THE INDIVIDUAL AS A SUBJECT OF INTERNATIONAL LAW (DISCUSSION REVISITED)

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In an environment of the globalization the system of contemporary international relations undergoes radical changes. The theory of international law finds it difficult to keep pace with these changes. This theory, especially in its «textbook» version, staunchly protects its bulwarks so as to have nothing to do with (allegedly) «temporary», «spur-of-the-moment» phenomena. This reticence concerns, above all, the most important issue of the theory of international law: the subjects of international law. Some authors (their number is rapidly diminishing), as before, believe a State to be the principal subject of international law, if not the sole subject. Other writers go to another extreme, declaring man to be the only subject of international law and propose, as has the French jurist, G. Scelle (we will discuss his studies below), to call international law the «law of peoples».

Many authors recognize that modern international law is characterized by a multiplicity of subjects. For instance, Lee Swepston believes a «unique virtual subject of international law» to be indigenous peoples who had insisted on and succeeded in drawing up a number of international conventions on the protection of their rights.[1] A. A. Moiseev qualified international organizations as a «secondary subject of international law».[2] But «especially fortunate» were the issues of the international legal personality of the individual. The present author has repeatedly engaged in polemics on this topic,[3] although it is for the reader to judge how successful those engagements have been.

[1] *L. Swepston*, «Indigenous Peoples in International Law and Organization», in International Law and Indigenous Peoples (Leiden-Boston, 2005), p. 53; id, «Indigenous Peoples on the International Scene: A Personal Reminiscence», in Making Peoples Heard. Essays on Human Rights in Honour of Gudmundur Alfredsson (Leiden-Boston, 2011).
[2] *A. A. Moiseev,* Суверенитет государства в международном праве [Sovereignty of the State in International Law] (Moscow, 2011), p. 229.
[3] Previous studies of the author on this topic include: *A. I. Kovler,* Антропология права [Anthropology of Law] (Moscow, 2002) (see Chapter 10. «Международные стандарты прав человека и проблемы международной правосубъектности индивида» [International Standards of Human Rights and Problems of International Legal Personality of the Individual]; id, «Проблемы международного права в решениях Европейского суда по правам человека (международная правосубъектность индивида и иммунитет государства)» [Problems of International Law in Decisions of the European Court for Human Rights (International Legal Personality of the Individual and State Immunity)], Российский ежегодник международного права [Russian Yearbook of International Law] (Saint Petersburg, 2003), pp. 299–306; id, «Международная правосубъектность индивида: продолжение дискуссии»

A return by the present author to the aforementioned topic was necessary because the discussion of the international legal personality of the individual is far from over. Indeed, it has hardly begun in earnest in post-Soviet space,[1] although such scholars as R. A. Müllerson,[2] N. V. Zakharova,[3] H. V. Ihnatenko,[4] and others have written about it.

In the textbook on international law which represents the most recent achievements of the Urals school of law, the late H. V. Ihnatenko noted: «In the continuing discussion in national doctrinal writings, we proceed from the fact that past perceptions of the features of international legal personality not extending to individuals are not in complete accord with the present status of international legal regulation and actual legal relations».[5] S. V. Chernichenko, however, is adamant in his position: «Under no circumstances are or may individuals ever be subjects of international law».[6] In a word, there are more than enough reasons to continue this discussion.

The participation of the author in heated discussions over the international legal personality of an individual led to an idea of the need, first, to define more accurately the fundamental theoretical concepts, as well as the instructive practice of the «background of the issue» as to the two rather «objective elements» (I. I. Lukashuk) of the process of interpretation.

Based on the generally-recognized proposition of the theory of law that the foundation of the concept of a subject of law is the possession of the rights and obligations of a participant of social relations,[7] the present author came to the premature conclusion (to acknowledge a mistake made) that international legal recognition of the legal personality of an individual entailed the recognition of the individual's status as a subject of international law.[8] In the meantime, Venherov warned against treating the notions «legal status» and «subject of law» as being automatically identical: «The difference is that the legal status of a citizen designates a set of rights possessed by the citizen so as to enter into hypothetically possible legal relations, whereas a subject of law is the characteristics of a concrete subject in a concrete legal relation».[9]

[International Legal Personality of the Individual: Discussion Continued], in Международное право XXI века. К 80-летию И. И. Лукашука [International Law of the XXI Century. For the 80th Birthday of I. I. Lukashuk] (Kyiv, 2006).

[1] See: *Проблема* правосубъектности: современные интерпретации [The Problem of Juridical Personality: Modern Interpretations], no. 5 (Samara, 2008); *M. N. Marchenko*, Государство и право в условиях глобализации [State and Law in an Environment of the Globalization] (Moscow, 2009); *M. V. Shuhurov*, «Право человека на признание правосубъектности: нормативно-ценностное содержание и международно-правовые гарантии» [Human Right to Recognition of Legal Personality: Normative-Value Content and International-Legal Guarantees], Право и политика [Law and Policy], no. 11 (2009); *T. D. Matveieva*, «Человек и международное право (к вопросу о международной правосубъектности индивида)» [Man and International Law (On the Question of the International Legal Personality of the Individual)], in Russian Yearbook of International Law (Saint Petersburg, 2003).

[2] *Курс* международного права [Course of International Law] (Moscow, 1989), I, p. 181.

[3] *N. V. Zakharova,* «Индивид — субъект международного права» [The Individual as a Subject of International Law], Советское государство и право [Soviet State and Law], no. 11 (1989).

[4] *H. V. Ihnatenko*, «Международное и советское право: Проблемы взаимодействия правовых систем» [International and Soviet Law: Problems of the Interaction of Legal Systems], Советское государство и право [Soviet State and Law], no. 1 (1985).

[5] *H. V. Ihnatenko, O. I. Tiunov* (eds), Международное право [International Law] (Moscow, 2002), p. 85.

[6] *S. V. Chernichenko*, Личность и международное право [The Individual and International Law] (Moscow, 1974), p.149. Similar standpoint is also expressed in some earlier publications, see for example: *S. V. Chernichenko,* Теория международного права [Theory of International Law.], Старые и новые теоретические проблемы [Old and New Theoretical Issues] (Moscow, 1999), vol. 2, p. 384.

[7] *«Law* makes the participant of social relations a subject of legal relations» (*A. B. Venherov*, Теория государства и права [The Theory of State and Law] (Moscow, 1998), p. 469).

[8] *A. I. Kovler,* Антропология права [Anthropology of Law] (Moscow, 2002), p. 382.

[9] *A. B. Venherov,* Ibid., p. 479.

The recognition of an addressee of law as some abstract legal entity and the bearer of rights and obligations[1] seems to be insufficient for a complete description of a legal subject. The comment by Venherov quoted above points out as the focal point the legal power of a concrete subject in a concrete situation. In other words, the recognition of a legal person as being legally empowered, that is, possessing the rights and obligations provided by legislation, is merely the first step in the identification of effective legal personality.

The next element of legal personality should be legal capacity, which is defined by Nersesiants as «the effective capacity (capability) of a legal subject to realize, by means of his lawful legal relations, his legal capacity in the corresponding legal relations, assume and exercise his subjective rights, create for himself and perform his subjective juridical obligations».[2] It is this legal capacity of an individual to exercise his rights and perform certain obligations in international legal space that assigns him certain international-legal personality.

Legal doctrine of the interwar period had laid the groundwork for the «international-legal baptism» of the individual. Of special significance in this process was the role of The Hague Academy of International Law established under the aegis of the League of Nations. This question had been posed with positivist straightforwardness in the 1932 lecture of M. Siotto-Pintor «International Law Subjects other than a State»: in contrast with municipal law, international law stated an absence of accurately delineated parameters of the legal subject status of both individual and legal entities, other than a State.[3] Law without a concrete individual is dead and scholastic, even if it is international law with all its specificities, Spiropoulos maintained that,[4] in his firm opinion, all the definitions of international law proceed from a priori considerations, and this is why it is practically impossible to induce empirically any clear-cut definitions of a legal subject. It is a task for theoreticians to overcome intellectual conformism.

The Hague Academy lecturers had oppose not only international law «dogmas», but also their reflection in the resolutions of the Permanent Court of International Justice of the League of Nations, which wrote in its judgment in the Lotus case in no uncertain terms as follows: «International law regulates relations between independent States».[5] Indeed, this judgment prompted the idea that the first step for an individual to assume the status of an international legal subject through the activation of his legal capacity may be the admittance of an individual to international justice as an autonomous legally effective person and a party in proceedings. This idea had been put forward by Scelle, although he had exaggerated, to put it mildly, the idea of the alienation of a State from the international law sphere from *jus gentium* positions.[6]

However, there is still some appeal in the idea of Scelle that international law is the law of individuals who make up the universal community *(société universelle)*. He considered unacceptable the idea that human rights were to be protected exclusively

[1] «The concept 'subject of law' means the recognition of legal personality of an addressee of law as a legally meaningful individual who possesses the abstract possibility to be a subject of rights and obligations» (*V. S. Nersesiants,* Общая теория права и государства [General Theory of Law and State] (Moscow, 2000), p. 510).
[2] Ibid., p. 511.
[3] See *M. Siotto-Pintor,* Les sujets de droit international autres que les Etats (R.C.A.D.I.,1932), vol. 41, pp. 245–261.
[4] *J. Spiropoulos,* L'individu et le droit international (R.C.A.D.I.,1929), vol. 30, pp. 191–270.
[5] *C. P. J. I. Arre*t du 27 septembre 1927. Affaire du «Lotus», Rec. C. P. J. I., Serie A, no. 10, p. 18.
[6] *G. Scelle,* Precis de droit des gens. Premier fascicule. (Paris, 1932), pp. 1–69. From among the contemporary studies on the subject, we can single out the fundamental work: S Laghmani, Histoire du droit des gens. Du jus gentium imperial au jus publicum europaeum (Paris, 2003).

in the system of those States where such individuals «were located». International common law *(droit commun international)* was to originate from individual juridical competences *(competences juridiques individuelles)* as its source. His standpoint was supported by Politis in his outspoken lecture «The Problem of Sovereignty Limitations and the Theory of Abuse of Law in International Relations»[1] presented in The Hague. His like-minded colleague, L.-E. Le Fur, expressed the opinion that the immediate task of modern international law was to overcome the «hated theory» of the absolute sovereignty of the State.[2] As we see, many French (more specifically, many Francophone) theoreticians of international law, unlike their Anglo-Saxon colleagues, had developed a distinct allergy to the «state of Leviathan» even in the sphere of international law.

It was only after the flames of the Second World War and the birth of a new system of international security and protection of human rights that a more rational concept came into being dealing with the international legal personality of an individual as expressed, both in theory and practice, by R. Cassin, deputy chairman of United Nations Human Rights Commission and one of the creators of the 1948 Universal Declaration of Human Rights.

He presented his concept in the article «Man as the Subject of International Law and the Protection of Human Rights in the Universal Human Society», to be found in the collection of studies published in memory of aforementioned Scelle. As can be seen from its title, the article specifically identifies the link of an individual legal status itself with the objective of international protection of human rights. His argumentation for this link is stunning in its iron logic, which is impossible to refute: «Straight after the end of World War I that had brought about innumerable crimes that remained practically without any punishment, it became no longer possible to continue abiding blindly with the principle that states that a war is the sphere of relations exclusively among States».[3]

The individualization of international law norms was a response to «State lawlessness». Section XIII of the Treaty of Versailles approved the establishment of the International Labor Organization (hereinafter: ILO), and Article 427 became a true declaration of the rights of employees. Article 23 of the Covenant of the League of Nations («fair and humane work environment»), the Convention on Slavery (1926), and other international treaties opened up prospects for a future international autonomous mechanism for the protection of human rights, although, let us add here, human rights issues still remained within the national jurisdiction of States and were to be regulated by the national legislation in accordance with the commitments undertaken by States under international treaties. However, the first initiative to protect human rights of an individual «over the head» of the State was undertaken in the 1933 application of Mr. Bernheim, a resident of Upper Silesia, to the Council of the League of Nations with a complaint about the actions of the German authorities having jurisdiction over Upper Silesia because these actions violated a German-Polish Convention signed in 1922. This complaint, vetoed by the German representatives in view of the conclusive competence of the State over all decisions

[1] *N. Politis*, Le probleme des limitations de la souverainete et la theorie de l'abus de droit dans les rapports internationaux (R.C.A.D.I.,1925), vol. 6, pp. 1–122.
[2] *L.-E. Le-Fur,* Le development historique de droit international. De l'anarchie internationale a une communaute internationale organisee (R.C.A.D.I.,1932), vol. 41, p. 548.
[3] *R. Cassin L'homme*, sujet de droit international et la protection des droits de l'homme dans la societe universelle // La Technique et les principes du droit public. Etudes en honneur de Georges Scelle (Paris, 1950), vol. 1, p. 68.

regarding the legal status of its citizens, had demonstrated huge gaps in international positive law.

Yet it is necessary to admit, for the sake of fairness, that attempts to recognize the international legal personality of an individual never ceased.[1] On many occasions the Hague International Court recognized officially in its decisions that an individual could not be deprived of his right by reference to international law (Decision No. 7), as well as to the fact that a State may agree to provide an individual his/her own legal competences formulated in international law so that the individual could speak in international courts directly, without preliminary legal documentation of this step (Advisory Opinion No. 15). The New York Institute of International Law passed a resolution in 1929 on the Declaration of Human Rights on an international scale. In 1928–1934, the International Diplomatic Academy sent similar proposals several times to the League of Nations. We would remind the reader that an urgent need had been felt as early as the height of World War II to establish a new world order on the basis of «preserving human rights and justice» (United Nations Declaration of 1 January 1942).

Paradoxical as this fact may seem, but the idea of the international juridical personality of an individual was boosted by the need to try and sentence the Nazi leaders for the crimes they had committed. It was at that period that the third aspect of an individual legal status came to the fore, namely, international delictual dispositive capacity or the capacity of a legal subject to stand trial and be held responsible for crimes (felonies) committed by such a subject. The Nuremberg trial (which we shall deal with later) marked, as it were, the completion of the theoretical and practical preparation to recognition of international juridical personality of an individual, adding to legal capacity and legal competence their final element, delictual dispositive capacity, which was lacking until then.

The work on the Charter of a new international organization was initially unfolding in the context of an International Bill of Human Rights as a component part of the founding documents of the United Nations, and later on, given the principled divergences among States as to its concept, the Human Rights Commission was established in 1946 which, as a result, drafted the text of the Universal Declaration of Human Rights. The history of the writing of this Declaration and its significance has been described in sufficient detail in doctrinal writings.[2] It will suffice to quote here the single most important provision of the Declaration emphasizing the universal (that is, with no territorial exceptions) nature of human rights: «Everyone has the right to recognition everywhere as a person before the law» (Article 6). This provision is of primary significance when discussing the matter of international legal personality of an individual.

If one interprets legal capacity literally as being primarily the real capacity of a legal subject to exercise his subjective rights, one may conclude that the Universal Declaration has assigned to the individual merely a conditional legal capacity,

[1] We recommend in this respect the fundamental study by K. Parlett dedicated to this subject: *K. Parlett,* The individual and the International Legal System Continuity and Change in International Law (Oxford, 2011).

[2] See: *V. A. Kartashkin*, «Всеобщая декларация и права человека в современном мире» [The Universal Declaration and Human Rights in Modern World], Советский ежегодник международного права [Russian Yearbook of International Law] (Moscow, 1989), pp. 39–50; *S. B. Krylov*, История создания Организации Объединенных Наций [A History of the Creation of the United Nations Organization] (Moscow, 1960); *A. P. Movchan*, Международная защита прав человека [International Protection of Human Rights] (Moscow, 1958); *Ya. A. Ostrovsky*, ООН и права человека [The U. N. and Human Rights] (Moscow, 1965).

because it included, as was recognized by Cassin himself, «a recommendation of a general nature», although Article 68 of the UN Charter provides for a review of concrete violations of human rights. At that historical moment, States were not able yet to renounce their monopoly of being actually the only subject of international law ... The creation of a supranational organ of control over compliance with the provisions of the Declaration was a matter of the future.

Having said that, the significance of the Universal Declaration is difficult to overestimate: for the first time in the history of humankind, it opened the way for internationally-recognized human rights and freedoms to become a component part of legal personality, which until then had been locked within «shell» of statehood. The Universal Declaration provides a minimum list of elementary human rights and freedoms that became a standard, to the attainment of which, as the Preamble states, all nations and all States should strive.

The Declaration is universal by its content because it is not tied to any one single national legal regime: in fact, the logical inference to be drawn from the right to leave one's country freely (Article 13) or the human right to political asylum (Article 14(1)) is that these rights extend beyond State borders, ignoring them. The Declaration is also universal in terms of its application if one reads more carefully the articles where there are such key words as «all people», «every person», and «everyone». However, to the joy of statists, the Preamble of the Declaration restricts the scope of its application saying that: «Both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction». It is true that in the course of the voting process, the majority of votes supported the inclusion in the text of the Declaration an amendment to Article 2(2) suggested by the United Kingdom that there should be «... no differentiation made on the basis of the political, legal or international status of a country or a territory to which an individual belongs, irrespective of whether this territory is independent, dependent, not self-regulated or depending on any other restriction in his sovereignty». Note the formulation: «Countries or territories to which an individual belongs». Two years later, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: 1950 Convention or European Convention) offered a more sweeping statement: «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms ...», which opened a way to apply to the European Court of Human Rights (hereinafter: Court or European Court) not only for citizens of the parties to the Convention, but also to foreigners and stateless persons whose rights have been violated by a certain party.

The text of the Declaration did not include such rights as the right of an individual to move freely from one country to another; it is silent on the right of immigration being symmetrical with the right to emigrate, and so on. The language of this Declaration offered «merely» an approximate list of standards of human rights, although this list, as noted above, laid the foundation for further progress.

Any declaration is called a declaration because it contains no specific obligations of States; instead, it only sets, as it were, the general tenor of the future binding legal norms. Such norms are to be found in the two covenants emanating from the Universal Declaration: the International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights, approved by the U.N. General Assembly on 16 December 1966, being open for signing, ratification and accession by Member States. The cornerstone of the two acts

was the implementation of the provision of the two covenants and the marriage of their provisions with the national legislation, which meant that individual citizens of participating countries were entitled to apply with their complaints regarding violations of their rights to an international authority that oversees compliance by States with commitments undertaken under the two covenants. Ultimately, a compromise solution was found when the First Optional Protocol to the International Covenant on Civil and Political Rights was developed, pursuant to which Member States of the Protocol were to recognize the competence of the U.N. Human Rights Commission as established under Section IV of the Covenant, and to accept and consider applications of individuals who claimed a violation by a Member State of any of their rights specified in the Covenant.

One may argue as to which of the rights specified in the Universal Declaration are *jus cogens* rights, that is, imperative rights, and not subject to any restrictions, and which rights are ordinary ones. Article 53 of the Vienna Convention on the Law of Treaties (1969) provides that «a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character». Doubtless, the essence of *jus cogens* is comprised of such rights as the right to life (Article 3), the right to be free of slavery or of subjugation (Article 4), the right not to be subjected to torture, inhuman or degrading treatment or punishment (Article 5), and the right to be free of a retroactive action (the retroactive force of law) in criminal prosecution (Article 11(2)). The 1950 Convention added to this list the rule of *non bis in idem*, — the right not to be tried or to be punished twice (Article 4, Protocol 7). The American Convention on Human Rights approved later (1969) and the African Charter on Human Rights and Rights of Peoples (1981) expanded this list further. Violations of these norms are considered to be a violation of the foundations of the world legal order. Therefore, the logical conclusion is that imperative and inviolable human rights constitute the foundation of the contemporary world legal order.

The non-transient significance of the Universal Declaration of Human Rights, in our opinion, lies, above all, in the fact that the legal existence of an individual who for centuries had been confined by the boundaries of the family, clan, tribe, and later of the State, attained universal, global scale for the first time. The individual was no longer hostage to the State, maintaining certain permanent legal ties due to his/her citizenship. An individual was now entitled by the right specified in an instrument of international law to protect his/her rights at supra-national bodies «over the head» of the State. Lukashuk, who, regrettably, refused to recognize the legal personality of the individual, made a significant reservation describing the status of an individual: «He is a beneficiary of the relevant norms of international law and, in this sense, is a subject of the corresponding rights».[1]

Therefore, we have reached a logical stage when one may pose the question whether an individual is a «subject of the corresponding rights» or a «subject of international law», even if this status of subject is of a specific, restricted nature.

We view as well-founded the position of Ihnatenko, who proceeded not only from the meaning of the norms of international law, but also from constitutional and

[1] *I. I. Lukashuk,* Право международной ответственности [Law of International Responsibility] (Moscow, 2004), p. 76.

civil law of contemporary Russia: «The assumption seems to be axiomatic that there exists a logical and legal connection between the provisions of Article 15(4) and Article 17(1) of the Constitution of the Russian Federation.[1] If we conclude that the formulations in Article 15(4) and Article 17(1) of the Constitution of the Russian Federation are the legal basis of further norms, above all those of Article 5(3) of the Federal Law on International Treaties of the Russian Federation and Article 7(2) of the Civil Code of the Russian Federation as regards direct effect, the direct application of the provisions of international treaties of the Russian Federation in the area of municipal relations, a thought logically arises regarding the independent value or rights and freedoms specified in international legal acts».[2] He was convinced that the rights and freedoms that are not specified in the Constitution, but expressed in international covenants «are of legal significance as subjective human rights along with and in mutual relations with the constitutional rights». He actively opposed the definition of the legal provision «traditionally» as a sovereign right of States and the position that international collaboration should never, God forbid, «cross the line marking the beginning of the domestic jurisdiction» (Yu. S. Reshetov). We agree with the author that what leads to this thought is an inadequate interpretation of the provision of Articles 15(4) and 17(1) of the 1993 Constitution of the Russian Federation and of a number of Russian laws providing for the direct application of civil rights and freedoms that are not only provided for in the Constitution, but also those stipulated by international treaties of the Russian Federation or those that are norms of customary international law. An ambiguous position on this matter is also taken by Bahlai, when he writes that the generally-recognized principles and norms of international law in the human rights area, in light of Article 17(1) of the Constitution, have direct effect and «require no mechanism of implementation, that is, fixation via national legislation».[3] This is worth mentioning in connection with the debates that flared up in Russia in late 2010 regarding the implementation of European Court judgments in cases when they do not agree with norms of the national Constitution.[4]

In a textbook on international public law, K. A. Bekiashev, author of the chapter on subjects of international law, although recognizing that in any branch of law its subjects possess «inadequate rights and obligations» (indeed, international legal capacity has been fully recognized only as regards a sovereign State, the author observed), draws, however, a clear-cut conclusion: «Individuals possess international rights and obligations as well as the capacity to ensure (for instance, via international

[1] Let us remind the readers the language of this provision: «Generally-recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If other rules have been established by an international treaty of the Russian Federation than provided for by a law, then rules of the international treaty shall apply» (Article 15(4), Constitution); and «The rights and freedoms of man and citizen according to generally-recognized principles and norms of international law shall be recognized and guaranteed in the Russian Federation» (Article 17(1), Constitution).

[2] *H. V. Ihnatenko*, «Международно признанные права и свободы как компоненты правового статуса личности» [Internationally Recognized Rights and Freedoms as Components of the Legal Status of Personality], Правоведение [Jurisprudence], no. 1 (2001), p. 87.

[3] *M. V. Bahlai*, Конституционное право Российской Федерации [Constitutional Law of the Russian Federation] (Moscow, 1998), p. 163.

[4] See: *K. Beshe-Golovko*, «Россия: государство и суверенитет versus общество и легитимность» [Russia: State and Sovereignty Versus Society and Legitimacy], Сравнительное конституционное обозрение [Comparative Constitutional Review Journal], no. 3 (82) (2011); *A. I Kovler*, «Сцилла и Харибда Европейского Суда: субсидиарность или правовой активизм?» [Scylla and Charybdis of the European Court: Subsidiarity of Legal Activism?], Сравнительное конституционное обозрение [Comparative Constitutional Review Journal], no. 6 (79) (2010).

judicial organs) proper compliance by international legal subjects with international legal norms. This fact is entirely sufficient to recognize that an individual possesses the characteristics of a subject of international law». This view is also held by P. A. Laptev.[1] Another staunch supporter of the status of the individual as a subject of international law is T. D. Matveieva.[2]

In complex research scenarios, just as in traffic situations, it is important for one to have «lateral vision» in order to follow what is going on and how others cope with similar problems. Let us examine the studies of foreign legal scholars.

In June 2004 the French Society for International Law organized a colloquium «The Subject in International Law» at Mans, France, where the discussion centered not on the topic of «to be or not to be for an individual as a subject of international law» (this issue seems to have already been resolved), but rather «in what capacity is this going to happen». The principal conclusion of the colloquium was as follows: in contemporary international law, «private individuals are expanding their legal capacity on a progressively larger scale, both with regard to substance and in procedural terms».[3]

This expansion of the material component of international law, primarily through an expansion of its social functions, had its first consequence in the form of virtually unanimous recognition of the international legal status of international organizations (above all, the United National and the ILO). The growing complexity of international law in the early twentieth century «could no longer co-exist with simplified schemes».[4] The status of a subject of international law was pushed through, with some difficulties and opposition, of rebels and national liberation movements (it was clear who masterminded this move). Next was finalizing the status of private persons as subjects of international law, which proved a more difficult undertaking because scholars were still under the influence of Roman law dogma: an individual could either be *a persona*, if he performs any legal function, or *a res*, if he remained a passive object of the rights of another individual. Even without going back to earlier centuries, one had to take into account the fact that in national law a legal subject possesses subjective rights, that is, the right to take certain steps and to require others to perform some actions to his benefit. The point is in the legal technique. In the opinion of the participants of the Mans colloquium, for this reason the matter of subject status is primarily a «notion of a purely technical character» *(notion de caractere purement technique)*.[5]

However, the stumbling block for a number of foreign theoreticians remains the «theory of recognition», which assigns an active role to the State: unless the State recognizes its obligations to support human rights, these rights, like the status of an individual, will come to nothing but a liberal fiction. To be sure, some international law theoreticians, as a gesture of good will, gave private persons as a gift the status of «non-sovereign subjects of international law»,[6] or, as the International Court of

[1] *P. A. Laptev*, «О правосубъектности индивида в свете международно-правовой защиты прав человека» [On the Legal Personality of the Individual in Light of International Legal Protection of Human Rights], Журнал российского права [The Journal of Russian Law], no. 2 (Saint Petersburg, 1999).
[2] *T. D. Matveieva*, «Человек и международное право (к вопросу о международной правосубъектности индивидуума)» [Man and International Law (on the Issue of International Legal Personality Status of the Individual], Журнал российского права [The Journal of Russian Law], no. 2 (Saint Petersburg, 2010).
[3] *«... De* particuliers (...) ce voient octroyer une capacite de plus en plus vaste que ce soit au plan substentiel ou procedural». — *M. Cosnard,* Le sujet en droit international. Coloque du Mans (Paris, 2005), p. 4.
[4] *M. Cosnard*, Rapport introductive, Ibid., p. 25.
[5] Ibid., p. 29.
[6] See: *C. Berezowski*, Les sujets non-souverains du droit international (R.C.A.D.I.,1938), vol. 65, pp. 1–85.

Justice had done in its famous 1949 Advisory Opinion, inventing the notion of a «relative legal subject status»,[1] which is synonymous with limited legal capacity. This terminological game of «hide and seek» was viewed by the attendees of the Mans colloquium as a thing of the past. The key speaker, Professor M. Cosnard, speaking of the concept of Karl Strupp according to which «the will of the State is sufficient to create international legal capacity», noted with a characteristically French hotheadedness: «It is difficult to permit the consequences of this absolute relativism. It looks shocking, - from the moral and legal point of view - to believe that a human being may be considered to be a subject of international law merely because he possesses the corresponding rights in a European state, although he cannot be a subject of international law in China».[2]

Nonetheless, the Mans colloquium demonstrated an insufficiently developed level of the criteria for international legal personality of an individual, at least separately for international public law and for international private law. One may probably take first, as a working hypothesis, the five criteria proposed in the past by Sir Hersch Lauterpacht. Under his approach, one needs to study five issues in order to «recognize» a subject of international law: who the subject of obligations is; applicability of international law as such to a national legal order; possession by an individual of the rights specified directly in international law, which rights may be the object of protection in international bodies; the principal rights of an individual as a component of the international community; and the role of an individual in the process of development of legal norms.[3] But this gives rise to a logical question: it is all good and well if, in a certain situation, an individual meets all the five criteria above (even criterion five, given the practice of the enforcement of judgments of the European Court, when the Committee of the Ministers of the Council of Europe overseeing their enforcement, is entitled to demand that the respondent State should take not only individual measures, but measures of a general nature, which means that an individual may have an indirect impact on the lawmaking process). But what if he meets only some of the above criteria, and if so, does this lead to the emergence of a limited or some other legal subject status? This, for example, is the conclusion about the limited legal personality of an individual that Cassese came to. Admitting that the State had lost its exclusive monopoly over individuals («States have lost their exclusive monopoly over individuals»), and that individuals had assumed legal rights that are realized on the international level («individuals have been granted legal rights that are operational at the international level»), he insisted, however, that it is necessary to differentiate the legal subject status of a State and of individuals because they differ in substance: «To differentiate the position of individuals from that of States, it can be maintained that while States have international legal personality proper, individuals possess a limited locus standi in international law».[4]

With all due respect for one of the most renowned international lawyers, it seems to us that the root of the problem lies elsewhere rather than in the simple suitability to the scope of subjectivity, namely, in the capacity to act in subjective legal relations and to perform relevant obligations. Jean-Louis Bergelle expressed this contradiction

[1] *Avi consultatif* du 11 avril 1949. Reparation des dommages subis au service des Nations Unies in C.I.J. Recueil (1949), p. 178.
[2] *M. Cosnard*, Ibid., p. 37.
[3] *H. Lauterpacht,* Regles generales du droit de la paix (R.C.A.D.I.,1937), vol. 62, p. 208.
[4] A. Cassese, International Law (Oxford, 2001), p. 79, 85. See also: *A. Cassese*, Il sogno dei diritti umani (Milano, 2008), p. 1.

of the two statuses very accurately: «Ultimately, we state that the cause of the differences in subjective rights lies in the two questions: (a) how should subjective rights be defined, — in terms of the right to make a willful decision or in terms of protecting the interests of individuals; and (b) are there subjective rights *per se*, or are they merely a result of objective law?»[1] The question is «loaded» in the best traditions of the philosophy of law, but posing this question is absolutely legitimate. It is probably worth looking for an answer to this question in the depths of the philosophy of law, which is beyond the topic at hand.

The prominent German legal philosopher, Radbruch, put forward the notion of a «target subject» by making use of the principle of the «teleological unity» of a natural person and of a legal entity. He proceeded from the following considerations: «If the concept of law, together with the idea of law and order, also involves the idea of a purpose, and if, due to this, both the interrelationship of the means and of the purpose and of the idea of the purpose as the necessary form of legal thinking brings together, within a legal notion, the ultimate goal and an end in itself, then the notion of an individual as the subject of law needs to be viewed not as the main category, even though restricted by life experience, but as the necessary and general legal category , since a legal subject is a person which is viewed by certain law, given historically, as an end in itself. Accordingly, the object of law is treated as a typical means of reaching the purpose identified».[2] The notion of a person remains for H. Radbruch a notion of equality: equality of rights, equal legal capacity constituting the essence of a person, not characteristic of an individual and of human communities. This equality of rights and equal legal capacity are assigned to them by the legal order. Nobody is a person by nature or from birth, as proven by the legal institute of slavery. To become a person, one needs an individualizing act of law and order. All persons, both natural and juridical, are created by law and order. Even natural persons in the literal sense are «legal individuals». The conclusions made by the jurist-philosopher are simple and ingenious: «... to be a person is to be a self-purpose. A human being is a person not because it is a living being that has a body and a soul, but because, in accordance with law and order, it is a self-purpose»[3]. Please note, once again, the principal postulate of the author: a «real subject» is a «target subject». And it is due to this that this subject is meaningful.

Therefore, having resolved for themselves the «principal question of philosophy» (with or without reservations) on the whole in favor of international legal personality of an individual, most foreign international lawyers have yet to come to terms with the criteria for an assessment of the feasibility of this legal personality of an individual, focusing their attention almost entirely on the issues of human rights obligations.[4] In this context the continuing debate about international legal personality of an individual is reduced, in our opinion, to the issue of whether or not to set the international human rights standards apart from the personal status of a citizen as provided by national law. Permitting this solitariness in view of existing concerns about the obligatory implementation of international law norms regarding human rights via national legislation, we would belittle knowingly the legal significance of

[1] *J.-L. Bergelle,* General Theory of Law, transl. from French (Moscow, 2002), p. 72.
[2] *H. Radbruch,* Философия права: пер с фр. [Philosophy of law], transl. from French (Moscow, 2004), p. 146.
[3] *H. Radbruch,* Философия права: пер с фр. [Philosophy of law], transl. from French (Moscow, 2004), p. 148.
[4] *It presents* a significant interest to compare their conclusions with the approaches of the post-Soviet science of international law. See: *S. I. Arhipov*, Субъект права: теоретическое исследование [Subject of Law: Theoretical Study] (Saint Petersburg, 2004).

an «international law norm implementing human rights» (as Ihnatenko puts it). In this sense, the founders of international humanitarian law have been visionary in this respect.

The establishment of the International Committee of the Red Cross in 1863 and the adoption of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, as well as the 1899 Hague Convention on the Laws and Customs of Land Warfare, and the subsequent Hague conventions, had laid the ground of modern international humanitarian law.[1] The emergence of international humanitarian law as *jus in bello* (law of warfare) was a challenge of *jus ad bellum* (right to apply military force), which had been abused for centuries by States. It was this branch of international law that reflected the long existing aspiration to extend legal protection to a human being where the human being seems to be the least protected, and to overcome a fatal unavoidability of the «dehumanization» of the conduct of combatants, both in relation to the enemy and to peaceful civilian population.

Of more importance for the object of our analysis is the «Martens clause» to the Hague Convention that has formed part of many international acts: in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and dominion of the principles of international law as they result from usages established between civilized nations, from the laws of humanity, and from the requirements of public conscience.

The Martens Clause, entitling the civil population and combatants to the protection and operation of customary law and the laws of humanity even in the absence of any norm in treaty law, followed logically from the positions of humanism of the outstanding lawyer, who had been prominent throughout his life for the recognition of fundamental rights that are linked inextricably to a human being. In this connection, Kartashkin wrote: «The Martens Clause is of great significance in the context of human rights protection and for international humanitarian law as a whole. It is for this reason that this clause has until now occupied an important place in the system of humanitarian law origins. The sense of the Martens Clause is that in the area of armed conflict it affirms, as the source of such regulation, along with the norms of treaty law and customary law, the principles of people's humanity and the requirements of the public conscience. It follows from this that when defining the entire scope of application of the laws of armed conflict, the Martens Clause makes it possible to go beyond the relatively rigid boundaries of treaty law, turning to the principles of humanity and dictates of the public conscience».[2]

It should be noted that in the course of developing the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, its authors had used, almost literally, the language of the Martens Clause: «... in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public

[1] Taking into account an arbitrary treatment of international humanitarian law definitions by a number of authors, we would like to single out the definition by Pustoharov, which, in our opinion, is the fullest and the most adequate of all: «... international humanitarian law is to be defined as a branch of international law, its object being protection of victims of war and of other international and non-international conflicts». See *V. V. Pustoharov*, Международное гуманитарное право [International Humanitarian Law] (Moscow, 1997), p. 31.
[2] *Права* человека [Human rights] (Moscow, 1999), p. 152.

conscience» (Preamble).[1] In other words, «the laws of humanity» come to be legally binding for the contracting parties.

The fundamental principles of contemporary international humanitarian law are founded on a series of Geneva conventions. The first of these, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, elaborated the «Hague rights» through an introduction of two new provisions: even if any of the participants in a conflict were not parties to the Hague conventions, this did not release it and the other parties to the conflict from the requirement to comply with humanitarian norms; each belligerent party, if it captures the medical personnel of the enemy, shall release them to return to the enemy. However, the weak point of the 1929 Geneva Convention, as well as of the preceding conventions, was that any one party, in the event of the other party failing to comply with an international treaty, could do likewise (the tradition of mutually binding treaties). Thus, as Pustoharov put it, humanity was left to the willful discretion of States. The developments during the Second World War confirmed this sad situation.

After the war, understanding reigned that the norms of humanitarian law are to be absolute and general commitments and, although subsequent Geneva conventions included an article on denunciation, they provided that the declaration of denunciation by one party to a conflict may come into effect only after the termination of the war or the armed conflict. Of special significance is the Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV) and Protocols I and II thereto. (Protocol I regulated the protection of victims of international armed conflicts, and Protocol II dealt with the protection of victims of conflicts of a non-international character).

As for Protocol II, we would point out the definition of an armed conflict of non-international character as the material field of application of the 1949 Convention provision: «This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol» (Article 1). Therefore, the status of participants in intra-State armed conflicts, – without the invocation of State sovereignty, — is subject to the requirements of humane treatment as provided for by the conventions:

— prohibition at any time of violence to the life and physical well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

— prohibition on taking hostages;

— prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment;

[1] A quote from *V. V. Pustoharov*, С пальмовой ветвью в руке [With Palm Branch in the Hand] (Moscow, 1995), p. 9.

— no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees as recognized to be necessary by civilized nations.

The Preamble to Protocol II repeats the Martens Clause: «... in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates or the public conscience ...».

Therefore, international humanitarian law may be considered to be a branch of international law in which the legal personality of individuals, civilian population, and prisoners of war is not only protected by the treaty obligations of a State, but also, under the «Martens Clause», by other criteria that come to be binding upon States. The rights specified in international humanitarian law are built organically into the international system of human rights protection. There is no need to explain why a particular human right may only be real in the presence of its normative guarantee and provided there exist means of effective legal protection of this right. Here we touch upon the matter of international protection, which is an important (although «subsidiary», that is, the one that complements domestic national legal remedies) instrument of human rights protection.

The universalization of the legal status of an individual, the assumption by an individual of international legal personality, finds adequate reflection in an expansion of possibilities of the individual's international-legal protection.[1] This means that an individual, as a subject of international law, may apply directly to the bodies of international jurisdiction for protection of their rights without having to get permission from the authorities of his State each time to do so: the state's 'consent' to such requests (according to the insistent emphases by some international law experts) is given once and for all when the State ratifies the respective international convention and recognizes the jurisdiction of the body specified in the convention to keep track of compliance with the Convention. Article 34 («Individual applications») of the European Convention provides as follows: «The Court may receive applications from any person, non-government organizations or group of individuals who claim to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right». Any attempt to hinder this civil right of an individual to appeal to an international authority is considered to be an obstacle to the exercise of the «right of access to justice» (the standard definition by the Court)[2] on the part of the State authorities.

It is no accident that the Convention (Article 35(1)) mentions the requirement to have all domestic remedies exhausted. This is not a whim of its authors and certainly not an effort to «tie» a citizen to his State, but rather one of the principal conditions for the acceptability of an individual application. This confirms the subsidiary nature of international justice as a jurisdiction that gives an individual the additional possibility to protect his rights after this proved to be impossible on the national level.

[1] This possibility was pointed out as early as in the 1950s by *A. P. Movchan* in his study «Международная защита прав человека» [International Protection of Human Rights] (Moscow, 1958). See also: *H. M. Danilchenko,* «Международная защита прав человека: вводный курс» [International Protection of Human Rights: An Introductory Course] (Moscow, 2000).

[2] The «right of access to justice» is the most important aspect of a broader «right to have a trial». See ECHR judgment in the case *«Hornsby v. Greece»* of 19 March 1997 // The European Court of Human Rights. Selected judgments: in 2 volumes (Moscow, 2000), vol. 2, p. 431.

Note should be made that initially a majority of the UN member states and most member states of the Council of Europe took a negative view of the idea to grant certain individuals the right to apply to international authorities with individual complaints about a violation of their rights by States under whose jurisdiction they are: the principle of «State sovereignty» and «non-interference in the internal affairs of the State», such as these had been understood in the 1950s were in the way.[1] For instance, the France that takes pride in its traditions of human rights protection had recognized the right to an individual application as late as a quarter of a century after the signing of the European Convention.

In 1946 the United Nations set up a Commission on Human Rights as an intermediary between citizens and States. The Commission itself was not directly involved in approving resolutions on applications filed with the UN, referring them instead to the relevant States with a request to respond to the claimed violation by these States of citizens' rights. Based on the complaints received, the Commission published annual materials (reports) on violations of the fundamental human rights and freedoms in certain States. Following the approval of the Covenant on Civil and Political Rights and the Optional Protocol thereto that provided for the establishment of the Committee on Human Rights vested with legal capacity to receive and review complaints from individuals under the jurisdiction of the States-parties to the Covenant, it became possible for individuals to challenge actions of States that undertook a commitment to comply with the requirements of this Covenant.[2] The key condition for an application to be accepted for review by the Committee is the exhaustion of available national legal remedies.

In addition to the aforementioned Commission (transformed into the UN Council), the system of controlling bodies of the United Nations includes the relevant controlling entities created within the framework of such international treaties as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Convention on the Elimination of All Forms of Racial Discrimination, and others.[3] These authorities, in addition to stating the violations of the Universal Declaration and the U.N. Conventions, issue recommendations to non-compliant States with regard to rectifying the effects of such violations and the needed amendments to be introduced in their legislation and law enforcement practices.

The European system for the protection of human rights and freedoms, similar to the United Nations system in certain procedural details, is fundamentally different in its contemporary form from the U.N. system.[4] However, at the initial stage of its establishment, the European system encountered the same challenges as the U. N. system had done: government officials proved unable to swallow at once the bitter pill of having to deal with the compulsory jurisdiction of a judicial body that reviews

[1] These approaches may be seen in The Doctrine of International Jurisdictions (London, 1984). Various points of view are represented in the collection: Jurisdiction in International Law (Dartmouth, 1999).
[2] An in-depth analysis of problem issues of the «original» obligations of States, the moment of their emergence and of an accountability for violations of individuals' human rights, the content of this accountability as well as other international-law problems can be found in the study: *L. H. Huseinov*, Международная ответственность государств за нарушения прав человека [International Accountability of States for Human Rights Violation] (Kyiv, 2000).
[3] For more details see: *B. H. Manov,* ООН и содействие осуществлению соглашений о правах человека [The U. N. and Facilitation of Implementing Treaties on Human Rights] (Moscow, 1986); *M. Novak*, U. N. Covenant on Civil and Political Rights. CCPR Commentary (Kehl — Strasbourg — Arlington, 1993); *D. Rouget,* Le guide de la protection international des droits de l'homme (Lyon, 2000).
[4] These differences have been outlined graphically in the study by F. Sudre, a renowned expert in the human rights theory area: F. Sudre, Droit international et europeen des droits de l'homme (5 ed.; Paris, 2001).

citizen applications on the merits and also issues judgments in the bargain that are binding upon States, as well as awarding, if it found the claims of applicants to be well-founded, «just compensation» to such applicants, naturally from the budget of the respondent State. Only Belgium, Ireland, Italy, and France (with reservations) had taken a «progressive» stand from the very beginning and agreed to the jurisdiction of the future court. Eventually, as a result of some diplomatic arrangements, a compromise was reached: organs of the Council of Europe, primarily the Committee of Ministers, would preserve the functions of supervision and control over compliance by member States with their obligations under the Conventions, and the Council of Europe Parliamentary Assembly, as a representative body, would form the European Human Rights Commission and the European Court of Human Rights to be vested with quasi-judicial (Commission) and judicial (Court) powers. «This arrangement constituted a compromise between the desire to establish an independent international judicial mechanism to ensure the exercise of human rights and the strivings of the governments of the member-states of the Council of Europe to salvage some share of political control over the operations of this mechanism»,[1] the authors of fundamental study of the European Convention wrote. This compromise was documented in the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950 in Rome, with effect as of 3 September 1953.

No individual applications came to the Court directly. They were first reviewed by the Commission and, if deemed to be acceptable, sent to the Court to be considered on the merits and for the Court to pass judgment thereon. Thus, the jurisdiction of the Court derived from the jurisdiction of the Commission. For this reason legal conflicts often arose, for instance, when the Court came to a conclusion of the unacceptability of an application recognized earlier by the Commission as acceptable (for example, in the case De Wilde, Ooms and Versyp versus Belgium, where the Court, sitting in full chamber, had to reserve the jurisdiction entitling it to overrule the decisions of the Commission about and acceptability of applications submitted).

This two-tier construction operated for almost 40 years until the urgent need to simplify it became obvious, to a significant extent due to the massive accession to the Council of Europe of new members — Central and East European States. This caused a dramatic increase in the number of applications for the Court to consider, and there was an increase in the number of applications from Western Europe. Moreover, applicants began to complain, ever more frequently, about the long duration of their cases passing through the cumbersome two tiers of the complex structure. Voices were heard more insistently for bringing the European Court closer to citizens of Europe and for simplifying and accelerating the pace of application reviews.

The ratification of Protocol 11, which came into effect on 1 November 1998, transformed the system of the controlling bodies of the European Convention. Only the function of monitoring and controlling compliance of States with European Court judgments remained the responsibility of the Committee of the Ministers; the Commission was to be disbanded by 1 November 1999, and the European Court itself started to operate as a standing judicial body. From then on, the Court has maintained, on its own, the entire cycle of application processing — from their arrival and registration through the approval of decisions as to their acceptability and issuing a

[1] *D. Gomien, D. Harris, L. Zwaak,* Европейская конвенция о правах человека и Европейская социальная хартия: право и практика [The European Convention on Human Rights and the European Social Charter: Law and Practice], transl. from English (Moscow, 1998), p. 45.

decision on the merits. These powers were specified in Protocol 14 to the Convention that came into effect on 1 July 2010.

During the half century of the existence of the European Convention, a unique system of control over compliance with the human rights proclaimed has been shaped in international law. As Hans Kelsen had argued in his time, international law empowers a victim of unlawful actions to take justice into his own hands. The burden of proof that a claim is unfounded and there were no such actions committed by its counterparties has been laid on the State. In the event of its guilt being proved in Court, the State is fully liable for the breach. States-parties that «have a common heritage of political traditions, ideals, freedom and the rule of law» (the Preamble to the Convention) undertake collective responsibility for exercising the rights provided for by the Universal Declaration and by the Convention (the words used in the Preamble are «collective enforcement»). The mechanism of this collective enforcement is realized through a referral from any High Contracting Party to the Court of the case of an alleged breach of the provisions of the Convention and of the Protocols thereto by another High Contracting Party under Article 33 «Inter-State cases» (the last inter-State case on which the ECHR passed a resolution of the Grand Chamber, «Cyprus versus Turkey» No. 25781/74 of 10 May 2001), or receipt of an application from any individual, any non-governmental organization or any group of private persons (Article 34 «Individual Applications»). In addition, political control has been put in place over States' compliance with their obligations under the Convention by the executive bodies of the Council of Europe — the Committee of Ministers (whose powers specified by the Charter of the Council of Europe have been confirmed by Article 54 of the Convention) and the Secretary General of the Council of Europe: «On receipt of a request from the Secretary General of the Council of Europe, any High Contracting Party shall furnish an explanation of the manner in which the internal law ensures the effective implementation of any of the provisions of the Convention» (Article 52, «Inquiries by the Secretary General»). Also, the Committee of Ministers is vested with the function of supervising the execution by Convention member-states of judgments and resolutions of the European Court, since the Court itself, obviously, has not been vested with such authorities, that is, the Cabinet of Ministers is the body that is held responsible for «enforcement» matters (Article 46).

The European Convention and the case-law of the European Court make a marked impact on the legislation and case-law of the European States. Thus, the international legal mechanism for human rights and freedoms protection provides an impulse in European space for an improvement of this mechanism within States, providing an individual citizen with «double legal security». This results in an entirely new paradigm of the legal status of an individual.

In recent years the Court has revised its approaches to such fundamental notions of the Convention as «right to life», «inhumane or degrading treatment or punishment», «access to fair trial», «private and family life», «discrimination», and «non-pecuniary damage».

The Court pays attention to international law problems as evidenced by judgments and resolutions of chambers and of the Grand Chamber of the Court. Thus, in a sensitive issue of a conflict between the international commitments of the respondent Governments and the provisions of the European Convention, the Court tends to give precedence, in reviewing individual applications, to the provi-

sions of the Convention, as in the ECHR judgment in the case «Mathews versus United Kingdom», where, in a tough dilemma whether to recognize the right of the Government to follow the restrictive provision of the international treaty (in this particular case, stripping Gibraltar residents of the right to participate in the elections to the European Parliament) or the norms of the European Convention that have no exemptions (in this particular case, the provisions of Article 3 of 1 — the right to a free election of bodies of legislative power), the Court recognized the priority of the norms of the Convention.[1] In other words, the right of an individual takes precedence here.

This position of the European Court can be accounted for by the recognition of the international legal personality of an individual, as an attempt (which does not have so far unanimous support from all judges) to confirm the priority of the norms of jus cogens over the other norms of international law, and as a clash of opinions on the issue of the limits of State immunity.

Speaking at the solemn meeting of the Court on 23 January 2003 on the occasion of the start of a new «judicial year», the ECHR President L. Wildhaber broached the issue of the international legal personality of an individual: «Wherever the Convention was discussed, we never stopped emphasizing that an individual was in the center of the system, that the recognition by the Convention of an individual as the subject of international law had made a real revolution and that international protection of the rights granted to the individual should never grow weak»[2].

For the European Court, the international legal personality of an individual is not devoid of meaning: how can one ensure the principle of equality of the parties in a trial where the respondent is the Government, if the applicant, that is, the claimant, does not possess legal personality or if the «individual has limited legal status», as some authors claim? The European Court has lately taken a tough stand against attempts by some judicial authorities of several countries to question the direct effect of the European Convention and, simultaneously, the international legal personality of an individual. For example, in its judgment regarding the applicability in the case «Scordino and others versus Italy» (March 2003),[3] the Court reminded in no uncertain terms the Constitutional Court of this country (the Supreme judicial instance) that «the terms of lodging a complaint under Article 34 of the Convention do not necessarily have to be identical to the terms regulating locus standi on the national level»; that is, in the event of sending an application to the European Court, an individual possesses a qualitatively different legal personality than on the national level. In the final judgment on the merits in the case (29 March 2009), the Court also emphasized that «the principle of subsidiarity does not mean a renunciation of any control over the result obtained through the use of the national legal remedies» (paragraph 192). Even more pressing is the question of the legal personality of an individual that arose in the case «Markovic and others against Italy»,[4] a truly mirror reflection of the case «Bankovic and others against 17 NATO states».[5]

[1] *Mathews v. United Kingdom*, No. 24833/94. Judgment (G.C.) of 18 February 1999, Reports 1999-I.
[2] *Audience* solennelle de la Cour Europeenne des droits de l'homme a l'occasion de l'ouverture de l'annee judiciaire, 23 janvier 2003. Sicours de M. Luzius Wildhaber, President de la Cour (Strasbourg, 2003), p. 5.
[3] *Scordino et. a. contre Italie,* No. 36813/97 (Dec.), 27 mars 2003 (non-publie). See also the judgment of the Grand Chamber of the ECHR in the case «Scozzari et Giunta c. Italie» (G.C.), No. 39221/98, No. 419963/98, para 138, CEDH 2000-VIII.
[4] *Marcovic et autre c. Italie,* No. 1398/03, requete introduite le 6 decembre 2002.
[5] *Bankovic et autre c. Belgique et 16 autres pays contractants* (Dec. G.C.), No. 52207/99, CEDH 2001-XII.

The above, of course, does not mean that the European Court takes an aggressive personality-centric stand to the detriment of an objective compliance with the interests of respondent States. On the contrary, in recent years the Court had to send for consideration to the Grand Chamber (which typically takes up cases that deal with serious issues relating to the interpretation of the provisions of the Convention or the Protocols thereto, - see Article 30, Convention) such issues as the resolution of conflicts (disputes) between habeas corpus of human rights and the principles and norms of international law regarding State immunity. Thus, Caflisch pointed out: «Issues related to sovereign immunity often arise before the ECHR, most often because of the individuals who challenge a refusal to get access to national courts in violation of Article 6(1) of the Convention. As a rule, the Court admits that this refusal was accounted for due to the respondent State's immunity as recognized by international law»[1].

However, there exist situations when the Court has to make a decision whether sovereign immunity falls under the exceptions determined by international law. These exceptions include, in the opinion of some judges (incidentally, most of them used to work previously in the sphere of international law), the norms that make up jus cogens, that is, imperative norms and norms that are not subject to any restrictions, as defined by Article 53 of the Vienna Convention on the Law of Treaties.[2] The Grand Chamber of the European Court addressed this problem on numerous occasions, as did students of the case-law of the Court.[3] The clash of opinions on this matter of principle can be traced in the following judgments of the Grand Chamber: Al-Adsani v. the United Kingdom, No. 35763/97; MacElhinney v. Ireland, No. 31253/96; Fogarty v. the United Kingdom, No. 37112/97.

The first case dealt with a complaint of a dual British-Kuwaiti national who had been tortured in Kuwait about a refusal by British courts to consider civil liability of the state of Kuwait so as to have it compensate the applicant for the resulting damage to his physical and mental state that he had sustained. The British judges dismissed the civil lawsuit against Kuwait on the grounds of State immunity, just as in the ex parte judgment in Pinochet case, where the United Kingdom court, following, in particular, the recommendations of the working group under the International Law Commission, had recognized that Pinochet, as a former head of State, possessed immunity against the criminal liability ratione materiae, as well as the ratione personae immunity of sovereign States against civil lawsuits of torture victims. In the above case, the European Court, noting the growing recognition of the overriding importance of the prohibition of torture, the Court «did not find it established that there was yet (underscored by author) acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State»[4]. Let us compare this conclusion of the Court (supported by nine judges against eight) with the recommendations of the International Law Commission in Article 26 of the Vienna Convention: «One State cannot dispense another from the obligation to comply with a peremptory

[1] *L. Caflisch*, Protection of Human Rights in Europe and General Rules of International Law (Strasbourg, 2002), p. 7.
[2] See the commentary about Article 53 of the Vienna Convention offered in: *A. N. Talalaev*, Венская Конвенция о праве международных договоров. Комментарии [The Vienna Convention on the Law of Treaties. Commentary] (Moscow, 1997), pp. 143–147.
[3] See, for instance, *B. Delzangles,* Activisme et Autolimitation de la Cour Europeenne des droits de l'homme (Paris, 2009).
[4] *Al-Adsani v. the United Kingdom*, No. 35763/97; Judgment (G.C.) of 21 November 2001, para 66.

norm, e.g. in relation to genocide or torture, whether by treaty or otherwise. But in applying some peremptory norms the consent of a particular State may be relevant»[1].

Such conflicts (although in a less acute form than those in the Al-Adsani v. the United Kingdom case) emerged when adjudicating the MacElhinney v. Ireland case (over the refusal of the Irish and British courts to consider the lawsuit filed by the applicant, a member of the Irish Guards, against the Government of the United Kingdom, including the Secretary of State for Defense, in connection with the actions of a corporal of the British Royal Military Police during an incident between them at the Irish-British checkpoint). When reviewing the case, the Court proceeded, among other things, from the provisions of the 1972 European Convention on State Immunity («the Basle Convention») and from the materials of the International Law Commission on non-immunity of States so as to come to a conclusion similar to that made in the Al-Adsani v. the United Kingdom case, namely, that there were no signs of a violation by Ireland of the provisions of Article 6(1) of the Convention as held by the Court (by 12 votes to five). In particular, Judge Loukaides pointed out in his dissenting opinion that «the general immunity invoked by the local court so as to block the court's judgment in a civil case <...> was a disproportionate restriction imposed upon the applicant's right to have access to a fair trial».[2]

Finally, in Fogarty v. the United Kingdom (refusal by British courts to entertain the civil lawsuit of the applicant, who is of Irish nationality, against the United States Embassy in London in connection with the termination of her employment, gender discrimination, and sexual harassment from United States Embassy employees). The Court applied to the legal norms at hand the provisions of the 1978 Act on the immunity enjoyed by States and their Embassies on the territory of Great Britain. Taking into account this circumstance and the test case Pellegrin v. France (termination of public servants is not included within the competence of the rights considered by the Court), the Court ruled (by 16 votes to one) that there had been no violation of Article 6(1) of the Convention by the respondent State in view of the fact that by conferring immunity on diplomatic missions and their agents, Great Britain «had not departed from the norms of international law recognized at the present time (emphasis by the author of the article)»; moreover, all such employment-related disputes of States with public service employees that concern the sphere of public law are not included in the Court's competence ratione materiae, irrespective of their subject-matter and of the sex, nationality, place of residence or other attributes of the complainant. In his dissenting opinion Judge Loukaides referred to the view reflected in the International Law Commission Draft Articles on the Jurisdictional Immunities of States and their Property, Article 11(1) of which states that «a Contracting State cannot claim immunity from the jurisdiction of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed in the territory of the State of the forum».[3]

This latter case is consistent with a number of other cases related to the immunity of international organizations as considered by the Court. The test cases Beer

[1] Quoted from: The United Nations Organization, General Assembly. Official records of the 56th Session. Supplement 10 (A/56/10). Report of the International Law Commission on the work of its fifty-third session (in Russian) (New York, 2001), p. 209.
[2] *MacElhinney v. Ireland,* No. 31253/96, Judgment (G.C.) of 21 November 2001. Dissenting opinion of Judge L. Loukaides. CEDH 2001-XI. pp. 55–56. As to the limits of State immunity, see: *G. Hafner* (ed.), State Practice Regarding State Immunity (Leiden, 2006).
[3] *Fogarty v. the United Kingdom,* No. 37112/97, Judgment (G.C.) of 21 November 2001, para 37. CEDH 2001-XI.

and Regan v. Germany and Wait and Kennedy v. Germany[1] the Court accounted for its refusal to recognize a violation of Article 6(1) of the Convention invoking an additional argument, namely, that international organizations have their own administrative policy as regards challenging labor disputes. It is worth mentioning the Court practices of identifying the liability of States in the light of Article 1 of the Convention (the obligation to secure human rights to everyone with the jurisdiction of States), both in terms of the well-known test cases Loisidou v. Turkey, Cyprus v. Turkey, and in light of the contentious ECHR judgment of 8 July 2004 in the case Ilascu and others v. Moldova and Russia.[2]

The European Convention and the European Court served as a model to shape the other regional systems of human rights protection — the American Convention on Human Rights (effective since 18 July 1978) and, accordingly, the Inter-American Court of Human Rights, the African Charter of Human and Peoples' Rights (it came into effect on 21 October 1986) and, accordingly, the African Commission on Human and Peoples' Rights. However, this is a topic for another discussion.

A separate analysis is necessary of the system of international criminal law[3] and of the issue of international delictual dispositive capacity of an individual as a component of the issues of international criminal liability of States and of separate individuals. The international military tribunals in Nuremberg and Tokyo had been vested, according to their Statutes, with the legal capacity to try and punish military criminals, qualifying their actions as such that carry individual liability. The recently created International Criminal Court, under its Statute, «shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes...».[4]

Thus, the international legal personality of an individual has been confirmed in this sphere.

To complete the picture, it should be added that the modern science of international law more frequently takes up the problem of «new subjects, primarily non-governmental organizations and insurgent organizations».[5] The matter of their international legal personality remains in dispute. For instance, noting the frequent practice when resolutions of the United Nations Security Council (UN Security Council) concern this category of participants of international relations (the «black list» drawn up by the UN Security Council Sanctions Committee alone includes about 250 individuals and organizations), many scholars point out at the same time that the UN Security Council takes special care not to qualify them as subjects of international law:[6] trying to keep abreast with the spirit of the times in the matte of maintaining international security, the UN Security Council is simultaneously

[1] *Beer and Regan v. Germany* No. 28934/95, Judgment (G.C.) of 18 February 1999; *Wait and Kennedy v. Germany* No. 26083/94, Judgment (G.C.) of 18 February 1999. Reports, 1999-I.
[2] *Ilascu et autres c. Moldova* et Russie, No. 4878799, Arr t (G.C.) du 8 juillet 2004. CEDH 2004-IV.
[3] The reader is referred to the following studies: *I. I. Lukashuk, A. V Naumov,* Международное уголовное право [International Criminal Law] (Moscow, 1999); *Ch. Van den Wyngaert* (ed.), International Criminal Law (Leiden, 2004); as well as to the periodical issue: The Law and Practice of International Courts and Tribunals (Leiden: The Hague, 2001-2006).
[4] See: *A. R. Kaiumova,* «Юрисдикция международного уголовного суда» [The Jurisdiction of the International Criminal Court], Российский юридический журнал [Russian Legal Journal], no. 3 (2000).
[5] See: *Civil* Society, International Courts and Compliance Bodies (Leiden: The Hague, 2005); *T. Meron,* The Humanization of International Law (Leiden: The Hague, 2006).
[6] *I.–L. Florent,* Les destinataires non-etatiques des resolutions du Conseil de Securite // Le subject en droit international. (Paris, 2005), pp. 107–115.

bound by the provisions of the UN Charter, which, even today, is an example of the traditional approach to the issue of international legal personality.

Therefore, summarizing the necessarily brief analysis of the issue of the international legal personality of an individual, the author would like, once again, to clarify his position. Never seeking, to use an apt description, «to put the cart before the horse» and to declare the emergence of a new fully legitimate subject of international law — the human being, the author, at the same time, fully realizes that in the previous fifty years, this problem has reached a critical level. It does not make sense to brush the whole matter aside. It is more expedient to agree on the recognition of a special feature of the legal personality of an individual in international law so as to define the scope and limits of this «special feature» going forward. We formulate this thought while keeping in mind the following stern warning: «A subject of international law is an objective category. It is defined by the nature of the international community as a community of sovereign States. The doctrine includes some relativist views on this issue which permit an arbitrary definition of the circle of such subjects».[1] However, should one feel apprehensive in this connection about the «transformation of international law», of its dilution, and of its being spread across numerous individual subjects?

In his book «The State and Mankind», published in starving Moscow in 1919, the prominent civil law scholar I. A. Pokrovskyi brought his discourse to an end with the following words: «History will not stop. It puts on the line the issues of the legal organization of all mankind, the creation of pan-human law and a pan-human court». He dreamed of the time when «an individual, in the capacity of a claimant, will also be able to file a lawsuit against his State ... in this forum. [...] Through the shell of the State, an individual will reach his arms out to all mankind, appealing to the pan-human conscience via the State conscience, and the inalienable rights of an individual will find for themselves in this appeal the highest authorization, which is only possible for them here, in our sinful land, which, however is searching for truth and is missing the truth».[2] This may sound too pompous in our times. But let us recall the «dreams» of our intellectuals from that time who were separated from entire generations of Soviet lawyers by the guardians of what they thought was Marxist: that people can be subjects of legal relations. In other words, only people possessing legal capacity».[3] Sergei Muromtsev: «An active actual relation is produced by three factors: the subject, the object, and the environment around them. The subject is an individual, the possibility of whose actions being dealt with in each concrete case».[4] There is no need to prove that these outstanding jurists had not been vulgar anarchists and anti-statist. The aspiration for the «homonization» of law was a response to the ruthless.

M. V. Shuhurov, Professor of the Saratov State Academy of Law and doctor of philosophy (let's not overlook this fact, — the author's note), was very substantive, in our opinion, when he outlined this trend towards humanization of the right of

[1] *I. I. Lukashuk, A. V Naumov,* «Субъекты права международных договоров» [Subjects of the Law of International Treaties], Государство и право [State and Law], no. 11 (2004), pp. 2–5.
[2] Quoted from *A. L. Makovskii,* «Выпавшее звено» [The Missing Link], Предисловие к книге «Основные проблемы гражданского права» [Preface to Basic Problems of Civil Law] (Moscow, 2003), p. 29.
[3] *N. M. Korkunov*, «Право в субъектном смысле» [Law in Subjective Sense], Лекции по общей теории права [Lectures on General Theory of Law] (Saint Petersburg, 2004), p. 189.
[4] *S. A. Muromtsev*, Определение и основное разделение права [Definition and Principal Allocation of Law] (Saint Petersburg, 2004), p. 64.

an individual have the international legal personality: «There can be no positive formal-law recognition of this right to possess the legal personality at all, unless it is recognized morally first».[1] Thus, the recognition of moral (natural) human rights to legal personality denotes its positive-law recognition. It is only in this way that such recognition may be meaningful. A proponent of natural and positive law as regards judicial proceedings is also V. G. Yaroslavtsev, Judge of the Constitutional Court of the Russian Federation, who believes that «the current existence of law» as a general notion includes, in equal measure, natural and positive law, which enrich and complement each other.[2]

In conclusion, paraphrasing V. I. Lenin that Russia went to great lengths to embrace Marxism, we will dare to assert that citizens of all post-Soviet States have long since paid the full price to be recognized as having legal personality under international law, «at least» (which is already a lot) in the sphere of international justice. What remains now is to persuade the «sovereignists»[3] that this is the right way to go. In any case, D. A. Hudyma is certainly right: what we need is the anthropologization of the methodology of law, including (let us add) international law.[4]

Kovler A. The Individual as a Subject of International Law (Discussion Revisited)

Abstract. The problem of international legal personality of the individual through the prism of international legal documents is examined in the article; the opinion of the foreign authors concerning this issue is given.

Key words: international legal personality of the individual, European Court of Human Rights.

Ковлер А. І. Індивід як суб'єкт міжнародного права (повернення до дискусії)

Анотація. У статті розглядається проблематика міжнародної правосуб'єктності індивіда через призму міжнародно-правових документів, висвітлюється позиція зарубіжних авторів із цього питання.

Ключові слова: міжнародна правосуб'єктність індивіда, Європейський суд з прав людини.

Ковлер А. И. Индивид как субъект международного права (возвращение к дискуссии)

Аннотация. В статье рассматривается проблематика международной правосубъектности индивида сквозь призму международно-правовых документов, освещается позиция зарубежных авторов по этому вопросу.

Ключевые слова: международная правосубъектность индивида, Европейский суд по правам человека.

[1] *M. V. Shuhurov*, Ibid., pp. 23–88.

[2] *V. H. Yaroslavtsev,* Нравственное правосудие и судейское творчество [Moral Justice and Creativity of Judges] (Moscow, 2007). These ideas are also proposed by Corresponding Member of the Russian Academy of Sciences E. A. Lukasheva in her studies of the most recent years. See: *E. A. Lukasheva*, Человек, право, цивилизации: нормативно-ценностное измерение [Man, Law, Civilizations: Normative and Value Dimension] (Moscow, 2009).

[3] This is an in-house term widely used by European Court judges. It denotes resolute opponents of recognizing, without any reservations, the jurisdiction of the European Court on the territory of the European Convention States-parties.

[4] *D. A. Hudyma,* «Антропологізація методології права» [Anthropologization of the Methodology of Law], Український правовий часопис [Ukrainian Legal Journal], no. 6 (11) (2004); *D. A. Hudyma*, Права людини: антрополого-методологічні засади дослідження [Human Rights: Anthropological and Methodological Foundations of Research] (Lviv, 2009).