen' in WG Vitzthum (ed), *Völkerrecht*, 3rd edn (Berlin, De Gruyter, 2004) 281ff.

[64] JE Alvarez, *International Organisations as Law-Makers* (Oxford, Oxford University Press, 2005); J Alvarez, 'The New Treaty Makers' (2012) 25 *Boston College International and Comparative Law Review* 218ff.

[65] A Reinisch, 'Sources of International Organisations' Law: Why Custom and General Principles are Crucial' in S Besson and J d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford, Oxford University Press, 2017) 1143–63; J Klabbers, *An Introduction to International Organisations Law*, 3rd edn (Cambridge, Cambridge University Press, 2015) ch 8, 158ff.

[66] On the impact of IOs on international law in general, see JE Alvarez, *The Impact of International Organisations on International Law* (Leiden, Brill, 2016).

[67] See, respectively, N Politis, *Les nouvelles tendances du droit international* (Paris, Hachette, 1927) 64–66; G Scelle, *Précis de droit des gens* (Paris, Recueil Sirey, 1932).

[68] H Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950).

of Julius Stone,[69] Wilfred Jenks,[70] Bartholmeus Landheer[71] and Richard Falk.[72] The common denominator of these doctrinal works that contributed to the advancement of the recognition of legal personality to individuals is the detachment from the dominant idea of a law of a society of states towards one in which the legal order is based instead on an international community in which individuals are endowed with legal entitlements and play a role as (main) subjects of international law.[73]

The eventual effective recognition of individuals as subjects of international law has its sociological roots in the fact that the vast majority of states and their people accept the normative and heuristic notion of human rights.[74] Similarly, most human communities see the protection of individuals and their legal entitlement as indispensable in contemporary relations. This is documented, for instance, in such normative references as the Preamble to and Articles 1(3) and 55(c) of the United Nations Charter, Article 1 of the Universal Declaration of Human Rights, and the preambles to the International Covenants on Human Rights of 1966, setting out a general imperative for universal respect for human rights and fundamental freedoms for all human beings without distinction.[75] Moreover, it is maintained that this necessity sometimes stands independently of the will of states, and even against the state of nationality.[76] This evolution is often attributed to a genuine revolution in mentalities brought about by the tragic, humanity-destroying acts committed during the Second World War. These facts

[69] J Stone, 'Problems Confronting Sociological Enquiries Concerning International Law' (1956) 89 *Recueil des Cours* 73–74; J Stone, 'A Sociological Perspective on International Law' in R St J Macdonald and DM Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague, Martinus Nijhoff, 1983) 263ff.

[70] CW Jenks, *The Common Law of Mankind* (New York, Frederick A Praeger, 1958) 14–18.

[71] B Landheer, *On the Sociology of International Law and International Society* (The Hague, Martinus Nijhoff, 1966) 56–64, 108–13.

[72] RA Falk, 'The Adequacy of Contemporary Theories of International Law: Gaps in Legal Thinking' (1964) 40 *Virginia Law Review* 247–49; 'A New Paradigm for International Legal Studies: Prospects and Proposals' (1975) 84(5) *Yale Law Review* 973–79.

[73] On these moments of theoretical development, see A Bianchi, *Theory and Philosophy of International Law* (Oxford, Oxford University Press, 2016) 246–57; M Hirsch, 'The Sociological Perspective on International Law' (2019) Hebrew University of Jerusalem Legal Studies Research Paper Series n 19-01.

[74] P Häberle, 'Die Menschenwürde als Grundlage der staatlichen Gemeinschaft' in *Handbuch des Staatsrechts der Bundesrepublik Deutschlands*, vol I (Heidelberg, CF Müller, 1995) 815ff; M Kotzur, 'Wechselwirkungen zwischen Europäischer Verfassungs- und Völkerrechtslehre' in A Blankennagel, I Pernice and H Schulze-Fielitz (eds), *Verfassung im Diskurs der Welt: Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag* (Tübingen, Mohr Siebeck, 2004) 289ff.

[75] K Stern, 'Idee der Menschenrechte' in Handbuch des Staatsrechts der Bundesrepublik Deutschlands V (Heidelberg, CF Müller, 1992) 108; W von der Wense, Der UN-Menschenrechtsausschuß und sein Beitrag zum universellen Schutz der Menschenrechte (Berlin, Springer, 1999) 15; P Mastronardi, 'Menschenwürde und kulturelle Bedingheit des Rechts' in T Marauhn (ed), Die Rechtsstellung des Menschen im Völkerrecht. Entwicklungen und Perspektiven (Tübingen, Mohr, 2003) 59ff.

[76] K Dicke, 'Die der Person innewohnende Würde und die Frage der Universalität der Menschenrechte' in H Bielefeldt, W Brugger and K Dicke (eds), *Würde und Recht des Menschen – Festschrift für Johannes Schwartländer zum 70 Geburtstag* (Würzburg, Könighausen und Neumann, 1992) 165ff; J Delbrück, 'Die Universalisierung des Menschenrechtsschutzes: Aspekte der Begründung und Durchsetzbarkeit' in A Zunker (ed), *Weltordnung oder Chaos*? *Beiträge zur internationalen Politik: Festschrift zum 65. Geburtstag von Professor Dr. Klaus Ritter* (*Internationale Politik und Sicherheit*) (Baden-Baden, Nomos, 1993) 551–66.

demonstrated the vacuity of the state mediation theory of international law norms and the danger that, the state – even the state of nationality of those individuals – can pose for individuals.[77] It is this vision of things and of what international normativity should be or become – arguably reflected in the objectives of the international community, namely the inclusion of the objective of the promotion and protection of human rights in Article 1(3) of the UN Charter – that would make it possible to overcome the classic doctrine that persistently denied the quality of subject of law to individuals.

In the traditional doctrine of subjects of international law, the law is equated with the law of states. Individuals are instead the mere object of international law.[78] In the same general sense, and with the same foundation in a vision rooted in an inflated perspective of state sovereignty, the theory of the mediation of individuals by states makes the latter the immediate addressees of international legal norms: states are the holders of rights and obligations. Consequently, it falls to states to mediate these provisions or reflect them on individuals and for their benefit – that is, if the state incorporates them into its domestic law. This doctrine finds expression in the Opinion of the Permanent Court of International Justice (PCIJ) regarding the question of the competence of the Danzig courts, in which the PCIJ pronounced the *dictum* that 'an agreement cannot, as such, create rights and obligations for individuals', although it simultaneously recognised that the object of the agreement may be to create rights and obligations for individuals that can be enforced by national jurisdictions.[79] In the same vein, the institute of diplomatic protection was and remains a purely interstate liability mechanism, in which the individual is undeniably the subject of litigation. Tellingly, even today, as evidenced by the codifying efforts of the ILC, any compensation that results from such diplomatic protection is titled and administered by the state.[80] According to this approach, even though some norms of international law deal with the condition of individuals, this is without prejudice to the holder of rights and obligations remaining to the state of the nationality of the individual. An example is the right to immunities. In this context, individuals can only indirectly be considered as benefiting; in reality, these are state prerogatives.[81]

[77] See, eg, C Dubost, 'Les crimes des États et la coutume pénale internationale' (1946) 11(6) *Politique étrangère* 553.

[78] The theory of individuals as objects of international law, often associated with dualist postulates, is a *vexata quaestio* that has been debated since at least G Jellinek, *System der Subjektiven öffentlichen Rechte* (Tübingen, Mohr, 1905). *cf* A Peters, 'Das subjektive internationale Recht' (2011) 59 *Jahrbuch des öffentlichen Rechts der Gegenwart* 439.

[79] Jurisdiction of the Courts of Danzig, PCIJ, Serial B, n 15 (1928) 17–18. See also *La Grand, Germany v United States of America* (2001) ICJ Rep 77, 89.

[80] 'Draft Articles on Diplomatic Protection with Commentaries' (2006) 2(2) *Yearbook of the International Law Commission* 97ff.

[81] C Dominicé, J Belhumeur and L Condorelli, 'L'individu, la coutume internationale et le juge national' in *L'ordre juridique international entre tradition et innovation* (Geneva, Graduate Institute Publications, 1997) paras 35, 40.

The recognition of a legal status for individuals instead derives from the waves of consecration of human rights following the Second World War. These human rights contribute to rendering individuals the status of subject of law. Individuals directly benefit from this condition and it is this one which allows them to pursue their specific fundamental rights.[82] The significance of this move in the contemporary international legal order, following the Second World War,[83] will be enhanced by the very consolidation and profound normative development of the branches of international law devoted to guaranteeing and protecting the rights of individuals, from the outset (but not only) against states,[84] that globalisation will facilitate.

International human rights law, just like international humanitarian law and international criminal law, which have the same foundations in common and pursue the same objectives, definitively set aside the classic treatment of international law regarding individuals, opening up the path of legal subjectivity to them. This makes individuals holders of international rights and obligations of human protection in international law.[85] At a material level, these bodies of law confer rights upon individuals that are enforceable against states. Or, from another angle, they prescribe obligations to states for the direct benefit of individuals. They also impose on states the obligation to guarantee the enjoyment by individuals of their rights by acting against interferences by other individuals or other agents, according to the theory of positive obligations, an element of the 'respect-protect-fulfil' triptych[86] constituted by the practice of the committees mandated to monitor and ensure compliance with the International Covenants on Human Rights.

[82] A Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Berlin, Duncker & Humblot, 2007) 459–572.

[83] H Lauterpacht, *International Law and Human Rights* (Hamden, Archon Books, 1968); LB Sohn and T Buergenthal, *The International Protection of Human Rights* (New York, Bobbs-Merrill Company, 1973); K Vasak (ed), *Les dimensions internationales des droits de l'homme* (Paris, UNESCO, 1978).

[84] This is certainly the case with international criminal law, particularly after the adoption of the Statute of the International Criminal Court (ICC).

[85] The international law of human rights and international humanitarian law share both values and foundations. The fundamental difference between them concerns the condition of application, since international humanitarian law applies in a context of armed conflict, while human rights apply in principle at any time, although with particularities in the case of armed conflict. In this sense, see ICJ Opinion, *Question Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep 106; and C Droege, 'Droits de l'homme et droit humanitaire: des affinités électives?' (2008) *Revue internationale de la Croix-Rouge* 871.

[86] The triptych concerns obligations or duties for states, corresponding to the human rights of individuals or groups. The obligation to respect means that states must refrain from interfering with or impairing the enjoyment of human rights. The obligation to protect means that states must protect individuals or groups against violations of their human rights. The obligation to fulfil means that states have to undertake positive action for the effective enjoyment of human rights. The concept of this threefold obligation was first formulated by H Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton, Princeton University Press, 1980) and has been adopted by the Committee on Economic, Social and Cultural Rights, which uses it repeatedly in its documents.

The great difference in the era of globalisation results from the fact that another constituent element of this common international law of human protection,[87] international criminal law, a branch of international law that since the era of globalisation has strongly developed, imposes a broad set of international obligations directly on individuals. Individuals are thereby also transformed into passive subjects of international law. International criminal law regulates not only the rights of states, but also the rights of individuals on a universal scale, using the common means of international law. It is this international law that directly incriminates,[88] as it is in the forms provided for by international law that international criminal responsibility is implemented.[89] International law thus increasingly creates and develops obligations for individuals, while at the same time granting them new rights. Moreover, in the new international criminal law, individuals also appear as the beneficiaries of the rules contained in this branch of international law. This is the case, in particular, with a set of rights of a procedural nature, which, although inspired by the general right to a fair trial of international human rights law – namely Article 14 of the International Covenant on Civil and Political Rights (ICCPR) – have come to be specifically rooted in the special framework of the statutes of the various international criminal jurisdictions.[90] The individual is the passive subject of immediate obligations that protect the fundamental rights of other individuals, the disrespect of which implies that individual's criminal responsibility. Importantly, the source of this responsibility, whether ascertained in domestic jurisdictions or in international jurisdictions, is international. It follows that in contemporary international criminal law the individual is clearly the holder of international rights and obligations.[91] Thus, the first criterion set out by the ICJ for the qualification as a subject of international law is fulfilled.

The same may be concluded regarding the second criterion of international legal personality: the capacity of individuals to assert their rights in international justice.[92] Contemporary international law in fact includes international mechanisms that allow individuals to enforce their rights or verify their responsibility. On a par with the development of globalisation, the international legal order, especially from the 1990s onwards, has created and will continue to create various

[87] Thus, see O de Frouville, Droit international pénal: Sources, incriminations, responsabilité (Paris, Pédone, 2012) 8–9.

[88] C Dominicé, J Belhumeur and L Condorelli, 'L'individu, la coutume internationale et le juge national' in *L'ordre juridique international entre tradition et innovation* (Geneva, Graduate Institute Publications, 1997) 93–107.

[89] B Simma and A Paulus, 'Sources du droit international pénal' in H Ascensio (ed), *Droit international pénal* (Paris, Pédone, 2012) 79.

[90] In this, international criminal law may appear as a guarantee of the efficacy of the two other branches of this common law of human protection: human rights and international humanitarian law.

[91] A-L Vaurs-Chaumette, Les sujets du droit international pénal: vers une nouvelle définition de la personnalité juridique internationale? (Paris, Pédone, 2009) 16.

[92] Cançado Trindade is of the opinion that this capacity does not stand as a constitutive element of the condition as a subject, but rather as its consequence, as a characterising trait as legal subject. See AA Cançado Trindade, 'L'humanité comme sujet du droit international: nouvelles réflexions' (2012) 61 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* 81ff.

ad hoc, hybrid and internationalised criminal jurisdictions. This process of the progressive institutionalisation of this law culminated with the adoption of the Rome Statute in 1998 and the establishment of the International Criminal Court (ICC). Simultaneously, the international community had also been consolidating and developing multiple jurisdictions and bodies for the protection of human rights. Since the general mission of these bodies is to ensure that human rights treaties are well implemented by states parties, a concomitant trend is developing for the corresponding jurisdictions to open to individuals, the raison d'être of these human protection regimes. An example of this trend is Protocol I to the ICCPR. Together, these mechanisms guarantee individuals access to the courts, to both international jurisdictions specialising in human rights, as well as international jurisdictions committed to the prosecution of international crimes.[93] In the latter, even when individuals do not appear as plaintiffs, they can participate in the proceedings under the special status of victims and as witnesses for the prosecution. Moreover, in these jurisdictions, the accused individual is already indisputably and fully a passive subject of law. It is in these jurisdictions that the criminal consequences of the actions of accused individuals are determined, as it is in these bodies that individuals can ascertain their rights and even obtain compensation for damages that they may have suffered in the event of, for example, a miscarriage of justice.[94] Furthermore, individuals enjoy important procedural rights within these instances. This is the case, for example, in the context of the ICC, with refusal proceedings, incidental proceedings or the right of appeal.[95]

Conversely, regarding the criterion of participation in law making, the status of the individual remains unchanged: in general, individuals are deemed incapable of producing international legal acts.[96]

C. Other Private Subjects

However, the analysis of the international legal order in the era of globalisation shows that the diversification of actors entitled to act and maintain a 'voice'[97] goes much further than IOs and individuals, contributing to constituting or reinforcing

[93] A Cassese and M Delmas-Marty (eds), *Crimes internationaux et jurisdictions internationales* (Paris, PUF, 2002) 71; T Margueritte, 'International Criminal Law and Human Rights' in W Shabas and N Bernaz (eds), *Routledge Handbook of International Criminal Law* (New York, Routledge, 2011) 436ff.

[94] Thus, the jurisprudence that has been affirmed by international criminal tribunals in cases such as *Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-T (before the ICC in Rwanda, 3 December 2003) paras 1106–07. This determination was then substantially reiterated in *Lubanga* ICC01/04-01/06-772 (OA4) (before the ICC, 14 December 2006) para 37. See also art 85 of the Statute of the ICC. In the doctrine, see T Margueritte, 'International Criminal Law and Human Rights' in Shabas and Bernaz (n 93) 445ff.

[95] Margueritte and Prouvèze (n 57) 171.

[96] See, however, the discussion below on international contracts under international investment law.

[97] J Nijman, The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law (The Hague, TMC Asser Press, 2004) 9.

a more diversified and complex international community, including and recognising the growing role of non-state actors.[98] This presence of private non-state actors in contemporary international and global relations is so striking that some go so far as to characterise the present day as the age of non-state actors.[99]

Yet, it is interesting to note that the generic term 'non-state actor' used to designate these other participants in the (new) international legal system, such as multinational companies and non-governmental organisations (NGOs),[100] cannot but be deemed problematic, as it determines the essence of these actors by what they are not (ie, they are not states). Philip Alston rightly notes that this definition can only have been 'intentionally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and central one around which all other entities gravitate'.[101] Such a definition also connotes or reinforces the view of that legal doctrine that resists accepting the legal personality of non-state legal persons[102] and instead insists on affirming the state as the sole participant in the creation of law.[103]

D. Multinational Enterprises

The global system will also reach those actors so relevant to globalisation: multinational enterprises. In spite of some attempts,[104] international law does not contain an established definition of a multinational enterprise. However, it may be defined as 'a group of enterprises of different nationality that are united by

[98] D Narayan, R Patel, K Sghafft, A Rademacher and S Koch-Shulte (eds), *Voices of the Poor: Crying out for Change* (Washington DC, World Bank, 2000). In a sociological observation, they note that, for most individuals, their factual relationship with the international legal system is precisely through these actors and not through 'distant' states.

[99] JT Mathews, 'Power Shift' (1997) 76(1) *Foreign Affairs* 50.

[100] A Bianchi, Non-state Actors and International Law (Aldershot, Ashgate, 2009); J d'Aspremont, Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law (Routledge, London, 2011); M Noortmann, A Reinisch and C Ryngaert (eds), Non-state Actors in International Law (Oxford, Hart Publishing, 2015).

[101] P Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime accommodate Non-state Actors?' in P Alston (ed), *Non-state Actors and Human Rights* (Oxford, Oxford University Press, 2005) 3.

[102] See, eg, A Mahiou, 'Le droit international ou la dialectique de la rigueur et de la fléxibilité: cours général de droit international' (2009) 337 *Recueil des Cours* 265. Pellet also attributes 'timidity' to the doctrine, 'including the most open', noting the difference with which it looks at individuals and other private persons: A Pellet, 'Le droit international à l'aube du XXIème siècle (La société internationale contemporaine – Permanences et tendances nouvelles)' (1997) I *Cours euro-méditerranéens Bancaja de droit international* 98. Margueritte and Prouvèze (n 57) 173–74 wonder if these actors will be the last bastion of this resistance or even outright dogmatic rejection vis-à-vis the recognition of international legal personality beyond States (and, as seen, with time, International Organisations, even individuals), and ultimately resistance towards integrating into the plan of international legal dogmatics the developments that the reality of international and global relations already insinuate.

[103] D Josselin and W Wallace (eds), *Non-state Actors in World Politics* (Basingstoke, Palgrave, 2001).

[104] P Fischer, 'Transnational Enterprises' (1985) VIII *Encyclopedia of Public International Law* 921–22.

common ownership ties and respond to a common management strategy'.[105] Their subsidiaries are located in several host states and are subject to the instructions of a parent enterprise, which is located in one of the states.[106] From a legal point of view, multinational enterprises are not international enterprises, but national enterprises belonging to one jurisdiction, as determined by their act of incorporation or seat. In this link with a national legal order, they immediately differ from IOs, whose specific governing legal order is international law.[107]

Multinational enterprises can be considered the main protagonists of economic globalisation and are powerful actors. Their turnover sometimes far exceeds the budget of many a state.[108] Equally, their effective overall power is sometimes greater than that of many states. This power derives from the influence that they can exert on the states that host their investments and the fact that states usually find it difficult, if not impossible, to control these enterprises in their life dynamics.[109]

Multinational enterprises have long been present and interacting with the international system as well as with international law.[110] Some proclaim them 'invisible' to international law, in the sense that it is national law that characteristically regulates them immediately. This only underlines the fact that while multinational enterprises are originally creatures of national law, their business operations are focused on a wider space than the territorial state space, and that they formulate international policies in their goal of profit making; in short, there is a discrepancy between their (initial) de iure national status and their de facto impact in the international framework, as it equally points to the relevance of the question about their international (possible) status.[111] However, although for several decades now, a few international law scholars such as Wolfgang Friedmann have suggested that multinational enterprises can be considered participants in the evolution of modern international law,[112] the classical opinion, which is still largely dominant among scholars (even those who usually defend progressive

[105] S Joseph, 'Taming the Leviathan: Multinational Entreprises and Human Rights' (1999) 46 *Netherlands International Law Review*.172.

[106] PN Doremus et al, *The Myth of Global Corporation* (Princeton, Princeton University Press, 1998). See also Resolution 3 on 'Multinational Enterprises' from the Institut de Droit International (1978) 57(2) *Annuaire de l'Institut de Droit International* 339.

[107] B Großfeld, 'Multinationale Unternehmen und nationale Souveränität' (1978) *Juristische Schulung* 73; R Higgins, 'A Multinational Corporation or an International Organization' in R Morgan et al (eds), *New Diplomacy in the Post-Cold War: Essays for Susan Strange* (London, Macmillan, 1993) 187.

[108] Fischer (n 104) 926.

[109] P Vellas, 'Les entreprises multinationales et les organisations non gouvernementales, sujets du droit international' in *Mélanges offerts à Paul Couzinet* (Toulouse, Université de Toulouse, 1974) 773–94.

[110] S Tully, *Corporations and International Lawmaking* (London, LSEPS, 2004) 68–73; PT Muchlinski, *Multinational Entreprises and the Law*, 2nd edn (Oxford, Oxford University Press, 2007) 5ff.

[111] F Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory' (1994) 19 *Melbourne University Law Review* 922.

[112] W Friedmann, *The Changing Structure of International Law* (New York, Columbia University Press, 1964) 230.

positions, such as Antonio Cassese) is instead that they have no rights or obligations, stressing that states, regardless of their ideological orientation, are reluctant to give enterprises international legal personality.[113]

Today, however, it seems more appropriate to recognise that multinational companies contribute, directly or indirectly, to the making of international rules,[114] which should be taken as the first indicator and justification for recognising their international legal personality.[115] An important element in this respect of overall international law reconstruction is the fact that, for a long time now, multinational enterprises have also been concluding contracts or agreements with host states in order to host their investments and foster the development sought by these states. These contracts and agreements and the relationship between many previously reticent states and multinational enterprises will become much more numerous and intense with the evolution of the global context brought about by globalisation. Mahiou, for instance, points to the dissolution of the international bloc of socialist states, the triumph of the liberal model of development and the weakening of solidarity between the member states of the Group of 77 as important factors in this evolution, and highlights the effect of so many developing countries, once reluctant to deal with multinational companies, now frequently doing so through these contracts or agreements.[116] Some doctrines even recognise these contracts or agreements, which are at the direct origin of a form of international law that has no direct raison d'etre other than these transnational companies, to be integrated into the categories of sources of international law.[117]

Multinational enterprises also participate in the drafting of international treaties. The negotiation and even drafting of major international economic treaties are, in actual fact, often done at the instigation and with the support or direct involvement of these companies; as was seen in the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods.[118]

More recently, the contribution of multinational enterprises to the construction of international law can be further illustrated by examples of self-regulation, with the production of the 'soft law' rules[119] of the codes of conduct that multinational

[113] A Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1986) 103.

[114] This was also denied by the more politically and socially oriented 'New Haven School': while it accepts that corporations are powerful independent actors, it considers that they are not competent to make international law. *cf* M McDougal, H Lasswell and M Reisman, 'The World Constitutive Process of Authoritative Decision' (1996) 19 *Journal of Legal Education* 403.

[115] JI Charney, 'Transnational Corporations and Developing Public International Law' (1983) *Duke Law Journal* 748ff.

[116] Mahiou (n 102) 271.

[117] ibid.

[118] 186 UNTS 299ff.

[119] On the concept of soft law, see R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 *ICLQ* 549; R Ida, 'Formation des normes internationales dans un monde en mutation: Critique de la notion de soft law' in *Le droit International au service de la paix, de la justice et du développement, Mélanges Michel Virally* (Paris, Pédone, 1991) 333; U Fastenrath, 'Normativity in International Law' (1993) 4 *European Journal of International Law* 305.

enterprises voluntarily adopt or accept to affect them. An example of these is the OECD Guidelines for Multinational Enterprises adopted in 2011.[120,121]

There is also a growing consensus in international society, as in the more plural international community, that multinational enterprises should be subject to certain obligations to respect fundamental human rights and fundamental elements or standards of social and environmental responsibility.[122] The United Nations Global Compact was created under the auspices of the World Organisation as a step in this direction.[123] It is still a non-binding 'pact' on human rights, labour, environment and anti-corruption[124] that encourages companies globally to adopt sustainable practices and policies, and to comply with the Decalogue of Principles.[125] Other international legal rules proposed or drafted to hold these companies accountable and ensure respect for human rights, labour law and environmental law included the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[126] approved in 2003 by the Sub-Commission on the Promotion and Protection of Human Rights of the Economic and Social Council (ECOSOC).[127] The Commission on Human Rights did not approve the draft, but rather called for the appointment of a special representative on the issue. The appointment of John Ruggie, the special representative on the issue of human rights and transnational corporations and other business enterprises, took place in 2005. Among the resulting works are the Guiding Principles on Business and Human Rights that seek to translate the Commission's framework of the threefold obligation to protect, respect and fulfil into this area. The draft was adopted by the Human Rights Council in 2011 and has been developed by other projects of the Special Rapporteur.[128]

[120] www.oecd.org.

[121] NMCP Jägers, Corporate Human Rights Obligations: In Search of Accountability (Cambridge, Intersentia, 2002), 19–35; JL Dunoff, SR Ratner and D Wippman, International Law Norms, Actors, Process: A Problem Oriented Approach, 2nd edn (Boston, Aspen Publishers, 2006) 216–34.

[122] A Clapham, *Human Rights Obligations of Non-state Actors* (Oxford, Oxford University Press, 2006) 79ff.

[123] www.unglobalcompact.org.

[124] *Guide to Corporate Sustainability: Shaping a Sustainable Future*, www.globalcompact.org https://d306pr3pise04h.cloudfront.net/docs/publications%2FUN_Global_Compact_Guide_to_Corporate_Sustainability.pdf.

[125] SV Schorlemmer, 'Der "Global Compact" der Vereinten Nationen – ein Faust'scher Pakt mit der Wirtschaftswelt?' in SV Schorlemmer (ed), *Praxishandbuch UNO*: *Die Vereinten nationen im Lichte globaler Herausforderungen* (Heidelberg, Springer, 2003) 507.

[126] United Nations, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2013) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

[127] In the doctrine, highlighting other normative initiatives, see Tully (n 110) 418; Dunoff, Ratner and Wippman (n 121); E Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6 *New Wales University Journal of Human Rights* 222; LC Backer, 'The United Nations' "Protect-Respect-Remedy" Project: Operationalizing a Global Human Rights Based Framework for the Regulation of Transnational Corporations (2011) 9 *Santa Clara Journal of International Law* 37; MT Kamminga and S Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Leiden, Brill, 2021).

[128] JG Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York, Norton, 2013); JG Ruggie, 'Multinationals as Global Institutions: Power, Authority, and Relative Autonomy' (2017) 12(3) *Regulation & Governance* 317.

To these other indicators of an emerging international legal personality for multinational enterprises, it should be added that international economic law (covering investment, trade and international financial operations law) currently provides a set of legal mechanisms by which companies can bring claims against states before various international bodies, whether non-judicial or judicial.[129] Such mechanisms include recourse to institutional bodies (both treaty-based and non-treaty-based) with defined procedures for hearing complaints, legally binding decision-making bodies and enforcement procedures.[130]

This participation of multinational companies in the mechanisms for ensuring compliance with international economic law may be direct or indirect. This indirect participation in jurisdictional mechanisms occurs, for example, within the framework of the dispute settlement system (DSS) of the World Trade Organization (WTO).[131] Thus, many of the international economic disputes formally brought by states before specialised tribunals are in fact undertaken, sponsored and supported by the companies affected by the commercial action that is the subject of the complaint.[132] That this is so is understandable, as these enterprises are the most interested parties in the case. They are the ones which know the market and are therefore in the best position to assess the effective (non-)compliance with the rules governing it, thus contributing with their testimonies to the proper establishment of the relevant facts.[133] There are also cases of direct participation. This is exemplified by the special dispute settlement mechanisms[134] within the framework of international investment law, namely through investor-host state arbitration[135] resorting to the International Centre

[129] C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2008); R Dolzer and C Schreuer, *Principles of International Investment Law*, 2nd edn (Oxford, Oxford University Press, 2012).

[130] M Sornarajah, 'Power and Justice in Foreign Investment Arbitration' (1997) 14 *Journal of International Arbitration* 103. Within the European Union (EU), companies can bring actions directly before the Court of Justice of the European Union for violations of EU law. See M Horspool and M Humphreys, *European Union Law*, 8th edn (Oxford, Oxford University Press, 2014).

[131] The relationship between the de facto propelling company and agent defending violated rights and the state that formally initiates and sustains the proceedings before the WTO DSS is particularly evident in the case of *Korea – Anti-dumping Duties on Imports of Certain Papers from Indonesia*, WT/DS312/R, 28 October 2005 (Panel Report).

[132] S-P Croley and JK Jackson, 'WTO Dispute Procedures, Standard of Review and Deference to National Governments' (1996) 90 *AJIL* 193; S Charnovitz, 'Economic and Social Actors in the World Trade Organization' (2001) 7 *ILSA Journal of International and Comparative Law* 259.

[133] Ph Maddalon, 'Les rapports des groupes spéciaux et de l'organe d'appel de l'OMC' (2005) 51(1) *Annuaire français de Droit international* 629.

[134] Fischer (n 104) 925.

[135] G van Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121; AS Alexandroff and IA Laird, 'Compliance and Enforcement' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (New York, Oxford University Press, 2008) 1171; B Kingsbury and S Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law' in B Kingsbury, A Gorgillo and RB Stewart (eds), *El Nuevo Derecho Administrativo Global en América latina* (New York, Institute for International Law and Justice, 2009).

for Settlement of Investment Disputes (ICSID) set up by the 1965 Washington Convention.[136] In this particular context, which is as unique as it is remarkable, multinational enterprises have access to the arbitral courts under exactly the same conditions as states.[137] It should also be noted that even when multinational companies do not have *ius standi* next to some of these judicial bodies – ie, the right to bring actions themselves – and instead have to resort to state mediation through diplomatic protection, like in the DSS of the WTO, they have been granted the right to participate in proceedings, for example, as amicus curiae.[138]

In addition to these manifestations of action, presence and participation in the international workings of globalisation, and even rights and obligations that are legally relevant in contemporary life, there are, in the practice of UN sanctions, examples of situations in which some multinational enterprises have been directly subject to such punitive measures for violating the rules on economic embargoes previously laid down by the UN Security Council and the UN General Assembly.[139] This was the case with the inclusion in blacklists and, even more specifically, with the concrete denunciation of the actions of tankers owned by international oil companies, consisting in the transportation of oil by these vessels to the Republic of South Africa, in violation of the embargo previously decreed by the Security Council as an enforcement measure in the fight against the apartheid regime in South Africa. What those sanctions implicitly meant was that the multinational companies owning those ships were deemed direct holders of obligations under international law within the framework of the sanctions regime established. The UN, by defining such a regime and acting accordingly in the face of acts perceived to violate that regime, took the non-state actor international company to be a legal entity, capable of and effectively standing as a holder of international legal obligations.[140]

[136] D Carreau and P Julliard, *Droit international économique*, 4th edn (Paris, Dalloz, 2010) 19.

[137] Article 25 of the Washington Convention, or Convention for the Settlement of Investment Disputes between States and Nationals of Other States (1966) 575 UNTS 175.

[138] Article 13, para 1 of the Memorandum of Agreement on Dispute Settlement, annexed to the Agreement establishing the World Trade Organization (Annex 2), which enshrines this option for cases brought before the panels or working groups. The Appellate Body within the WTO DSS has extended this option to the appeal process, albeit prudently. Examples of the use of this option can be seen in *United States – Import Ban on Certain Shrimp and Shrimp-Based Products*, WT/DS58/R, 15 May 1998 (Working Group report) and WT/DS58/AB/R, 12 October 1998 (Appellate Body report); *Canada – Final Determination on Countervailing Duties on Certain Hardwood Lumber from Canada, WT/DS257/AB/R of 19 January 2004* (Appellate Body report); *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001 (Appellate Body report).

[139] C Langenfeld, 'Embargo' (1999) II *Encyclopedia of Public International Law* 62, 66; Tully (n 110) 172.

[140] ES Schmidt, 'United Nations Sanctions and South Africa: Lessons from the Case of Southern Rhodesia' in United Nations, *Sanctions against South Africa* (New York, United Nations, 1987) 21; T Stoll, 'Rhodesien/Zimbabwe; Konflikte, Südafrika' in R Wolfrum (ed), *Handbuch Vereinte Nationen* (Munich, CH Beck 1991) 501.

E. NGOs

International NGOs[141] will also begin to be recognised as having limited international legal status.

As with multinational enterprises, international law does not contain an established definition of NGOs, although Resolution 1996/31 of the UN Economic and Social Council identifies the attributes of NGOs.[142] However, the international legal doctrine points to certain constituent elements: these are private associations created by natural or legal persons on the basis of a private law contract; they pursue objectives (normally non-profit making) at the national or cross-border level; they have an institutional structure and a permanent headquarters for this purpose; and they are subject to state law, even when they act at the international level.[143] Regardless of their legal personality, subject to the laws of a specific state,[144] the existence and effectiveness of NGOs increasingly occur at the global international level. Their large number,[145] their vigorous presence in decisive fora of deliberation on global governance, their well-established international practice of networking, their systematic use of the internet for communication,[146] the skills that they display and, even more specifically, their political capacity to influence decision makers not only make NGOs a remarkable, unavoidable element of the international and transnational relations of the global era[147] and of contemporary global governance, in the context of a generic transformation of humanity into a global civil society,[148] but also increasingly raise the question of their international

[141] More broadly, in 'Cooperation between the UN and All Relevant Partners, in Particular the Private Sector', UN Doc A/56/323 (2001), para 6 and Annex 1, the UN Secretary-General refers to the 'private sector', where enterprises are also included. In the doctrine, T Princen and M. Finger (eds), *Environmental NGOs in World Politics* (London, Routledge, 1994) 6 define NGOs as associations of individuals representing elements of public opinion, established under domestic law, with a permanent (ideally democratic and transparent) organisation or governance structure, and possessing specialised skills or knowledge capabilities.

[142] Previously, Resolution 288 (X) of 27 February 1950 merely stated that it was 'any international organisation which is not founded by a treaty'.

[143] O Kimminich and S Hobe, *Einführung in das Völkerrecht*, 6th edn (Tübingen, Francke, 1997) 149; J Delbrück, 'Nichtregierungsinstitutionen. Geschichte – Bedeutung – Rechtsstatus' (2003) 13 *Rechtspolitisches Forum* 3.

[144] Based on the criterion of the headquarters or the constitutive act, it is national law that governs NGOs. See G Kegel, *Internationales Privatrecht, Ein Studienbuch* (Munich, CH Beck 1995) 413; D Thürer, 'The Emergence of Non-governmental Organisations and Transnational Enterprises and the Changing Role of the State' in R Hoffmann (ed), *Non-state Actors as New Subjects of International Law* (Berlin, Duncker & Humblot, 1999) 45; K Doehring, *Völkerrecht. Ein Lehrbuch* (Heidelberg, CF Müller, 1999) 84.

[145] Tully (n 110) 46.

[146] See J Neyer, Postnationale politische Herrschaft: Vergesellschaftung und Verrechtlichung jenseits des Staates (Baden-Baden, Nomos, 2004) 85, with examples.

[147] R Falk, 'The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society' (1997) 7 *Transnational Law and Contemporary Problems* 333.

[148] If the concept of civil society were limited to its private dimension, based on the theory that distinguishes state and society (*cf* EW Böckenförde, *Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit* (Wiesbaden, Springer, 1973); HH Rupp,

legal status. In fact, the problem of recognising such a status thus arises from the acceptance of the contemporary transformation of the traditional international system into a different, global international system comprising transnational vectors.[149] To date, no such status enabling NGOs to be generically recognised and ensured protection exists.[150] A larger part of international legal doctrine also makes many objections to a generic international personality resulting from the mere participation in international relations.[151]

Regardless of this lack of general status of NGOs, nothing seems to prevent the recognition of the legal personality of at least some NGOs. This certainly implies that there is no legal necessity for legal policy to sustain a *numerus clausus* in relation to international legal subjectivity. As seen with regard to IOs, there is no kind of a priori impediment to international law attributing personality to other actors in international life besides states. Although such a restriction may be alleged,[152] in the end, nothing seems to impose it.

Acceptance of the reality of international practice and the important role that this effectively plays in the current global system instead seems to abound in the sense that the international legal community resulting from globalisation is open to at least the most important non-governmental actors being included in the universe of functional limited subjects. What is decisive, it seems, is to verify if international law itself contains positive normative responses that effectively extend international legal subjectivity to these actors typical of globalisation, and if it contains rules that make these actors holders of rights and even obligations

'Die Unterscheidung von Staat und Gesellschaft' in J Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschlands* II, 3rd edn (Heidelberg, CF Müller, 2004) 879), it would be devoid of political content. It is not this 'bourgeois' notion that is embraced here or that permeates studies on globalisation and its legal regulation. Rather, it is a politically charged or significant concept, in which the members of civil society perceive themselves as citizens involved in defining the destinies of the *polis*. This notion of *citizenship* in the global space is reminiscent of the one that Habermas presents, eg, in *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 4th edn (Frankfurt am Main,Suhrkamp, 1994) 443. On the other hand, it is a notion analogous to that which, in the international normative context, results from the Civil Society Declaration issued by the Global People's Forum at the Johannesburg Summit on Sustainable Development in 2002.

[149] PC Jessup, *Transnational Law* (New Haven, Yale University Press, 1956) 106. While 'international' describes interactions between states, 'transnational' refers to cross-border transactions that also involve non-state actors. See T Risse-Kappen, 'Introduction' in T Risse-Kappen (ed) *Non-state Actors: Domestic Structures and International Institutions* (Cambridge, Cambridge University Press, 1995) 3.

[150] S Hobe, 'Der Rechtsstatus der Nichtregierungsorganisationen nach geltendem Völkerrecht' (1999) 37 *Archiv des Völkerrechts* 152; A Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Berlin, Duncker & Humblot, 2007) 854. It should be noted that even within the already limited European framework and with an equally limited thematic scope, the European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations of 24 April 1986 requires prior verification of a national legal subjectivity and includes numerous exceptions.

[151] H Mosler, 'Die Erweiterung des Kreises der Völkerrechtssubjekte' (1962) 22 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1; S Hobe, 'Völkerrecht im Zeitalter der Globalisierung' (1999) 37 *Archiv des Völkerrechts* 152; U Hingst, *Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge* (Berlin, Dunker & Humbolt, 2001) 154.

[152] For instance, it is still invoked by I Brownlie, *Principles of Public International Law*, 4th edn (Oxford, Oxford University Press, 1995) 58.

that are directly attributable to these rules. Similarly, these NGOs will become legal subjects if rules of international law empower them to enforce these titles in accordance with international law. When this is the case, regardless of whether these titles result from the recognition of faculties to perhaps even participate in the increasingly complex process of developing international law or whether they appear as effective substantive rights and obligations, or procedural rights relating to the process of the jurisdictional application of the law, it seems necessary to conclude that at least some NGOs acquire international legal personality.

In contemporary international law, there are in fact increasing elements of positive law which corroborate this conclusion.

First, there is the experience of institutionalising the participation of NGOs in the creation of international law specific to labour relations, within the unique but also limited framework of the ILO, where both employers' and workers' organisations have a common seat within the tripartite mode of working of this particular IO. Also noteworthy is the fact that international NGOs participate as observers in the work of IOs of the UN family, and that NGOs are given a legal status therein under the secondary rules of international law created by the organs of these IOs. This is the case, for example, with procedural rules enacted by the IO in the exercise of the competencies recognised as belonging to it in its primary law, especially the constituent treaty of that organisation. The practice of the UN illustrates such a trend.[153] On the basis of Article 71 of the UN Charter, the ECOSOC has reached agreements setting out ways of consulting with NGOs.[154] The status thus defined comprises three categories: general consultative status; special consultative status; and the status for other NGOs that do not enjoy the first two. Under this differentiated consultative status, qualified NGOs may contribute their views and address UN bodies, in addition to being able to request the inclusion of issues of their interest on the agenda.[155] Similar rights and observer status are also foreseen by Article V(2) of the WTO Agreement. Additionally, the possibility of consulting NGOs has been exercised by the WTO Secretariat, which invites NGOs on a thematic basis. The practice of the WTO also comprehends the possibility for NGOs to contribute position documents by electronic means. However, they are excluded from participating in meetings of the WTO bodies.[156]

[153] FW Stoecker, NGOs und die UNO. Die Einbindung Nichtregierungsorganisationen (NGOs) in die Strukturen der Vereinten Nationen (Frankfurt am Main, Peter Lang, 2000) 90.

[154] R Lagoni and Chaitidou, 'Article 71' in B Simma et al (eds), *The Charter of the United Nations: A Commentary*, vol II, 2nd edn (Oxford, Oxford University Press, 2002) 1068.

[155] UN ECOSOC Resolution 1296/XLIV of 23 May 1998. In the literature, see O Kimminich and S Hobe, *Einführung in das Völkerrecht* (Tübingen, UTB, 2008) 149; Hobe (n 151); V Epping, 'Völkerrechtssubjekte' in K Ipsen (ed), *Völkerrecht. Ein Studienbuch*, 4th edn (Munich, CH Beck 1999) 78; I Seidl-Hohenveldern and G Loibl, *Das Recht der internationalen Organisationen, einschießlich der Supranationalen Gemeinschaften*, 7th edn (Cologne, Carl Heymanns, 2000) 4.

[156] J Neyer, Postnationale politische Herrschaft: Vergesellschaftung und Verrechtlichung jenseits des Staates (Baden-Baden, Nomos, 2004) 55; A. Emmerich-Fritsche, Vom Völkerrecht zum Weltrecht (Berlin, Duncker & Humblot, 2007) 855.

In addition to these rights, it is worth highlighting the capacity of NGOs to influence the formation of decision making and their contributions to shaping international public opinion and even the formation of rules in law making. This has been particularly seen in their participation in the areas of human rights protection and the international protection of the environment. While this practice does not amount to NGOs being given a general faculty to contribute their views directly to the deliberations of IOs and or a right to vote, it does signify that there is a freedom for them to make proposals under observer status and, in some cases, to participate in special working groups together with state representatives. This may be seen, for example, in relation to the Washington Agreement on the Protection of Endangered Species[157] and the participatory rights of NGOs in the implementation of the Convention on Desertification.[158]

Furthermore, NGOs are involved in the production of standards, contributing to their definition as well as contributing knowledge, awareness raising and pressure, which zaffre particularly relevant in their implementation.[159] This has been documented in the fields of international environmental law,[160] international humanitarian law, the international law of the sea[161] and human rights law. Some international treaties, in particular, are known to have been strongly influenced in terms of their content and general sense by the contributions made by NGOs in the process of their adoption.[162] Such was the case, for example, with the 1973 Treaty on Trade in Endangered Species of Wild Flora and Fauna,[163] the 1989 Convention on the Rights of the Child,[164] the 1997 Treaty on the Prohibition of

[157] Article XI, para 7. See also S Oberthür, 'Auf dem Weg zum Weltumweltrecht? Tendenzen und Wirkungen der Verrechtlichung der internationalen Umweltpolitik' in B Zangl and M Zürn (eds), *Verrechtlichung. Baustein für Global Governance*? (Bonn, Dietz, 2004) 119.

[158] UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, UN Doc.A/AaC.241/27 (1994) 33(5) ILM 1328. See also KW Danish, 'International Environmental Law and the "Bottom-up" Approach: A Review of the Desertification Convention' (1995) 3(1) *Indiana Journal of Global Legal Studies* 133.

[159] T van Boven, 'The Role of Non-governmental Organisations in International Human Rights Standard-Setting: A Prerequisite for Democracy' (1990) 20 *California Western International Law Journal* 207; P-M Dupuy and L Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Cheltenham, Edward Elgar, 2008).

[160] P Canelas de Castro, 'Mutações e Constâncias do Direito Internacional do Ambiente' (1994) 2 *Revista jurídica do urbanismo e do ambiente* 145, 183; J Gupta, 'The Role of Non-state Actors in International Environmental Affairs' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 463.

[161] S Hobe, 'Global Challenges to Statehood: The Increasingly Important Role of International Nongovernmental Organisations' (1997) 5 *Indiana Journal of Global Legal Studies* 1919; J Delbrück, 'Laws in the Public Interest' – Some Observations on the Foundations and Identification of *Erga Omnes* Norms in International Law' in V Götz et al (eds), *Liber Amicorum Günther Jaenicke – Zum 85. Geburtstag* (Berlin, Springer, 1998) 26; U Beyerlin and M Reichard, 'The Johannesburg Summit: Outcome and Overall Assessment' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 226.

[162] Hobe (n 151); U Hingst, *Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge* (Berlin, Duncker & Humblot, 2001) 49; Gupta (n 161).

[163] (1973) 12 ILM 1055.

[164] S Detrick (ed), The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires' (Dordrecht, Martinus Nijhoff, 1992).

the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction[165] and the 1998 Statute of the ICC.[166] Similarly, it is generally acknowledged that, through their participation, NGOs contributed powerfully to shaping the will of the Conferences on Environment and Development in Rio de Janeiro in 1992,[167] on Human Rights in Vienna in 1993, on Women's Rights in Beijing in 1997, on the Statute of the ICC in Rome in 1998 and on Sustainable Development in Johannesburg in 2002.[168]

Besides their growing participation in the drafting of international law, international NGOs have also played an important role in its application. They contribute to the implementation of some of the instruments of international law, in particular by monitoring compliance, in a watchdog role that is recognised or assigned to them in part by the bodies of institutions linked to those instruments.[169]

To this first level of analysis and detection of international law rules enabling the international legal capacity of NGOs, a second level should be added: primary international law also contains instruments and rules that directly confer rights upon these actors, which are directly exercisable by them. These rules of primary IO law also sustain the limited international legal personality of NGOs. This is the case, for example, when certain international treaties directly attribute substantive rights to international NGOs, like the right to freedom of assembly and association held by NGOs under Article 11 of the European Convention on Human Rights.[170] NGOs may also be granted procedural rights, as foreseen by the Aarhus Convention.[171]

The other element identified by the ICJ in 1949 as an important vector for defining international legal personality consists of the recognition of the right of action before international courts or tribunals or before non-judicial monitoring bodies created by certain conventions. This may be evidenced in particular by instruments for the protection and promotion of human rights, which also define the framework of competence of these bodies, whether jurisdictional or non-jurisdictional. Examples include the 1503 procedure before the Economic, Social and Cultural Rights Committee, the complaint procedure under the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the

[165] United Nations, 'Conference on Disarmament' (CD/1487, United Nations, 1997).

[166] Margueritte and Prouvèze (n 57) 184.

[167] NGOs are said to be important players in the discipline adopted in 10 of the 42 chapters that make up Agenda 21. See Report of the United Nations Conference on Environment and Development, United Nations General (4) Assembly, A/Conf.151/26.

[168] Beyerlin and Reichard (n 162). On this modality of the contribution of NGOs to the process of defining international law, through their participation in summit conferences, with various examples, see also R Wedgwood, 'Legal Personality and the Role of Non-governmental Organisations and Non-state Political Entities in the United Nations System' in R Hoffman (ed), *Non-state Actors as New Subjects of International Law* (Berlin, Duncker & Humblot, 1999) 20; Thürer (n 45) 37.

[169] Canelas de Castro (n 161) 183.

[170] M Hempel, Die Völkerrechtssubjektivität internationaler nichtstaatlicher Organisationen (Berlin, Duncker & Humbolt, 1999) 88.

[171] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2nd edn (New York, UNECE, 2014).

complaint procedure in the case of consistent patterns of gross and credible violations of human rights and fundamental freedoms before the current Human Rights Council.[172] This is especially the case with regional conventional law, whether it be the American Convention on Human Rights and its corresponding Commission,[173] the European Convention on Human Rights and Fundamental Freedoms and the European Court of Human Rights,[174] or the African Charter on Human and Peoples' Rights and its Court on Human and Peoples' Rights.[175] There are, however, some restrictions on the exercise of this right of action, such as the fact that collective interest actions (*actio popularis*) cannot be filed in the absence of a direct interest of the holder of the right, distinct from that of the NGO members.[176] In criminal matters, the involvement of NGOs is even more restricted, being limited to the possibility of transmitting information to the Prosecutor of the ICC, who opens an investigation on their own initiative.[177]

Another means for NGOs to participate in international court proceedings is their intervention as amicus curiae. This procedure, while not making NGO parties to the proceedings, enables them to submit written communications on the factual and legal aspects of the case. However, while not generally available in all international jurisdictions, this is the case in jurisdictions dealing with litigation pertaining to the protection of human rights and international humanitarian law. NGOs are also recognised as having rights to intervene as amicus curiae before the international criminal justice system[178] or before the WTO Dispute Settlement System[179] and in arbitration proceedings within the framework of international investment law.[180]

Finally, reference should be made to the Council of Europe European Convention on the Recognition of the Legal Personality of International

[172] See www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx. In the doctrine, see M Hempel, *Die Völkerrechtssubjektivität internationaler nichtstaatlicher Organisationen* (Berlin, Duncker & Humblot, 1999) 127.

[173] Article 44 of the 1969 Convention. *cf* UNTS, v 1144.

[174] Article 34 of the 1950 Convention. *cf UNTS*, v 213.

[175] Article 3 of the 1998 Protocol to the African Charter on Human and Peoples' Rights establishing an African Court on Human and Peoples' Rights. The Court may be called to act among other subjects by NGOs which have obtained observer status from the Commission. It is also necessary that the state of nationality of such NGOs has accepted this procedure by special declaration.

[176] See, eg, Case C-321/959 *Greenpeace v Commission* [1998] ECR I-01651 and, in the doctrine, Y Winisdoerffer, 'La jurisprudence de la Cour européenne des droits de l'homme et l'environnement' (2003) 2 *Revue Juridique de l'Environnement* 213.

[177] Article 15 of the Rome Statute.

[178] Article 74 of the Rules of the Criminal Court for the former Yugoslavia and Article 103 of the Rules of the ICC.

[179] Article 13, para 1 of the Understanding on Rules and Procedures for the Settlement of Disputes, Annex 2 to the Marrakesh Agreement.

[180] *cf* the examples of recent cases in which problems of international water law intersect with problems of international investment law, all concerning cases brought before international arbitration bodies under investor-host state dispute settlement mechanisms, making use of the resources of the ICSID, such as the *Aguas del Tunari v Republic of Bolivia* [2005] ICSID Case No ARB/02/3; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [2008] ICSID Case No ARB/05/22 or *Suez v Argentine Republic* ICSID Case Nos ARB/03/17 and ARB/03/19. These examples are the more

Non-governmental Organisations of 24 April 1986, which directly tackles the issue of the legal personality of NGOs, enshrining the principle of recognition by all states parties of such legal personality when obtained by an NGO under the law of another state party.[181]

From all these developments, the conclusion seems to follow that at least some NGOs have acquired international legal personality.

F. Minorities and Indigenous Peoples

After a period of somewhat less visibility, minorities and Indigenous peoples are also acquiring through globalisation a new prominence in the international legal framework. In fact, from a historical perspective, this is a legal re-emergence, particularly in comparison with the pattern of international legal protection that had been established in the eighteenth and nineteenth centuries, a period in which, for example, the Indians of North America were granted a limited status of legal protection, whereby they were accepted as contracting parties to conventions between state governments and Indian tribes. Subsequently, although the question of defining legal regimes for the special protection of minorities still figured prominently in the age of the League of Nations, with the 1919 Paris Peace Treaty giving rise to a set of treaties for the protection of European minorities and elevating them to the status of an international issue, the normative strategy of minority protection was virtually abandoned in the immediate post-the Second World War era. In the second half of the twentieth century, it was argued that the previously enacted special status of protection of minorities had resulted in the aggravation of ethnic conflicts in several states and that these conflicts had contributed to the outbreak of the Second World War. The international legal strategy that was subsequently advocated as a result instead involved ensuring the protection of the human rights of all people, without discrimination on the basis of race, ethnicity, religion or any other grounds. This newly advocated strategy would also guarantee the protection of minorities, although through the protection of each individual member.

However, in more recent decades in the era of globalisation, with the end of the Cold War, a number of developments, both factual and normative, are going to lead to a new change of direction and the adoption of another approach. Amongst

significant as they involved an important shift in international jurisprudence and led to the revision of international treaties and pertinent provisions (such as the Washington Convention and the 2006 ICSID Arbitration Rules) to accommodate this participation by NGOs. See P Canelas de Castro, *Mutações e Constâncias do Direito Internacional da Água. Mudanças de Paradigmas* (Coimbra, Universidade de Coimbra, 2016) 336; P Canelas de Castro, 'Towards the Harmonization of the Human Right to Water with the Protection of International Investments in the Context of the Processes of Privatization of Water Services?' (2016) 13(1) *Soochow Law Journal* 43, 57.

[181] MO Wiederkehr, 'La Convention du Conseil de l'Europe sur le statut des organisations non-gouvernementales' (1987) 33(1) *Annuaire français de Droit international* 749.

these factors are: the reconceptualisation of national security issues, now also including a human security vector; focusing on infra- and supra-state entities; the accentuation of ethnic conflicts, immediately within the European framework of the Balkans; the phenomena of reconstitution of political spaces, which also start to comprise an alternative to inclusion in the whole state via the means of 'looser' regional integration; and the very success of the human rights movement and the processes of decolonisation and self-determination of non-self-governing peoples.[182]

Within the framework of international law, this redefinition of the status of *minorities* in the more favourable context of globalisation[183] is notably expressed in the adoption of the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[184] This instrument builds on the normative basis of the ICCPR and, in particular, the core provision of Article 27, which serves as direct inspiration to the Declaration, as the latter expressly acknowledges. It is equally influenced by the first post-Second World War international treaty designed to protect minorities from the greatest threat to their existence, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. However, it is not a mere reflection of these instruments, but rather complements or goes beyond their normative content, especially by enshrining a new or strengthened set of minority rights.

The rights of ethnic, religious or linguistic minorities and Indigenous peoples are an integral part of international human rights law. Like the rights of the child, women's rights and refugee rights, minority rights are a legal framework designed to ensure that a particular group, which is a minority in a state framework and is therefore in a vulnerable, disadvantaged or marginalised position in society, is able to achieve substantive equality and is protected from persecution.

[182] On the latter, see M Galvão Teles and P Canelas de Castro, 'Portugal and the Right of Peoples to Self-Determination' (1996) 34(1) *Archiv des Völkerrechts* 2, 46.

[183] P Thornberry, *International Law and the Rights of Minorities* (Oxford, Clarendon Press, 1991); G Alfredsson, 'Indigenous Populations, Protection' (1995) II *Encyclopedia of Public International Law* 946, 951; G Gilbert, 'The Council of Europe and Minority Rights' (1996) 18 *Human Rights Quarterly* 160; JJ Preece, *National Minorities and the European Nation-States System* (Oxford, Clarendon Press, 1998); K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-Determination* (Leiden, Nijhoff, 2000); R Hoffman, 'Protecting the Rights of National Minorities in Europe' (2001) 44 *German Yearbook of International Law* 237; G Pentassuglia, *Minorities in International Law: An Introductory Study* (Strasbourg, Council of Europe, 2002); JJ Preece, *Minority Rights: Between Diversity and Community* (Cambridge, Polity, 2005); TH Malloy, *National Minority Rights in Europe* (Oxford, Oxford University Press, 2005); M Weller, *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford, Oxford University Press, 2006); D Šmihula, 'National Minorities in the Law of the EC/EU' (2008) 8(3) *Romanian Journal of European Affairs* 51, 81; M Weller, D Blacklock and K Nobbs (eds), *The Protection of Minorities in the Wider Europe* (Basingstoke, Palgrave, 2008); P Macklem, 'Minority Rights in International Law' (2008) 6(3)(4) *International Journal of Constitutional Law* 531, 552.

[184] General Assembly, 'Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities: Resolution', United Nations Digital Library, UN Doc A/RES/47/135 https://digitallibrary.un.org/record/158458?ln=en.

General Comment No 23 on the rights of minorities of the Human Rights Committee,[185] which gives an authoritative interpretation of Article 27 of the Covenant, states that 'this article establishes and recognises a right which is conferred on individuals belonging to minority groups and which is distinct from and additional to all the other rights which, as individuals, and in common with all others, they already hold and are entitled to enjoy under the Covenant'. Article 27 thus constitutes autonomous rights under the Covenant. The interpretation of its scope by the Human Rights Committee has had the effect of ensuring the recognition of the existence of diverse groups within a State, of the fact that decisions making such recognition are not the exclusive competence of the State, and that States are obliged to take positive measures 'necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of the group'. More specifically, the rights of minorities under the Declaration are the right to protection by states of their existence and their national or ethnic, cultural, religious and linguistic identity; the right to enjoy their own culture, to profess and practise their religion, and to use their own language in private and in public; the right to participate effectively in cultural, religious, social, economic activities and public life; the right to participate effectively in decisions affecting minorities at the national and regional levels; the right to establish and maintain associations of minorities; the right to establish and maintain peaceful contacts with other members of their group and with persons belonging to other minorities, both within their state and beyond state boundaries; and the freedom to exercise their rights, both individually and in community with other members of their group, without discrimination. These rights correspond to the obligations of states to take steps to protect and promote the rights of members of minorities, and of the specialised agencies and other international organisations of the UN family to assist in the realisation of those rights.[186]

This overall global movement of growth and densification of the protective normative content of a law dedicated to minorities is also discernible at a regional level. Thus, in particular, in the European framework,[187] after the events in the Balkans after 1989, with the adoption of two treaties within the framework of the Council of Europe (the European Charter for Regional or Minority Languages

[185] Human Rights Committee, General Comment No 23: Article 27, 1994.

[186] In 2005, the Working Group on Minorities adopted a commentary to guide the interpretation and application of the UN Declaration on Minorities. See Secretary-General, 'Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities', United Nations Digital Library, UN Doc E/CN.4/Sub.2/AC.5/2005/2.

[187] Besides the works of Preece (n 184), Malloy (n 184), Weller (n 184), and Šmihula (n 184), see T Orlin, Minorities and Human Rights Education. Human Rights Law as a Paradigm for the Protection and Advancement of Minority Education in Europe, in C Mahler et al (eds), *The United Nations Decade for Human Rights Education and the Inclusion of National Minorities*, (Frankfurt am Main, Peter Lang, 2009), 159–69.

of 1992[188] and the Framework Convention for the Protection of National Minorities of 1995),[189] the Copenhagen Document of 1990 of the Organisation for Security and Cooperation in Europe (OSCE) and the particular regime of minorities in the framework of the Charter of Fundamental Rights of the EU. The concern that a lack of minority protection undermines international and regional stability also informs the criteria for membership in the EU and the North Atlantic Treaty Organization (NATO). The candidate countries must comply with the Copenhagen Agreement on criteria for admission to the EU which were laid down by the European Council in 1993. These criteria include the requirement that candidate states demonstrate 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'. A democratic political system and functioning, including respect for persons belonging to minorities in accordance with OSCE standards, is also one of the criteria for NATO membership.

In addition to substantive rights,[190] the instruments adopted in this area in the era of globalisation strengthen and perfect mechanisms for the participation of minorities and their representatives in the application and development of these regimes and in verifying the progress of states in complying with the obligations enshrined therein. This web of mechanisms, instruments and institutions is now very complex and includes, first and foremost, the conventional human rights bodies, including not only the committees mandated to monitor compliance with the ICCPR and the ICESCR, but also the bodies with the same mission established under other conventions protecting the rights of vulnerable groups or combating discrimination (children, women, migrant workers, people with disabilities and racial discrimination). They act on the basis of reports which give rise to recommendations in the form of 'Concluding Observations'. Early warning mechanisms and urgent procedures have also been put in place to prevent and respond to crises of respect for the rights of minorities. In addition, there are also special human rights procedures established under the current Human Rights, which deal with special issues or the special situations of particular states. These special procedures include the intervention of the Independent Expert on minority issues, established in 2005, whose mandate is to promote the implementation of the 1992 Declaration by making enquiries on national or thematic issues, the results of which give rise to reports and dialogue with states, the Forum on Minority Issues, in which international and global actors of various kinds participate to list issues affecting minorities and adopt recommendations to improve their lot, and other special procedures with 'state mandates' or 'thematic mandates'.[191] Also of relevance are

[188] European Charter for Regional or Minority Languages (148) CETS.

[189] Framework Convention for the Protection of National Minorities (157) CETS. See G Gilbert, 'The Council of Europe and Minority Rights' (1996) 18 *Human Rights Quarterly* 160.

[190] For other sources of minority rights, see Human Rights Office of the High Commissioner, *Minority Rights: International Standards and Guidance for Implementation* (New York, United Nations, 2010) 17.

[191] ibid 23.

the mechanisms of the Human Rights Council, under which, in accordance with the procedure established by UN General Assembly Resolution 60/251 of 2006, there is a periodic universal review of compliance by all states every four years, on the basis of reports submitted not only by state governments but also by other organisations, which may include contributions from interested parties. There are also more specific procedures within the framework of the ILO and UNESCO.[192] In several of these mechanisms and procedures and before the various bodies involved, minorities have the opportunity or are called upon to actively provide information and report experiences relevant to the evaluation of the respect of their rights and the formulation of policies or new instruments that strengthen or develop these rights.

In addition to minorities, *Indigenous peoples* will also find their own rights in the era of globalisation. International law does not provide an unambiguous definition of indigenous peoples. In particular, the main normative text concerning Indigenous peoples, the UN Declaration of 2007 on the Rights of Indigenous Peoples, contains no definition. Articles 9 and 33 state that Indigenous peoples and individuals have the right to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation concerned, and that they have the right to determine their own identity.[193] For its part, the ILO, in another legal instrument dedicated to Indigenous peoples, the Convention on Indigenous and Tribal Peoples in Independent Countries (No 169), distinguishes between indigenous and tribal peoples. In Articles 1 and 2, the ILO Convention highlights the importance of self-identification of Indigenous peoples.

Today, the rights of Indigenous peoples derive in particular from these two international instruments: the 2007 UN Declaration and, in a more restricted context, the 1989 ILO Convention 169. Among the rights of Indigenous peoples that are recognised, the right to self-determination stands out, which is closely related to their other political rights and, in particular, the right to participate in decision making regarding issues that affect their rights and through their representative institutions. These political rights of indigenous peoples correspond to the duties of states to consult and cooperate with these peoples – in particular, to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[194] Indigenous

[192] ibid 19.

[193] In JM Cobo, 'Study of the Problem of Discrimination against Indigenous Populations', United Nations Digital Library, https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html, a broader list of identifying criteria is given, but self-identification is relevant. In addition to the more common criteria of the conventional instruments, the UN Permanent Forum on Indigenous Peoples adds an emphasis on the elements of a strong connection with surrounding territories and natural resources, distinct social, economic and political systems, and distinct language, culture and beliefs.

[194] The UN Specialized Mechanism on the Rights of Indigenous Peoples, which from 2009 to 2011 carried out a detailed study on Indigenous peoples and their right to participate in decision making, and the Special Rapporteur on the rights of Indigenous peoples, through reports on thematic issues and country issues, has focused on the issue of Indigenous peoples' participation rights, reinforcing

peoples are also recognised as having rights to their lands, territories and natural resources,[195] various economic, social and cultural rights,[196] innovative collective rights in good measure,[197] rights to equality and non-discrimination, and rights in relation to treaties, agreements and other arrangements between indigenous peoples and states.[198] Some of these rights are the same as those enjoyed by minorities under more recent international law, which is because indigenous peoples are often also in a minority in the states in which they reside. However, the UN Declaration on the Rights of Indigenous Peoples has a more comprehensive protective content than that of the international legal instruments associated with minorities.[199]

To these must be added other legal developments, especially at the regional level.[200] Of particular note in this respect is the jurisprudence of the Inter-American Court of Human Rights and decisions of the African Commission on Human and Peoples' Rights. This jurisprudence,[201] concerning core issues relating to this

important jurisprudential developments, both by the Human Rights Committee and the Inter-American Court and Commission on Human Rights, to ensure that the participation of Indigenous peoples implies special care in obtaining their prior, free and informed consent in relation to activities that have an impact on these peoples, their lands, territories and natural resources. See 'Expert Mechanism on the Rights of Indigenous Peoples, Advice n. 2: Indigenous Peoples and the Right to Participate in Decision-Making' (2018) United Nations Digital Library, UN Doc A/HRC/18/42.

[195] See the corresponding jurisprudence in *Mayagna* (*Sumo*) *Awas Twingni Community v Nicaragua* [2001] IACHR 9, IHRL 1462.

[196] Human Rights Committee, *General Comment No 23*, 1994; and Committee on Economic, Social and Cultural Rights, *General Comment No 21*, 2009 on the right to participate in cultural life. Also of note is *Massacre of the Plan de Sanchez v Guatemala* [2004] IACHR 12, IHRL 1499.

[197] With the exception of the right to self-determination, group rights were virtually unknown in international human rights law.

[198] MA Martínez, 'Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations' (1999) United Nations Digital Library, https://digitallibrary.un.org/record/276353?ln=en.

[199] Among the main differences between minorities and Indigenous peoples is the fact that minorities do not necessarily have the long-standing, traditional and spiritual connection to their lands and territories that is usually associated with the self-identification of Indigenous peoples. Furthermore, the 2007 UN Declaration on the Rights of Indigenous Peoples requires states to consult and cooperate with Indigenous peoples to obtain their free, prior and informed consent before undertaking development activities that may have an impact on these peoples, while the 1992 UN Declaration on Minorities provides a more general right to participation in decision making and requires that the legitimate interests of persons belonging to minorities be taken into account in national planning and programmes. Similarly, see Office of the High Commissioner, *Indigenous Peoples and Human Rights. The United Nations Human Rights System: Fact Sheet n. 9/Rev.2* (New York, United Nations, 2013) 5.

[200] Recently, see R Pereira, 'Public Participation, Indigenous Peoples' Land Rights and Major Infrastructure Projects in the Amazon: The Case for a Human Rights Assessment Framework' (2021) 30 *Review of European, Comparative & International Environmental Law* 184, 196.

[201] This jurisprudence consists, in particular, of decisions in leading cases of the Inter-American Court of Human Rights, such as the case *Mary and Carrie Dann v USA* [2002] 470 US 39, 7502, Inter-American Court of Human Rights 11(140); *Mayagna Awas Twingi Community v Nicaragua Yaxye Axa Indigenous Community* [2001] IACHR 9, IHRL 1462; *Saramaka People v Suriname* IACHR Series C no 172, IHRL 3046; *Sarayka v Ecuador* [2012] IACtHR Series C No 245; or the African Commission on Human and Peoples' Rights in *Endorois – Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on Behalf of Endorois Welfare Council) v Kenya* [2009] communication no 276/03.

status – such as the question on the need for economic development projects to obtain the free, prior and informed consent of indigenous peoples or the question of what constitutes sufficient consultation – has made it possible to argue, in a globally progressive sense, that the rights of Indigenous peoples to their lands, territories and resources,[202] as well as the principle of their free, prior and informed consent,[203] are now part of the *corpus iuris* of binding human rights.

In addition to these substantive rights, indigenous peoples have the right to participate in the intricate institutional system of the UN family that applies and enforces the complex normative framework of human rights. Indigenous peoples have acquired unprecedented access to the system, especially to those bodies whose action specifically addresses indigenous peoples' issues, such as the Permanent Forum and the Specialised Mechanism.

In particular, this can be seen in the practice of enabling the representative organisations of Indigenous peoples to participate in UN human rights events and mechanisms without requiring them to be accredited before the ECOSOC, an accreditation that is required of other non-state actors. The extent of such participation at the UN is clearly visible in the annual sessions of the Permanent Forum and the Expert Mechanism. During these sessions, Indigenous peoples also have the opportunity to meet with the Special Rapporteur to report on the rights compliance issues they are facing.[204]

IV. Conclusion

The effects of globalisation on the international system led international law to rethink its traditional approach to the core issue of legal subjects, ie, of those entities or actors whom the international legal order recognises to have legal rights for participating in its workings. Today, the problem focuses in particular on the question of the legal status granted to non-state actors. One line of response to this problem continues to proclaim, in a somewhat mechanical and viciously circular reiteration, that international law is the law between states, at most also including IOs, so that non-state actors do not have legal personality.[205] Other authors

[202] In the doctrine, see L Rodríguez Pinero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement' in S Allen and A Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, Hart Publishing, 2011). For examples in the increasingly contentious area of international water law, see Canelas de Castro (n 181).

[203] On this particular right, its application and the case law to which it has given rise, see J Anaya, *International Human Rights and Indigenous Peoples* (New York, Kluwer, 2009); RB Lillich, H Hannum, SJ Anaya and D Shelton, *International Human Rights: Documentary, Supplement* (Austin, Kluwer, 2009); JS Phillips, 'The Rights of Indigenous Peoples under International Law' (2015) 26(2) *Global Bioethics* 120, 127.

[204] See www.ohchr.org/EN/Issues/IPeoples/SRIndigenous Peoples/Pages/SRIPeoplesIndex.aspx.

[205] See, eg, K Doehring, *Völkerrecht. Ein Lehrbuch* (Heidelberg, CF Müller, 1999) 196, who categorically rejects the possibility of NGOs being subjects of international law, holding that the very nature of private entities by definition excludes them from the spectrum of entities capable of attaining the status

maintain that there would be no advantage in recognising the legal status of NGOs and other non-state actors and that, on the contrary, the absence of such a status allows them to play a useful independent and critical role vis-a-vis states, the dominant subjects within the system, one that allows them to reflect public opinion, defend collective interests and enrich international public discourse, as well as helping to achieve the desired common good.[206] Both positions appear to us to be flawed, fundamentally because they do not question what the effective normative response of a continuously developing international law itself is today regarding the problem of legal personality or subjectivity. If the definition of international legal personality remains that it is the capacity to hold rights and obligations under international law, the developments in international law have mapped out evidence that the contemporary international community has effectively created rules that integrate a wider universe of actors and extend international legal subjectivity to entities other than states.[207] In particular, some NGOs and some multinational enterprises, as well as other groups and individuals have achieved the condition of international legal subjects, although their personality is functional, because it is related to certain community purposes that are relevant in the framework of contemporary international law and is also limited in its character. This is in line with the ICJ's *dictum* in its *Reparations for Injuries* Opinion that 'the subjects of law, in a legal system, are not necessarily identical as regards their nature and the extent of their rights'.[208] This is also a welcome development whereby the more 'abstract', almost 'nominalistic' issue of the personality of certain actors imperceptibly shifts towards the more normatively 'dense', 'operational' query about what is the specific legal capacity to act in certain, specific international law relations.[209] Moreover, this is in harmony with the (at least partial) tendency for an overall movement of a growing international law, in its 'post-ontological hour',[210] to transform itself from a merely interstate order into a legal order which henceforth also contains elements of transnationality,[211] in correspondence with the confirmed

of subjects of international law. In his general course at the Academy of International Law, Crawford, in a more dogmatically elaborated position, put forward four fundamental arguments for reaching a fundamentally similar result of rejection of recognition of the international legal personality, in particular of multinational enterprises: the entities are the creation of states; a lack of international obligations on those entities; a lack of legal capacity in the international context; and a lack of horizontal application of international law between private persons. See J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 35 *Recueil des Cours* 249.

[206] S Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts* (Berlin, Duncker & Humblot, 2001); Mahiou (n 102) 265.

[207] K Ipsen (ed), *Völkerrecht. Ein Studienbuch*, 4th edn (Munich, CH Beck, 1999) para 20, who then argued that states were free to give international legal personality to NGOs and do so by treaty, illustrating that this had already occurred with the International Committee of the Red Cross.

[208] (1949) ICJ Rep 178.

[209] See also C Walter, 'Subjects of International Law' (2013), https://hoclv.com/wp-content/uploads/2017/11/2.-subjects-of-international-law.pdf, para 30.

[210] T Franck, *Fairness in International Law and Institutitons* (Oxford, Oxford University Press, 1995) 5.

[211] A constant theme of Francis Snyder's here honoured – as evidenced, for example, in the titles of publications such as F Snyder and L Yi, 'Transnational Law and the European Union: Reflections from WISH in China' (2013) 19(6) *European Law Journal* 1; F Snyder, *Food Safety in China: Making*

existence today of a globalised international system and in response to the latter's more plural and complex needs, concerns and expectations. The usefulness of recognising the international legal personality of these other actors, the reason for proceeding with this pathway of inclusion which makes international law appear more integrative of reality and its 'living forces', is precisely that it contributes to the consolidation of an international law that is more capable of fulfilling the normative project that it contains. Furthermore, only thus will it be able to fully honour the ('constitutional') axiological and teleological determinations that underpin positive international law, reflected in its general principles as well as in its *erga omnes* and *ius cogens* provisions, and to enhance the sense of international law as a truly international legal *order*, where rights are taken seriously[212] and the legal *system* appears, both substantively and procedurally, to be endowed with fairness and legitimacy.[213]

Transnational Law (Leiden, Brill, 2015); F Snyder, *The Future of Transnational Law: EU, USA, China and the BRICS* (Brussels, Bruylant, 2015).

[212] R Dworkin, *Taking Rights Seriously*, 8th edn (London, Duckworth Overlook, 1996); JJ Gomes Canotilho, 'Tomemos a sério os direitos económicos, sociais e culturais' in *Estudos sobre direitos fundamentais*, 2nd edn (Coimbra, Coimbra Editora, 2008), 35–68.

[213] T Franck, 'Legitimacy in the International System' (1988) 82(4) *AJIL* 705, 759; T Franck, *The Power of Legitimacy Among Nations* (New York, Oxford University Press, 1990); T Franck, *Fairness in International Law and Institutions* (Oxford, Oxford University Press, 1995) 5–6.