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The Evolving International Procedural Capacity of Individuals

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Contents

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities
DADP	Draft Articles on Diplomatic Protection
DPRK	Democratic People's Republic of Korea
ECOSOC	United Nations Economic and Social Council
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
NGO	Non-governmental organization
OP	Optional Protocol
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
RoC	Rules of the Court
RoP	Rules of Procedure
TFV	Trust Fund for Victims

UN	United Nations
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

Chapter 1
Preliminary Remarks

1.1 The Individual's Procedural Handicap

International law no longer turns a blind eye to the individual. Quite the contrary, "with increasing frequency international legal norms directly address and engage individuals"[1] and confer rights and obligations upon them. Numerous international treaties, agreements and protocols have been dedicated to the legal position of human beings. Special Rapporteurs, Working Groups and treaty bodies have been established to observe compliance with international Human Rights standards and are consistently presenting suggestions to further advance the law. Criminal courts and tribunals have been installed to prosecute the misconduct of individuals and sanction the commission of international crimes.

The legal appearance of the individual at the international stage covers various fields of international law. The law of armed conflict, international criminal law, international economic law as well as international environmental law are prominent examples for individual-infused areas of international law. The individual has thus become an integral part of the international legal system and an "irreversible"[2] legal reality impossible to ignore.

This increasing awareness for the individual and the shift of focus towards the human aspect of the law[3] has led scholars to proclaim the humanization[4] or individualization[5] of the international legal order. These terms seek to describe "the process by which we have taken the black box of the state and made it gradually

[1] Peters (2016), p. 1.

[2] Concurring Opinion of Judge C. Trindade to Inter-American Court of Human Rights, 'Juridical Condition and Human Rights of the Child' (Advisory Opinion of 28 August 2002) *OC-17/2002,* p. 9 para. 23.

[3] Parlett (2011), p. 343.

[4] Meron (2006).

[5] van den Herik (2017), Peters (2016), p. 472.

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transparent to focus on individuals rather than states as unitary political entities".[6] The international legal system has opened up and become more inclusive towards the individual.[7] The extensive evolution of individual rights consequently leaves little room for doubting the increased and strengthened role of the individual in the international legal sphere.[8] Nowadays, the individual and international law are directly connected and inseparably linked.[9] Judge *Antônio Augusto Cançado Trindade* puts it more drastically when he states that "no one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations which emanate directly from International Law, with which they find themselves, therefore, in direct contact".[10]

Despite this elation regarding the strengthened position of the individual in the international legal sphere, the quantitative increase of rights and duties remains restricted to certain areas of the law and thus constitutes a rather selective process. *Kate Parlett* aptly points out that "while in some fields of international law it is uncontroversial to treat individuals as holding rights", in other areas this practice is far less advanced.[11] The different degree of growth and progress becomes strikingly obvious when analyzing the substance of the rights conferred. Many treaties establish privileges of the individual vis-à-vis the State and the corresponding obligation of the State to refrain from any conduct which negates or substantially delimits these privileges.[12] However, international agreements often neglect the procedural component—namely the ability to bring an international claim against the State which infringes this privilege or violates the immunity.[13]

Similar to municipal legal systems, a "distinction exists in international law between substantive principles, and rules on the one hand, and the principles, standards and rules related to remedies, procedures and enforcement on the other".[14] These two aspects are, however, not inseparably linked. By implication, a substantive

[6] Slaughter (2002); *Slaughter* and *Burke-White* equally utilize the notion of individualization, Slaughter and Burke-White (2002), pp. 13 ff.

[7] Parlett (2011), p. 4; Grossman and Bradlow (1993), pp. 22 ff.; Ochoa (2007).

[8] Orakhelashvili (2001), p. 242.

[9] Mullerson (1990), p. 38.

[10] Concurring Opinion of Judge Cancado Trindade, 'Inter-American Court of Human Rights, Advisory Opinion on the Juridical Condition and Human Rights of the Child' (Opinion of 28 August 2002) *OC-17/2002,* p. 10 para. 28.

[11] Parlett (2011), p. 3.

[12] Article 5 (1) ICCPR codifies the negative obligation of States which obliges them to refrain from the destruction of the rights enshrined in the Covenant: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.".

[13] Cassese (2005), p. 150; Cassidy (2004), p. 564; Clapham (2010), p. 27; J. R. Dugard, 'First Report on Diplomatic Protection by the Special Rapporteur Mr. John R. Dugard' (2000) *UN Doc. A/CN.4/506 and Add. 1,* p. 214 para. 28; McCorquodale (2014), p. 288; Shaw (2014), p. 189; Walter (2019), para. 22.

[14] Cowles (1952), pp. 78 f.

right does not automatically entail the procedural competence to ensure compliance. The Permanent Court of International Justice [PCIJ] confirmed this distinction by emphasizing that "it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself".[15] Yet, it is precisely this enforcement capability which is essential for a fully functioning and comprehensive Human Rights system. Without such a "capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims",[16] the substantive right remains a mere promise on paper, a "dead letter"[17] leaving the infringement of rights without consequences. The absence of the possibility to enforce a right may easily convey the impression of the right "being seen as a [mere] voluntary obligation that can be fulfilled or ignored at will."[18] The procedural ability to enforce a right on the other hand empowers individuals to compel compliance with their rights and to induce a certain conduct from the violating State. On a sheer practical level, it allows individuals to defend their rights and "to protect [their] interests at the international level".[19] For them it is thus desirable to possess this capacity. Examining the scope of the individual's procedural status is therefore more than just an academic exercise raising a mere "speculative problem […] for the sole pleasure of resolving" it.[20] Quite the contrary, the procedural capacity of individuals sheds light on the ability of victims to seek redress for a Human Rights abuse and thus to transform their rights on paper into reality.

Yet, it also holds true that "international individual rights are and should be primarily enforced through domestic institutions"[21] and not through international legal bodies. This rationale is generally implemented through the various forms of local remedies rules which allow the relevant State to settle the case domestically before an international legal body may be concerned with the matter. The exhaustion of domestic remedies serves the principle of subsidiarity and permits to solve the dispute at the lowest (and therefore closest) level of governance possible.[22] It is both useful and reasonable to allocate the dispute settlement function to the national authorities because the national justice system is much closer to the facts of the case and the involved actors. Furthermore, States usually already possess the necessary

[15] Permanent Court of International Justice, 'Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. Czechoslovakia)' (Judgment of 15 December 1933) *PCIJ Series A/B, No. 61,* p. 231.

[16] International Court of Justice, 'Reparation for Injuries Suffered in the Service of the United Nations' (Advisory Opinion of 11 April 1949) *1949 ICJ Reports* 174, p. 177.

[17] Trindade (2011), p. 14.

[18] Shelton (2006), p. 8.

[19] Meijknecht (2001), p. 56.

[20] Bourdieu (1990), p. 381.

[21] Peters (2016), p. 480.

[22] According to Feichtner (2019), para. 1 "the principle expresses a preference for the allocation and exercise of governmental functions at the lowest level of governance"; see also Peters (2016), p. 483.

judicial infrastructure to solve the matter in a time and cost-efficient manner. At the international level, on the other hand, these judicial structures usually do not naturally exist and would therefore need to be established for these specific purposes.

This presumption in favor of domestic institutions and the concomitant credit of trust for sovereign authorities, however, are only justified as long as the State actually provides access to justice and an effective remedy to the individual.[23] If legal protection cannot or no longer be ensured at the national level, this fundamental element of (human) rights protection must be delegated to the international level. International enforcement mechanisms therefore serve as a safeguard in case of lacking or insufficient domestic remedies.[24] In this regard, "the right of individual petition shelters […] the last hope of those who did not find justice at the national level."[25] International procedural capability therefore ensures that "those marginalized and forgotten by the world [may] resort to an international tribunal to vindicate their rights as human beings."[26]

Furthermore, the enforcement of Human Rights does not constitute a mere sovereign concern of individual States but a common value of the international community as a whole.[27] Providing procedural mechanisms against the violation of basic rights of human beings at the international level must be considered the logical flipside of the joint pledge of nations to respect Human Rights.[28] The ability to defend one's rights before an international legal body serves a substantial purpose: the enforcement of Human Rights for those who are denied their rightful privileges and immunities at the national level. It therefore ensures an equal minimum standard of procedural enforcement for all individuals regardless of their nationality or place of residence.

Notwithstanding the importance of enforcement mechanisms for ensuring observance of the substance of the right, the majority of international treaties and agreements adheres to the dichotomy of substantive rights on the one hand, and procedural rights on the other. They consequently omit to provide individuals with an effective (procedural) tool to defend their own rights internationally against an imminent or past abuse.[29] Even those treaties which contain international procedural enforcement mechanisms provide States with a variety of opt-out options to shield themselves against the risk of proceedings being instigated by the individual against

[23] For the discussion on whether the right to an effective remedy constitutes a free standing right or the procedural dimension of another substantive Human Right see Francioni (2007), pp. 30 ff.

[24] Gormley (1966), p. 30.

[25] Concurring Opinion of Judge C. Trindade to Inter-American Court of Human Rights, 'Case of Castillo Petruzzi et al. v. Peru: Preliminary Objections' (Judgment of 04 September 1998) *Series C No. 41,* p. 62 para. 35.

[26] Concurring Opinion of Judge C. Trindade to Inter-American Court of Human Rights *op cit* n 2 *supra,* p. 9 para. 25.

[27] International Court of Justice, 'Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain): Second Phase' (Judgment of 5 February 1970) *1970 ICJ Reports* 3, p. 32 paras. 33 f.

[28] Article 55 UN Charter.

[29] Meijknecht (2001), p. 56.

them. These mechanisms are thus designed as annexes to the (Human Rights) obligations and not as integral parts of the substantive right. States can freely choose to deselect the procedural component of the obligation when acceding to the international agreement.[30] Furthermore, existing procedural mechanisms lack decisive procedural elements such as the bindingness of their outcome or the possibility to ensure compliance therewith. This weak treaty design is a conscious choice by the negotiating States eager to limit the risk of being identified as being in violation of an international treaty.[31] The optionality of procedural mechanisms significantly limits the "enforcement capability" of the individual at the international level.[32] While there may have developed an "abstract capacity to invoke international law", this abstract capacity only rarely translates into concrete international enforcement possibilities.[33]

The limited availability of an international remedy for Human Rights abuses has prompted *Rosalyn Higgins* to detect a "procedural disability" of the individual. She accordingly finds that the individual is "extremely handicapped […] from a procedural point of view".[34] Her statement echoed *Hersch Lauterpacht's* even more pessimistic conclusion from 1950 that "the beneficiary of rights is not authorized to take independent steps in his own name to enforce them".[35] *Francesco Francioni* reaches a similar conclusion. He finds that "even today [the States] continue to enjoy a near monopoly in relation to the capacity to bring claims before international mechanisms of dispute settlement".[36] These statements suggest that the possibility to file a formal complaint constitutes the exception rather than the rule.[37] Although the international avenues of complaint have been opened up for private citizens throughout the past decades[38] and it has become more common for States to establish enforcement mechanisms which entitle individuals to seek redress before international legal bodies,[39] their procedural rights still remain largely underdeveloped (especially in contrast to their substantive entitlements). The "trend towards judicial protection"[40] progresses significantly slower than the conferral of substantive rights and duties to the individual, thus perpetuating the imbalance between the substantive law and its procedural counterpart. International procedural enforcement mechanisms are still in a development process.[41]

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[30] Briggs (1953), p. 94; McCorquodale (2014), p. 290; Meijknecht (2001), p. 57.

[31] Risk aversion and the fear of reputational damages are put forward as motives for States not to include strong enforcement mechanisms in international treaties, Guzman (2010), pp. 138 f.

[32] Mullerson (1990), p. 36.

[33] Francioni (2007), pp. 6 f.

[34] Higgins (1995), p. 51.

[35] Lauterpacht (1975), p. 510.

[36] Francioni (2007), p. 6.

[37] Pentikäinen (2012), p. 146; Shaw (2014), p. 189.

[38] Shelton (2006), p. 465.

[39] Parlett (2011), p. 350.

[40] Peters (2016), p. 493.

[41] Schmitt (2017), p. 103.

This book therefore seeks to examine whether the reproach of the individual's international procedural disability still holds true today. It intends to identify and assess the most recent developments in the field of international procedural law including the codification of new international enforcement mechanisms by States and the advancement of the law through the jurisprudence of international judicial bodies. For this purpose, this study aims at answering the question whether and to what extent international adjudication provides the individual with the possibility to bring claims—both inside and outside those avenues traditionally considered as *individual* complaint mechanisms. An affirmative answer would counter the allegation of procedurally handicapped individuals by showing that they in fact possess more than just limited options to obtain judicial relief and enforce their individual rights at the international level.

1.2 A Matter of International Subjectivity

Besides the obvious *practical* relevance of the (un)availability of international avenues of enforcement in individual cases, the international procedural capacity of individuals[42] equally entails *legal* and *political* consequences at a broader level. The ability to enforce one's rights is generally considered an indispensable element of international subjectivity[43] (international legal personality).[44] Most prominently, authors supporting a formalist or positivist understanding of subjectivity advocate for the relevance of procedural capacity for the recognition of international legal personality. In contrast to the outdated and obsolete object or States-only doctrine,[45] this philosophical movement does not presume legal personality for any international actor but attaches this quality to the fulfillment of certain preconditions.[46] The formal approach therefore constitutes an open concept which provides sufficient flexibility to accommodate changes in the international legal landscape and to respond to the emergence of new international actors.[47] *Trindade*, who follows an individualistic approach, likewise links subjectivity and the power to enforce one's

[42] *Trindade* coined the term in Trindade (2011), p. 18.

[43] Brownlie (2012), p. 115; Dahm et al. (2002), pp. 260 f.; Meijknecht (2001), pp. 56 ff.; Ochoa (2007), p. 123; Shaw (2014), p. 142; Simma (2008), p. 734; Verdross and Simma (1981), p. 256 para. 424; for the suggestion to separate the substantive law and the procedural enforceability see Peters (2016), pp. 44–47.

[44] The two notions 'subjectivity' and 'legal personality' are used interchangeably throughout this study. For the interchangeability of these notions see Walter (2019), para. 1; see, however, Meijknecht (2001), pp. 23 ff. who distinguishes between subjectivity and personality.

[45] Manner (1952), Portmann (2010), p. 42.

[46] Portmann (2010), p. 173.

[47] For the responsiveness of international law in general see Ackermann and Fenrich (2017).

rights when he states that the "respect for the individual's personality at international level is instrumentalized by the international right of individual petition."[48]

The debate about the classification of the individual as a subject of international law has, however, been criticized as "useless"[49] or as being of mere theoretical value[50] because "no basic set of rights […] can be derived from international legal personality".[51] The notion of subjectivity was therefore labeled as "empty",[52] artificial and auxiliary[53] and a matter of sheer formality.[54] *Alexander Orakhelashvili* summarizes the shortcomings of the concept by stating that "this notion makes no real contribution to the protection of the individual human being but instead can lead to confusion and misunderstanding in theory as well as in practice".[55] Absent any perceptible benefits for individuals, the attempt to demonstrate their international subjectivity thus seems to be a mere academic exercise, "a theoretical game".[56]

Admittedly, the glut of theoretical concepts, philosophical arguments and doctrinal approaches to legal subjectivity befogs the true origin and the very essence of the debate. Yet, the academic haze surrounding the topic must not be mistaken as indicative for its practical irrelevance. Quite the contrary, international legal subjectivity serves as a tool to explain the relationships between different actors at the international sphere.[57] It thus constitutes a measure of engagement[58] which structures the international legal landscape. On a political level, it distinguishes "those social actors belonging to the international legal system from those being excluded from it".[59] International personality is therefore used as a legal device to express political recognition of certain entities. It is only these recognized entities which directly exist in the international legal sphere and may therefore participate, benefit and be heard.[60] Only they are considered equal partners and thus relevant international actors. Put differently, international subjectivity serves as a legal justification for the political decision to alienate certain actors from the international legal order[61] and as an excuse to disregard or even overrule their concerns. Obtaining this quality consequently amounts to a door opener for the individual to the international legal

[48] Trindade (2011), p. 13.

[49] Mazzeschi (2009), pp. 214 f.; see also Alvarez (2011), p. 26.

[50] Meijknecht (2001), p. 31; Mazzeschi (2009), pp. 214 f.; Parlett (2011), p. 38.

[51] Peters (2016), p. 41.

[52] Meijknecht (2001), p. 31.

[53] Peters (2016), p. 40.

[54] Dahm et al. (2002), p. 267.

[55] Orakhelashvili (2001), p. 276.

[56] Peters (2016), p. 40; see also Higgins (1995), p. 49 who argues that the concept of subjectivity has "no functional purpose".

[57] Parlett (2011), p. 29.

[58] Parlett (2011), p. 29.

[59] Portmann (2010), p. 19.

[60] Portmann (2010), p. 19.

[61] Concurring Opinion of C. Trindade to Inter-American Court of Human Rights *op cit* n 2 *supra,* p. 10 para. 27.

order. It creates equal legal fighting power between the factually superior State and the inferior individual. States may thus no longer dismiss valid claims of the individual on the basis of their sovereign interests if the individual constitutes an international actor on an equal legal footing who would then be impossible to ignore.

According to *Sir Ian Brownlie*, an international legal person is "an entity possessing rights and obligations *and having the capacity […] to maintain its rights by bringing international claims*".[62] *Bruno Simma* emphasizes the importance of the ability to procedurally defend one's rights by relying on the principle of "no right without a remedy".[63] He states that the existence of procedural mechanisms for the enforcement of rights determines the quality of an entity as an international subject of law.[64] *Hans Kelsen* is even more categorical. He suggests that "without […] a procedural capacity individuals cannot strictly be regarded as the subjects of international rights".[65] While he does not entirely deny the status of the individual as a subject of international law, he considers them to be "subjects of international law *in a specific way*".[66] Proponents of this formal concept of legal personality[67] consequently consider the ability to enforce a right to be a constitutive precondition for the classification as a subject of international law. The existence of international avenues of enforcement may accordingly imply legal personality, whereas the lack thereof may indicate its absence. The procedural counterpart of a substantive privilege or immunity therefore amounts to a distinguishing characteristic between those entities possessing international legal personality and all other (international) actors lacking this legal quality. International procedural capacity is thus pivotal for the legal status of the individual in the international order.

The suggested inseparability of a substantive right and its procedural enforceability has a long legal tradition dating back to the Roman concept of *actio*.[68] At the beginning of the twentieth century, *Georg Jellinek* proposed a theoretical approach to the issue in his treatise about the systems of subjective public rights. He concluded that it is the "capacity to actuate legal norms in the individual's interest" which determines a public individual right.[69] The verb 'actuate' is open for interpretation and may thus be understood as 'to enforce' in this context. International legal scholars, however, predominantly relied on the Advisory Opinion by the International Court of Justice in the *Reparations for Injuries* case to substantiate the relevance of

[62] Brownlie (2012), p. 115 (emphasis added).

[63] Simma (2008), p. 734.

[64] Simma (2008), p. 734.

[65] Kelsen (1966), p. 231.

[66] Kelsen (1966), p. 180 (emphasis added).

[67] On the formal conception of international legal personality see generally Portmann (2010), p. 173. In contrast to the States-only conception or the object theory, formalists do not presume international personality to be limited to States only. Any entity which fulfills the required preconditions may be considered an international subject of law. For the object theory see generally Manner (1952), pp. 428 ff.

[68] Peters (2016), p. 45.

[69] Jellinek (2011), p. 51.

procedural capability for the subjectivity of an entity. In this opinion, the Court came "to the conclusion that the United Nations is an international person. […] What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that *it has capacity to maintain its rights by bringing international claims*".[70] It was this statement which arguably linked the possession of *enforceable* international rights and duties to the subjectivity of an entity.

At closer inspection, however, this statement neither provides a general definition of an international legal person nor clear criteria for its recognition. The conjunctive 'and' between the determination of the subjectivity and the entitlements and capacities of the United Nations [UN] does not (necessarily) suggest a conditional link between the two parts of the statement. Yet, it neither precludes such an interpretation. From a formal perspective, the findings of the International Court of Justice [ICJ] are not only inconclusive but even circular as "the indicia referred to depend on the existence of a legal person".[71] It therefore remains unclear whether, according to the Court, the possession of enforceable rights and duties constitutes a precondition for the formation of an entity with legal personality or whether the possession of these rights is merely a consequence of an entity's legal subjectivity.[72]

Despite this ambiguity regarding the dogmatic relation between the enforceability of rights and the subjectivity of an entity, the individual's procedural capability remains a relevant element even outside the formal conception of legal personality. As an alternative to the formalist doctrine, the individualistic approach places the human being at the center of international law asserting that "as a matter of fundamental legal principle, the individual human being is an international person and, as such, has certain basic international rights and duties".[73] This concept does not establish preconditions for obtaining legal personality. Individuals are rather considered the ultimate subject of international law[74]—a status which they hold *a priori* and independent from their substantial rights and procedural capacities.[75] Accordingly, the enforceability of their rights is not considered an indispensable element for their legal personality. Yet, supporters of the individualistic conception do not disregard its relevance and even attach certain consequences to the lack of enforceable rights. *Lauterpacht*, for example, stresses that "the fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law".[76] For him, the availability

[70] International Court of Justice *op cit* n 16 *supra,* p. 179 (emphasis added).

[71] Brownlie (2012), p. 57.

[72] See Meijknecht (2001), p. 58; Peters (2016), p. 38.

[73] Portmann (2010), p. 126; for proponents of this concept supporting Portman's summary see Brierly (1936), p. 47; Concurring Opinion of Antonio C. Trindade to Inter-American Court of Human Rights *op cit* n 2 *supra,* pp. 9 f. paras. 26 ff.; Lauterpacht (1950 reprint 1968), pp. 70 f.; Scelle (1932), p. 42.

[74] Bourquin (1931), p. 42; Brierly (1936), p. 47.

[75] See Portmann (2010), pp. 126 f.

[76] Lauterpacht (1950 reprint 1968), p. 27.

of enforcement mechanisms does not constitute a necessary precondition for the international legal personality of the individual. He even suggests that it is the "failure to observe the distinction between the recognition, in an international instrument, of rights ensuring to the benefit of the individual and the enforceability of these rights at his instance" which obscured the position of the individual as a subject of international law.[77] Notwithstanding this seemingly rigorous rejection of the constitutive relevance of the individual's limited procedural capacity, he concludes that the absence of enforcement mechanisms "reduces the status of the individual as a subject of international law; (it does not negative it)".[78] *Lauterpacht* downgrades the legal status of the individual due to the lack of *enforceable* rights although—according to him—the element of enforceability is not indicative for the individual's legal subjectivity. *Anna Meijknecht* shares this uncertainty regarding the legal consequences of the individual's insufficient procedural capacity for its classification as a subject of law. She considers this procedural right "not indispensable for the existence of an entity as a 'subject of law'".[79] On the other hand, she acknowledges that "the idea that a right without a remedy is practically useless also appears as one of the constituent elements of international personality".[80] As a result, the individual constitutes a subject "to a lesser extent".[81]

This line of argument may equally be called circular since the legal status of individuals is influenced by elements which had previously been referred to as irrelevant for their quality as a subject of law. Yet, *Lauterpacht*'s and *Meijknecht*'s concluding remarks reveal even in the individualistic approach the importance of individuals' procedural capacity for their international legal status. While they refrain from formally acknowledging the existence of enforcement mechanisms as a necessary precondition for obtaining legal personality, they do include this factor into their overall legal assessment.

The procedural capacity of the individual is therefore relevant to both approaches to international subjectivity: Formalists such as *Kelsen* adhere to a *negative* presumption against the individual's quality as a subject of international law by declaring the element of enforceability a necessary prerequisite for the emergence of international legal personality. A procedurally handicapped entity may therefore not be considered a full subject of law. This presumption is, however, open for rebuttal, if it can be shown that individuals do possess procedural enforcement options to ensure the protection of their Human Rights. Other more individualistic authors, such as *Lauterpacht*, (positively) presume the subjectivity of individuals at the international level regardless of the fulfillment of any preconditions. Yet, they include the enforceability of their rights into their general considerations. While they thus principally confirm the legal quality of individuals as subjects of international law, they degrade their status given the lack of avenues of enforcement.

[77] Lauterpacht (1950 reprint 1968), p. 27.

[78] Lauterpacht (1950 reprint 1968), p. 61.

[79] Meijknecht (2001), p. 60.

[80] Meijknecht (2001), p. 61.

[81] Meijknecht (2001), p. 55.

The appealing feature of the formalistic approach is its adherence to objective criteria which then translate into legal consequences. Any international entity fulfilling these criteria may therefore be labeled a subject of international law. The formalistic doctrine is embedded in a legal rather than a natural reasoning. Furthermore, it is closer to the current understanding of the international legal order in which States still dominate the codification process and the international sphere as a whole. This approach thus sufficiently considers the sovereign prerogative of States—an argument many nations still consider utterly important. Regardless of these merits, the procedural options for obtaining judicial relief at the international level are crucial for both the individualistic and the formalistic approach. The positive as well as the negative presumption regarding the individual's subjectivity are based on the element of procedural enforceability. Procedurally strong individuals would therefore be more likely to qualify as (full) subjects of international law according to both approaches. The analysis of available avenues of complaint thus allows to comprehensively (re)assess their current role in the international legal order and permits to draw adjusted conclusions regarding their formal legal status.

Yet, the alleged procedural handicap is not the only argument which is put forward to refute the subjectivity of individuals. Their lacking ability to participate in the international law-making process[82] as well as their continuing dependency on the willingness of States to confer rights and obligations upon them[83] are just two other reasons among many more. Furthermore, there are concepts which either entirely reject the idea of individuals qualifying as subjects of international law[84] or which apply substantially different approaches irrespective of their procedural capacity.[85] Even procedurally strong and fully capable individuals with enforceable rights would therefore not conclusively erase all doubts as to their international status.

It is, however, not the approach of this book to silence or rebut every concern regarding the international subjectivity of human beings as this would be tantamount to tilting at windmills. Rather, it takes the reversed approach by seeking to show that due to individuals' substantially strengthened procedural capacity, the criterion of enforceability no longer serves as a basis to deny their international legal personality. The purpose of the following study is to dismantle one of the most common reservations regarding the international subjectivity of individuals: their alleged procedural handicap. The analysis of the available avenues of enforcement therefore contributes to the more general debate about individuals' position in the international legal sphere.

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[82] Ochoa (2007); McCorquodale (2014), p. 294; Orakhelashvili (2001), pp. 256 ff.

[83] "[W]hile individuals have a kind of status as passive subjects of international law, individuals do not have independency or autonomy in the international legal system at any meaningful extent", Parlett (2011), pp. 370 see also 353; see also Ferdinand Gärditz (2014), p. 91 and McCorquodale (2014), p. 284.

[84] The object theory or the recognition theory are examples thereof.

[85] Such as the actor or process conception, see Portmann (2010), pp. 208 ff. and the concept of cosmopolitanism, see Parlett (2011), pp. 43 f.; for the irrelevance of the criterion of enforceability see Dahm et al. (2002), p. 261.

1.3 Determining International Procedural Capacity

In order to counter the prevailing presumption of the individual's procedural handicap, this study examines and evaluates the possibilities of individuals to obtain judicial relief for the infringement of their rights before an international legal body. The existence of these individual enforcement mechanisms would imply procedural strength of individuals at the international level and accordingly be indicative for their international procedural capacity. For the purpose of this book, international procedural capacity is defined as the ability to avert or respond to an imminent or past infringement of rights before an international legal body by means of an international legal avenue of complaint.

This definition corresponds with the concept of access to justice or of an effective remedy enshrined in "virtually all universal and regional human rights instruments since the 1948 Universal Declaration".[86] Article 7(1) of the African Charter on Human and People's Rights[87] stipulates that "[e]very individual shall have the right to have his cause heard." Article 25 (1) of the American Charter on Human Rights states that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention".[88] The European Convention on Human Rights[89] contains a similar provision in Articles 6 (1) and 13. The International Covenant on Civil and Political Rights [ICCPR][90] likewise refers to the right of access to justice in Article 2 (3). The treaty states accordingly that "[e]ach State Party to the present Covenant undertakes [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy". While the individual definitions of the concepts of access to justice and of an effective legal remedy vary, in essence, they all describe the "means by which a right is enforced or the violation of a right is prevented, [or] redressed".[91] They therefore all refer to judicial measures designed to avert the commission of a violative act, address the violation of an individual right or restore the *status quo ante*.[92] Both access to justice and the right to an effective remedy consequently seek to ensure the realization of justice.[93]

Yet, the rights of access to justice and to an effective legal remedy enshrined in these documents address judicial measures of relief at the domestic level by domestic

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[86] Francioni (2007), p. 2.

[87] 1520 UNTS 217 ff.

[88] American Convention on Human Rights, 1144 UNTS 123 ff.

[89] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 ff.

[90] 999 UNTS 171 ff.

[91] Capone (2019), para. 1; for a similar definition see Shelton (2019), para. 1.

[92] For the discussion on the definition of the term 'remedy' see generally Haasdijk (1992), pp. 245 ff.

[93] Concurring Opinion of Judge A. A. Cancade Trindade, Inter-American Court of Human Rights, 'Case of the Pueblo Bello Massacre v. Colombia: Merits, Reparations and Costs' (Judgment of 31 January 2006), p. 21 paras. 61 f.

institutions.[94] Thus they are not concerned with international procedural mechanisms but rather make reference to national courts and tribunals.[95] Evidently, "the enforcement of the individual's rights under international law [is] something quite different from the enforcement of rights under municipal law"[96] and must be strictly distinguished. The notion of access to justice and the right to an effective legal remedy are therefore not synonym with the ability to enforce one's right at the international level. Furthermore, there is no (customary) right of access to international justice or of access to an effective international legal remedy.[97] States are thus not obliged to create mechanisms which ensure the possibility for individuals to have their cases heard by an international legal institution. While there may be no right to an *international* remedy, the power to enforce Human Rights at the international level requires a similar procedural set up like enforcing Human Rights at the domestic level. Both undertakings presuppose an institutionalized procedure to claim a violation of a right and the possibility of being compensated for this violation; both require the availability of procedural mechanisms, which allow individuals concerned to prevent or redress this imminent or past violation of their rights. Accordingly, international and domestic enforcement are two sides of the same coin: maintaining one's rights by bringing claims. They just concern different procedural fora. The sophisticated concepts of access to domestic justice and of a domestic remedy may therefore serve as a point of reference to define the much less developed notion of international procedural capacity and what this capacity requires.

The legal concept of remedies generally comprises two distinct dimensions, one of which is procedural, the other substantive. *Dinah Shelton* described these two elements as "the substance of relief" and "the procedures through which relief may be obtained".[98] *Pierre Schmitt* likewise acknowledges the procedural and the substantive side of this concept.[99] He, however, assigns the procedural dimension to the right of access to justice and the substantive dimension to the right to an effective legal remedy. According to *Schmitt*, "the right of access to justice has to be differentiated from the right to a remedy since the former concentrates on the procedural aspect while the latter focuses on the substantive result of the proceedings."[100] The UN General Assembly on the other hand combines the two rights in its "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law".[101] Therein, it also adopted the two-dimensional approach to the concept of remedies and established that a judicial

[94] Francioni (2007), p. 41.

[95] Article 8 of the United Nations General Assembly, 'Universal Declaration of Human Rights' (10 December 1948) *UN Doc. A/RES/3/217 A*.

[96] Kelsen (1966), p. 232.

[97] Francioni (2007), p. 8.

[98] Shelton (2006), p. 8; see also Capone (2019), para. 1.

[99] Schmitt (2017), pp. 93 ff.

[100] Schmitt (2017), p. 95.

[101] United Nations General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,' (16 December 2005) *UN Doc. A/Res/60/147*.

remedy must not only be procedurally accessible but it must equally be effective on a substantive level in order to ensure the proper enforcement of the individual's rights. The principal UN organ stated that a "victim of a gross violation of international human rights law […] shall have equal *access* to an effective judicial remedy as provided for under international law".[102] On a substantial level, the relief "intended to promote justice by redressing gross violations of international human rights" must be adequate, effective and prompt.[103]

The notions of access to justice and of an effective remedy are thus evidently intertwined and sometimes impossible to distinguish. The dividing line between the two concepts, however, seems to be a matter of mere terminology rather than of substance. Yet, the terminological differences cannot hide the fact that the various definitions all share the same core: they all refer to a procedural and to a substantive element. The procedural component relates to the existence and availability of international procedures through which relief may be obtained; the substantial component concerns the substance of relief which ensures the realization of justice and the restoration of the *status quo ante* if still possible. It is the combination of these two elements which enables individuals to enforce their rights. This study adopts this two-dimensional approach of the concept of domestic remedies and applies it to the international sphere. It thus examines the procedural and the substantive component of international enforcement mechanisms in order to assess whether they enable the individual to avert or respond to a threatened or past infringement of rights before an international legal body. It focuses on the procedural embedding of the mechanism, thereby shedding light on procedural obstacles which may prevent or hamper the individual's access to the mechanisms. It also analyzes the substantive outcome of the enforcement mechanisms thereby assessing in how far they provide the individual with judicial relief. In addition to the procedural and the substantial dimension, the principle of consent adds another important element to the individual's *international* procedural capacity: the element of commitment. Procedurally accessible and substantially effective enforcement mechanisms constitute a mere legal illusion if States refuse to ratify their constitutive treaties. It is only after their ratification that these mechanisms become applicable to the State and thus available for the individual.[104] This study therefore equally analyses in how far States are willing to commit to international procedural mechanisms.

1.3.1 Conventional Commitment

The first chapter of this book focuses on States' level of conventional commitment to international enforcement procedures. The term describes the degree to which States have pledged to adhere to the procedural mechanism enshrined in the legal

[102] *Ibid,* para. 12 (emphasis added); on this dimension see also Trindade (2011), Zarbiyev (2012), p. 256.

[103] United Nations General Assembly *op cit* n 101 *supra,* para. 15.

[104] Briggs (1953), p. 94; McCorquodale (2014), p. 290; Meijknecht (2001), p. 57.

instrument.[105] It determines how States accede to these treaty-based procedures and under which circumstances they may delimit or revoke their consent thereto. Conventional commitment thus constitutes a central preliminary procedural gateway: existing commitment provides judicial remedies, the lack thereof prevents them. The availability of international enforcement mechanisms essentially depends on the willingness of States to provide such procedural mechanisms for the individual. The individual therefore lacks international procedural capacity unless this ability has been explicitly conferred upon him.[106] In this regard, the State remains the intermediary between the individual and the international legal sphere,[107] thereby perpetuating the individual's dependency on its mercy. Accordingly, the first determinative factor for the individual's procedural capacity is whether and to what extent the State has agreed to the relevant treaty establishing the procedural mechanism in question.

A number of flexibility tools allows States to modulate their level of conventional commitment according to their specific needs and preferences.[108] These tools include, *inter alia*, the modalities of accession, the right to submit reservations as well as the right to withdraw from the convention.[109] While the modalities of accession determine the extent and the form of commitment, reservations allow the acceding State to modify the legal effect of the treaty on a substantial level.[110] Exit clauses on the other hand provide the State with the option to withdraw from the treaty in parts or entirely.[111] States may utilize this catalogue of tools to adjust their level of commitment at two stages of the international treaty adoption process: they may firstly influence the design of the convention during its drafting stage as negotiators[112] by opting for the inclusion of these flexibility tools. They may secondly make use of the tools as treaty members or ratifiers.[113] It is consequently the abstract treaty design as well as its specific application and interpretation by the Member States and the relevant judicial bodies which determine the level of commitment. The analysis of States' conventional commitment equally sheds light on the question in how far States remain fully independent vis-à-vis their decision whether and how to accede to an international agreement. Lastly, it reveals the role of international treaty bodies in the advancement of international treaty law and its effect on the individual's procedural capacity.

[105] See Guzman (2010), p. 131.

[106] Briggs (1953), p. 94; Lippman (1979), p. 265; Bilder (1969), p. 205.

[107] McCorquodale (2014), p. 290.

[108] Guzman (2010), p. 131.

[109] These are generally considered the most relevant flexibility tools, Guzman (2010), p. 131.

[110] Gamble (1980), p. 374.

[111] Helfer (2005), pp. 1579 ff.

[112] For the distinction between a State's role as negotiator on the one hand and ratifier on the other see Galbraith (2013), p. 313.

[113] Galbraith (2013), p. 313.

1.3.2 Procedural Embedding

The procedural embedding of international enforcement mechanisms forms the second chapter of this study. This chapter examines whether and under which circumstances individuals may present their cases on its merits and thus have their voices heard by an international legal body. Access to international remedies depends on the fulfillment of certain admissibility prerequisites which delimit the use of (generally available) enforcement mechanisms. Only if individuals comply with these admissibility prerequisites, they may approach the legal body with the prospect of having their rights enforced or the violation of their rights prevented, redressed or compensated. Accordingly, the notion 'procedural embedding' refers to those admissibility prerequisites which detrimentally affect the approachability of international legal bodies and thus delimit the individual's access to judicial remedies.[114] These procedural prerequisites constitute obstacles which prevent the utilization of international enforcement mechanisms not as a result of the State's lack of consent, but as a matter of admissibility. As such, the pre-adjudicative set-up of judicial remedies determines the procedural powers of individuals during the process of seizing international legal bodies and ultimately their international procedural capacity.

The satisfaction of certain procedural preconditions prior to the analysis of the substance of a dispute is common practice in international adjudication.[115] Accordingly, the power of the individual to initiate proceedings and to appear before the judicial body, the requirement of exhausting local remedies and the effect of parallel international proceedings are of relevance for the assessment of the procedural embedding of the mechanism.

Different factors influence the form of procedural embedding. As indicated above, during the drafting phase of international treaties States decide how to set up international enforcement mechanisms. As negotiators, they consequently determine which admissibility requirements the individual needs to fulfill in order to access the mechanism. States thus set the general level of accessibility by including or excluding certain pre-adjudicative prerequisites. Once the States adopted the treaty, the interpretation of these requirements is predominantly undertaken by the competent legal body which applies the wording of the agreement to the specific case in question. The case law of these bodies may thus subsequently influence the procedural embedding of the mechanism and possibly facilitate the individual's access to international remedies. As a result, it is both States as well as international judicial organs which determine the pre-adjudicative set-up of the procedures. The second chapter therefore not only focuses on the drafting decisions of States but equally examines the role and the power of treaty bodies in refining international treaty law.

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[114] For the relevance of admissibility criteria with regard to the accessibility of a mechanism see Trindade (2011), p. 50.

[115] Amerasinghe (2003), p. 309; Kolb (2013), p. 199.

1.3.3 Substance of Relief

The third chapter of this book sheds light on the degree to which the international enforcement mechanisms substantially redresses the individual and thus on the substance of relief. It is the purpose of international judicial remedies to "rectify the wrong done to a victim, that is, to correct injustice"[116] and to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[117] International remedies should therefore be "capable of redressing the harm that was inflicted".[118]

From the perspective of individuals, the usefulness of international enforcement mechanisms depends on the degree to which they prevent, redress or compensate the violation of the their right. In order to attain this rectifying effect international legal bodies must be mandated to properly address the violation of individuals' rights and to order the necessary measures[119] which may be of provisional or of permanent nature. Furthermore, the ordered measures must be suitable to prevent the impending or correct the befallen injustice. Ideally, international enforcement mechanisms culminate in legally binding decisions which grant compensation awards and oblige the offender to refrain from any further infringing conduct. The statutory "remedy design",[120] the nature and the enforceability of the obtainable remedial measures[121] constitute relevant factors which influence the degree to which international enforcement mechanism substantially redress the individual. The chapter on the substance of relief therefore examines the outcome of international proceedings. It focuses on the results of the instigation of proceedings and the degree of legal satisfaction the individual may obtain from the activation of the procedural mechanism. Accordingly, it seeks to analyze the "actions or measures taken to prevent, redress or compensate the violation of a right"[122] and "the relief afforded to the successful claimant".[123]

It analyzes the conventional framework as well as the legal bodies' application and interpretation thereof. The treaty design sheds light on the architecture of the judicial remedies. Furthermore, it shows which competences the negotiating States conferred to the international legal bodies in order to bring the envisioned system of redress to life. The case law on the other hand indicates how the legal bodies availed themselves of these competences thereby potentially advancing the law of enforcement. This

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[116] Shelton (2006), p. 19; see also Lenzerini (2008), pp. 13 f.; Dwertmann (2010), p. 37.

[117] Permanent Court of International Justice, 'Case Concerning the Factory at Chorzow (Germany v. Poland): Merits' (Judgment of 13 September 1928) *PCIJ Series A, No. 17,* p. 47.

[118] Shelton (2006), p. 9.

[119] *Amerashinghe* labels this competence the "jurisdiction vis-à-vis remedies" which comprises the power to "decide what is to be done in terms of redress", Amerasinghe (2003), p. 385.

[120] Shany (2014), p. 122.

[121] *Shany* argues that effectiveness of proceedings derives from "the contents of the judgment in question and the nature of the remedies it prescribes", Shany (2014), p. 118.

[122] Shelton (2019), para. 1.

[123] Shelton (2006), p. 16.

holistic approach allows a comprehensive assessment of the judicial outcome from the individual's perspective.

1.4 Object of Study

In order to evaluate the individual's international procedural capacity, this study seeks to examine and compare three selected international enforcement mechanisms which allow individuals to defend their rights against an imminent or past abuse. The study follows a positivist approach relying on the law as it currently stands rather than developing a legal framework of how it should be based on moral or ethical considerations.[124] The terms 'international proceedings' and 'international enforcement mechanisms' are thereby used interchangeably. They likewise refer to a "law-based way of reaching a decision in a contention"[125] by an international legal body. This decision may be rendered by any (treaty) body officially mandated with the power to receive, consider and conclusively decide cases and is consequently not restricted to formal judgments delivered by courts or tribunals.

The study focuses on international as opposed to regional mechanisms. Regional enforcement mechanisms are restricted in their applicability to certain geographical areas. International procedures on the other hand provide an open membership without a minimum standard for participation[126] to all States willing to commit to the constitutive treaty. These universal systems are therefore available to every State and ultimately to the affected individuals after the ratification of the respective treaty regardless of their specific locality.

In contrast, only a limited circle of individuals may benefit from the powerful enforcement tools provided for by regional Human Rights systems. While these systems are pioneers regarding the effective protection of individual rights outside domestic avenues of complaint, they are unavailable to a significant number of people globally. Whether an individual may utilize these proceedings consequently depends on a geographical coincidence. Furthermore, the sophisticated treaty design of these mechanisms predominantly result from specific regional dynamics and is therefore not necessarily indicative of a global trend. Their content and scope

[124] *Morgenthau* defines legal positivism as follows: "The juridic positivist delimits the subject-matter of his research in a dual way. On the one hand, he proposes to deal exclusively with matters legal, and for this purpose strictly separates the legal sphere from ethics and mores as well as psychology and sociology. Hence, his legalism. On the other hand, he restricts his attention within the legal sphere to the legal rules enacted by the state, and excludes all law whose existence cannot be traced to the statute books or the decisions of the courts. […] This 'positive' law the positivist accepts as it is, without passing judgment upon its ethical value or questioning its practical appropriateness", Morgenthau (1940), p. 261; for the distinction between the positive doctrines and other approaches see generally Koskenniemi (2019).

[125] *Romano*, *Alter* and *Shany* use the term "adjudication", however, with the same substantial connotation, Romano et al. (2014), p. 4.

[126] Hafner-Burton (2013), p. 93.

are strongly contingent on cultural and political particularities of the region. Additionally, the drafting process of regional agreements often involves a lower number of negotiating parties with less diverse interests. All of these factors facilitate building a consensus among the interested States and thus the adoption of a treaty with stronger obligations and a higher level of commitment.[127] Although regional proceedings thus constitute important procedural tools which significantly expand the catalogue of individual enforcement mechanisms, they are not necessarily representative for the individual's *international* procedural capacity and therefore are not covered by the subsequent analysis.

The comparative nature of this study requires a thorough selection of cases, which are both sufficiently similar in order to be comparable as well as different enough to cover various areas of international law. It is this balance which creates indicative results allowing to draw general conclusions on the procedural status of the individual in international adjudication based on the analysis of just a few cases.[128] *John Stuart Mill*'s Method of Agreement[129] provides the necessary methodological framework to compare profoundly dissimilar cases by focusing on their differences as opposed to their commonalities.[130] He stipulates that if "two or more instances of the phenomenon under investigation have only one circumstance in common, the circumstance in which alone all the instances agree, is the cause".[131] His method consequently allows to induce general conclusions from the analysis of different (legal) contexts. The method constitutes a suitable tool to detect an overarching tendency and common patterns (the enhancement of the procedural capacity of the individual) by analyzing unlike scenarios (the various international enforcement mechanisms).

Since the enforcement of the individual's rights at the domestic level is different from enforcing rights at the domestic level,[132] the possibilities of obtaining international remedy for the violation of a right are not limited to individual complaint procedures which resemble constitutional or administrative complaints before national courts. Quite the contrary, access to international justice may come in various forms and shapes. This study therefore analyzes three procedural mechanisms which are embedded in different contexts and pursue different purposes. The three selected enforcement mechanisms of interest to this study are the individual complaint procedure before the UN Committees, the Diplomatic Protection procedure

[127] In contrast, UN Human Rights treaties, which are universal, "constitute a kind of lowest common denominator between the Western and the Socialist concepts of human rights" and thus "contain extremely weak language", Nowak et al. (2008), p. 722 para. 2 (Article 22).

[128] *Schwarzenberger* states that the inductive method "presupposes the existence of a fair amount of case material from which plausible generalizations may be attempted", Schwarzenberger (1947), p. 541.

[129] Mill (1875), p. 454.

[130] Dannemann (2006), p. 397; Brand (2007), pp. 436 and 438.

[131] Mill (1875), p. 454.

[132] Kelsen (1966), p. 232.

before the ICJ and the Adhesion Procedure before the International Criminal Court [ICC].

The UN individual complaint procedure constitutes the archetype of a fully individualized universal enforcement mechanism which vests individuals with the procedural capacity to obtain remedy for the abuse of their rights before an international quasi-judicial body independent from the intervention of any other international actor. In contrast, the Diplomatic Protection procedure before the ICJ is the prototype and most traditional example for a dispute settlement mechanism between States. It, however, likewise constitutes one of the first procedural mechanisms which provided an international remedy for individuals as "access to justice as it first appeared in customary international law, i.e. as a subset of the law of state responsibility for *injuries to aliens*".[133] Until the development of international Human Rights law and the corresponding system of individual complaints, "the only means available for individuals to bring a claim within the international legal system [and thus to enforce his rights internationally] has been when the individual is able to persuade a government to bring a claim on [her or his] behalf".[134] The inter-State controversy in a Diplomatic Protection case is consequently triggered by the mistreatment of a national by the other State and thus by the violation of the individual's Human Rights. The individuals and the abuse of their rights are thus equally at the core of and the reason for the procedure. Finally, the Adhesion Procedure before the ICC constitutes the most recent and likewise the most innovative addition of an international enforcement mechanism to the international legal sphere. This procedure allows individuals to request compensation for their sufferings resulting from the commission of an international crime. The ICC is thus the "first international criminal tribunal offering victims direct access to justice as a party in the litigation, not just indirect participation via the prosecutor".[135] The Adhesion Procedure before the ICC is therefore equally concerned with the abuse of the individual's Human Rights.

While the three mechanisms do not exhaust the list of international enforcement mechanisms, they all constitute prototypes of procedures and pioneers in specific areas of international adjudication. Their outstanding role within the field of international procedural law renders them unique and potentially insightful objects of study. Despite the great differences between the three procedures, they all show that judicial bodies across mechanisms forward to improve the procedural status of the individual in international adjudication.

The selected proceedings are profoundly dissimilar in their specific treaty design, their scope as well as in their object and purpose. Most importantly, they differ regarding the rules which govern the modalities of the initiation of proceedings. While the UN individual complaint mechanisms vest individuals themselves with the right to instigate proceedings, the Diplomatic Protection procedure before the ICJ restricts this right to States only; the Adhesion Procedure before the ICC, on the

[133] Francioni (2007), pp. 1 f. (emphasis added).

[134] McCorquodale (2014), p. 288.

[135] Keyzer et al. (2015), p. 7.

other hand, may be triggered by Member States of the Rome Statute, the Security Council or the Office of the Prosecutor. Despite these tremendous differences, they share one common, unifying feature: all three enforcement mechanisms are provoked by the abuse of an individual's Human Rights. They are thus activated in response to the mistreatment of an individual. This commonality provides the necessary nexus between the different mechanisms and allows comparing them through the prism of the individual in accordance with *Mill*'s Method of Similarities. The differences between the three enforcement mechanisms are obvious. Yet, it is precisely these differences which allow to classify the commonly detected patterns as general tendencies in international law. If the same line of argument or a similar behavioral pattern occurs in all three procedures—despite their tremendous dissimilarities—it may indicate a common development in international adjudication.

Against this backdrop, this study identifies a general tendency among all three mechanisms to put individuals at the heart of proceedings and thereby to allow them to obtain judicial redress for the infringement of their right even outside those avenues which are traditionally referred to as individual complaint procedures.

1.4.1 UN Individual Complaint Procedure

The first international enforcement mechanism which this study seeks to examine is the individual complaint procedure before the UN Committees. These Committees are vested with the competence to "receive and consider communications from individuals subject to [the] jurisdiction [of a State Party] who claim to be victims of a violation by that State Party of any of the rights set forth in the [treaty]".[136] The individuals may thus submit a complaint to these Committees alleging the infringement of their conventional rights by a Member State of the respective treaty.

The optional individual complaint mechanisms[137] form part of the UN Human Rights treaty network which was established shortly after the foundation of the organization and has ever since been continuously expanded. Commencing in 1966 with the adoption of the twin treaties, the International Covenant on Civil and Political Rights [ICCPR][138] and the International Covenant on Economic, Social

[136] Article 1 Optional Protocol to the International Covenant on Civil and Political Rights [OP ICCPR], 999 UNTS 171; Article 1 (1) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights [OP ICESCR], UN Doc. A/63/435; Article 14 CERD, 660 UNTS 195; Articles 1 and 2 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women [OP CEDAW] 2131 UNTS 83; Article 22 (1) CAT, 1465 UNTS 85; Articles 1 (1) and 5 (1) Optional Protocol to the Convention on the Rights of the Child on a communications procedure [OP CRC], UN Doc. A/RES/66/138; Article 77 (1) CRWM, 2220 UNTS 3; Article 1 (1) Optional Protocol to the Convention on the Rights of Persons with Disabilities [OP CRPD] 2518 UNTS 283; Article 31 (3) CED, 2716 UNTS 3.

[137] Nowak et al. (2008), p. 722 para. 2 (Article 22).

[138] 999 UNTS 171.