
The Role of the Individual in the Process of International Law Creation

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Abstract

This work set out to assess and examine the position of the individuals as non-state actors within the process of international law creation, in essence taking an existing problem and bringing a new idea. In undertaking this aim three new classifications of non-state actor have been identified in which the evidence gives a better informed theory. These new classifications, the authorised, independent and unauthorised individual, give a more realistic account between the theoretical narrative of the individual and realities seen within international law creation. In contrast to the current theories which are heavily theoretical and abstract, this work has an evidence based approach informing on a new theoretical framework. The authorised individual is someone mandated to perform negotiations of future international law on behalf of an authorised-decision maker, usually a state government. The principal features of the authorised individual are that they are briefed to act on behalf of states, usually conforming to a strict mandate to which they are expected to follow. The independent authorised individual is similarly related to the authorised individual in that they are mandated by an authorised decision maker. The main differences being they are given more freedom to perform the role and are asked to fulfil more general aims and expected outcomes set down by the individual's home government. John Ruggie and the process used by him in the creation of the UNGP's provide an excellent example of the work of this category of individual. Finally, the unauthorised individual is someone who by conventional standards and expectations wouldn't be expected to have a role in the negotiations for international law making, i.e. they have no mandate, and are not acting on behalf of a state. Examples are Raphael Lemkin and John Peters Humphrey. To demonstrate that individuals have a role in law-making, this alternative approach has a focus on the realities of the international system. In using Rational Choice theory models of analysis the effectiveness of the different categories of the individual can be seen, with clear benefits of the work of independent authorised individuals demonstrated as effective law makers within the system.

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Table of Treaties

European Convention on Human Rights

European Social Charter

Guiding Principles on Business and Human Rights

Montevideo Convention on the Rights and Duties of States (1933)

Statue of the International Court of Justice

The Treaty of Versailles (1919)

The Treaty of Westphalia

UN Charter

Universal Declaration of Human Rights

Vienna Convention of the Law of treaties

Vienna Convention on Diplomatic Relations

Table of Abbreviations

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

FDI: Foreign Direct Investment

HRC: Human Rights Commission

IR: International Relations

IACtHR - Inter-American Court of Human Rights

NGO: Non-Government Organisation

OECD: Organization for Economic Co-operation and Development

OHCHR: Office of the High Commissioner for Human Rights

SRSG: Secretary-Generals Special Representative for Business and Human Rights

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNGPs: United Nations Guiding Principles on Business and Human Rights

WHO: World Health Organisation

Introduction

The formal role of the individual in the process of international law creation is an underdeveloped area of international law. This thesis intends to examine the role that individuals play when creating international law. Presently, especially in the mainstream approach within international law, the individual is sidelined during the creation process. A highly state-centric system is considered as the only significant theoretical model. This idea helps suppress the role of the individual at almost all stages of international law. The realities of the international system no longer match this theoretical ideal, with individuals gaining access to international tribunals and international organisations giving rights to individuals.¹ To continue with either a modification of existing theory or ignoring the role of the individual within international law would not sufficiently credit the individual for the role they have within the system.

The main themes which give rise to the individual's role within international law are the focal point around which this thesis's new theoretical narrative is built. The themes include consent, legitimacy, authority, process, and the abstract nature of the state. These five themes raise important questions such as: how do people within states give consent to those sent to make international law? How do governments consent to international law creation? What is the place of legitimacy within the system of international law creation? How do states give authority and authorisation to those undertaking law creation? What is the purpose of doing so? How much authority can be retained by a government, not actually within the room, during a creation event? Is the process of creation a good method of deriving legitimacy for international law? When international law creation is considered in depth we start to

¹ For example the Universal Declaration of Human Rights (1948), The European Convention of Human Rights (1950) or The African Charter on Human and Peoples Rights (1981)

look beyond that abstract idea of the state and start to consider the individual who is actually working under the identity of the state.

I. Objectives of the Thesis

The thesis will focus on the need for a new assessment and re-valuation of the individual within the creation of international law. The project has four basic objectives, firstly to assess the role and value of the individual in the creation of international law. Second, to provide a new theoretical framework to conceptualise the role of the individual within the creation of international law that accurately reflects the realities of the international system. The new theoretical framework will demonstrate that it is sufficiently robust and a superior model to any current literature on relation to the individual. Finally, this framework for understanding the individual will examine and analyse existing models of decision making within the process of international law creation in order to demonstrate that it is workable.

II. Structure of the Thesis

The thesis will be split into six chapters; the first will extensively review how the individual has been understood within the existing literature. This will serve to provide some background on the issues associated with a state centric nature of international law, whereby the individual is given only a minor role. This will illuminate the nature of the problem being tackled here, that the theoretical narrative no longer accurately reflects the realities of international law creation. This background review will be expanded to evaluate and assess the dominant positivist conception of international law since the turn of the twentieth century. In doing this it will illuminate how positivists have understood the development of the place of the individual. Legal process theory will also be explored as an additional theory to

understanding the role of the individual within international law. Finally a comparison with international relations will be undertaken to see how a different, but closely related, area understands the individual.

The second chapter starts to set out the first part of the new theoretical framework for increasing the understanding of how the individual acts within the international system. This chapter will focus on the authorised individual; these individuals are those that follow instructions, usually given by authorised decision makers, when creating new legal documents. These documents are usually created at bi and multi-lateral talks between states. The authorised individual is usually a diplomat or representative of the state, but they can also have a lower profile as back room staff within a delegation. The authorised individual may also appear on a scale of independence, with some authorised individuals being under far more instructions when states want to protect high value interests. At other times instructions may be less precise and the authorised individual is given far more independence in the interpretation of what they need to ensure within the negotiations of international law. Discussions such as those that created the Universal Declaration on Human Rights (UDHR) and SALT (Strategic Arms Limitation Talks) agreements provide excellent examples to demonstrate how different authorised individuals work with different levels of detailed instructions.

Chapter three introduces the second part of the new theoretical narrative which involves the independent authorised individual. These individuals have much more freedom than the authorised individuals, but still require state support or nomination for their position within the international system. These individuals tend to be state representatives to international negotiations but are given broad aims instead of specific instructions. Members of the international judiciary include judges serving at

the International Court of Justice, or the European Court of Human Rights. The final area where independent authorised individuals can be found is UN special procedures mandate holders.

Chapter four provides an in-depth examination of the independent authorised individual John Ruggie, in the role of a UN special procedures mandate holder. It focuses on Ruggie to see how he performed this role in the creation of the United Nations Guiding Principles on Business and Human Rights (UNGP)². This closer look intends to set out the role of the modern independent authorised individual in the context of mastering a highly contentious human rights issue. It will expand on the ideas expressed in chapter three regarding how independent authorised individuals have the ability to successfully use the law creation process. This section intends to break down the different elements of how the UNGP's and the Protect, Respect, and Remedy Framework (Framework) were achieved, focusing on the process elements including the selection of Ruggie himself, the mandates he was working under, the approach, his strategy of principled pragmatism, the language and structure of his speeches, the team he created, the resources (both financial and in kind), the open debate, and finally the willingness to engage and accept new ideas.

Chapter five sets out the last part of the new theoretical narrative and focuses on the unauthorised individual. These individuals would, by the positivist understanding of international law, have nothing to do with the creation of new law. They are individuals that have no formal place within the law creation system. They are often found working within the secretariats of international organisations and can have significant influence over the direction and development of new legal documents.

² http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 14.01.13

Other unauthorised individuals work completely outside the international system and exert change by persuading authorised individuals to act on their behalf. Notable unauthorised individuals will be examined; they are John P. Humphrey and Raphael Lemkin.

The final chapter examines decision making of the individual within international law. Using game theory provides a greater account of how these individuals' decision making actually works within international negotiations. This chapter will draw on all categories of individual discussed in the proceeding chapters to illustrate how reputation of the individual can affect the decision making process and, therefore, affect the outcomes of international summits. Other theoretical models will be assessed and examined to see the influence that the new theoretical framework can have. The Tragedy of the Commons, alongside game theory models, prisoner's dilemma, stag hunt, battle of the sexes and dove and hawk, should lead to the conclusion that this theoretical model gives a far better understanding of the individual's role within the creation of international law.

III. Engagement with Existing Literature

The thesis will engage with the literature which has already been published in this area. There are numerous books and other publications detailing how international law is created and used. Many of these publications are focused on the state, and the role that the state plays within the international system. By engaging with this significant body of literature an assessment of why the state has become the de facto primary actor within the international system. By charting the rise of international law from the Peace of Westphalia, the process of state regulation can be understood, thus why the state became central to the primary player. Other

scholars, for example Randall Lesaffer,³ have considered Westphalia as the starting point for their arguments. Lesaffer's considers that the creation and function of peace treaties, running from Westphalia to Versailles has formed a backbone of a European international constitution from which other international law documents take their origins. Using Westphalia as the starting point for the state centric nature, also encompasses the trend for natural law theory of Emmerich de Vattel⁴ and Hugo Grotius⁵, these two scholars placed the state at the centre of international law where it has remained. Grotius's contribution was to separate *ius gentium* (the law of peoples) and the *ius natural* (natural law properly) into the modern law of nations, which applied to the rulers of states.⁶ Vattel introduced the doctrine of the equality of states into international law. He made the argument that a small state was not less powerful than much larger states.⁷ Under Thomas Hobbes's social contract the individual's rights are recognised, but also that individuals would collectively come together to cede some of their rights to the state, reinforcing the importance of the state to international law.⁸ The natural law theory identifies the state as the most important actor, but with the beginning of the 20th century, scholars have attempted to break the state monopoly on international law. Hans Kelsen and the sociologic

³ Randall Lesaffer, "Peace Treaties and the Formation of International Law" as found in Edited by Bardo Fassbender and Anne Peters, *The Oxford Handbook of The History of International Law*, (Oxford University Press: Oxford: 2012), pp71-94

⁴ Vattel's primary work *Droit des gens; ou, Principes de la loinaturelleappliqués à la conduiteet aux affaires des nations et des souverains*, first published in 1758. Available in English translation Ed. Joseph Chutty, Emmerich de Vattel, *The Law of Nations: Or the Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, (Cambridge University Press: Cambridge: 2011)

⁵ Grotius primary work *De Jure Belli ac Pacis* written during 1623 to 1624. Available in English translation Ed Stephen C. Neff, *Hugo Grotius On the Law of War and Peace: Student Edition*, (Cambridge University Press: Cambridge: 2012)

⁶ James Crawford, *Brownlie's Principles of Public International law*, (Oxford University Press: Oxford: 2012) p7

⁷ Arther Nussbaum, *A Concise History of the law of Nations*, (Macmillan: New York: 1954), pp156-64

⁸ J.C.A. Gaskin (ed), *Thomas Hobbes: Leviathan*, (Oxford University Press: Oxford: 2007)

solidarism of Georges Scelle are two such examples, both stating that the individual was the ultimate and true subject of all legal orders.⁹

The start of the nineteenth century marked a significant change within the theoretical narrative to positivism.¹⁰ Within the positivist conception of international law state centralism was re-enforced, having been made the only significant actor by the natural law theory. Positivism re-enforced that position and remained unchallenged as only the states themselves could enter into treaties, or give consent to other actors. While these generally ensured states kept a monopoly of the subjects of international law, this discounts the role of all other actors.¹¹

The Oppenheim series of books,¹² which span the early part of the 20th century set out the positivist stance of the individual, being that they are objects of the law of nations.¹³ Despite the increased importance in the concern for the individual within the 20th century, resulting in the beginnings of distinctive new branches of international law, human rights law and humanitarian law, the positivist conception of the individual remained as the object of law.¹⁴ The rise of the International Organisations such as the League of Nations and International Labour Organisation all required the consent of states to be formed and states remained central to their running and organisation of the international system.¹⁵

⁹ Robert Kolb, *The Protection of the Individual in Times of War and Peace*, as found in Edited by Bardo Fassbender and Anne Peters, *The Oxford Handbook of The History of International Law*, (Oxford University Press: Oxford: 2012) p319

¹⁰ Malcolm N. Shaw, *International Law*, (Cambridge University Press: Cambridge: 2008) p27

¹¹ Steven R. Ratner & Anne-Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers", *The American Journal of international law*, Vol. 93, No. 2 (April 1999), p 239

¹² L. Oppenheim, *International Law: A Treatise*, (Longman's, Green and Co: London: 1905). Please see Chapter 1 section 2, for a full account of the Oppenheim series.

¹³ L. Oppenheim, *International Law: A Treatise*, (Longman's, Green and Co: London: 1905) p344

¹⁴ Lauterpacht, H., *International Law: A Treatise by L. Oppenheim*, (Longman's, Green and Co: London: 1955) p.639

¹⁵ Kolb (2012) pp.321-329

The main theoretical doctrine within modern positivist literature, concerned with the individual, still remains within the broad outline of the object and subject debate as discussed in the Oppenheim series. Shaw's *International Law*,¹⁶ currently in its sixth edition, indicates that the individual is a subject within international law through the increasing practice of states. Shaw does not consider, in depth, why the individual is to be considered a subject, but seems to accept the general dominance of the state within the international system. Others such as Martin Dixon,¹⁷ Malcolm Evans,¹⁸ and Antonio Cassese's¹⁹ all come to similar positions that the individual is, on balance, a subject, but the international system is still focused and dominated by the state. The individual is further scrutinised by Brownlie²⁰ and O'Connell.²¹ Brownlie expresses a positivist position similar to that of Oppenheim, in the latest version edited by Crawford.²² The position is maintained that, while individuals may be considered subjects, it is unhelpful to consider them as such as they do not have the same rights and responsibilities as other subjects,²³ such as the ever dominant state actor. In contrast, O'Connell acknowledges the place of the individual as part of the international community and, therefore, must have personality.²⁴

Hersch Lauterpacht's own position was far more complex than the extreme positivism he expressed in editing three editions of Oppenheim; in his own work he expressed his vision of international society as one founded on the rule of law.²⁵

Lauterpacht was not a rigid positivist, happy to embrace a distinctive thread of

¹⁶ Shaw (2008)

¹⁷ Martin Dixon, *Textbook on International Law*, (Blackstone Press: London: 1993)

¹⁸ Ed Malcolm D. Evans, *International Law*, (Oxford University Press: Oxford: 2003)

¹⁹ Antonio Cassese, *International Law*, (Oxford University Press: Oxford: 2001)

²⁰ Ian Brownlie, *Principles of Public International Law*, (Clarendon Press: Oxford: 1966) & Ian Brownlie, *Principles of Public International Law*, (Oxford University Press: Oxford: 2008)

²¹ D.P. O'Connell, *International Law*, (Stevens: London: 1970)

²² James Crawford (2012)

²³ James Crawford (2012) p121

²⁴ D.P. O'Connell, *International Law*, (Stevens: London: 1965) p116

²⁵ Iain Scobbie "Hersch Lauterpacht (1897-1960)" as found in Edited by Bardo Fassbender and Anne Peters, *The Oxford Handbook of The History of International Law*, (Oxford University Press: Oxford: 2012) p1181

natural law throughout his work. Perhaps his most significant work, *International law and Human Rights*²⁶ gives a significant place of the individual under international law. Lauterpacht states that the individual is a subject of international law, and this is due to an interpretation of the UN charter.²⁷ In further support of this, the individual has acquired a status and a stature which has given them fundamental rights of the individual, independent of the law of the state.²⁸ In conclusion, Lauterpacht argues that while the individual has rights and personality this does not mean that they can actually be used, unless an international tribunal or international organisation is willing to hear a case and make judgment against a state.

Another theoretical perspective emerged within the Yale School²⁹ established and developed by Harold Lasswell and Myres McDougal.³⁰ This narrative sets out to combine the analytical methods of other social sciences most notably international relations and seeks to apply these methodologies to the perceptive purpose of the law.³¹ This school of thought has since been developed by scholars such as Richard Falk³², Anne-Marie Slaughter³³ and Rosalyn Higgins.³⁴ Ratner and Slaughter argue that the greatest contribution and value from this narrative is the “emphasis on both

²⁶ H. Lauterpacht, *International law and Human Rights*, (Stevens & Sons Limited: London: 1950)

²⁷ H. Lauterpacht (1950) pp.33-35

²⁸ H. Lauterpacht (1950) pp.3-4

²⁹ Please see James Crawford, *Brownlie's Principles of Public International law*, (Oxford University Press: Oxford: 2012), p11 or W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, “The New Haven School: A Brief Introduction”, *The Yale Journal of International Law*, Vol. 32, pp575-582

³⁰ Please see Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a free society: Studies in law, science and policy*, (Martinus Nijhoff Publishers, Dordrecht, 1992), Myres S. McDougal, “Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry”, *The Journal of Conflict Resolution*, Vol. 4, No. 3, 1960, pp337-354; Myres S. McDougal and Harold D. Lasswell, “The Identification and Appraisal of Diverse Systems of Public Order”, *The American Journal of International Law*, Vol. 53, No.1, 1959, pp1-29; Harold D. Lasswell and Myres S. McDougal, “Legal Education and Public Policy: Professional Training in the Public Interest”, *The Yale Law Journal*, Vol. 52, No. 2, 1943, pp203-295

³¹ W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, “The New Haven School: A Brief Introduction”, *The Yale Journal of International Law*, Vol. 32, pp575-576 (pp575-582)

³² Richard Falk, *The Status of Law in International Society*, (Princeton University Press: New Jersey: 1970)

³³ Anne-Marie Slaughter, *A New World Order*, (Princeton University Press: New Jersey:2004)

³⁴ Rosalyn Higgins (1994)

what actors say and what they do.”³⁵ Higgins, setting her argument within the context of the positivist subject/ object debate, focuses on participants within the system; this can, therefore, include individuals and multinational corporations of non-state actors.³⁶ Due to this conceptual understanding this school is more focused on how rules are actually used by all actors within the system, not what the rules actually are.³⁷ An advantage of considering this theory is that it has a much wider focus on international actors, often described as “authorised decision makers”³⁸ these are any actor who actually contributes to the international system. Slaughter takes this idea a step further, arguing that if the international system is considered in the same way that domestic governments are viewed, a whole system of government networks and actors pop up everywhere.³⁹ Legal process theory gives far greater scope to any actor within the international legal system, even the individual.

The final area of literature worthy of engagement is to see how International Relations engages with the individual within law creation. Four notable threads of debate have dominated International Relations: realism v idealism in the 1930s, Traditionalism v Behaviourism 1960s, neo-realism v neo-liberalism 1980s and finally, in the 1990s, rationalism and reflectivism.⁴⁰ Interestingly, realism and positivism share a common focus on the state as the main actor within the international system.⁴¹ In contrast, Liberalism within International Relations is the perspective based on the assumption of the goodness of the individual and the value of international political institutions in promoting social progress.

³⁵ Steven R. Ratner & Anne-Marie Slaughter, “Appraising the Methods of International Law: A Prospectus for Readers”, *The American Journal of international law*, Vol. 93, No. 2 (April 1999) p294

³⁶ Rosalyn Higgins (1994) p50

³⁷ Mary Ellen O’Connell (1999) p 334

³⁸ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, (Cambridge University Press: Cambridge: 2013) p42

³⁹ Anne-Marie Slaughter (2004) p13

⁴⁰ Peter Sutch and Juanita Elias, *International Relations: the Basics*, (Routledge: London: 2007) p8

⁴¹ Peter Sutch and Juanita Elias (2007) p44

The aim of this thesis is to examine all of the theoretical perspectives above as well as to consider space for a new way of evaluating the individual within the creation of international law. This work seeks to analyse the diversion between theoretical narratives and the practice of international law.

IV. Methodology

The thesis will first explore the nature and context of the individual's role within international law with reference to the extensive literature described above. This will serve to provide some explanation as to why the individual's role within the international system has been overlooked within the state centric approach of current mainstream international legal theory. It is against this background that a new theoretical narrative of the individual and the scope to which they have a significant role within international law creation will be set out.

The method being taken will be a theoretical and evidence based approach, looking at both previous theoretical narratives and individuals' past experiences when they have created international law. In essence, this provides evidence informing on a new theory. Due to the nature of international law creation it takes time for the publication of information regarding how documents were created to be made public. This is due to the desire of the state centric version of international law wishing to keep a façade that law is created by states alone. As such, a historical approach has been taken, with many examples of individuals being taken from significant developments of international law since the creation of the UN. Much evidence has been sourced from autobiographies, biographies, and secondary accounts of events. This approach means that participants are more open about their roles and events are no longer classified as secret; this is important regarding arms limitation talks. A

historical account also means that accounts of debates have been written by those individuals involved and their accounts can normally be cross-referenced against secretariat minutes or support documents. This also means that archive material supporting the analysis being undertaken is available from the UN archives. One notable, recent example is used in John Ruggie's creation of the UNGPs. This, almost unique, process in law creation was undertaken in a very open way, with supporting documents, reports, records, and an account by Ruggie all either available during the creation process or very soon after the process was completed.

V. Original Contribution

While the issue of international law creation has been considered before, it has in the past usually been in relation to a state based approach. This thesis will seek to provide an analysis focused upon how the individual is involved within the creation of international law. In doing this the thesis will consider the review of the current theoretical narrative in order to understand how effective the current literature is in describing the role of the individual. A new theoretical framework on the individual will then be created in order to provide a more realistic model of how the individual interacts and functions within International law creation. Part of this will provide one of the first reviews of the Ruggie process used in the creation of the UNGPs.

This thesis will reflect the law as it stands on 1st March 2014.

Chapter 1:- Doctrinal review, The Place of the Individual in International Law

I. Introduction

“Individuals are just as important to the Law of Nations as territory, for individuals are the personal basis of every State. Just as a State cannot exist without a territory, so it cannot exist without a multitude of individuals who are its subjects and who, as a body, form the people or the nation. The individuals belonging to a State can, and do, come in various ways in contact with foreign states in time of peace as well as of war. The Law of Nations is therefore compelled to provide certain rules regarding individuals.”¹

This quotation taken from Arnold McNair’s fourth edition of *Oppenheim’s International Law* shows the importance of the individual within international law. Yet this quotation does not capture the whole theoretical narrative that has been developing and changing for over one hundred years. This chapter seeks to evaluate the current theories concerning the place of the individual in international law, and where there are any gaps within the current knowledge base.

To accomplish this goal the doctrinal review will be broken down into five sections, each evaluating and analysing particular areas of interest concerning the place of the individual within international law. This first section, will consider the significance of the traditional focus of states in international law. In starting with an assessment of the development of international law since 1648, it will consider how the rise of natural law, into the nineteenth century positivism and the rise of international organisations, side-lined the individual and almost every other actor to ensure the dominance of the state. This will reflect the development of the doctrinal realities and, in doing so, outline the strength the state has had in becoming the main theoretical player.

¹ A. McNair (ed), *International Law: A Treatise*, (Longman’s, Green and Co: London: 1926) p518

The second section will examine the question of personality within international law. This section will focus on notable works by scholars, including Oppenheim's, Brownlie, and Lauterpacht. Oppenheim and Brownlie have a significant number of back editions to give an insight into how the place of the individual has evolved in international law. Lauterpacht has delivered some of the most significant works in the last century. This evolution has raised interesting arguments in legal literature regarding whether individuals have legal personality within international law. This argument will be the common theme throughout this work, yet by closely monitoring the argument that has developed, it is then possible to pin down areas where the argument has evolved or changed. This change could be a reaction to events or just an evolution in thinking. By looking at these turning points it should help our understanding of the position of the individual in international law. In turning to consider the rise of modern textbooks a direct comparison can be made with Oppenheim's literature. This will provide an insight into how the mainstream literature of the individual has developed and changed since the early part of the twentieth century.

The Third section, having seen how state-centric positivism is still dominant within international law today, will consider international legal process theory as advocated by the New Haven School. In doing this it will explore how this theory better suits today's conception of international law, being able to accommodate all actors as participants and influences from a variety of sources. This will be contrasted against the work of Antonio Augusto Cançado Trindade, whose academic judgements are at the cutting edge of how the individual should be treated within International Law.

This will be followed with an assessment of how non-state actors are treated within the theoretical literature. The focus will be on a narrative greatly enhanced in the last

twenty years as more attention has been placed on this particular actor. By examining non-state actors, analysis can be made as to how the theoretical narrative has adapted to allow for an increased role. This may provide an insight into how the narrative can be adapted once more to accommodate a bigger role of the individual.

The final section will focus on how International Relations, the closest social science discipline to international law, treats the individual within the international sphere.

Focusing on three different schools of thought, realism, liberalism, and constructivism, provides a broad approach to see how this discipline interacts with both the individual or, if they are highly focused, on the state as the main actors.

In evaluating the place of the individual in not only legal theory but the wider social sciences this chapter will chart the development of scholars' thoughts and theory throughout the last century and will, therefore, draw conclusions as to how ideas have developed and changed. This information will act as the theoretical framework within which to analyse the issues in subsequent chapters. This review is by no means a comprehensive review of all sources, which is outside the scope of this work, but will significantly demonstrate the trends, changes and development of the place of the individual.

II. The State Centric Nature of International Law

Historically, one of the most striking features of international law is the state-centric nature which will be a major theme of this chapter. Therefore, this section intends to examine why this is the case and in doing so explore the underpinnings of international law. Many works on international law² consider the development of the

² For example see James Crawford, *Brownlie's Principles of Public International Law*, (Oxford University Press: Oxford: 2012), Chapter 1, pp3-19 or Stephen C Neff, "Short History of International law" as found in Malcolm D. Evans (ed), *International Law*, (Oxford University Press: Oxford: 2003), pp3-31 or Malcolm N. Shaw, *International*

subject from the rise of the Eurocentric state based system of relations to the modern day. Within these reviews that take into account the Peace of Westphalia (1648), Vattel's international law, and the development of international law in the late nineteenth century the development of international organisations is finally considered. These factors are considered, not so much as the underpinning of international law, but as a process reflecting the development of international law, whereby philosophy and perspectives have been adapted and changed to keep pace with the development of international law.

Modern international law is generally traced back to the last 400 years. The basic ideas of a system of regulations between different political entities can be traced back to the dawn of civilisation.³ International law grew out of the desire to regulate the relations between states. This gradual process is shown first through the development of states themselves between 12th and 16th centuries⁴ in which recognisable power structures can be seen, and second the diminished power of the Holy Roman Empire and the Pope after the Thirty Years War with the resolution of the Peace of Westphalia in 1648.⁵ Crawford makes the argument that as a result of Westphalia "...ultimately at the expense of the notion of the *civitas gentium maxima* - the universal community of mankind transcending the authority of states".⁶ As a result of Westphalia the reality meant that the increasingly powerful states, for which expansion and Empire were around the corner, attempted to formulate some

Law, (Cambridge University Press: Cambridge: 2003), pp1-42. The general histories of International law as seen in these works is accurately described by Martti Koskenniemi, in the Artily "A History of International Law Histories" as found in Edited by Bardo Fassbender and Anne Peters, *The Oxford Handbook of The History of International Law*, (Oxford University Press: Oxford: 2012) p944-945

³ On this please see D.J. Bederman, *International Law in Antiquity*, (Cambridge University Press: Cambridge: 2001)

⁴ Antonio Cassese, "States: Rise and Decline of the Primary Subjects of the International Community", as found in Edited by Bardo Fassbender and Anne Peters, *The Oxford Handbook of The History of International Law*, (Oxford University Press: Oxford: 2012), p944-945 Also see James Crawford, *The Creation of States in International Law*, (Oxford University Press: Oxford: 2007), p6-10

⁵ Antonio Cassese (2012) p50

⁶ James Crawford, *The Creation of States in International Law*, (Oxford University Press: Oxford: 2007), p10

international governance, which consisted, according to Cassese, of three basic rules: the free use of the high seas, the capture of pirates and resorting to force.⁷

This was enhanced by states emphasising three fundamental rights: The right to self-preservation, self-defence and intervention.⁸ The realities of this era, prior to the start of the twentieth century, were that states were growing in strength both economically, and also militarily. Generally, a divine king or landed elite ruled over the states, therefore, the common individual was unimportant to the system.

Relations between states followed the only sensible course available, which was to ensure that international law was primarily concerned with the state and its practice towards other states. This Euro-centric approach to its development, partly due to the advanced nature of the European nations, ensured the dominance of European states over less developed states. Notably Randall Lesaffer⁹ sets out the argument that the development of international law within the last 400 years can be linked to that of the creation and function of peace treaties. The acknowledgment of a series of peace treaties that run from Westphalia to Versailles have formed the backbone of a European international constitution. These peace treaties laid down the foundations of international order, such as religious neutrality, and common responsibility of states for upholding peace and stability.¹⁰ While Lesaffer makes a valid and strong argument as to the development of international law from peace treaties, the importance of the peace treaty to the whole of international law is perhaps, overstated. A more balanced approach may be in order to state the importance, but in conjunction with other developments which took place between Westphalia and Versailles such as the place of custom, the building of empire,

⁷ Antonio Cassese (2012) p54

⁸ James Crawford (2007) p55

⁹ Randall Lesaffer, "Peace Treaties and the Formation of International Law" as found in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of The History of International Law*, (Oxford University Press: Oxford: 2012) pp.71-94

¹⁰ Lesaffer (2012) pp.71-72

diplomatic practice and other treaties. The use of peace treaties as a means of international law development helps to explain the role of the state, as war and peace are a state dominated activity. With the industrial revolution, large standing armies could be maintained; therefore, regulation by the international community as to the acceptable conduct of war became increasingly apparent.

The German scholar Hegel first proposed the doctrine of the will of the state. Within this doctrine it emphasised the role of the state and subordination of the individual, because the state enshrined the wills of all individuals, which evolved into a collective or higher will. While on the outside, the state was sovereign and, therefore, supreme to the individual and external state.¹¹ This theory demonstrates the domination of the state over the individual, and that the individual's needs are taken care of by the state. The domination of international law by states reached its peak in the 1920s when sovereignty was assigned a unique value in the international sphere and as an extension of this international law was largely dependent on the consent of states and was applicable to states alone.¹²

The state centric nature of international law can be partly linked to state practice and also the role of scholars writing on the subject, notably natural law and the positivist schools. The natural law works of Emmerich de Vattel¹³ and Hugo Grotius¹⁴ have had a significant influence on the development of modern international law. These two scholars played a key role in theoretical position of the state as the central actor

¹¹ See <https://www.marxists.org/reference/archive/hegel/works/hi/history4.htm> accessed 12.02.14 or Shlomo Avineri, *Hegel's Theory of the Modern State*, (Cambridge University Press: Cambridge: 1974)

¹² James Crawford, *Brownlie's Principles of Public International Law*, (Oxford University Press: Oxford: 2012) p5

¹³ Vattel's primary work *Droit des gens; ou, Principes de la loia naturelle appliqués à la conduite et aux affaires des nations et des souverains*, first published in 1758. Available in English translation Ed. Joseph Chutty, Emmerich de Vattel, *The Law of Nations: Or the Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, (Cambridge University Press: Cambridge: 2011)

¹⁴ Grotius primary work *De Jure Belli ac Pacis* written during 1623 to 1624. Available in English translation Ed Stephen C. Neff, *Hugo Grotius On the Law of War and Peace: Student Edition*, (Cambridge University Press: Cambridge: 2012)

in international law. Grotius's significant contribution was to separate *ius gentium* (the law of peoples) and the *ius natural* (natural law properly) into the modern law of nations, which applied to the rulers of states.¹⁵ The effect of this was for Grotius to suggest that international law, as the gradual development of universal principles of justice, could be deciphered through human agency, separately from any religion.¹⁶ Vattel's contribution, no less significant, was to introduce the doctrine of the equality of states into international law. He made the argument that a small state was not less powerful than much larger states. He also made the important distinction between laws of conscience and laws of action, stating that only the second was of importance.¹⁷ Therefore, he reduced the importance of natural law as from the Roman law tradition. However, within his resolution he establishes the importance of the state over the individual in doing this, helping to explain why the state became the primary actor. Vattel's separated the law of nature from international law, but also he separated the law of nature which applied to the individual as apart from the state. In doing this he regarded the individual as independent of the state, but the state had its own will, distinguishable from its members.¹⁸ Therefore, in setting out this argument, Vattel aided the state-centric nature of international law by separating the individual from the state, which had previously been seen as one and the same. Consequently, the law of nature was created as a result of this split to a product of the will of states not of the individuals comprising the state.¹⁹

¹⁵ Brownlie (2012) p7

¹⁶ Brownlie (2012) p7

¹⁷ Arthur Nussbaum, *A Concise History of the Law of Nations*, (Macmillan: New York: 1954), pp156-64

¹⁸ Peter Pavel Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, (Martinus Nijhoff: The Hague: 1960) pp.160-162

¹⁹ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, (Cambridge University Press: Cambridge: 2013) p13

The presence of Vattel's doctrine within almost every textbook on international law indicates the strong dominant position that it occupied from the eighteenth until the start of the nineteenth century. As Parlett so clearly argues:

“The nineteenth century framework of the international legal system reflected Vattel's state-centrism: international law was the regulating the relations between sovereign states, who were the exclusive subjects of international law. The relations of individuals were governed by municipal law; if international law dictated standards or rules as to their treatment at all, it only imposed an obligation on states to create rights for individuals through their domestic law.”²⁰

Natural law soon gave way to natural rights theory and the work of Thomas Hobbes and the social contract.²¹ Under Hobbes' social contract the individual's rights are recognised, but also that the individual would collectively come together to cede some of their rights to the state, reinforcing the importance of the state to international law. Hobbes' system of states was anarchic as it emphasises that states are out for their own self-interest, and that no one was above states to add control to state practice. Hobbes' work provides a basis not just for international law but is also used in Hans Morgenthau's²² defining work on international relations.

The start of the nineteenth century marked an evolution in international law doctrine to one which was expansionist and positivist.²³ The logical extension that national systems of law depended upon the will of the sovereign was, therefore, extended into the international sphere the law between nations depended upon the will of states. This links back to Hegel and the will of states. Positivism strengthens the role of the state as the central actor. In Bentham's *An Introduction to the Principles of*

²⁰ Kate Parlett (2013) p16

²¹ J.C.A. Gaskin (ed), *Thomas Hobbes: Leviathan*, (Oxford University Press: Oxford: 2007)

²² Hans Morgenthau, *Politics and Nations: The Struggle for Power and Peace*, (Alfred. A. Knopf: New York: 1967)

²³ Shaw p27

*Morals and Legislation*²⁴ the argument is made that as national sovereigns could proclaim laws for the benefits of their own citizens, they also could equally create international law.²⁵ The positivist position can be described as “international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent.”²⁶ Therefore, only the actors to which states consent have a role within international law. This position can be seen within the first volumes of Oppenheim²⁷ and is reflected by Crawford in Brownlie as:

“...positivism was distinguished by the notion that only positive law – that is, law which had in some form been enacted or made by authority – could be considered true law. International law, which could only with difficulty be seen to be made – and then in a diffuse way was caught up in this.”²⁸

Within this positivist conception of international law state centralism was re-enforced, having been made the only actor by the work of Vattel, positivism ensured that position remained unchallenged as only the states themselves could enter into treaties, or give consent to other actors. While these generally ensured states kept a monopoly of the subjects of international law, this discounts the role of non-state actors.²⁹

Some notable changes start to occur within this positivist dominated period with the rise of the International Committee of the Red Cross, the Holy See, and the Order of St. Johns of Malta.³⁰ These organisations, while not considered as equal to states, certainly had influence and consideration within international law. Importantly, they

²⁴ Jeremy Bentham, *An Introduction to the Principles of Morals and legislation*, (Dover Publications: Mineola: 2007)

²⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and legislation*, (Dover Publications: Mineola: 2007) pp.68-70

²⁶ Steven R. Ratner & Anne-Marie Slaughter, “Appraising the Methods of International Law: A Prospectus for Readers”, *The American Journal of international law*, Vol. 93, No. 2 (April 1999) p239

²⁷ L. Oppenheim, *International Law: A Treatise*, (Longman's, Green and Co: London: 1905) pp18-19

²⁸ Crawford in Brownlie (2012) p9

²⁹ Steven R. Ratner & Anne-Marie Slaughter, “Appraising the Methods of International Law: A Prospectus for Readers”, *The American Journal of international law*, Vol. 93, No. 2 (April 1999) p239

³⁰ Parlett (2013) pp33-35

had been allowed by states to have a position within the system. This fulfilled the positivist's conception to require consent for actors within international law.

Since the beginning of the 20th century, scholars have attempted to break the state monopoly on international law. Hans Kelsen and the sociologic solidarism of Georges Scelle are two such examples both setting out that the individual was the ultimate and true subject of all legal orders.³¹ Georges Scelle emphasises three principle themes within his conceptualisation of the system of International law and a significant break from positivism; the trial of state sovereignty, the advent of federalism and the promotion of the individual at the core of all reasoning.³² In advocating a theory of "international law called 'Methodological individualism', which focuses on the actions and responsibilities of individuals and aims to demystify the State"³³ this theory is neither positivist nor pragmatic; it envisages a sociological theory of law in general as one aspect of the legal phenomenon.³⁴ It realises that all societies, including the international society was composed of individuals and to ignore this was to be trapped in an anti-scientific collectivism.³⁵ The fact that states hold such a dominant place was due to historical accident,³⁶ for which all individuals and groups are linked.³⁷ Individuals within states are either subjects of liberties, objects of behavioural regulation, or as administrators "*gouvernants*".³⁸ Due to this, it would be artificial to differentiate between international law dealing with government

³¹ Robert Kolb, *The Protection of the Individual in Times of War and Peace*, as found in the *Oxford Handbook of International Law*, p319

³² Hubert Thierry, "The European Tradition in International Law: Georges Scelle", *European Journal of International Law*, No 1, 1990, p198

³³ Oliver Diggelmann, *Georges Scelle (1878-1961)*, as found in the *Oxford Handbook of International Law*, p1162

³⁴ Hubert Thierry, "The European Tradition in International Law: Georges Scelle", *European Journal of International Law*, No 1, 1990, p197

³⁵ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, (Cambridge University Press: Cambridge: 2002) p330

³⁶ Koskenniemi (2002) p330

³⁷ Antonio Cassese, "Remarks on Scelle's Theory of 'Role Splitting' (dedoublement fonctionnel) in International Law", *European Journal of International Law*, No 1, 1990, p211

³⁸ Koskenniemi (2002) p332

actions and individuals actions.³⁹ This promotion of the individual at the expense of the state was a revolutionary way of assessing international legal theory. Scelle's theory places the individual at the centre of the international system, creating a direct link between international law and the individual without the state having a significant role. This system would have had the power for international law to directly modify the domestic law of a state. Consequentially, sovereignty of states would, for practical purposes, no longer exist.⁴⁰ The theory suffered due to its combination of realism and utopianism; too abstract a system to ground in a realistic program in the post-war world and far from independent of the political struggles (the start of the cold war) that it hoped to overcome.⁴¹

The increased importance in the concern for the individual resulted in the beginnings of Human Rights Law and Humanitarian Law. Positivism's role during the early twentieth century, the rise of the International Organisations such as the League of Nations and International Labour Organisation all required the consent of states to be formed and states remained central to their running and organisation of the international system.⁴² Increasingly, international law has moved away into accepting other actors; as Christoph Schreuer argues, the classical model of state at the centre of international law has served an extremely useful purpose. The concentration of authority at the level of national governments has facilitated the abuse of power. International law has responded to such abuses with a massive growth in international human rights law, and such laws have limited the freedom of state and the absolute concept of sovereignty has gone. However, the basic underlining

³⁹ Cassese (1990) pp.211-212

⁴⁰ Koskenniemi (2002) p338

⁴¹ Koskenniemi (2002) p338

⁴² Kolb (2012) pp.321-329

concept of state-centric power is still established within international law.⁴³ Schreuer goes on to argue for a functionalist approach to international law that accepts the different actors but values them for their power functions.⁴⁴

Since 1648, international law has developed with the state as its sole actor. It is only relatively recently, since 1945, that any other actor within international law has been given serious thought. This state centric doctrine that has occurred in the literature explains why international law has always viewed the individual and other actors as unequal partners. Even the literature regarding the development of international law can be seen as a process that has developed in order to reflect the current practice amongst states. The practice of states has not only influenced the literature but the literature has influenced the practice of states.

III. Oppenheim's Positivism of the 20th Century

When considering the concept of the individual in international law, it is useful to start with academic texts that have editions reaching back to the turn of the twentieth century. The twentieth century saw huge change with the technological and social advances that have revolutionised the world. These same technological and social advancements have also raised many interesting questions, some of which affect the situation of the individual within international law.

Oppenheim's series on international law is a good source. Oppenheim himself prepared the first edition in 1905⁴⁵ and the series continued after his death. First by Roxburgh⁴⁶ in 1920, McNair⁴⁷ in 1926, and this was followed by Lauterpacht⁴⁸ editing

⁴³ Christoph Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?", *European Journal of International Law*, 1993, pp448-449

⁴⁴ Schreuer (1993) p453

⁴⁵ L. Oppenheim, *International Law: A Treatise*, (Longman's, Green and Co: London: 1905)

⁴⁶ R. F. Roxburgh (ed), *International Law: A Treatise*, (Longman's, Green and Co: London: 1920)

four editions, with his final edition published in 1955.⁴⁹ After a break of thirty eight years a ninth edition was published with Jennings and Watt⁵⁰ as editors. The first edition published in 1905 nicely sets out the starting position of the debate on personality when Oppenheim's argues:

"But what is the real position of individuals in International law, if they are not subjects thereof? The answer can only be that they are objects of the law of nations. They appear as such from many different points of view."⁵¹

This initial statement is then clarified by Oppenheim who sets out the three conditions that make individuals the object of international law and not the subject of it. First, the law of nations recognises the personal supremacy of the state over its individuals.⁵² Second, the supremacy of states recognises the right of states over foreign subjects within their states.⁵³ Finally, the law of nations may seize and punish foreign pirates on the open seas,⁵⁴ or when belligerents may seize and punish neutral blockade runners and carriers of contraband on the open sea without the individual's home state having a right to interfere.⁵⁵ Finally Oppenheim concludes his work by stating:

"If, as stated, individuals are never subjects but always objects of the Law of Nations, then nationality is the link between this law and individuals. It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations."⁵⁶

This argument is further reinforced with explanations that diplomats and other aliens with special rights do not gain these rights from international treaties but rather due

⁴⁷ A. McNair (ed), *International Law: A Treatise*, (Longman's, Green and Co: London: 1926)

⁴⁸ H. Lauterpacht, *International Law: A Treatise by L. Oppenheim*, (Longman's, Green and Co: London: 1938)

⁴⁹ H. Lauterpacht, *International Law: A Treatise by L. Oppenheim*, (Longman's, Green and Co: London: 1955)

⁵⁰ Sir Robert Jennings and Sir Arthur Watts (ed), *Oppenheim's International Law*, (Longman: Harlow:1992)

⁵¹ L. Oppenheim, *International Law: A Treatise*, (Longman's, Green and Co: London: 1905) p344

⁵² L. Oppenheim (1905) p344

⁵³ L. Oppenheim (1905) p344

⁵⁴ L. Oppenheim (1905) p344

⁵⁵ L. Oppenheim (1905) p344

⁵⁶ L. Oppenheim (1905) p345

to municipal law which the state was obliged to create as party to an international treaty.⁵⁷ This leaves the focus for enforcement of international law down to states to incorporate into domestic law. Therefore, this has all the weaknesses of a system whereby state sovereignty is the primary aspect. This dynamic of the importance of state sovereignty is reinforced when Oppenheim discusses the rights of man, that there is no such guarantee in the law of nations and that as the law of nations is between states, there is no place for the individual.⁵⁸

Oppenheim provides an ideal starting point for this theoretical narrative that, as of 1905, the individual is definitively an object of international law and certainly not a subject. The second edition⁵⁹ published in 1912, is almost identical in respect of how the individual within international law should be viewed to that of the first edition.

These two editions provide an ideal snapshot of Edwardian positivism.

The two volume, third edition published in 1920⁶⁰ and 1921,⁶¹ was mainly written by Oppenheim until his death in 1919, with the work complemented and supplemented by Oppenheim's student,⁶² Ronald F. Roxburgh using Oppenheim's notes to finish the edition.⁶³ With Roxburgh being a former student of Oppenheim and using his notes it can be reasonably concluded that this third edition is of Oppenheim's theoretical narrative.⁶⁴ This edition has strong echoes of the first edition. The editions post First World War witnessed the chapter on the individual developing in content and size, to include post-war changes to international law. With the creation of the League of

⁵⁷ L. Oppenheim (1905) p342

⁵⁸ L. Oppenheim (1905) p346

⁵⁹ L. Oppenheim, *International Law: A Treatise*, (Longman's, Green and Co: London: 1912)

⁶⁰ R. F. Roxburgh (ed), *International Law: A Treatise*, (Longman's, Green and Co: London: 1920)

⁶¹ R. F. Roxburgh (ed), *International Law: A Treatise*, (Longman's, Green and Co: London: 1921)

⁶² Mathias Schmoeckel, *Lassa Oppenheim (1858-1919)*, as found in the Oxford Handbook of International law

⁶³ Mark W. Janis, "The New Oppenheim and its Theory of International law", *Oxford Journal of Legal Studies*, Vol.16, No.2, 1996, p329

⁶⁴ Arthur Watts, "The New Oppenheim and its Theory of International law Oppenheim's International law", *Oxford Journal of Legal Studies*, Vol. 16, No.2, 199, pp.329-336

Nations⁶⁵ the existence of rights and duties is expanded from just between states to include those between international organisations and states.⁶⁶ Therefore, an expansion in the meaning of subjects was already in development. In this third edition Roxburgh and Oppenheim further continue down a difficult path by creating a third way; arguing that when international law creates an independent organisation certain powers can be granted to courts, councils and individuals. Yet these rights are neither international, nor municipal rights, but only rights within the organisation concerned.⁶⁷ This approach is theoretically consistent, that individuals gain rights under international treaties, yet saying that this does not alter the general relationship between international law and the individual is both impractical and illogical. By giving individuals rights under treaties it changes the nature of international law, and, therefore, by arguing for this third way in order to maintain a theoretical position means that Oppenheim is failing to take into account, the changes and developments with the realities of the time.

The fourth edition of Oppenheim was edited and updated by Arnold D. McNair in 1928. This update being published as the post first world war economic bubble was about to burst, causing extensive economic and social problems. Therefore, this update brings with it the ideal optimistic inter-war snapshot of international law, and as such it can increase our understanding of international law from a viewpoint not usually examined. The unique circumstances of post-war economic and social mobility, coupled with the development of international organisations for the first time, were a set of conditions never seen before in social sciences giving a unique lens in which to view the role of the individual. This was followed by international

⁶⁵ League of Nations 1919- 1946

⁶⁶ A. McNair (1926) p459

⁶⁷ R. F. Roxburgh (1920) p460

decline throughout the 1930s and the perceived failure of the international system building up to the start of the Second World War this period is not seen with much fondness. McNair builds on the previous editions by arguing the individuals are only ever objects of international law,⁶⁸ and that any rights given to individuals from international law are only enforceable through the use of municipal law,⁶⁹ yet international law requires that states make these municipal laws within the state.⁷⁰ Though, McNair recognises the exception to those international organisations such as Permanent Court of International Justice or the European Danube Commission that can grant certain rights and duties directly to individuals.⁷¹ In restating the position expressed in past editions, McNair, struggles to find a solution to the question of individuals that fits into a situation where international organisations are interacting directly with individuals, but still maintains a theoretical position according to which they are objects of international law.

For the fifth edition of Oppenheim's International Law, Hersch Lauterpacht had taken over the editorship of the series. Having been a student and close friend of McNair and assistant on the previous edition⁷² he was perfectly placed to continue the traditions of the Oppenheim. Lauterpacht may not have been the most obvious candidate to agree with the extreme positivist method embodied within the series, basing his conceptions of international law on the rule of law.^{73 74} Published in 1938

⁶⁸ A. McNair (1926) p519

⁶⁹ A. McNair (1926) p519

⁷⁰ A. McNair (1926) pp.519-521

⁷¹ A. McNair (1926) pp.520-521

⁷² Mark W. Janis (1996) p329

⁷³ Iain Scobbie, "Hersch Lauterpacht (1897-1960)", as found Edited by Bardo Fassbender and Anne Peters, *The Oxford Handbook of The History of International Law*, (Oxford University Press: Oxford: 2012), p1182

⁷⁴ Lauterpacht and his conception of International law will be given greater scope and evaluation later in this chapter.

as the international system was starting to breakdown⁷⁵ and gearing up towards war, the edition remains optimistic with the international system. Much of the discussion regarding the individual remains unchanged from the previous editions. One notable area that has seen development is this idea of the third way of individuals gaining rights under international organisations but not becoming subjects of international law. Lauterpacht takes much the same lines as his predecessors yet concludes, “As such they must be deemed to possess a species of international personality of their own.”⁷⁶ This point in starting to consider that an actor other than a state may have some level or description of legal personality was the start of a revolution in terms of wider acceptance of other actors, including individuals.

With the publication of the updated eighth edition version of Oppenheim’s work, edited for the final time by Hersch Lauterpacht,⁷⁷ a new emphasis and switch towards the individual can be seen through an increase in depth and size of the chapter regarding the individual. The chapter has a more in-depth discussion regarding the individual, with the argument being made that “Individuals are not normally subjects of the Law of Nations; they have certain rights and duties in conformity with, or according to, International Law?”⁷⁸ A discussion of occasions when individuals have rights conferred on them follows, notably heads of states, and foreign citizens.⁷⁹ A revolutionary argument is then made by Lauterpacht stating:

"Moreover, the quality of individuals as subjects of international law is apparent from the fact that, in various spheres, they are, as such, bound by duties which international law imposes directly upon them. The various

⁷⁵ The League of Nations was effectively over by the mid-1930s as aggressive many Axis powers withdraw from the league. The militarisation of Europe, culminating in the outbreak of the WWII demonstrated the failure of the league in guaranteeing lasting peace.

⁷⁶ H. Lauterpacht, *International Law: A Treatise* by L. Oppenheim, (Longman’s, Green and Co: London: 1938) p507

⁷⁷ H. Lauterpacht, *International Law: A Treatise* by L. Oppenheim, (Longman’s, Green and Co: London: 1955)

⁷⁸ H. Lauterpacht (1955) p637

⁷⁹ H. Lauterpacht (1955) p637

developments since the two World Wars no longer countenance the view that, as a matter of positive law, states are the only subjects of international law. In proportion as the realisation of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of international law."⁸⁰

This position is quickly corrected to more traditional positivism, that the "normal position of individuals in International Law, if they are not regularly subjects thereof?

The answer can only be that, generally speaking, they are objects of the Law of Nations."⁸¹ Lauterpacht sets out an evolving positivist position that takes into account the recent developments in International law, but remains in a position which is at best a compromise where the individual no longer comfortably fits into being an object but the positivist theoretical narrative is not ready to identify them as subjects.

Over these eight editions, spanning 47 years, a clear growth can be seen in the justification and the place of the individual in international law to the position in the eighth edition where the opinion has been clarified to the extent that the individual does have personality, albeit only in certain circumstances. This earlier statement is clarified when he picks up the argument that, surely if individuals are not subjects of international law then, by reasonable deduction, they are objects of the law of nations.⁸² This argument holds up if we are prepared to believe that the only two definitions that an individual can be is either subject or object, without this third way concept of the limited subject.

One reoccurring aspect in the Oppenheim series of books is a quote from the end of the chapter on the individual, which features in all pre-Second World War editions, which needs further explanation:

⁸⁰ H. Lauterpacht (1955) pp.638-639

⁸¹ H. Lauterpacht (1955) p639

⁸² H. Lauterpacht (1955) p639

“Lastly, there is no doubt that, should a state venture to treat its own subjects or some of them with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation.”⁸³

This statement can be interpreted in a number of ways, and in a number of different lights depending on the edition from which it is taken. For example, with the McNair fourth edition this can quite easily be seen as advocating an interventionist policy in order to prevent another state from abusing its citizens. As the editions move closer to the Second World War they can be seen as a reaction to the breakdown in the international system and the rise of fascism in Europe and the Far East. Therefore, this justifies the state’s interfering with the sovereignty of other states for the benefit of a state’s population, a huge theoretical step forward for the law of nations during this time. This statement should be read in the context of the chapter that perhaps individuals should be given international personality in order to protect them from states abusing their own citizens as part of the colonies system of Empire.

The publication of the ninth edition of *Oppenheim’s International law*,⁸⁴ edited by Sir Robert Jennings and Sir Arthur Watts, came thirty-eight years after the previous edition. The edition continues the tradition of Oppenheim to be a thoroughly positivist work, which is reflected within a notably similar structure being maintained within the work. The authors, although experts in the field, do not think as radically as the previous editor, Lauterpacht. When the work considers the individual it uses the single chapter formation as before, yet the theoretical narrative has advanced as would be expected. From the outset, the editors accept the position of individuals as subjects:

⁸³ McNair, *International Law: A Treatise* by L. Oppenheim, 1928, p523 As found in all editions at end of chapter on the individuals

⁸⁴ Sir Robert Jennings and Sir Arthur Watts (ed), *Oppenheim’s International Law*, (Longman: Harlow:1992)

“It is no longer possible, as a matter of positive law, to regard states as the only subjects of international law, and there is an increasing disposition to treat individuals, within a limited sphere, as subjects of international law.”⁸⁵

This position is accepted as states do occasionally give individuals standing and rights without the intervention of municipal legislation, with these rights enforceable at international tribunals.⁸⁶ Individuals, private companies, and NGOs enter into direct legal relationships on an international plane with states, and, therefore, support the arguments that the individual is indeed a subject.⁸⁷ Finally the authors address the issue of state intervention in order to address human rights violation, in which they point towards the development of humanitarian treaties preventing slavery, forced labour, and protection of stateless persons and refugees.⁸⁸ Pointing towards the Charter of the United Nations⁸⁹ which recognised the importance of fundamental and human rights, and upon which the European Convention on Human Rights⁹⁰ and the United Nations Covenants,⁹¹ have developed complex rules that are legally binding upon states.⁹² As such this ninth edition is a theoretical step forward for positivism from the previous edition. This should not be seen as surprising due to the length of time between editions but in the process still retains the extreme positivism familiar to the Oppenheim series. The concluding point we can take from this edition is that individuals are subjects of international law. This means that they have a role within the international sphere, and demonstrates clear development and evolution. The greatest step forward with the ninth edition is that the editors view points towards the creation of international human rights law which is a turning point

⁸⁵ Jennings & Watts (1992) pp.848-849

⁸⁶ Jennings & Watts (1992) p847

⁸⁷ Jennings & Watts (1992) pp.847-849

⁸⁸ Jennings & Watts (1992) p850

⁸⁹ Jennings & Watts (1992) p850

⁹⁰ Jennings & Watts (1992) p850

⁹¹ Jennings & Watts (1992) p850

⁹² Jennings & Watts (1992) p850

and the place where the individual starts to have increased recognition as an actor in international law.⁹³

III.1.Modern Positivism

Since the early 1990s a new generation of textbooks on international law has been launched, these books are similar to Oppenheim in that they give a good overview to the whole subject area. By and large many of these mainstream books are mainly positivist theoretical narratives, but by exploring the debate within these works a greater understanding of the post-cold war doctrine will be gained. Through analysis of this literature one will be able to see if legal process theory has penetrated the mainstream.

The main theoretical doctrine within this modern literature concerned with the individual still remains within the broad outline of the object and subject debate as discussed above in Oppenheim's text. Shaw's *International Law*⁹⁴, currently in its sixth edition indicates that the individual is a subject within international law through the increasing practice of states; as a result of, but not mutually exclusive to, the expansion of human rights law.⁹⁵ In the same edition he qualifies his argument slightly by stating "it remains only to determine the nature and extent of this personality".⁹⁶ If Shaw is uncertain about the scope of this personality, there is little point in him arguing that individuals have it. Without defining the scope of personality there is little purpose to having something which cannot be reasonably defined and as such remains in a state of flux. This argument remains relatively unchanged throughout his textbook series as it moves forward in editions. The argument

⁹³ Jennings & Watts (1992) pp.847-850

⁹⁴ Malcolm N. Shaw, *International Law*, (Cambridge University Press: Cambridge: 2008)

⁹⁵ Malcolm N. Shaw, *International Law*, (Grotius: Cambridge: 1986) p163

⁹⁶ Malcolm N. Shaw (1986) p165

becomes more elaborated drawing a link between the increase of the status of the individual being bound closely with the individuals place under the system of international protection of human rights.⁹⁷ The sixth edition of Shaw does not move the argument forward much more than that seen in the fifth edition. The most striking part of Shaw's work, over the course of the six editions is the general lack of information and interest taken by Shaw in regards to the personality of the individual, and the acceptance of the dominance of the abstract notion of the state.

Martin Dixon⁹⁸ takes a similar approach to Shaw, in his textbook series on international law using the subject and object debate to discuss the position of the individual. However, unlike Shaw he reaches the conclusion that individuals and most international organisations will have personality, but this will be a reduced personality compared to that of states.⁹⁹ This position echoes views expressed by Brownlie, but unlike Brownlie his argument is reasoned by stating that this personality has been conferred on individuals and international organisations by states accepting, recognising and supporting this concept.¹⁰⁰ This idea is developed in the fourth edition where he argues that the personality is due to the consent of states.¹⁰¹ In the sixth edition Dixon's argument has evolved once more to the position that individuals now have full personality in international law, and, as such, arguments about the consent of states being needed have been removed. The removal of this argument means that that work no longer includes his excellent point that states would find it politically difficult to withdraw their consent from individuals

⁹⁷ Malcolm N. Shaw, *International Law*, (Cambridge University Press: Cambridge: 2003) p232

⁹⁸ Martin Dixon, *Textbook on International Law*, (Blackstone Press: London: 1993)

⁹⁹ Martin Dixon (1993) p89

¹⁰⁰ Martin Dixon (1993) p89

¹⁰¹ Martin Dixon, *Textbook on International Law*, (Blackstone: London: 2000) p117

being subjects.¹⁰² Within this work a clear development has occurred in Dixon's argument over the space of his textbook series, from one where individuals are only special subjects, to subjects where the consent of states is required and thus can be withdrawn, to individuals as full subjects.

Evan's textbook¹⁰³ series has Evans as the editor and not the author of the works. First published in 2003, and now in its third edition by 2010 it indicates a high level of development in the theoretical narrative. The chapter regarding the individual and that is of interest to this review is written by Robert McCorquodale.¹⁰⁴ The chapter, in all three editions, has a strong emphasis on giving a review of the debate on the individual as subject or object regarding personality of the individual. While McCorquodale does not draw any surprising conclusions in any of the volumes he does side with the debate that individuals are indeed subjects of international law.¹⁰⁵ In the third edition of McCorquodale's one interesting passage highlights a new position for this work when the argument is made that:

"The rights of individuals and the rights of states in the international legal system are not identical but, whilst they may overlap or interact (such as under international humanitarian law in relation to use of force on a territory affecting combatants and non-combatants), they are distinct rights."¹⁰⁶

Both states and individuals have personality, yet the rights that this personality gives are not the same. At first this may seem apparent as clearly individuals and states are widely different entities, yet having this distinction makes it easier to find differences in how their personality can be treated. Consequently, limiting the personality of an individual could, theoretically, be easier in the event that an

¹⁰² Martin Dixon, *Textbook on International Law*, (Oxford University Press: Oxford: 2007) pp.124-125

¹⁰³ Malcolm D. Evans (ed), *International Law*, (Oxford University Press: Oxford: 2003)

¹⁰⁴ "The Individual and the International Legal System" Robert McCorquodale as found in Malcolm D. Evans, (ed) Malcolm D., *International Law*, (Oxford University Press: Oxford: 2010) pp.284- 310

¹⁰⁵ Malcolm D. Evans (2003) p304

¹⁰⁶ Malcolm D. Evans (2003) p289

international tribunal felt that the individual should not have personality in international law equal to that of a state. Having distinct rights and forms of personality makes practical sense, yet it still leaves the door open to affecting the level and depth of personality of individuals in comparison to that against the personality given to states. This is nicely summarised in the conclusion of the chapter when McCorquodale writes:

“In most cases the crucial issue is whether the individual has an independent role in the system or whether the individual’s role is solely dependent on State consent.”¹⁰⁷

In the first edition of Antonio Cassese’s, *International Law*,¹⁰⁸ first published in 2001 Cassese focuses on the role of states as the primary focus of international law. His only consideration of individuals is when the argument is made that individuals have a limited capacity to act within the international sphere, and this is due to the lack of an enforcement mechanism to enforce these rights and duties.¹⁰⁹ As such he reflects other, earlier opinions in which the individual’s personality is limited by the ability to enforce these rights.

This limited scope and consideration within the first edition is telling in itself. The area is either of little interest to the author or he believes the debate is already pretty much settled and accordingly no lengthy discussion is needed. However, in the second edition¹¹⁰ the debate is given more of a detailed and extended passage on the development of the legal personality of individuals, which reviews the different arguments and bodies of thought from different perspectives such as traditional and

¹⁰⁷ Malcolm D. Evans (2003) pp.305-306

¹⁰⁸ Antonio Cassese, *International Law*, (Oxford University Press: Oxford: 2001)

¹⁰⁹ Antonio Cassese (2001) p47

¹¹⁰ Antonio Cassese, *International Law*, (Oxford University Press: Oxford: 2005)

modern.¹¹¹ When Cassese summarised his argument at the end of the chapter he writes:

"In sum, in contemporary international law individuals possess international legal status. They have a few obligations, deriving from customary international law. In addition, procedural rights ensure to the benefit of individuals, not however vis-a-vis all, States, but only towards the group of States that have concluded treaties, or the international organizations that have adopted resolutions, envisaging such rights. Clearly, the international legal status of individuals is unique: they have a lopsided position in the international community."¹¹²

Cassese, in his second edition, summarises the idea that since the individual does have personality in international law, individuals also have responsibilities coupled with the rights they have acquired. This is not a new argument, yet his observation that individuals now have a lopsided position in the international community is an interesting comment that brings a new insight to the issue of individuals in international law. This development means that with the individual gaining personality they have a more favourable position than states under international law, which subsequently raises political, as well as legal questions. If this was really the case then the emphasis in world politics and international organisations would move their own emphasis towards the individual, rather than the current state centric based policies of these international organisations.

Analysis of the mainstream debate over the last twenty years indicates that the theoretical narrative has advanced very little, with legal positivism expressed by Oppenheim and Brownlie still being the main ideas expressed within the works. These works hark back to the positivist school of thought of a state-centric system built on the consent of states. This relatively conservative approach to international

¹¹¹ Antonio Cassese (2005) pp.142-156

¹¹² Antonio Cassese (2005) p150

law re-enforces the idea of the individual as only a secondary actor within the system at best. The effect of this is to leave the reader in a theoretical landscape which is distant and apart from the realities displayed with the modern, international legal system. The following section will explore why international law has developed to be state-centric.

III.2.Hersch Lauterpacht

In writing three editions of *Oppenheim's International Law*¹¹³ and being an assistant on a fourth to McNair,¹¹⁴ Lauterpacht was engaging with the extreme positivist method embodied within the title, which was in contrast to his own views.¹¹⁵ Lauterpacht's own position was far more complex, expressing his vision of international society as one founded on the rule of law.¹¹⁶ His conception of the role of law, influenced by Kelsen, advocates "the notion that legal rules are abstract and only resolve into individual legal relations through judicial decisions or the agreement of the parties."¹¹⁷ However, despite this influence Lauterpacht was not a rigid positivist, with a distinctive thread of natural law running through his work.¹¹⁸ While Lauterpacht was editor of Oppenheim's international law he kept true to the strict positivist approach that was an important feature of the work, yet in his own work he expressed his own perspective of international law, most notably in *International law and Human Rights*¹¹⁹. While being a flexible positivist but seeing a place for natural law and the necessity of international judiciary, Lauterpacht can almost be seen as a

¹¹³ The fifth to eighth editions published between 1935-1955

¹¹⁴ A. McNair (1926)

¹¹⁵ Iain Scobbie "Hersch Lauterpacht (1897-1960)" as found in Edited by Bardo Fassbender and Anne Peters, *The Oxford Handbook of The History of International Law*, (Oxford University Press: Oxford: 2012) pp.1181-1182

¹¹⁶ Iain Scobbie (2012) p1181

¹¹⁷ Iain Scobbie (2012) p1181

¹¹⁸ Iain Scobbie (2012) p1181

¹¹⁹ H. Lauterpacht, *International law and Human Rights*, (Stevens & Sons Limited: London: 1950)

pragmatist seeing how the international system could be best served by combining these elements.

Lauterpacht's concern for the individual within international law, as expressed with *International Law and Human Rights* was a theme that ran throughout his career.

From the early days in Vienna he rejected the notion of states alone as subjects of international law.¹²⁰ He first tested the idea of human rights in the article *The Law of Nations, the Law of Nature, and the Rights of Man*¹²¹. This academic paper was a first attempt for the later books in which the concept of human rights are more clearly articulated. Lauterpacht's perspective on international law and the need for an active international judiciary is a justification to his argument that the UDHR had to be of a binding nature on states.¹²² His book *An International Bill of Rights*¹²³ was considered revolutionary as it was the first legal set of proposals on the subject of human rights.¹²⁴ It advocated the legally binding nature required of a future, international human rights document:

“The International Bill of the Rights of Man is, with regard to the contemplation of the present draft, a legal instrument asserting legal rights and obligations. The obligations are, primarily, those of the States accepting the Bill and binding themselves to observe it.”¹²⁵

“the International Bill of Rights of man would include the obligation to participate in the international supervision and enforcement of its clauses.”¹²⁶

A second, much revised edition of this book was published in 1950 under the new title of *International Law and Human Rights*.¹²⁷ Lauterpacht was critical of the UDHR

¹²⁰ Elihu Lauterpacht, *The Life of Hersch Lauterpacht*, (Cambridge University Press: Cambridge: 2012), p251

¹²¹ H. Lauterpacht, “The Law of Nations, the Law of Nature, and the Rights of Man”, *Transactions of the Grotius Society*, Vol. 29, 1943, pp1-33

¹²² H. Lauterpacht (1950) p425

¹²³ Sir Hersch Lauterpacht, *An International Bill of the Rights of Man*, (Oxford University Press: Oxford:2013) With an introduction by Philippe Sands: This is the republication of Hersch Lauterpacht, *An International Bill of Rights of Man*, (New York: Columbia: 1945)

¹²⁴ Sir Hersch Lauterpacht (2013) p3

¹²⁵ Sir Hersch Lauterpacht (2013) p78

¹²⁶ Sir Hersch Lauterpacht (2013) p82

stating it “is not in itself an achievement of magnitude”¹²⁸ due to “no legal force and, probably only inconsiderable moral authority”.¹²⁹ This work was very much more than a second edition of the previous book,¹³⁰ it went much further in its scope according to Elihu Lauterpacht:

“The new book, as stated in its preface, had three purposes: first, to analyse the legal effects of the human rights provisions in the UN Charter and the relevant practice of its organs; Secondly, to re-examine the question of an international bill of rights of man in light of the initial efforts of the UN to give substance to the idea; and, thirdly, to present afresh the wider problem of the subjects of international law. This third aspect drew heavily upon the 1945 volume. He also thought it desirable to discuss in a general way development of a regional solution in the form of the proposed European Court and Commission of Human Rights.”¹³¹

The effect of the two books on the on-going negotiation for both the UDHR, and the two covenants on human rights appears to be non-existent.¹³² If either book was ever discussed during the committee stage, it did not have a direct influence on proceedings and does not appear in any record.¹³³

International Law and Human Rights is broken down into three distinct sections. It is only in part one where Lauterpacht explores the argument regarding the individual. Lauterpacht’s argument is based upon two particular themes connected to the UN charter. First, that the UN charter indicates that individuals have personality within international law on the grounds that the interpretation of the charter does not prevent any individual or international body from acquiring rights under or being

¹²⁷ H. Lauterpacht, *International law and Human Rights*, (Stevens & Sons Limited: London: 1950)

¹²⁸ H. Lauterpacht (1950) p425

¹²⁹ H. Lauterpacht (1950) p425

¹³⁰ Elihu Lauterpacht (2012) p263

¹³¹ Elihu Lauterpacht (2012) p263

¹³² A.W. Brian Simpson, “Hersch Lauterpacht and the Genesis of the Age of Human Rights”, *Law Quarterly Review*, No. 120, 2004, p78

¹³³ A.W. Brian Simpson (2004) After careful examination of the meeting records available online at http://www.un.org/Depts/dhl/udhr/meetings_1946_nuclear.shtml and from sources of those working within the UN at this time i.e. John P. Humphrey, *Human Rights & the United Nations: a Great Adventure*, (Transnational Publishers INC, New York, 1984) indicate there was no such interaction with Lauterpacht’s two books on Human Rights.

bound by other international duties.¹³⁴ Lauterpacht supports the argument that the coming into force of the UN charter has been translated in many fields and in respect of rights and duties into positive law for the individual.¹³⁵ The second theme from the charter is that the individual has acquired a status and a stature which has given them fundamental rights of the individual, independent of the law of the state. As such it is clear that the individual has personality in international law.¹³⁶ However, even with this argument for personality being made so clearly and strongly, it links into Lauterpacht's second main argument that even having these rights and personality does not mean that they can actually be used, unless an international tribunal or international organisation is willing to hear a case or receive petitions of complaint.

"The position of the individual as a subject of international law has often been obscured by 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. The fact that the beneficiary of rights is not authorised to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them."¹³⁷

In summary, Lauterpacht sets out that individuals have personality in international law derived from the UN charter, but are unable to fulfil this personality without a tribunal for individuals to take their complaints to. Without such a tribunal the individual's position has only moved forward theoretically, and in reality is still in the traditional position as an object of international law.

Lauterpacht's work, especially *International Law and Human Rights* radically changed the theoretical framework for international law, and importantly for how the

¹³⁴ H. Lauterpacht (1950) pp.33-35

¹³⁵ H. Lauterpacht (1950) pp.69-72

¹³⁶ H. Lauterpacht (1950) pp.3-4

¹³⁷ H. Lauterpacht (1950) p27

individual was perceived within international law. His work on Human Rights was truly ground breaking,¹³⁸ prior to his work nothing like this existed. *An International Bill of Rights of Man* was the first time that an inclusive list of rights had been set out in this format. Today, these achievements seem small, yet without Lauterpacht's contribution, international law would be a very different discipline.

III.3. Ian Brownlie, Marek St. Korowica, & D.P. O'Connell

The question of personality is given further scrutiny by Ian Brownlie¹³⁹ and Marek St. Korowica, both writing after Lauterpacht, they explore the concept further. Marek St. Korowica in 1956¹⁴⁰ outlines many problems with the issue of personality of individuals in international law. Korowica commences with a review of practice up to 1956, highlighting that many legal writers after the First and Second World Wars were in favour of the individual gaining international legal personality. He states that this was achieved, albeit, in a limited way with the Upper Silesian Convention.¹⁴¹ He states that the concept of personality in international law relies on states' consent as to who has this personality. It requires state's consent which means that this consent can be withdrawn. If personality relies on state consent it implies that the personality is limited. This limitation is created by the uncertainty of the on-going personality. Without the assurance of personality no matter the circumstances or issues arising from the concept that personality cannot be fully exploited. This issue links into Korowica's idea that there are many practical and moral reasons for recognising

¹³⁸ Iain Scobbie (2012) p1182

¹³⁹ Ian Brownlie, *Principles of Public International Law*, (Clarendon Press: Oxford: 1966) & Ian Brownlie, *Principles of Public International Law*, (Oxford University Press: Oxford: 2008)

¹⁴⁰ Marek St. Korowicz, "The Problem of the International Personality of Individuals" *The American Journal of International Law*, Vol. 50, No. 3(July 1956) pp.503-562

¹⁴¹ Marek St. Korowicz, (1956) pp.535-537

rights,¹⁴² and in doing so would place safeguards on, not only those using rights and personality, but also for states in how these obligations should be upheld.

Just ten years after Korowica's article, Ian Brownlie published the first edition of *Principles of Public International Law*¹⁴³ in a similar outlook to Oppenheim. The book has grown and evolved into having a significant number of editions with a similar positivist conception of international law as Oppenheim. The first edition published in 1966 came after Lauterpacht's seventh and eighth editions of Oppenheim's international law. Brownlie's work continues to develop the arguments regarding standing of the individual and picks up in terms of time span where Oppenheim left off. Brownlie sets out the far more positivist argument that while individuals are recognised under international law in cases of genocide, and war crimes, but under international treaties they are not recognised and it is merely an international agreement for individuals to seek claims against the state under municipal law.¹⁴⁴ Brownlie does make the concession that the individual has a more general role within international law when seen in connection with human rights law and the self-determination of peoples. However, this distinction is somewhat artificial and almost impossible to achieve within the realities of the system. This position is hard to maintain as it requires that human rights law be treated in a parallel system to that of other fields of international law, which would be both unrealistic and impractical with the lessons of human rights law not being applied to the rest of international law. It also fails to take into account the effect that economic and social events can have.

¹⁴² Marek St. Korowicz (1956) p561

¹⁴³ Ian Brownlie (1966)

¹⁴⁴ Ian Brownlie (1966) p34

Brownlie's position only evolves very slightly, in his sixth and seventh editions¹⁴⁵

where he sets out the argument that:

"There is no general rule that the individual cannot be a 'subject of International law', and in particular contexts he appears as a legal person on the international plane. At the same time to classify the individual as a 'subject' of the law is unhelpful, since this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject."¹⁴⁶

Brownlie's argument only develops very slightly between editions, remaining true to the original positivist argument. The influence of the realities of international law mean, though, that his argument is not as strong as he would desire, expressing a qualification on his argument that it is "unhelpful" to consider individuals as subjects.¹⁴⁷ This final position arrived at by Brownlie in 2008 is only slightly ahead of Lauterpacht's 1955 position in *Oppenheim*, where he acknowledges the individual as a subject. But qualifies the argument with a desire for them to have a distinct place as subjects of international law, which is away from that of states as subjects. This requires that individuals need to meet different criteria to that of states to gain personality in international law.

In a similar fashion to *Oppenheim's international law*, *Brownlie's Principles on International Law* were continued after his death, by his former student and colleague, James Crawford. Crawford is a highly regarded scholar who has written extensively on the state within international law¹⁴⁸ and was nominated as a judge for the International Court of Justice in 2012¹⁴⁹. The eighth edition¹⁵⁰ continues the

¹⁴⁵ Sixth and seventh editions of Ian Brownlie's *Principles of Public International law*, (Clarendon Press: Oxford: 1966) share identical information, almost word for word, in regards to information on the individual

¹⁴⁶ Ian Brownlie, *Principles of Public International law*, (Oxford University Press: Oxford: 2008), p65

¹⁴⁷ Ian Brownlie (2008) p65

¹⁴⁸ James Crawford, *The Creation of States in International Law*, (Oxford University Press: Oxford: 2006) & James Crawford, *State Responsibility*, (Cambridge University Press: Cambridge: 2013)

¹⁴⁹ <http://openday.law.cam.ac.uk/press/news/2012/10/professor-james-crawford-nominated-for-the-international-court-of-justice/2018> accessed 19.02.14

same theoretical position of Brownlie, but he updates the work to reflect developments. The effect is in relation to the individual within international law and is still maintaining the position of the seventh edition. The edition provides justification that it is unhelpful to consider individuals as subjects on the basis that there are capacities which do not exist, and it does not distinguish the individual from other subjects within international law.¹⁵¹ While human rights law gives the individual rights and responsibilities these norms cannot be enforced horizontally between individuals, and that states still maintain almost all responsibility for actions which breach rights.¹⁵²

While Brownlie maintains his position throughout the majority of his work others such as D.P. O'Connell¹⁵³ were much quicker to acknowledge the place of the individual. However, O'Connell's justification as to why the individual has personality is perhaps more intriguing than this acknowledgment. His argument is nicely summarised when he states that:

"The individual as the end of community is a member of the community, and a member has status: he is not an object. It is not a sufficient answer to assert that the State is the medium between international law and its own nationals, for the law has often fractured this link when it failed in its purpose."¹⁵⁴

"Does it suffice to admit that the individual's good is the ultimate end of the law but refuse the individual any capacity in the realisation of that good? Is the good in fact attained through treating the individual as an instrumentality of law and not as an actor? Philosophy and practice demonstrate that the answer to all these questions must be in the negative..."¹⁵⁵

¹⁵⁰ James Crawford, *Brownlie's Principles of Public International Law*, (Oxford University Press: Oxford: 2012)

¹⁵¹ James Crawford (2012) p121

¹⁵² James Crawford (2012) p121

¹⁵³ D.P.O'Connell, *International Law*, (Stevens: London: 1970)

¹⁵⁴ D.P. O'Connell, *International Law*, (Stevens: London: 1965) p108

¹⁵⁵ D.P. O'Connell, *International Law*, (Stevens: London: 1965) p116 as found in Rosalyn Higgins, *Problems and Process: International Law and How we Use it*, (Clarendon Press: Oxford: 1994) pp.50-51

Consequently, an individual is an end-user of the international society they must be part of the international community and therefore logically have to possess personality under international law. O'Connell is highlighted in Higgins¹⁵⁶ as one of the first to challenge this traditional debate, therefore his argument while basic is ground breaking in its rejection of the traditional theoretical approach.

This section summarises evolving developments regarding the positivist ideas of the place of the individual within international law. There is clear progression towards the recognition of the individual as a subject, yet some the scholar considered above for example Brownlie,¹⁵⁷ are not happy to acknowledge this point and as such have taken to creating a new concept of the limited-subject personality for individuals. This is not upsetting the traditional positivist landscape of the law of nations while incorporating human rights law and the increasing influence the individual has in treaties and international organisations.

IV. Antonio Augusto Cançado Trindade

Antonio Augusto Cançado Trindade has extensive personal experience of the international tribunal system, having sat as a judge and later president of the Inter-American Court of Human Rights (IACtHR)¹⁵⁸ and since 2009 has sat as a judge on the International court of justice.¹⁵⁹ His written work is built on and reflected within his work at these international tribunals, and is at the cutting edge of how the individual should be treated within international law.

¹⁵⁶ Rosalyn Higgins, *Problems and Process: International Law and How we Use it*, (Clarendon Press: Oxford: 1994) p50

¹⁵⁷ Ian Brownlie, (2008) p65

¹⁵⁸ Antônio Augusto Cançado Trindade was a judge on the Inter-American Court of Human Rights 1995-2008 and later president of the Court 1999-2004, as found at http://legal.un.org/avl/pdf/ls/Cancado-Trindade_bio.pdf accessed 10.11.14

¹⁵⁹ <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=167> accessed 28.10.14

Within Cançado Trindade's work, *International law for Humankind: Towards a new "Jus Gentium"*¹⁶⁰ the individual¹⁶¹ is given far greater importance and standing than in most past and contemporary works. This is expressed within part four¹⁶², where the subjects of international law are considered at length, and is of importance to this review. The individual is regarded within the work as "true subjects – rather than simply "actors" – of international law"¹⁶³, later stating "to call individuals 'actors' in International Law is nothing but a platitude. They are true subjects of international law, bearers of rights and duties which emanate directly therefrom."¹⁶⁴ Perhaps the most important reasoning behind this assertion of the individual's importance, Cançado Trindade draws on the Right of Petition within the ECHR and IACtHR as the central mechanism by which individuals have been able to take up this position.¹⁶⁵ Capacity and personality are closely linked, but should an individual not enjoy a full juridical capacity, this does not mean that they would suffer in no longer being a subject of International Law.¹⁶⁶

In this line of argument, Cançado Trindade tackles one of the common concerns regarding the condition of the individual that they should have limited personality, being that individuals only have limited capacities within international law, whereas states do not. For example, states can enter and make treaties. This argument is addressed with a direct comparison with domestic law, whereby not all individuals, participate, directly or indirectly, in the process of law creation, and their status as subjects of domestic law is not questioned. This argument is further extended to

¹⁶⁰ Antonio Augusto Cancado Trindade, *International law for HumanKind: Towards a new "Jus Gentium"*. Hague Academy of International Law Monographs (Martinus Nijhoff Publishers / Brill Academic 2010)

¹⁶¹ Within this work Trindade considers a range of actors, States, International Organisations, NGOs, peoples, and individuals.

¹⁶² Antonio Augusto Cancado Trindade, *International law for HumanKind: Towards a new "Jus Gentium"*. Hague Academy of International Law Monographs (Martinus Nijhoff Publishers / Brill Academic 2010) p165-288

¹⁶³ Antonio Augusto Cancado Trindade (2010) p213

¹⁶⁴ Antonio Augusto Cancado Trindade (2010) p240

¹⁶⁵ Antonio Augusto Cancado Trindade (2010) pp.256-260

¹⁶⁶ Antonio Augusto Cancado Trindade (2010) p267

legal norms that the creation and application of norms has never required the full participation of international actors.¹⁶⁷ This acceptance represents a “significant achievement of contemporary International Law”¹⁶⁸ which has “hindered its progressive development towards the construction of a new *jus gentium*”.¹⁶⁹ Further to the mere identification of the individual as an end-user of the law, Cançado Trindade’s also argues that the individual, alongside NGOs and other entities of civil society, can act in the process of formation and application of international norms.¹⁷⁰ With this identification it promotes the idea of the possible role that the individual may have in the creation of International law, the main subject of this work.

Part five¹⁷¹ of the book regards the construction of the international law for humankind, one of the ambitions of the title. After discussions as to the importance of the individual, chapter eleven starts with an acceptance that this work does not set out that individuals or humankind have replaced states as subjects of international law, but instead that states now co-exist alongside individuals, international organisations.¹⁷² In exploring certain conceptual constructions such as *jus cogens*, the common heritage of mankind, the right to peace, and the right to development, Cançado Trindade sets out the argument that over the last 60 years international law has increased towards becoming more humanised.¹⁷³ This results from enhanced state responsibility for international crimes, and the ever increasing protection of human rights through international tribunals and instruments. Cançado Trindade is certainly at the cutting edge of the individual within international law, but his

¹⁶⁷ Antonio Augusto Cancado Trindade (2010) p221

¹⁶⁸ Antonio Augusto Cancado Trindade (2010) p273

¹⁶⁹ Antonio Augusto Cancado Trindade (2010) p273

¹⁷⁰ Antonio Augusto Cancado Trindade (2010) p223, also expressed p 240

¹⁷¹ Antonio Augusto Cancado Trindade (2010) pp.289-390

¹⁷² Antonio Augusto Cancado Trindade (2010) p275

¹⁷³ Antonio Augusto Cancado Trindade (2010) pp.289-365

arguments as to why the individual is a subject are convincing and are embraced by this work.

Within his work, *The Access of Individuals to International Justice*,¹⁷⁴ Cançado Trindade argues that the right of access to courts, especially at international level, is fundamental to the international protection of human rights. Cançado Trindade argues that the importance of the right to access to justice belongs in the domain of *jus cogens*.¹⁷⁵ The significance of this is that it automatically accepts the place of the individual within the international system, and accepts their place within international courts. In a similar fashion to *International law for Humankind: Towards a new "Jus Gentium"*¹⁷⁶ the argument is made that the individual is not just an actor but a subject of international law, and that this distinction is important as it does not give parity between individual and States.¹⁷⁷ The work goes on to explore different examples of access to international tribunals, reinforcing the idea of the individual as subject of International law. This work builds on, and is closely related to, the previous work examined.

The final work of Cançado Trindade's work to be considered within this review is *The Construction of a Humanized International law*¹⁷⁸ this work brings together a collection of individual opinions of the authors. Many of these opinions have a focus on the humanisation of international law, in which the individuals concern is elevated to the same level as states. In essence this work gives the practical demonstration of the academic ideas expressed within *International law for Humankind: Towards a*

¹⁷⁴ Antonio Augusto Cancado Trindade, *The access of individuals to international justice*, (Oxford University Press: Oxford: 2011)

¹⁷⁵ Antonio Augusto Cancado Trindade, (2011) pp.198-202

¹⁷⁶ Antonio Augusto Cancado Trindade (2010)

¹⁷⁷ Antonio Augusto Cancado Trindade (2011) p16

¹⁷⁸ Antonio Augusto Cancado Trindade, *The Construction of a Humanized International law* (Martinus Nijhoff Publishers: 2014)

new “*Jus Gentium*”¹⁷⁹ and *The Access of Individuals to International Justice*¹⁸⁰ have been adopted by the author in judgements.

Cançado Trindade’s focus on the individual, and the arguments made are highly credible and greatly advance the field. However, they are very focused on the individual in terms of being an end-user of the law, i.e. subject. He hardly touches on the subject of the individual with capacity to create international law and that is where this work is aimed.

V. Process Based Theory

The New Haven or Yale School¹⁸¹ established and developed by Harold Lasswell and Myres McDougal¹⁸² sets out to combine the analytical methods of other social sciences most notably international relations and seeks to apply these methodologies to the perceptive purpose of the law.¹⁸³ This school of thought has since been developed by scholars such as Richard Falk,¹⁸⁴ Anne-Marie Slaughter,¹⁸⁵ and Rosalyn Higgins¹⁸⁶. According to Falk, “McDougal combines the outlook of legal realism with the systematic policy science of Harold Lasswell”.¹⁸⁷ This entailed a significant change to the theoretical underpinnings of understanding towards

¹⁷⁹ Antonio Augusto Cancado Trindade (2010)

¹⁸⁰ Antonio Augusto Cancado Trindade (2011)

¹⁸¹ Please see James Crawford, *Brownlie’s Principles of Public International Law*, (Oxford University Press: Oxford: 2012) p11 or W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, “The New Haven School: A Brief Introduction”, *The Yale Journal of International Law*, Vol. 32, pp575-582

¹⁸² Please see Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a free society: Studies in law, science and policy*, (Martinus Nijhoff Publishers, Dordrecht, 1992), Myres S. McDougal, “Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry”, *The Journal of Conflict Resolution*, Vol. 4, No. 3, 1960, pp337-354; Myres S. McDougal and Harold D. Lasswell, “The Identification and Appraisal of Diverse Systems of Public Order”, *The American Journal of International Law*, Vol. 53, No.1, 1959, pp1-29; Harold D. Lasswell and Myres S. McDougal, “Legal Education and Public Policy: Professional Training in the Public Interest”, *The Yale Law Journal*, Vol. 52, No. 2, 1943, pp203-295

¹⁸³ W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, “The New Haven School: A Brief Introduction”, *The Yale Journal of International Law*, Vol. 32, pp575-576

¹⁸⁴ Richard Falk, *The Status of Law in International Society*, (Princeton University Press: New Jersey: 1970)

¹⁸⁵ Anne-Marie Slaughter, *A New World Order*, (Princeton University Press: New Jersey:2004)

¹⁸⁶ Rosalyn Higgins (1994)

¹⁸⁷ Richard Falk, *The Status of Law in International Society*, (Princeton University Press: New Jersey: 1970), p43

international law. Falk's contribution in *The Status of Law in International Society*¹⁸⁸ sets out to reconcile Kelsen's theory of international law as autonomous with that of McDougal arguing for its relevance. "This book is an attempt to develop a conception of the international legal order that effectuates reconciliation between these intertwined considerations of autonomy and relevance".¹⁸⁹ This perspective on international law as policy-oriented and viewing international law as a process of decision making by which various actors clarify and implement their common interests in accordance with their expectations of appropriate processes and effective governance.¹⁹⁰ Reisman, Wiessner and Willard set out that:

"The New Haven School defines law as a process of decision that is both authoritative and controlling; it places past such decisions in the illuminating light of their conditioning factors, both environmental and predispositional, and appraises decision trends for their compatibility with clarified goals; it forecasts, to the extent possible, alternative future decisions and their consequences; and it provides conceptual tools for those using it to invent and appraise alternative decisions, constitutive arrangements, and courses of action using the guiding light of a preferred future world public order of human dignity."¹⁹¹

Ratner and Slaughter argue that "Perhaps the New Haven School's greatest contribution has been its emphasis on both what actors say and what they do."¹⁹² As McDougal and Feliciano argue:

"International law may be most realistically observed, and fruitfully conceived, as a process of authoritative decision transcending state lines by which the peoples of the world seek to clarify and implement their common interests in both minimum order, in the sense of the prevention of unauthorised coercion,

¹⁸⁸ Richard Falk (1970)

¹⁸⁹ Richard Falk (1970) ppxi-xii

¹⁹⁰ Steven R. Ratner & Anne-Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers", *The American Journal of international law*, Vol. 93, No. 2 (April 1999), pp293-294

¹⁹¹ W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, "The New haven School: A Brief Introduction", *The Yale Journal of International Law*, Vol. 32, p576

¹⁹² Steven R. Ratner & Anne-Marie Slaughter (1999), p294

and optimum order, in the sense of the promotion of the greater production and wider distribution of all values.”¹⁹³

In undertaking this conceptual position it concentrates less on the exposition of rules and their content and more on how those rules are actually used by all actors within the international system.¹⁹⁴ Therefore, if a legal rule is not used by actors, it has minimum value under legal process theory due to it having minimum real world effect. A rejuvenation of the theory into New International Legal Process¹⁹⁵ sets out that the theory should also have certain normative values that are different from or in addition to those of positivism. With these values international organisations should be given the authority to make decisions that support such values.¹⁹⁶ However, in determining normative values in this theory we are distorting the nature of the concept by not only setting out to identify those normative values within international society, but also asking institutions to apply them. While this makes logical sense, asking an international organisation to implement a normative value such as human dignity may be difficult. What, actually, is this value in reality? How far does it go? What effect does it have in a realistic sense? When faced with these questions we start having to use the legal process theory to understand the normative values, and get into a recurring cycle.

Legal process theory has a wider focus on international actors as “authorised decision makers”¹⁹⁷ than traditional legal theories. McDougal defines authorised decisions makers as:

¹⁹³ Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The legal Regulation of International Coercion*, (Yale University Press: New Haven: 1967), pvii

¹⁹⁴ Mary Ellen O’Connell (1999) p 334

¹⁹⁵ Mary Ellen O’Connell (1999) pp.334-351

¹⁹⁶ Mary Ellen O’Connell (1999) p 335

¹⁹⁷ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, (Cambridge University Press: Cambridge: 2013) p42

“Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorised or not. The conjunction of common expectations concerning authority with a high degree of corroboration in actual operation is what we understand by law.”¹⁹⁸

These authorised decision makers are in the majority with traditional states¹⁹⁹ and second international organisations²⁰⁰ but the theory does not exclude non-state actors. Weissner and Willard point to a whole range of actors including:

“Besides the traditional nation- state, whether independent or associated with another actor, the world social and decision processes include intergovernmental organizations, non-self-governing territories, autonomous regions, and indigenous and other peoples, as well as private entities such as multinational corporations, media, nongovernmental organizations, private armies, gangs and individuals. An actor with actual or potential influence is a candidate for participation in the decision process; and by grasping the totality of the international process of decision, policy-oriented jurisprudence enables scholars, advisers and decision makers to be maximally effective while empowering non state entities to play greater roles in decision.”²⁰¹

Higgins explores this idea further by setting out that without subject or objects, but only participants (this includes individuals, multinational corporations and private non-state actors)²⁰² this comprehensive approach gives far greater scope to almost any actor within the international legal system, notably even the individual. This recognition of all actors is a significant step forward to the state centric approach and the subject/ object debate regarding the individual. These actors are also

¹⁹⁸ Myres S. McDougal and Harold D. Lasswell, “The Identification and Appraisal of Diverse Systems of Public Order”, *The American Journal of International Law*, Vol. 53, No.1, 1959, p 9

¹⁹⁹ Rosalyn Higgins (1994) pp.39-46

²⁰⁰ Rosalyn Higgins (1994) pp.46-48

²⁰¹ Siegfried Wiessner and Andrew R. Willard, “Policy Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity”, *The American Journal of International Law*, Vol. 93, No. 2., April 1999, p323

²⁰² Rosalyn Higgins (1994) p50

transcending the boundaries of particular territorial communities,²⁰³ therefore, giving emphasis to those actors which are non-states.

*Problems and Process: International Law and How We Use It*²⁰⁴ suggests that “international law is a process for resolving problems”,²⁰⁵ a system of authoritative decision-making and should not be understood as a set of rules²⁰⁶ finally concluding that “the role of international law is to assist in choice between these various alternatives”.²⁰⁷ In arriving at these conclusions Higgins tackles the subject/ object debate:

“...the whole notion of "subjects" and "objects" has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.”²⁰⁸

This break with the theoretical narrative that has dominated the literature, demonstrates how far the theoretical narrative had departed from the realities of the international system. By rejecting this debate, Higgins’s also rejects much of the traditional thought regarding international law, and argues that:

“It is more helpful, and closer to perceived reality, to return to the view of the international law as particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximising various values.”²⁰⁹

With this move towards having only participants within international law it allows, as has been seen above, for a far broader view of those that have personality, such as states, individuals, multinational corporations, NGO's and international organisations

²⁰³ Myres S. McDougal, “Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry”, *The Journal of Conflict Resolution*, Vol. 4, No. 3, 1960, p345

²⁰⁴ Rosalyn Higgins (1994)

²⁰⁵ Rosalyn Higgins (1994) p267

²⁰⁶ Rosalyn Higgins (1994) p49

²⁰⁷ Rosalyn Higgins (1994) p67

²⁰⁸ Rosalyn Higgins (1994) p49

²⁰⁹ Rosalyn Higgins (1994) p50

such as the UN, and IMF.²¹⁰ This greater scope of personality in international law means that the theoretical system more accurately reflects the realities of the system, especially in an increasingly globalised society. This reflection of the reality on the ground is fundamental to understanding how the system can be improved and developed. An increased scope of who has personality allows for a clearer understanding of rights and duties and with this comes greater accountability, not only for states but for NGOs and transnational corporations.

Slaughter, in a similar fashion to Higgins, argues that as a result of our pre-disposition to viewing the international system with the unitary state at the forefront with the state being represented as one voice²¹¹:

“...is the wilful adoption of analytical blinders, allowing us to see the “international system” only in the terms that we ourselves have imposed.”²¹²

Similarly to Higgins’ self-imposed intellectual prison as an analytical tool,²¹³

Slaughter argues that due to examining the international system, through that of unitary states, means the focus is on the traditional international organisations and formal state delegations. However, if we start to consider the international system of states in the same way that domestic governments are considered,²¹⁴ “provides a lens that allows us to see a new international landscape. Government networks pop up everywhere.”²¹⁵ These networks are both horizontal and vertical, vertical being a relatively rare decision by states to delegate their sovereignty to an international organisation, such as the EU.²¹⁶ However, even the EU sits within a broader set of regulatory networks among OECD states. With the OECD membership coming from

²¹⁰ Rosalyn Higgins (1994) p50

²¹¹ Anne-Marie Slaughter, *A New World Order*, (Princeton University Press: New Jersey:2004), p13

²¹² Anne-Marie Slaughter (2004) p13

²¹³ Rosalyn Higgins (1994) p49

²¹⁴ Anne-Marie Slaughter (2004) p13

²¹⁵ Anne-Marie Slaughter (2004) p13

²¹⁶ Anne-Marie Slaughter (2004) p13

the USA, Japan, and Mexico, as such this system is a multi-layered global regulatory system.²¹⁷ The genius of Slaughter's work is in going beyond the identification and consideration of these networks to "how they actually conduct the business of global governance"²¹⁸. In doing this, a spine of governance networks was created, which included international organisations, NGOs, and other non-state actors, thereby including a wider participation in international law than usually seen, but also retaining an accountable core of government. This moves away from the almost obsessive examination of states and international organisations now seen within the international law literature.

The New Haven School and legal process theory still views states as the primary actors but also gives room to other decision makers, most notably non-state actors. The school also gives a new lens in which to observe international law as a process made by authoritative decision makers, therefore, not just giving increased recognition to non-state actors but also to how all actors interact using international law. This opens the door to further inquiry into how this process actually works. How do the actors function? Are these actors' individuals within larger actors, such as NGOs? This last question is certainly intriguing with the Slaughters multi-layered networks approach; can networks within actors be identified?

VI. Non-State Actors

The traditional conception of international law being state-centric has difficulty fitting other actors into the doctrine. As Alston argues: "the phrase "non-state actors" makes it abundantly clear that, as far as international law is concerned, the key

²¹⁷ Anne-Marie Slaughter (2004) pp.50-51

²¹⁸ Anne-Marie Slaughter (2004) p167

actors are divided into two categories: states and the rest.”²¹⁹ This raises the question of how non-state actors fit into this positivist conception of international law. Some non-state actors within the traditional positivist conception of international law are far easier to reconcile with this conception. The Sovereign Order of Malta and The Holy See are considered as subjects of international law on the basis of a historical claim and recognition by other states.²²⁰ Other non-state actors are far harder to reconcile within the positivist framework, these actors include insurgents and belligerents, transnational corporations, and international public companies.²²¹ Some of these non-state actors are easier to reconcile, essentially those that have close links to states and are, therefore, accepted by the states to have a role such as insurgents and belligerents. These actors are generally recognised under international law when they become the de facto administration of a specific territory, and in due course may become the recognised government of a particular territory.²²² Examples of this range from the unrecognised Republic of Somaliland which administers a portion of Somalia²²³, to the Republic of Abkhazia which has a minimum recognition within the international community²²⁴, to the more widely recognised Republic of Kosovo, which is not a full member of the international community because Serbia still claims territorial sovereignty, but Kosovo is a member of the IMF and World Bank. Non-state actors such as international public companies and transnational corporations are far harder to bring into line with the subject/ object debate, yet with international public companies:

“...personality will depend upon the differences between municipal and international personality. If the entity is given a range of powers and is

²¹⁹ Philip Alston, *Non-state Actors and Human Rights*, (Oxford University Press: Oxford: 2005) p19

²²⁰ Shaw (2008) pp.243-244 or James Crawford (2012) pp.124-125

²²¹ Shaw (2008) pp.245-250

²²² Shaw (2008) p245

²²³ <http://www.bbc.co.uk/news/world-africa-14115069> accessed 2/03/14

²²⁴ <http://news.bbc.co.uk/1/hi/world/7582181.stm> accessed 2/03/14

distanced sufficiently from municipal law, an international person may be included, but it will require careful consideration of the circumstances.”²²⁵

While transnational corporations are seen by Shaw as “remain[s] an open one”.²²⁶

The consideration of transnational corporations has changed dramatically with the UN Guiding Principles on Business and Human Rights,²²⁷ which certainly raises the questions regarding the status of transnational corporations within international law.²²⁸ Since the 1949 advisory opinion of the ICJ²²⁹ in which it stated that the UN was a subject of international law and could enforce its right by bringing international claims:

“Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state.... 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”²³⁰

This advisory opinion sets out that international organisations have been recognised as having legal personality in international law,²³¹ this personality is not the same as states’ personality. These particular non-state actors have, to varying degrees, gained a limited amount of acceptance under international law, not the full subjects of states but more than those held by objects.

Alston proposes an interesting theory of the “Not-a-Cat” concept. The concept relates to Alston’s daughter describing any animal such as a rabbit or a mouse as simply “not-a-Cat”, this is then transferred as a metaphor to international law,

²²⁵ Shaw (2008) p249

²²⁶ Shaw (2008) p250

²²⁷ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 2/03/14

²²⁸ The UNGPs will be considered in-depth in chapter 3

²²⁹ Reparation for Injuries suffered in the service of the United Nations, ICJ Reports, 1949 as found in Shaw (2008) p47

²³⁰ Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p179

²³¹ Crawford (2012) p180

whereby anything that is not a state is described as a non-state actor, irrelevant as to the importance or scope of the organization.²³² Alston critiques this method of evaluating non-state actors as:

“Uni-dimensional or monochromatic way of viewing the world. It is not only misleading, but also makes it much more difficult to adapt the human rights regime in order to take adequate account of the fundamental changes that have occurred in recent years.”²³³

This argument that sees all actors within international law divided between two categories also has an effect on how they are treated as subjects or objects. Alston’s argument builds on this notion that the term “object” has been defined with such “flexibility” and “generosity” and that no particular entity could not be treated as such due to these factors.²³⁴ He concludes this chapter within his collection of works, by stating that there appears to be reluctance on the part of academics to change the status of non-state actors or even create a wider range of definitions available.²³⁵ This is reflected within the non-state actors considered above.

Unlike the legal process that has been explored in this chapter, where any participant within the international system is given status, mainstream international law, especially positivist international law, sticks with the object and subject doctrine. In doing this this positivist doctrine limits actors to a select grouping. As Alston argues:

“...at least a subset of non-state actors has suddenly become a force to be reckoned with and one which demands to be factored into the overall equation in a far more explicit and direct way than had been the case to date.”²³⁶

²³² Philip Alston (ed), *Non-State Actors and Human Rights*, (Oxford, Oxford University Press, 2005) p3

²³³ Philip Alston (2005) p4

²³⁴ Philip Alston (2005) pp.19-20

²³⁵ Philip Alston (2005) p21

²³⁶ Philip Alston (2005) pp.5-6

The place of non-state actors will always cause a theoretical issue for legal positivists, as they simply do not suit that theory of international law and reconciling the two creates issues. The realities are that non-state actors are increasingly playing an important role within international law, therefore, the legal process theory and the notion of participants is far more suited to the accurate reflection of the international system.

VII. International Law and International Relations: - Methodology

The relationship between International Law and International Relations are closely related, notable inter-disciplinary works exist such as John Murphy's book on *The United States and the Rule of Law in International Affairs*,²³⁷ or John Setear's article²³⁸ on treaty law which highlights the need to consider political, alongside legal concerns. Also Jutta Brunnee and Stephen Toope's²³⁹ work on *Environmental Security and Freshwater Resources*, which provides an interesting analysis on the interplay between regime theory and international environmental law. These two disciplines can be described as the two sides of the same coin, similar but notably different. These differences primarily centre on the unique methodological approach of each individual discipline. This sub-section intends to explore some of these methodology differences which shape the different approaches between International Law and International Relations.

The fundamental difference between the fields of International law and International Relations is that International law is focused on the legal system while International

²³⁷ John F. Murphy, *The United States and the Rule of Law in International Affairs*, (Cambridge University Press: Cambridge: 2004)

²³⁸ John K. Setear, "An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law" *Harvard International Law Journal*, Vol. 37, 1997, pp. 139-230

²³⁹ Jutta Brunnee & Stephen J. Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building" *The American Journal of International Law*, Vol. 92, No.1, 1997, pp.36-59

Relations focuses on the political system.²⁴⁰ This has the effect that international law is focused on “analysis of legal rules and instruments, and their application to facts. The ultimate aim of studying international legal theory is to understand the principal systemic and structural categories of the international legal system.”²⁴¹ In Ratner and Slaughter’s *The Methods of International Law*²⁴², they focus on the various methodologies of international law, asking each contributor to tackle the same issue from a different methodological perspective. This work provides an excellent overview of the different methodologies available to international law scholars and these are identified as Legal positivism, New Haven School, International Legal Process: Critical Legal Studies; International Law and International Relations; Feminist Jurisprudence; Third World Approaches to International Law; Law and Economics.²⁴³ These different approaches are set up to tackle and answer three broad questions: questions of compliance; questions of the formation of international rules; and policy oriented approaches.²⁴⁴ In essence, International law is focused on a system of binding rules, by which all actors must work within. In order to give a full picture the approaches include creation of law, application of law, and how that law works in practice.

International relations differ within their approach to methodology, as Scott Burchill identifies in *Theories of International Relations*²⁴⁵, ten important approaches:

Liberalism, Realism, Rationalism, The English School, Marxism, Historical Sociology,

²⁴⁰ Robert Cryer, Tamara Herve, Bal Sokhi-Bulley with Alexandra Bohm, *Research Methodologies in EU and International Law*, (Hart: Oxford: 2011) p78

²⁴¹ Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law*, (Edward Elgar, Cheltenham: 2011) p 3

²⁴² Steven R. Ratner & Anne-Marie Slaughter (eds), *The Methods of International Law*, (American Society of International Law: Washington: 2004)

²⁴³ Steven R. Ratner & Anne-Marie Slaughter (eds), *The Methods of International Law*, (American Society of International Law: Washington: 2004) This work is also cited in Research Methodologies In EU and International law (full reference) as a good example of the different methodologies available to international law scholars p11

²⁴⁴ International law, international politics and ideology Alexander Orakhelashvili as found in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law*, (Edward Elgar, Cheltenham: 2011) pp.334-335

²⁴⁵ Scott Burchill, *Theories of International Relations*, (Palgrave Macmillan: Basingstoke: 2005)

and Critical theory, Post Structuralism, Constructivism, Feminism and Green Politics.

²⁴⁶ ²⁴⁷ These methodological approaches try to explain a range of political interactions between States, International Organisations, and Non-State Actors. This focus is, therefore, on how these relationships work and the effect that they can have, this can be within the creation of international law. This work will move the closest towards the International Relations methodology when considering the work of John Ruggie in the creation of the United Nations Guiding Principles on Business and Human Rights. However, as Alexander Orakhelashvili states:

“Politics can be relevant for the existence, creation and change of international law in a number of ways. But politics is not the same as law; it certainly matters in terms of States agreeing to a rule or instrument, but it does not influence the content of already established legal rules, nor prejudice the separate existence of law.”²⁴⁸

While interdisciplinary work and politics can be helpful to international law, and notably to this work in chapter four. This work’s main focus is within International law and when examining how Ruggie created the UNGPs the development of the law is always at the heart of the matter, rather than the politics. The methodology used to achieve this is derived from that policy oriented approach of the New Haven School, with additional emphasis on the importance of the individual. The chapter can also be seen within the context of constructivism and how agents of states interact to create law.

²⁴⁶ Burchill (2005)

²⁴⁷ Burchill (2005) Some of these approaches have been considered at length within Chapter 1

²⁴⁸ Orakhelashvili (ed) (2011) p375

VIII. The Individual within International Relations

So far this review has considered the individual and domination of states within international law. This review will now consider a wider spectrum of how the individual and state is reflected in another social science, international relations. This evaluation will explore what it means to be an individual within this discipline and whether there are any underlining values or concepts that can transcend international law. International Relations (IR), perhaps the closest social science to international law, shares a common history starting with both disciplines having foundations in the Peace of Westphalia in 1648.²⁴⁹ Within the last century some notable debates within IR have been established; realism v idealism in the 1930s, Traditionalism v Behaviourism 1960s, neo-realism v neo-liberalism 1980s and finally in the 1990s rationalism and reflectivism.²⁵⁰ This section will consider some of the main lenses through which to view the place of the individual in IR.

The basic themes of realism are the anarchy of the state of nature, the self-interest of actors, the priority of power over morality or justice, the focus on states as primary actors, and the examination of these ideas will reflect in a realistic or scientific account of IR.²⁵¹ Realism within IR has its origins in Machiavelli's *The Prince*²⁵² and Thomas Hobbes' *The Leviathan*²⁵³ where both of these works expressed that the individual was fundamentally motivated by their own self-interests, and the most dangerous of these self-interests was the desire for power. Therefore, any interaction at a state level was one without rules; this is most notable in Machiavelli's *The Prince* and the city-based system of a pre-unified Italy. Significant works by E.H.

²⁴⁹ Peter Sutch and Juanita Elias (2007)

²⁵⁰ Peter Sutch and Juanita Elias (2007) p8

²⁵¹ Peter Sutch and Juanita Elias (2007) p44

²⁵² Niccolo Machiavelli, *The Prince*, (Penguin Books: Bury St. Edmunds: 2008)

²⁵³ J.C.A. Gaskin (ed), *Thomas Hobbes: Leviathan*, (Oxford University Press: Oxford: 2007)

Carr²⁵⁴ and Hans Morgenthau²⁵⁵ signalled the start of modern realism. Carr's work, is an attack on the utopian views of liberals that led to a dangerously flawed inter-war system as a result of the 1919 settlement.²⁵⁶ Hans Morgenthau argues that states are self-interested, power-seeking rational actors, who seek to maximise each individual state's security. In the process he sets out six principles of realism, which consider that the state is central to IR having their roots in human nature. That in this regard interest defines power and that; realist maintains the autonomy of the political sphere.²⁵⁷ In essence, realism is a simplification of the world. Due to the power interests at play within realism, the prisoners' dilemma has been used to model the dynamics of the interactions between the actors in order to anticipate behaviour.²⁵⁸ The state centric nature of realism is similar to the positivist conception of international law²⁵⁹ as such it has many of the shortcomings that legal positivism has, and can only, in part, explain the international system. The view struggles when wider actors are considered, and much like positivism is only clear when states are the only actors.

Liberalism in IR is the perspective based on the assumption of the goodness of the individual and the value of international political institutions in promoting social progress. Liberalism is principally associated with the internationalism of the interwar period as proposed by liberals such as Woodrow Wilson,²⁶⁰ which came under heavy criticism from Carr. As with many forms of liberalism it has its foundations with the

²⁵⁴ Edward Hallett Carr, *The Twenty Years' crisis, 1919-1939: An Introduction to the study of international relations*, (Macmillan Press: London: 1946)

²⁵⁵ Hans J. Morgenthau, *Politics Among Nations: the Struggle for Power and Peace*, (Alfred A Knopf: New York: 1968)

²⁵⁶ Carr (1946)

²⁵⁷ Hans J. Morgenthau (1968) pp4-14

²⁵⁸ Jack Donnelly, *Realism and International Relations*, (Cambridge University Press: Cambridge:2002) p19

²⁵⁹ David Armstrong, Theo Farrell, Helene Lambert, *International Law and International Relations*, (Cambridge University Press: Cambridge 2012) p86

²⁶⁰ Peter Sutch and Juanita Elias (2007) pp64-65

works of Bentham,²⁶¹ Locke,²⁶² and Kant.²⁶³ As with realism, liberalism shares a common philosophical underpinning with elements of international law. Liberalism and legal process theory also share the same basic conceptions; both look further than the power hungry, state-centric approach offered by realists and positivists. Focusing instead on the normative imperatives and multitude of actors in world politics especially international organisations.²⁶⁴ Liberalism explores IR with promotion of all actors, and shares a similar approach to legal process theory explored above.

Constructivism embraces all actors with IR, setting out the theory of a socially constructed system, which reflects our own prejudices, ideas and assumptions rather than an objective social reality.²⁶⁵ As Alexander Wendt identifies "that the structures of human association are determined primarily by shared ideas rather than material forces, and that the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature".²⁶⁶ Therefore, it is stated that international organisations and inter-governmental organisations are all included within the social construct. A large part of this theory relates to the perception of actors and what they want. Therefore, if a state perceives themselves as a great power, they will want and act as such, regardless of their actual material capabilities.²⁶⁷ Viewing international law as socially constructed would certainly allow for any actors to be considered within the international system, yet the process is largely still state dominated with how they view their own power. Within International

²⁶¹ Jeremy Bentham, *An Introduction to the Principles of Morals and legislation*, (Dover Publications: Mineola: 2007)

²⁶² John Locke, *Two Treatises of government: A Critical Introduction and Apparatus criticus by Peter Laslett*, (Cambridge University Press: Cambridge: 1967)

²⁶³ Immanuel Kant, *Perpetual Peace, and other Essays on Politics, History and Morals; Translated, with Introduction by Ted Humphrey*, (Hackett Pub. Co.: Indianapolis: 1983)

²⁶⁴ David Armstrong, Theo Farrell, Helene Lambert (2012) p88

²⁶⁵ Peter Sutch and Juanita Elias (2007) p125

²⁶⁶ Alexander Wendt, *Social Theory of International Politics*, (Cambridge University Press: Cambridge: 1999), p1

²⁶⁷ David Armstrong, Theo Farrell, Helene Lambert (2012) p101

law how they perceive power, may also give rise to when they wish to follow international law and when not.

Other approaches to IR have focused on the leadership of individual state leaders. In Valerie Hudson's *Foreign Policy Analysis: Classic and Contemporary Theory*²⁶⁸, the second chapter²⁶⁹ discusses the effect that an individual leader can have on IR. The argument is made that within the context of the post-cold war the identity of characteristics of leaders can give greater understanding of foreign policy, the so called "great man" approach.²⁷⁰ Within this great man approach nothing but the characteristics of the personality matter to foreign policy. Therefore, when considering Iraq or North Korea in the 90s, the leader's personality was central to understanding the international relations of the state.²⁷¹ The effect of this was that to consider a broad strategy of deterrence and negotiation effectively required an understanding of the leader's world views.²⁷² Within Hudson's considerations she explores the effect that emotional states of the individual world leaders can have on international relations:

"Emotion is one of the most effective ways by which humans can change goal emphasis".²⁷³

Hudson illustrates this point by using psychological experiments in which individual's decision making changes when they are in a heightened emotional state.²⁷⁴ If world leaders are in heightened emotional states far different results with foreign policy decisions are often obtained. Hudson notes reluctance among leaders to undertake

²⁶⁸ Valerie M. Hudson, *Foreign Policy Analysis: Classic and Contemporary Theory*, (Rowman and Little Field Publishers: Plymouth: 2007)

²⁶⁹ Valerie M. Hudson (2007) pp.37-68

²⁷⁰ Valerie M. Hudson (2007) p37

²⁷¹ Valerie M. Hudson (2007) p37

²⁷² Valerie M. Hudson (2007) pp.37-38

²⁷³ Valerie M. Hudson (2007) p45

²⁷⁴ Valerie M. Hudson (2007) p47

empirical psychological assessments due to the negative consequences seen within such action.²⁷⁵ In concluding the chapter, Hudson states that “leaders do matter, and that analysis of perception, cognition, and personality of world leaders is well worth undertaking.”²⁷⁶ This psychological analysis of interest, as, if it is applicable to world leaders the same can be said for those undertaking important roles in drafting international law or working with international organisations. For instance, when the UN secretariat drafts concluding observations for human rights treaty bodies, the mood of the secretariat official may influence the strength of the report and the depth of report in different areas of interest. In other areas the mood of delegates interacting with each other may have significant influence on the outcomes of documents. Should individuals not get along, on a personal level, this could be reflected in a document which fails to deliver as would have been expected. But if they get along well, and met socially, issues in new legal documents may be resolved far quicker giving a much more complete document. This area remains significantly underdeveloped within wider International Relations literature.

International Relations provide, not just an interesting lens to consider the international system, but also a reflective lens to look at international law. This exploration has given rise to the ideas of an international system whereby the legal process is one embedded within a socially constructed system. This would marry liberalism to constructivism, to a certain extent, but it would propose an interesting lens to view international law.

²⁷⁵ Valerie M. Hudson (2007) p53

²⁷⁶ Valerie M. Hudson (2007) p63

IX. Conclusion

Within the literature concerned with international law it almost always talks about the individual as either why or why not they are subjects of international law, yet overlooks the individual in the role of contribution to the creation of international law. Instead, scholars seem closed off in a world in which states are abstract entities, and have the ability to decide law without individuals or almost any other actor having a consideration. The desire to keep the state-centric nature of international law has blinded the theoretical narrative to developments which accurately reflect the international system today. While the subject and object debate left the growing realities of international law behind, it has become clear that the theoretical narrative no longer fits the realities seen within the international legal system. Parallels can be drawn between this debate and that of cultural relativist and universalism in human rights law.²⁷⁷ What can be drawn out is a fluid debate that has developed from the start of the last century to the present day. Arising from the subject/ object debate is a steadily increasing body of thought which, overtime, comes out in favour of the individual having personality under international law, albeit only in limited circumstances. This development has evolved very slowly, with many scholars unwilling to let go of legal positivism which has been the major theory since the mid-nineteenth century. By letting go of common held doctrine, theory and practice can once more start to move closer together. Legal process theory allows for this to happen, by viewing international law as a decision-making system which allows for different actors as participants. This allows for factors that create difficulties to positivists to be openly considered without issue to the underlining considerations, as such the theory actually reflects practice.

²⁷⁷ Richard Falk. "Cultural foundations for protection of human rights", taken from Ed, Abdullahi Ahmed An-Na'im, *Human Rights in Cross Cultural Perspectives: A Quest for consensus*. (University of Pennsylvania Press: Philadelphia: 1995) p44

Two significant turning points can be identified within the literature; first Lauterpacht *International Law and Human Rights*²⁷⁸, in which the individual is accepted as a subject of international law due to the practice of international law, and the need for the theatrical narrative to catch up with the practical situation. This work was radical in its nature and brought a new perspective to the situation and Lauterpacht should be recognised for the role and impact that he had. In much the same way as the second turning point did in Higgins's work *Problems and Process: International Law and How We Use It*,²⁷⁹ brought with it not only a radical new way of viewing international law, but also a radical new perspective on the objects or subjects debate arguing instead for the concept of participants within international law. This concept of participants in international law not only removes the minefield of the object or subject debate, and, therefore, the limitations of struggling to fit a positive or natural legal philosophy into those theoretical concepts, but allows the theoretical narrative to move into line with the realities of events happening on the ground.

The traditional and majority body of thought currently is one which documents the trend of the individual as developing, or having, personality in international law. However, the traditional doctrine only addresses individuals as the end users of international law. However, scholars have given little thought to the role of the individual in drafting international law. Surely the question will arise whether the individual has personality as a participant in the process of international law. Surely individuals should have the right to take part in the drafting process; therefore, it should not just be state representatives undertaking any such drafting process. Using Higgins's analysis, in which the individual would be an authorised decision maker in international law would give a stronger theoretical basis for an individual to

²⁷⁸ Lauterpacht (1950)

²⁷⁹ Higgins (1994)

be present during drafting of international law, as individuals as participants could be present at any stage of events concerning international law much as they are entitled to with domestic law. This is a little intellectual leap but the analysis in the next four chapters will demonstrate its importance.

The individual in international relations is, again, in the majority side lined to a spectator amongst the power of states. Certainly the dominant theories of realism, liberalism, and constructivism, only have a minor role for the individual to play. Some international relations works examining the psychological aspects of international relations focusing on the personality of individual leaders highlights the importance that individuals can have in the development of international relations. As such this idea can be transferred into international law that different personalities can create different aspects of international law. This would give a wider recognition to the role played by individuals, something as yet theoretically unacknowledged.

By using influences and theories from other disciplines such as international relations a new picture and better understanding of what international law is, and what was intended by the drafters is gained. This will mean looking at pro-active individuals who have developed international law to analyse the effect that these individuals have had. In doing this it will mean a departure from the traditional theoretical narrative concerning the role of the individual within international law.

This review of existing scholarship in the field of the individual within international law has identified a gap of the individual within a role as creator of international law. In order to fill this gap this work will introduce new representation of the individual as either, the authorised, independent authorised, and unauthorised individual.

Chapter 2: - The Authorised Individual

I. Introduction

The ideological place of the individual within international law is a trapped and an uncomfortable one, stuck in a constant battle either as a subject or object of international law. George Manner states, “The highly controversial issue of the standing of the individual in international law is the theory that the individual is not a subject, but an object, of the law.”¹ For Rosalyn Higgins states “We have all been held captive by a doctrine that stipulates that all international law is to be divided into ‘subjects’ – that is, those elements bearing, without the need for municipal intervention, rights and responsibilities; and ‘objects’- that is, the rest.”² This debate overshadows what individuals can actually achieve within international law, and especially during the formative stages of the international law process. The theoretical idea that international law is for states by states alone is not always reflected in reality. States are merely a legal construct to facilitate the convenience of international discourse. In practice, a state is a community which has leadership over an area of land, sea, and air, whether or not that leadership is chosen by democracy, or forced on the people in a dictatorship. Without the people a state is just a landmass. According to Article 1 of the Montevideo Convention on the Rights and Duties of States (1933) a state is defined as:

“The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states”³

¹ George Manner, “The Object Theory of the Individual; in International Law”, *The American Journal of International Law*, Vol. 46, No. 3, July 1952, p428

² Rosalyn Higgins, *Problems and Process: International Law and How we Use it*, (Clarendon Press: Oxford: 1994) p49

³ Article 1 of the Montevideo Convention on the Rights and Duties of States (1933)

A state is thus a label used to help define international relations. It does not have an independent identity except as a matter of legal doctrine, established as part of the state centric nature of international law as a simplification to aid development. In this respect, although a state can be a personification of the people that live within that state, it is the people, either as individuals or as groups, acting on behalf of the abstract entity of the state that ensures that the state may achieve its key attributes. This approach helps to increase our understanding of whom and how state representatives work and interact.

This chapter, alongside the next two, assesses and sets out the role of three categories of individuals within international law, the authorised, independent-authorised and unauthorised individual. The authorised individual may be defined as one who is formally nominated and appointed in accordance with national and international law as a government representative at international law making events. Such an individual may act on behalf of, and is often mandated by their government to perform certain roles and functions. They take strict instructions from the governments they represent and their limits are what the state expects them to include within an international law making process.

Much of the material examples used in this chapter will take a historical perspective because of the time delay between the emergence of international rules and standards and the appreciation of the role played by particular individuals in the process leading to the development of the law. The role played by individuals tends to become evident as careers progress and, as they near their end, autobiographies are written, and documents have been de-classified. This has a knock on effect that many details concerning the roles of individuals in the drafting of recent international agreements, such as the Rome Statute creating the International Criminal Court

(ICC), or European Union expansion is only known sometime after the conclusion of the event.

The chapter has a distinctive split, the first part considers the theoretical aspects of the authorised individual and how the concept has its roots in existing theory of diplomacy, representation, and legal sources. The second part considers the practice of the authorised individual, giving an examination of how authorised individuals are appointed. This examination of the practice of the authorised individuals will continue with a look at how they are controlled by governments, especially those authorised individuals involved in highly controlled discussion events. Finally, the chapter will move away from high profile individuals, and will consider the roles that the majority of authorised individuals take within this category of back room diplomats, legal advisors, or press officials. In using this approach it will demonstrate that the practical process of law creation means that this theory is always playing, to a certain extent, catch up.

Section 1 – Theory of the Authorised Individual

II. The Authorised Individual

An authorised individual in its most simplistic form is an individual mandated, or authorised by law to perform a particular role on behalf of their home government or another authorised decision-maker actor within the international law making system.

These individuals will have a particular role to perform within the international system. For example, they may make up part of a delegation to an international organisation, or be a diplomat taking part in bilateral discussions with another state, or most likely be a member of a delegation sent by a state to take part in the drafting

of a new international law document, or even an individual working for a non-state actor who has an influential role within talks.

Throughout the history of international agreements and law making, individuals have always been selected to represent and take part in discussions on behalf of their state.⁴ The purpose of selecting individuals can be seen as a logical part of an international treaty making process, that heads of states cannot always be available for lengthy discussions on such details so it is logical to send a state representative who has the authority to take part in such discussions. The Treaty of Westphalia, so often seen as the foundation for modern international law,⁵ was negotiated and discussed not by the head of states, but by representatives and delegates consisting of lawyers and diplomats.⁶ Therefore, international treaties have always been conducted by appointed representatives with the power to make decisions for governments as has been seen in key treaties, The Treaty of Versailles (1919),⁷ the UN Charter,⁸ and the European Convention on Human Rights.⁹ This concept of sending representatives not only frees up time for the head of state or leader of government, but also ensures there is political distance between the international law making process and the state leader. Therefore, if it ends in failure or the treaty is a weak one it does not directly reflect upon the state leader.

⁴ This is mirrored in the history of diplomacy. Please see the introduction and chapter 1 of Keith Hamilton and Richard Langhorne, *The practice of Diplomacy; Its evolution, theory and administration*, (Routledge: London: 2011)

⁵ Malcolm N. Shaw, *International Law*, (Cambridge University Press: Cambridge: 2008) p26 & also see Chapter 1 of this work

⁶ Keith Hamilton and Richard Langhorne, *The practice of Diplomacy; Its evolution, theory and administration*, (Routledge: London: 2011) p85 gives an overview of the quantity of individuals working for different actors during the treaty creation process.

⁷ The role of wider diplomats within the Treaty of Versailles can be found at Keith Hamilton and Richard Langhorne (2008) pp.158-161

⁸ The history and creation of the UN Charter and the role played by wider diplomats can be found here http://www.un.org/en/aboutun/history/charter_history.shtml accessed 13.03.14

⁹ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford University Press: Oxford:2004) pp.603-604

The authorised, independent authorised, and unauthorised individual classifications may be seen on a spectrum, with some authorised individuals being far more regulated and directed than others. The authorised individual is not one particular type of individual where the classifications fit exactly, but is more likely to be found on a range of these classifications. If this individual is placed on a spectrum of ten to one, ten would be an individual very tightly controlled by that state government, with no freedom or flexibility in what they were doing and would have to follow government instructions to the letter. A five would score an authorised individual with moderate freedoms to negotiate as they wish, but they must still follow instructions and briefings of their home government closely. A one on the scale is an authorised individual who is almost within the independent authorised individual category, they have lots of freedom to achieve their government's instructions, yet what stops them from becoming a full independent authorised individual is that the government still retains a higher level of control over them than the independent authorised category. An individual may move around on the spectrum starting as a very controlled individual, close to a nine or ten, but as negotiations process and the individual becomes more confident as an expert in the area, they may move down the spectrum towards being less controlled. This can certainly be seen with one of the examples to be considered in the section on Eleanor Roosevelt.

III. Theory of Representation

The theory of representation is a highly complex area. There is no simple definition to the concept, with notable scholars and their work on the subject ranging from Hanna Pitkin's *The Concept of Representation*¹⁰, to Pennock and Chapman's

¹⁰ Hanna Fenichel Pitkin, *The Concept of Representation*, (University of California Press: Berkeley and Los Angeles: 1967)

*Representation*¹¹ to Schwatz's *The Blue Guitar: Political Representation and Community*¹² to more modern scholars such as Ian Shipiro's work *Political Representation*¹³. All of these scholars have one theme in common, that they do not agree to a definition of what exactly representation is, or how it should be used. Pitkin uses an accurate metaphor to explain why so many different political theorists treat representation differently. She states that it's as if "the concept is a rather complicated, convoluted, three-dimensional structure in the middle of a dark enclosure. Political theorists give us, as it were, flash-bulb photographs of the structure akin from different angles, but each proceeds to treat his partial view as the complete structure."¹⁴ However, Pitkin's work is often considered an important baseline and remains hugely influential within this subject matter.¹⁵ Pitkin's basic theory on representation is that to represent others is simply to "make present or manifest or to present again"¹⁶. In effect the ideal political representative's role is to make the ideas, opinions, and voices of the citizens present in the public policy arena once more. With an important dividing line in a distinction between "standing for"¹⁷ and "acting for"¹⁸. Within Pitkin's work she defines four different theories of representation; formalistic representation¹⁹, descriptive representation²⁰ symbolic representation²¹, and substantive representation.²² Formalistic representation is split into two different elements, authorisation and accountability, and considers the

¹¹ J. Roland Pennock and John Chapman (eds.), *Representation*, (Atherton Press: New York: 1968)

¹² Nancy Schwartz, *The Blue Guitar: Political Representation and Community*, (University of Chicago Press: Chicago: 1988)

¹³ Ian Shipiro, *Political Representation*, (University of Cambridge Press: Cambridge: 2009)

¹⁴ Hanna Fenichel Pitkin, *The Concept of Representation*, (University of California Press: Berkeley and Los Angeles: 1967) p10

¹⁵ Monica Brito Vieira & David Runciman, *Representation*, (Polity Press: Cambridge: 2008) p X

¹⁶ Hanna Fenichel Pitkin, *The Concept of Representation*, (University of California Press: Berkeley and Los Angeles: 1967) p241

¹⁷ Hanna Fenichel Pitkin (1967) p11

¹⁸ Hanna Fenichel Pitkin (1967) p11

¹⁹ Hanna Fenichel Pitkin (1967) p38

²⁰ Hanna Fenichel Pitkin (1967) p60

²¹ Hanna Fenichel Pitkin (1967) p92

²² Hanna Fenichel Pitkin (1967) p209

process and institutional arrangements. Authorisation representation refers primarily to how the representative obtained their position or office. This could be obtained through elections or through appointment on behalf of individuals. Within this form of representation there is no standard, to check how the representative performs, only how they obtained their position. The second part of accountability is how the constituents have the ability to punish their representative for failing to act with their wishes.²³ For example, some states have the option to recall their elected politicians, while others have very little ability to impose sanctions upon individual representatives when they are in power.

Descriptive representation is the idea that elected representatives in democracies should represent the descriptive characteristics of those within their constituencies such as geographical area of birth, ethnicity, or gender. The elected body, as a whole, should resemble the characteristics of the nation.²⁴ Therefore, a highly controlled system of proportional representation which requires the legislature to match the composition of the population would be an example of this concept of representation.

Symbolic representation is that in which the representative stands for those being represented. They may not be elected and may only assume the position. The degree to which they are accepted by the represented will determine how successful they have been.²⁵ For example, the image of Che Guevara has come to symbolise Marxist revolution and left wing politics.

Substantive representation according to Pitkin is the representation on behalf of a certain group, often in the area of advocacy and is in contrast to the background of

²³ Hanna Fenichel Pitkin (1967) p38

²⁴ Hanna Fenichel Pitkin (1967) p60

²⁵ Hanna Fenichel Pitkin (1967) p92

those undertaking the representation. For example, Senator Edward Kennedy often spoke up for the poor, even though he was personally from a wealthy and privileged background.²⁶

These four different categories provide the backbone for all further discussion on representation and have stood the test of time over the last fifty years. These theories all provide different theoretical lines for representation. However, Pitkin gives an interesting analysis of the modern representative in the final chapter of her work in arguing that within the modern political system the representative is required to act independently in using their discretion and judgement, while those being represented must also be capable of independent action and judgement. Not merely being taken care of by the representative. While these may seem contradictory in nature, the resulting conflict between the representative and represented must be managed in such a way that it must not normally occur.²⁷

Monica Brito Vieira and David Runciman provide a different consideration of the theory of representation. In taking a chronological view, they use this as a tool for explaining why there are so many different concepts on the term. Representation is understood to mean political representative, in the UK, that of being a MP's, MEP's, County Councillors, or even Parish Councillors. Prior to this modern meaning, representation was more commonly associated with pictorial representation, theatrical representation and juridical representation.²⁸ The use of representation as we understand it today came into its own within Thomas Hobbes' work *Leviathan*:

“What Hobbes showed was that representation could provide the foundation for a stable form of politics because it was a concept that might transcend the

²⁶ Hanna Fenichel Pitkin (1967) p209

²⁷ Hanna Fenichel Pitkin (1967) p209

²⁸ Monica Brito Vieira & David Runciman, *Representation*, (Polity Press: Cambridge: 2008) p6

disputes that were tearing the English State apart. Representation, in Hobbes's hands, turned out to be the idea that could hold the state – any state – together.”²⁹

From Hobbes' work on representation, a line can be traced from him to other enlightenment era scholars and philosophers building and arguing beyond their initial starting point. This beginning was followed by Rousseau,³⁰ Sieyes,³¹ Burke,³² James Mill,³³ and John Stuart Mill.³⁴ On examination of these philosophers Vieira and Runciman conclude that throughout the history of representation there is no single model of the concept that was subsequently developed or elaborated to produce more complex versions.³⁵ They suggest the reverse that “Representation began life as a complicated, multifaceted idea that has been progressively pared down by political theorists searching for a clarified understanding of what it can do.”³⁶ Perhaps this idea that political representation has been increasingly simplified by scholars means that the most simplistic analysis of the term is one that is being followed. As with any unclear term, there is a constant desire for scholars to change the term to suit whatever they are currently arguing for, therefore, the term representation is in constant flux.

As the very term has been changing constantly, perhaps a better way of examining representation is through what representatives actually do. What defines modern politics is that of the role representative's play in shaping the modern state. They act at all levels of government, forming the government, opposition, and act in the name

²⁹ Monica Brito Vieira & David Runciman (2008) p25

³⁰ Victor Gourevitch & Jean-Jacques Rousseau (eds), *The Social Contract and Other Later Political Writings*, (Cambridge University Press: Cambridge: 1997)

³¹ Michael Sonenscher & Emmanuel Joseph Sieyes (eds), *Political Writings: Including the debate between Sieyes and Tom Paine in 1791*, (Hackett Pub. Co.: Cambridge: 2003)

³² James T. Boulton & Edmund Burke(eds), *A Philosophical Enquiry into the Origin of our Ideas of the Sublime and the Beautiful*, (Basil Blackwell: Oxford: 1987)

³³ Terence Ball & James Mill (eds), *Political Writings*, (Cambridge University Press: Cambridge: 1992)

³⁴ John Gray & John Stuart Mill (eds), “Considerations on Representative Government”, in *On Liberty and Other essays*,(Oxford University Press: Oxford: 1991) pp. 203-467

³⁵ Monica Brito Vieira & David Runciman (2008) p65

³⁶ Monica Brito Vieira & David Runciman (2008) p65

of the people. Without this level of representation, no matter what form that representation takes, it is unavoidable that political institutions on the scale and power of the modern state would be impossible without it.³⁷

The modern political system gives rise to two main concepts of representation mechanical and trustees. The mechanical representative acts as a passive extension of a communities' principles, they are the mechanism by which that communities channel their ideas and thoughts. This process is not completely without input from the representative who will check the ideas against their own principles to ensure they are acting in a manner which they personally agree with. The issue is that this model is, as the name suggests, very mechanical.³⁸

The trusteeship model refers to a representative who speaks on behalf of those that they claim to represent. They do not claim to be acting under direct instructions from individuals whose interests they represent instead they are asked to do whatever they think best.³⁹ The issue is that the represented parties are not able to object, which turns the model into simple paternalism.⁴⁰

Both of these models seem like extremes. Representation is needed for the modern state to function, and for individuals to feel as if they have a sense in how the state is being managed. Representation as a modern concept sits somewhere between this mechanical and trusteeship model, expecting representatives to consult with those being represented, but also use their own judgement at times. However, representatives are also used in states without democracy, and democracy should not be seen as essential or a direct link to representation. Even in western

³⁷ Monica Brito Vieira & David Runciman (2008) p4

³⁸ Monica Brito Vieira & David Runciman (2008) pp.74-75

³⁹ Monica Brito Vieira & David Runciman (2008) p75

⁴⁰ Monica Brito Vieira & David Runciman (2008) p79

democracies such as the UK, at local government level, individuals can be brought onto Parish Councils to represent others within the local community by co-option without an election in the event that electors do not petition for a bye election.⁴¹ In states without a western democratic style of government, officials can still represent individuals within the state although those being represented cannot choose who the representative is. This does not prevent the representative from undertaking a role on behalf of those individuals.

As seen within domestic representation, representation does not necessarily need to have a direct link with democracy. Democracy can bring benefits to representation, but does not necessarily link the two concepts indefinitely. Vieira points out that some writers, including Przeworski and Shapiro, have concluded that the term 'representation' is too vague to help make sense of democratic politics.⁴² One type of representation is when individuals share a similar cause. They may never have spoken but as they have a common cause and are both seeking the same solution one can be considered the representative for all parties that have this common concern.

Representation can be broken in this system when the representative and those being represented no longer share a common cause or agree with each other. Within this relationship the two individuals may never have any contact or one may never authorise the other to represent them but that does not prevent representation from occurring.⁴³ Therefore, representatives do not necessarily require an elected link. The lack of a need for an electoral link between representative and represented can be seen within international representation. Where representatives are not directly

⁴¹ <http://www.allerdale.gov.uk/council-and-democracy/councillors-democracy-election/elections-2011/advice-to-parish-clerks/co-option-procedures.aspx> accessed 12.03.14

⁴² Monica Brito Vieira & David Runciman (2008) p4

⁴³ Monica Brito Vieira & David Runciman (2008) p80

elected by individuals within a state, they still derive legitimacy from being appointed to position by the elected government. What is decided by these representatives has an impact on the individuals, and they make arguments to ensure that the issue being discussed has a benefit or limited impact upon the individuals within the state. The relationship between international representatives and the individual within the state is a secondary one at best. Therefore, international representation and democracy have a very limited connection. This distinguishes the domestic representation that has a relationship between the representative and democracy.

No theory of representation is perfect; the concept is still as Pitkin observed that the view different scholars give us are just a flash-bulb photograph for a difficult three-dimensional structure.⁴⁴ The authorised individual, therefore, is a mixture of different theories, partly substantive representation and partly mechanical and trustee. The mix of these three different theories does not adequately cover the authorised individual, to fully understand the representative role they perform. The practice of identified individuals will give a more elaborate idea of how they function in terms of representation.

III.1. NGOs and representation

As the state centric nature of international law has decreased, as seen in the rise of non-state actors, the role of NGO representation has increased. This representation sees those working for NGOs and representing an interest or the interests of a collection of ideas. This reflects what Pitkin sets out within symbolic representation category.⁴⁵ NGO representation on behalf of individuals is far more radical than international representation, and demonstrates how far and wide the concept has

⁴⁴ Hanna Fenichel Pitkin (1967) p10

⁴⁵ Hanna Fenichel Pitkin (1967) p92

developed and been stretched. Within an increasingly globalised society there is a need for representation, especially for those unable to represent themselves, such as refugees or an issue unable to represent itself such as global warming.

“Leaders of nongovernmental organizations (NGOs) like the International Red Cross purportedly represent the interests of prisoners of war even when those individuals have had no say in the selection of their representatives.”⁴⁶

In effect, we have people claiming to represent the best interests of others, who have had no say in the choice of representative. This cuts any links to democracy, and couples with the likelihood that these representatives are unlikely to be in the same situation or circumstances with those that they claim to represent. They are representatives who have chosen to take it upon themselves to fight for others who are unable to do so themselves. This form of representation is completely new and different from anything that Hobbes,⁴⁷ Rousseau⁴⁸ or Mills⁴⁹ proposed, but it appears to be a logical extension of the idea of representation. Wider NGOs such as global social movements, transnational advocacy networks, and global public policy networks should also be considered as increasing their role, all forming part of a new civil society, having the ability to represent an increasingly mobilised world public forum.⁵⁰

Technology is also allowing individuals to represent themselves on the global stage, using social media such as Twitter and Facebook. The impact and use of social media has had a significant impact on the Arab Spring.⁵¹ Activists could not only get their message out to the local and regional community but also the global

⁴⁶ Andrew Rehfeld, “Towards a General Theory of Political Representation”, *The Journal of Politics*, Vol. 68, No. 1, February 2006, pp1-2

⁴⁷ J.C.A. Gaskin (2007)

⁴⁸ Victor Gourevitch & Jean-Jacques Rousseau (ed), *The Social Contract and Other Later Political Writings*, (Cambridge University Press: Cambridge: 1997)

⁴⁹ Terence Ball & James Mill (ed), *Political Writings*, (Cambridge University Press: Cambridge: 1992)

⁵⁰ Monica Brito Vieira & David Runciman (2008) p151

⁵¹ <http://www.policymic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media> accessed 1.07.13

community, gaining widespread international support. These two social media sites allow individuals to express their views directly to global organisations, other individuals and states, in effect reversing over 3000 years of representation and going back to the original Greek idea of individuals talking for themselves to a public forum to persuade and discuss issues affecting them.

NGO representation can at times be complex, with the NGO representing the views and interests of its members, but also representing itself. The interests that it may represent may be a small group or because it wishes to support; these may not be an active intelligence such as the environment or a group protecting an endangered species. While NGOs may have no direct actor to report to, the NGO is responsible to and accountable to its members, donors, and even governments who support NGOs with resources.⁵²

The general theory of representation has been developing over thousands of years, ever since civilisation realised that not everybody could be involved in making every decision to ensure that an effective system of control and governance was able to develop. Authorised individuals from non-government actors slot into the theory of representation quite easily when considered alongside other non-state actors who represent other interests. The general theory of representation will continue to develop with the current trend to simplify what is understood by representation, the term will change and continue to encompass more individuals working on behalf of others, who have either delegated power, or are unable to speak on their own behalf.

⁵² Monica Brito Vieira & David Runciman (2008) p158

III.2. Constructivism and Representation of the State

The individual needs to be distinguished from the state itself. One theory that will aid this is Constructivist theory. While Constructivism is a social theory, not a substantive international politics theory,⁵³ it will provide a useful framework to justify the difference between the state as an entity and an individual who is acting as a representative of the state. Constructivism, not regarded as a political theory, consequently has attracted a broad area of research. This attraction is partly due to the previous dominating theories of neo-realism and neo-liberalism failing to predict the end of the Cold War. This has caused constructivism to become a dominant theory, the issue being that this broad appeal has meant that constructivism is increasingly in “danger of becoming all things to all scholars, finally suffering the fate of all fads.”⁵⁴ This is certainly reflected when attempting to define constructivism; however, one broad area of theory is concerned with how the world interacts, especially “how normative structures construct the identities and interest of actors, and how actors are rule-following”.⁵⁵ This interaction between norms, actors and process can provide useful insight to this body of work.

Part of this interaction is that which relates to the use of agents by states. Within this doctrine, States deal with each other through agents whose status is determined by the state.⁵⁶ I.e. they are representatives of the state, therefore, separate from the state but accountable to it. Due to the formalities of statehood this limits the number of state agents and, by extension, the agency that can be undertaken.⁵⁷ The agency of the state certainly has dominance over non-state actors within the theoretical

⁵³ John Baylis, Steve Smith, Patricia Owens (ed), *The Globalization of World Politics: an Introduction to International Relations*, (Oxford University Press: Oxford: 2013) p157

⁵⁴ Nicholas Greenwood Onuf, *Making Sense, Making Worlds: Constructivism in social theory and International relations*, (Routledge: London: 2013) p32

⁵⁵ John Baylis, Steve Smith, Patricia Owens (ed) (2013) p163

⁵⁶ Nicholas Greenwood Onuf (2013) p25

⁵⁷ Nicholas Greenwood Onuf (2013) p25

narrative. The inter-relationship between state and agent is set out by Nicholas Greenwood Onuf:

“State agents take the formalities of their relations exceedingly seriously. They are always careful to justify their conduct by claiming to act on behalf, and in the interest, of their states. By doing so, they make the preoccupations of their small world weighty and impersonal. They have access to resources not otherwise available in any world.”⁵⁸

The state agent certainly enjoys the privilege of working on behalf of the state but, importantly, the agent claims to be working on behalf of the state, and not the state itself – an important distinction. In being a sovereign state, the state actors have certain rights and privileges which are not enjoyed by other non-state actors or their agents cause states to have significant advantages⁵⁹ over non-state actors, and, as such, a significant advantage to the power that their agents may exert. The state, the state agents, and the agents of non-state actors all have interlinking and different powers, and levels of legitimacy set by the norms of the international system. Part of the strength of the approach used by constructivists is that by understanding how actors develop interest has the effect to help explain a wide range of international political phenomenon.⁶⁰ This relationship between states and states agents also extends the relationship between agents and structure; notably, the international structure and normative frameworks in which these agents operate.⁶¹ Alexander Wendt, one of the fathers of constructivism, in the *Social Theory of International Politics* defines the relationship between the state and individuals as:

⁵⁸ Nicholas Greenwood Onuf, (2013) p25

⁵⁹ John Baylis, Steve Smith, Patricia Owens (ed) (2013) p162

⁶⁰ Christian Reus-Smit, “Constructivism” as found in Burchill (2005) p197

⁶¹ Christian Reus-Smit, “Constructivism” as found in Burchill (2005) p188

“concrete individuals play an essential role in state action, instantiating and carrying it forward in time, but state action is no more reducible to those individuals than their action is reducible to neurons in the brain.”⁶²

It is at this point where the argument within this work and constructivist theory separate. Because, while within constructivism the individual and the state are notably inter-linked, this work will maintain the argument that the individual is centrally important to the state. While being linked, the actions of the state and the individual can be separated, a minor but important distinction. Constructivist theory is certainly useful in distinguishing between the state, and state agents. But the theory overlooks the importance of the individual as the state agent.

IV. Diplomatic Theory and the Authorised Individual

Diplomacy is the representation and communication between global actors.⁶³ This can be directly between heads of governments, indirectly through the intermediary of written correspondence or of an ambassador.⁶⁴ The diplomat is the work horse of the authorised individual; they are the individuals who represent the state every day. “In the classical, Westphalia notion of diplomacy, who counted as a diplomatic actor was inseparable from the idea of what counted as a nation-state. Both rested on the notion of sovereignty...”⁶⁵ Diplomats work all over the world in different roles; from ambassador for the UK posted in Washington DC to providing holiday makers with emergency travel documents in Poland, to undertaking administrative duties within the foreign office. The international system requires individuals to seek help from the state, yet the state is an abstract idea and, therefore, requires agents to act on its

⁶² Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) p 221

⁶³ Geoffrey Allen Pigman, *Contemporary Diplomacy*, (Polity Press: Cambridge: 2012) p10

⁶⁴ R.G. Feltham, *Diplomatic Handbook*, (Longman: London: 1988) p1

⁶⁵ Geoffrey Allen Pigman (2012) p19

behalf. Why and how we have created these agents to act on behalf of the abstract state is part of diplomatic history. The power to act on behalf of the state gives the authorised individual far more power than they possess as an individual.

The reality of a diplomat is that they no longer are the high power deal makers that prevent all-out war between states. The professional diplomat is now focused on much more low level diplomacy, “issues of detail, such as building networks aimed at specific areas, trade and other economic agreements, public diplomacy, image building, contacts with influential non-officials, consular diplomacy, education, S&T [science and technology] and the like.”⁶⁶ The majority of those working in the diplomatic services are directly employed by state actors and perform these low level roles. Their work may be vital to the overall interests of the state but although unglamorous they are still undertaking the instructions and acting upon them. For the majority of states, high level ambassadors and diplomats are appointed on a political basis, with those of the USA approved by Senate.⁶⁷ For the majority of diplomats, entry into the service is through application, requiring high entry standards. Although, a diverse range of individuals are selected, on account of subjects studied, regional and personal background,⁶⁸ as well as age which has increased in recent years.⁶⁹ Those taken on by the diplomatic services are elites in talented quality, chosen from the best of a large number of high graded applicants, with efficient human resource management being the hallmark of the best services.⁷⁰ The training of a diplomatic service is key to the efficient running of the service. In the past an apprenticeship was seen as the best method of training diplomatic staff, however this is no longer

⁶⁶ Kishan S. Rana, *21st Century Diplomacy: A Practitioner's Guide*, (Continuum: London: 2011) p17

⁶⁷ <http://www.theguardian.com/world/2014/feb/25/us-ambassadors-confidence-vote-amid-firestorm> accessed 12.03.14

⁶⁸ <http://faststream.civilservice.gov.uk/the-different-streams/generalist/diplomatic-service/> accessed 12.03.14

⁶⁹ Kishan S. Rana (2011) p30

⁷⁰ Kishan S. Rana (2011) p30

considered enough to meet the high skill levels required.⁷¹ An increasing number of services, from a variety of states, now give training course and have specific training for particular activities and career levels.⁷² This in house training is supplemented by the offering of external programs of study, including MBA's. This is all aimed at meeting the functional expertise required of the modern diplomat.⁷³ A distance learning course for diplomats to enhance craft skills is also offered by specialist institutions such as DiploFoundation.⁷⁴

Until the Vienna Convention on Diplomatic Relations in 1961, diplomatic law was derived from customary international law⁷⁵ which traces its roots back to the advent of civilisation:

“... [It] is often and correctly observed that the beginnings of diplomacy occurred when the first human societies decided that it was better to hear a message, than to eat the messenger.”⁷⁶

Alongside this new willingness to listen to the message, the messenger was also granted safety from danger while undertaking this role, firmly establishing the principle of diplomatic immunity within the concept of diplomacy from the beginning.⁷⁷ This early form of diplomatic relations, while sharing core values with that of today, has been left far behind as a more sophisticated and complex system, often seen to originate from the Italian City states of the fifteenth century.⁷⁸ This initial diplomacy was much the same as the caveman diplomacy without any formalised code of conduct as to what a diplomat was, their role, or even their legal position within states.

⁷¹ Kishan S. Rana (2011) p124

⁷² Kishan S. Rana (2011) p35

⁷³ Kishan S. Rana (2011) p125

⁷⁴ As found in Kishan S. Rana (2011) p35 but can also be found at <http://www.diplomacy.edu/> accessed 12.03.14

⁷⁵ G.R. Berridge, *Diplomacy Theory and Practice*, (Palgrave: Basingstoke:2005) p115

⁷⁶ Keith Hamilton and Richard Langhorne (2011) p7

⁷⁷ J. Craig Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil*, (Dartmouth: Aldershot: 1996) p32

⁷⁸ G.R. Berridge (2005) p1 and Keith Hamilton and Richard Langhorne (2011), p2 and Chapter 2, pp37-61

Keith Hamilton and Richard Langhorne's classic text *The Practice of Diplomacy; Its Evolution, Theory and Administration*⁷⁹ breaks down this ebb and flow of the international system, in relation to diplomatic theory, into five different phases since 1815 as to how the role of diplomat has changed. These five phases are old diplomacy,⁸⁰ new diplomacy,⁸¹ total diplomacy,⁸² diplomacy diffused⁸³ and diplomacy transformed and transcended.⁸⁴ In essence Hamilton and Langhorne stated that the role of the diplomat has changed greatly since the start of the eighteenth century. As the international system has changed, the role of the diplomat has evolved in reflection to these events. For instance the advent of the League of Nations was a turning point within diplomatic theory, and brought in the new diplomacy phases. Out went the classic diplomat of the nineteenth century and in came a new breed of diplomat engaged after the League of Nations,⁸⁵ based within an international organisation which would dominate the next phase of total diplomacy. This overview of the development of the diplomat indicates the state centric nature of diplomacy, until the arrival of transnational corporations. These corporations had operating profits similar to many GDP's whose state actors have an influence on diplomatic practice.⁸⁶ The striking conclusion from Hamilton and Langhorne's work is that the diplomats not only influences events, but are also affected by them.

The traditional idea of the diplomat, one born of inter-state relations under the Westphalia system, is now a dated one. Diplomacy covers far more than the official exchange of ambassadors and embassies. Within modern diplomacy there are non-

⁷⁹ Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy; Its Evolution, Theory and Administration*, (Routledge: London: 2011)

⁸⁰ Keith Hamilton and Richard Langhorne (2011) pp. 93-140

⁸¹ Keith Hamilton and Richard Langhorne (2011) pp.141-184

⁸² Keith Hamilton and Richard Langhorne (2011) pp.185-228

⁸³ Keith Hamilton and Richard Langhorne (2011) pp.229-254

⁸⁴ Keith Hamilton and Richard Langhorne (2011) pp.257-271

⁸⁵ Keith Hamilton and Richard Langhorne (2011) p162

⁸⁶ Keith Hamilton and Richard Langhorne (2011) p240

state actors, business leaders, and global and transnational firms, civil society organisations, international and regional organisations, and eminent people,⁸⁷ all have the ability to play a role. Diplomacy is, as much, about economic, social, cultural, and military process⁸⁸ as it is about foreign relations. The increase in new diplomatic actors, considered above, demonstrates diplomacy to be becoming much more of a process between actors as how they conduct relations. This is in contrast to the traditional positivist concept of ambassadors undertaking foreign policy exchanges with members of the hosting state government.

IV.1. Multilateral institutions

Perhaps the biggest switch for the traditional diplomat is the multilateral institutions, such as the European Union, United Nations, African Union, and World Trade Organisation. A sole diplomat has limited power. Multilateral diplomacy requires the building and managing of coalitions before, during and after negotiations.⁸⁹ The complexity of coalition building allows for an informal consensus amongst stakeholders with how to manage an issue before presenting a decision for a resolution and vote within an institutional organisation.⁹⁰

Multilateral institutions do not just provide an arena for diplomats to engage in the process of diplomacy, but the institutions have the ability to become diplomatic actors in their own right. This emergence of these new institutional diplomatic actors is “as a result of the technologically driven processes through which more and more of the world’s resources, population and economic activity have become

⁸⁷ Geoffrey Allen Pigman (2012) pp22-30

⁸⁸ Please see section two of Geoffrey Allen Pigman, *Contemporary Diplomacy*, (Polity Press: Cambridge: 2012)

⁸⁹ James P. Muldoon Jr., Richard Reitano, JoAnn Fagot Aviel, Earl Sullivan (ed), *Multilateral Diplomacy and the United Nations Today*, (Westview Press: Oxford: 1999) p12

⁹⁰ James P. Muldoon Jr., Richard Reitano, JoAnn Fagot Aviel, Earl Sullivan (1999) p12

interdependent”.⁹¹ The inter-relationship between the multilateral institutions who actively engage in diplomatic relations with non-state actors does not need any contact with a diplomat from a state. These circumstances, whereby diplomatic actors have discussions without the involvement of any states, sum up current diplomatic practice.

Even amongst multilateral diplomacy there are great differences between organisations in terms of personnel and location, “At one extreme, the G7/G8 operates with minimal institutional structure and a Secretariat that rotates amongst its members, whereas other bodies maybe highly institutionalised with permanent structures and professional staffs.”⁹² Also in terms of the role that a particular institution is providing, knowledge based institutions, such as the Organisation for Economic Cooperation and Development and the International Chamber of Commerce, are focused on knowledge-generating and sharing and information services.⁹³

The consideration of who a diplomat is has developed, along with the process of diplomacy that has also evolved, alongside the multilateral organisation creating new actors who inter-act with each other without necessarily interacting directly with a state. Within this evolution, the core function of diplomacy remains as representation and communication.⁹⁴ Diplomacy should be considered as the process of relationship management on behalf of the state, towards all actors. Diplomacy has become more complex, as seen in the growth of actors, and yet Pigman argues that some generalisations can still be made about the process:

⁹¹ Geoffrey Allen Pigman (2012) p50

⁹² Geoffrey Allen Pigman (2012) p52

⁹³ Geoffrey Allen Pigman (2012) pp.52-53

⁹⁴ Geoffrey Allen Pigman (2012) p5

“Although diplomacy, by encompassing more types of actors, becomes more complex, some generalizations about outcomes are still possible. Governments and firms increasingly may share particular interests, such as facilitating a particular investment or acquisition, or building a factory that will create a significant number of highly paid jobs. Hence, in a broad sense, state-firm diplomacy in individual instances are not necessarily becoming more predictable.”⁹⁵

There has been conflict between governments and business for example the EU's antitrust charges against Microsoft.⁹⁶

IV.2. Economic Diplomacy

Economic diplomacy is a significant part of the process of modern diplomacy.

Former ambassador Kishan S. Rana has suggested that “Economic diplomacy began to emerge as a major component of external relations, in some ways overshadowing political diplomacy; export promotion and foreign direct investment (FDI) mobilization became the priority activities of the diplomatic system.”⁹⁷ While the state actor diplomat can use influence to gain trade deals, economic diplomacy from non-state actors also has a role. For example, when Microsoft CEO Bill Gates announced a \$400 million investment in India by Microsoft he was treated in the same manner as a head of state, meeting the Prime Minister, A.B. Vajpayee, and a range of India's political and business leaders.⁹⁸ This visit from Gates and investment from Microsoft can be seen to have a link to the request of world and Indian technology firms to put pressure on the Indian government regarding the disputed Kashmir region which had threatened stability only months before.⁹⁹ The Gates visit can be seen as economic diplomacy at work.

⁹⁵ Geoffrey Allen Pigman (2012) p75

⁹⁶ Geoffrey Allen Pigman (2012) p75

⁹⁷ Kishan S. Rana (2011) pp.13-14

⁹⁸ Geoffrey Allen Pigman (2012) pp.17-18

⁹⁹ Geoffrey Allen Pigman (2012) pp.17-18

IV.3. Cultural Diplomacy

Cultural diplomacy's main focus is not so much on the individual diplomat but how the abstract state represents itself. The culture of the state is used as a tool to promote the identity of the state and as a means of overcoming alienation from others, and this may include sporting events or cultural exchanges.¹⁰⁰ This can also extend to global firms with brand building extending into new markets with little brand awareness.¹⁰¹ The use of cultural diplomacy can be seen in what has become known as panda diplomacy, the use of giving or loaning giant pandas to states has become a notable feature of Chinese diplomacy. While the system has developed since its inception by Chairman Mao, it is now characterised by panda loans to nations supplying China with valuable resources and technology.¹⁰² "In the case of Edinburgh, Scotland, the panda loan deal was overseen by China's deputy premier while negotiating contracts valued at £2.6 billion for supply to China of Salmon meat, Land Rover cars, and petrochemical and renewable energy technology."¹⁰³ The cultural role in diplomacy is just as important to the overall process to that of political relationship building.

The process of diplomacy does not prevent any actor from being considered as an actor within the field, much along Higgins participants within wider international law, the reality of diplomacy is that if an actor is involved they are recognised. Therefore, even a private individual, who had a role within sensitive or difficult diplomatic negotiations between estranged states, should be recognised.¹⁰⁴ For example, Bono, alongside former US Treasury secretary Paul O'Neill, undertook what became

¹⁰⁰ Geoffrey Allen Pigman (2012) p180

¹⁰¹ Geoffrey Allen Pigman (2012) p180

¹⁰² Kathleen Carmel Buckingham. Jonathan Neil William David, and Paul Jepson, "Diplomats and Refugees: Panda Diplomacy, Soft "Cuddly" Power, and the New Trajectory in Panda Conservation", *Environmental Practice*, Volume 15 / Issue 03 / September 2013, pp.263-265

¹⁰³ Kathleen Carmel Buckingham. Jonathan Neil William David, and Paul Jepson (2013) p264

¹⁰⁴ Geoffrey Allen Pigman (2012) pp.95-96

known as the “Odd-Couple Tour of Africa”. During which Bono attempted to raise the knowledge of various issues facing Africa.¹⁰⁵

Technology has been the major catalyst for change, much communication and negotiation can be undertaken without leaving the office, via video-conference, phone, and email. The relevant principal individuals can be involved within all areas of negotiation, using these methods, making agreements far less time consuming.¹⁰⁶

The second impact of technological change is that of pre-negotiation talks, i.e. agenda setting can be undertaken far more efficiently. How diplomats work has changed drastically due to instant technology instructions between government and diplomats. Diplomatic input may come from a range of departments, not just the foreign office.¹⁰⁷ With technology being used for behind the scenes pre-talks and negotiation the growth of the diplomatic summit meetings between heads of government have become increasingly important. Summit meetings are seen as the substantive end of negotiation when the tough decisions and final agreements can be made.¹⁰⁸

The rise of technology has another side effect, especially with inter-state relations, that when a face-to-face meeting is undertaken it has greater emphasis than before. For example, following the recent trouble in the Crimean region of Ukraine, the UK Foreign Secretary, William Hague, summoned the Ambassador of the Russian Federation, Alexander Vladimirovich Yakovenko, for talks at the Foreign Office.¹⁰⁹

This summoning of the Ambassador demonstrated the great importance given to the issue that could not be expressed via electronic communication. These throw backs

¹⁰⁵ Geoffrey Allen Pigman (2012) p96

¹⁰⁶ Geoffrey Allen Pigman (2012) p111

¹⁰⁷ Kishan S. Rana (2011) pp.18-20

¹⁰⁸ Geoffrey Allen Pigman (2012) p111

¹⁰⁹ <http://www.bbc.co.uk/news/uk-26399412> accessed 11.03.14

to the old days of diplomacy still remain but have taken a renewed significance when the situation arises. The disadvantage of technology is that diplomacy loses that personal touch to relationships, or the tiny switch in perception towards an idea or position that is not perceivable over electronic communications.

The rise of technology allows for easier communication between actors. The effect on diplomacy and the need for diplomatic actors to check with governments during negotiation has limited the role of freedom and independent judgement required. For example, when the USA undertook the Louisiana Purchase the representatives of the USA, James Monroe and Robert Livingstone, felt no need to contact the US government. When, instead of buying just New Orleans and its adjacent territory they were offered the whole of the Louisiana territory for only 5 million dollars more than the original 10 million they had been authorised to spend.¹¹⁰

V. Vienna Convention on Diplomatic Relations

The traditional notion of diplomacy is between states and is covered by the Vienna Convention on Diplomatic Relations,¹¹¹ which entered into force in 1964, is the codification of diplomatic practices of states held in customary international law. The convention has been described as the “bedrock of interstate diplomacy”.¹¹² The process for codification had started in the nineteenth century; becoming urgent as a result of complaints made by the Yugoslav government about the activities of the Soviet embassy in Belgrade.¹¹³ The Convention provides for privileges and immunities under local criminal and civil law to allow for diplomats to undertake their

¹¹⁰ Keith Hamilton and Richard Langhorne(2011) p136

¹¹¹ Vienna Convention on Diplomatic Relations 1961

¹¹² Kishan S. Rana (2011) p13

¹¹³ G.R. Berridge (2005) p115

work without interference or influences from the host state. For example, article 34¹¹⁴ exempts members of diplomatic teams from local taxation, article 26¹¹⁵ concerns freedom of movement, and article 31.1 covers immunity from jurisdiction.¹¹⁶ The shortcoming with the convention is that it only deals with traditional bilateral diplomacy and, therefore, excludes relations with international organisations and special missions.¹¹⁷ This is covered by a lesser known treaty, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.¹¹⁸ Combined with modern diplomacy which also involves non-state actors, in the 21st century the convention seemed less relevant than during the height of the cold war.

¹¹⁴ Article 34 of the Vienna Convention on Diplomatic Relations 1961

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

- (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
- (b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;
- (d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
- (e) charges levied for specific services rendered;
- (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23

¹¹⁵ Article 26 of the Vienna Convention on Diplomatic Relations 1961

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

¹¹⁶ Article 31 of the Vienna Convention on Diplomatic Relations 1961

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving States. He shall also enjoy immunity from its civil and administrative jurisdiction except in the case of:

- (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

¹¹⁷ G.R. Berridge (2005) p115

¹¹⁸ Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character 1975

One of the most significant immunities within the Convention is article 22, the inviolability of mission premises.¹¹⁹ This protection is vital to the on-going diplomatic process knowing that diplomats have a safe area to conduct work without the interference of the host state or other actors. The influence of this article has been disseminated to the wider public as seen within the fictional world of Ian Fleming's James Bond, during the film version of *Casino Royale*¹²⁰ when Bond charges into an Embassy and kills a known terrorist, "M" is disgusted by her agent's behaviour saying:

"M: You stormed into an embassy.

You violated the only absolutely inviolate rule...of international relationships.

And why?"¹²¹

Therefore the symbolic status of the convention cannot be underestimated, yet in reality the Convention provided the additional clarification for both states and diplomats that was missing from customary law.

One significant unforeseen aspect of diplomatic powers, which demonstrates the effect that these individuals can have, is the abuse of these powers, especially diplomatic immunities from criminal charges.¹²² Often there is an area of uncertainty as to when diplomatic immunity should be allowed and when it is clearly outside the working areas of a diplomat. However, the convention gives the diplomatic delegation immunity from all acts, criminal or civil, whether inside their working remit

¹¹⁹ Article 22 of the Vienna Convention on Diplomatic Relations 1961

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property, thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

¹²⁰ *Casino Royal*, (2006) Directed by Martin Campbell

¹²¹ *Casino Royal*, (2006) Directed by Martin Campbell

¹²² Diplomatic immunities and exceptions are covered under the Convention in Articles 28-38

or not.¹²³ The range of offences that diplomats and their dependants have committed in the UK since 2003 range from shoplifting, drink-driving, to being accused of robbery, human trafficking, and sexual assault.¹²⁴ All attempts by the police in asking the sending governments to waive immunity were declined, although in some cases the home government of the individual withdraw them from working within the UK.¹²⁵ Within the UK the most controversial use of diplomatic immunity for an individual appears to be in avoiding the congestion charge in central London and in parking tickets. Since 2003¹²⁶ the USA, Russia, and Japan have all run up debts of £4m with Germany owing over £3m.¹²⁷ This aspect of misuse of the convention underlines the unfortunate side effect that individuals can play, by committing an illegal act within a state and claiming immunity. This can cause international repercussions for that inter-state relationship, while the individual remains relatively unscathed by the act which they have committed. This means that the individual can have an unplanned and opportunistic effect on relations within the international system.

VI. Legal Framework of the Authorised Individual

The authorised individual operates within the international legal framework, primarily within the Vienna Convention on the Law of Treaties 1969, Rule 27 of the rules of procedure of the General Assembly of the United Nations,¹²⁸ and Article 38 of the

¹²³ G.R. Berridge (2005) p117

¹²⁴ <http://www.guardian.co.uk/uk/2010/jun/28/ambassadorial-crime-sprees-foreign-embassy-staff-exempt-charges> accessed 4.8.12

¹²⁵ <http://www.guardian.co.uk/uk/2010/jun/28/ambassadorial-crime-sprees-foreign-embassy-staff-exempt-charges> accessed 4.8.12

¹²⁶ <http://www.bbc.co.uk/news/uk-politics-18725937> accessed 4.8.12 Figures correct as of 4th July 2012

¹²⁷ <http://www.bbc.co.uk/news/uk-politics-18725937> accessed 4.8.12

¹²⁸ The credentials of representatives and the names of members of a delegation shall be submitted to the Secretary-General if possible not less than one week before the opening of the session. The credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs.

International Court of Justice.¹²⁹ Within this framework, established to govern international law creation in different forums, the authorised individual can be found.

“[T]reaties have always been an indispensable tool of diplomacy”,¹³⁰ the Vienna Convention on the Law of Treaties¹³¹ codified customary process of treaty creation. While the convention should be read as a whole, Article 7 defines someone with “Full Powers” as “A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty”.¹³² A similar article can also be seen at the UN by Rule 27¹³³ of the rules of procedure of the General Assembly of the United Nations. These two instruments set down that in order to be authorised to discuss and sign international treaties the individual must submit credentials from his or her government. Without these credentials individuals are not permitted to sign or negotiate treaties. Under this system of full powers there are circumstances when state practice is slightly more flexible than would be expected, for example:

“United Kingdom practice distinguishes between “general full powers” and “special full powers”. “General Full Powers” which are at present held by the Secretary of State for Foreign and Commonwealth Affairs (notwithstanding paragraph 2 of Article 7), Ministers of State and Parliamentary Under-secretaries in the Foreign and Commonwealth office, and by the United Kingdom Permanent Representatives to the United Nations, to the European Communities and to the GATT, entitle the holder to negotiate and sign any

¹²⁹ Article 38 of Statute of the International Court of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

¹³⁰ Antony Aust, *Modern Treaty Law and Practice*, (Cambridge: Cambridge University Press: 2007) p1

¹³¹ Vienna Convention on the Law of Treaties 1969

¹³² From the Vienna Convention of the Law of treaties, Article 7 Section 1

¹³³ The credentials of representatives and the names of members of a delegation shall be submitted to the Secretary-General if possible not less than one week before the opening of the session. The credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs.

treaty. “Special full Powers” are directed to a particular named individual authorising him to negotiate and sign a specified treaty. On occasion, telegraphic authority to sign a treaty may be given by a Foreign Ministry to one of its ambassadors or permanent representatives, but it must be followed by the presentation of the formal full power.”¹³⁴

As the Vienna Convention provides a contextualised account of who can legally negotiate and sign treaties, it retains an element of customary international law as to how states interpret and practise these requirements. This allows states to give different levels of full powers to aid different officials in their particular area of expertise. The convention practice allows for flexibility to accommodate future developments,¹³⁵ and provides that, if states wish, they can depart from the rules of conventions keeping power in the hands of states.¹³⁶

Article 38 of the International Court of Justice is regarded by scholars, such as H.W.A. Thirlway,¹³⁷ to define the “traditional sources”¹³⁸ of international law. These sources are the only valid rules that the International Court of Justice will recognise as legitimate methods by which international law can be created and, therefore, applied by the court. These being international treaty,¹³⁹ customary international law,¹⁴⁰ the general principles of civilized nations,¹⁴¹ and the decisions reached by the Court itself.¹⁴² Thirlway argues that not only can the only sources of international law be seen within Article 38, but all international law must come from these sources.

¹³⁴ Ian Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester; Manchester University Press:1984) p32

¹³⁵ Antony Aust (2007) p7

¹³⁶ Antony Aust (2007) p7

¹³⁷ H.W.A. Thirlway, *International Customary Law and Codification*, (A.W.Sijthoff: Leiden: 1972)

¹³⁸ H.W.A. Thirlway (1972) pp.35-36

¹³⁹ Article 38 (1) (a) of Statue of the International Court of Justice

“a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”

¹⁴⁰ Article 38 (1) (b) of Statue of the International Court of Justice

“b. international custom, as evidence of a general practice accepted as law;”

¹⁴¹ Article 38 (1) (c) of Statue of the International Court of Justice

“c. the general principles of law recognized by civilized nations;”

¹⁴² Article 38 (1) (a) of Statue of the International Court of Justice

“d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. “

Any new source would not be valid unless it was able to prove a genealogical link to one of the sources mentioned within Article 38.¹⁴³ However, Higgins takes a different line of argument, stemming from her notion of international law is a process in her review:

“International law has to be identified by reference to what the actors (most often states), often without benefit of pronouncement by the International Court of Justice, believe normative in their relations with each other.”¹⁴⁴

Therefore, Article 38 and the ICJ set down what some scholars and practisers believe valid international law to be. However, what is far more important is what the actors consider to be international law. This is just purely a reflection on the workability and practicality of international law. For example, the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights¹⁴⁵ have been rejected by states and non-state actors alike as they would have been unworkable.¹⁴⁶ Even Thirlway hints towards the power of states in the acceptance of international law when setting out:

“The notorious incompleteness of customary law is of less importance in a world in which ultimately solutions to differences are likely to be imposed by the stronger party than in one in which it will be the task of a judge or arbitrator to apply legal principles so far as he can ascertain them.”¹⁴⁷

This recognition is important in that it sets out the realities of international law and that politics does play a major part, not just within the creation, but also the enforcement of law.

Article 38 provides the legitimacy for the work of the authorised individuals when creating treaties to be formally recognised by the international community; however,

¹⁴³ H.W.A. Thirlway (1972) p45

¹⁴⁴ Rosalyn Higgins (1994) p18

¹⁴⁵ UN Doc. E/CN.4/Sub.2/2003/12/Rev.2

¹⁴⁶ Larry Cata Backer, “On the Evolution of the UN Protect, Respect Remedy project: The state, the Corporation and Human Rights in a Global Governance Context”, *Santa Clara Journal of International Law*, 38, 201, pp45-50

¹⁴⁷ H.W.A. Thirlway (1972) p34

this should not be considered as the final say of which international law is valid. The will and power of states is as important as the Statute of the International Court of Justice, therefore, the role of the authorised individual in the creation of new international law is important and the choice of the representative can be critical in the success or failure of a particular, new international law.

The legal basis of the evident, authorised individual is a legal positivist one based around the needs of the state. This is a reflection that while other actors, especially non-state actors, can influence the law the international legal system requires international law to be confirmed by states. Legal process theory would dictate that any participants recognised by the authorised decision makers are able to undertake international law creation.¹⁴⁸ Certainly the present international law creation system allows for participants to have an influence, but the final act and recognition of the law requires state consent.

Section 2: Practice & Process of the Authorised Individual

In the second section of this chapter the practice and characteristics of the authorised individual will be explored in depth. There will be an assessment of how the authorised individual within the process of international law creation actually functions and the different structures that the authorised individual is required to work under. The authorised individual is, in essence, a representative and so in examining the practice of how they work this section will explore the idea of the authorised individual as an agent of the abstract notion of the state. Eleanor Roosevelt has been chosen as the epitome of the authorised individual, having been active at the United Nations during the drafting of the Universal Declaration on

¹⁴⁸ Rosalyn Higgins (1994) p50

Human Rights¹⁴⁹ and at the beginning of the drafting of the two UN Covenants on Human Rights.¹⁵⁰ Other authorised individuals provide a comparison to Roosevelt, including members of the UK and French delegations to the drafting of the European Convention on Human Rights. From the UK, the Earl of Kilmuir, David Patrick Maxwell-Fyfe, and Pierre-Henri Teitgen¹⁵¹ of France, both acted on behalf of their respective governments.¹⁵² Finally, as an example of highly controlled authorised individuals of arms limitation talks, Gerard Smith is an authorised individual under strong government control.

VII. Nomination and Appointment

The authorised individuals considered in this chapter are representatives of the state. This should not mean that individuals who work for non-state actors cannot be considered as authorised individuals. Any authorised decision makers that are participants within the international system should be considered as authorised individuals. The diplomat provides an excellent example of the authorised individual, but one should remember that the authorised individual can be a representative from a wider group of organisations, such as the international civil servant within the European Union, the negotiators for the Taliban within Pakistan, and employees of big TNC's such as Coca-Cola. In order to become an authorised individual, one must be selected and appointed by the state or actor to perform that particular role.

¹⁴⁹ Mary Ann Glendon, *A world Made new – Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House: New York: 2001) pp.36-51

¹⁵⁰ The UN covenants on Human Rights finally came into force in 1966. Roosevelt left the UN in 1952 after the election of republican President Eisenhower. See Chapter 11 "The deep Freeze" Mary Ann Glendon (2001)

¹⁵¹ Pierre-Henri Teitgen (1908-1997) was a French representative to the drafting of the ECHR, and is often described as a founding father of the convention. For more on Teitgen please see AWB Simpson (2004)

¹⁵² Bates(ed), *The Evolution of the European Convention on Human Rights, From its Inception to the Creation of a Permanent Court of Human Rights*, (Oxford University Press: Oxford: 2010)

Eleanor Roosevelt was selected by President Truman to be part of the US delegation to the UN. In order to take up this position, her nomination had to be approved by the Senate, which was achieved with only a few votes against. Her nomination can be considered in a number of different ways. Firstly, as a measure to keep the Roosevelt name associated with the United Nations, after Franklin Roosevelt had put so much effort into setting up the initial meetings, and plans for this new international organisation,¹⁵³ both within his four freedoms and at international conferences at Dumbarton Oaks¹⁵⁴ and San Francisco¹⁵⁵. Having the Roosevelt name associated with the US delegation linked it with those initial plans and provided a sense of continuity. Along with this rationale was her genuine ability as a liberal thinker; having been associated with civil rights issues most of her adult life.¹⁵⁶ For instance, during a radio broadcast with her daughter Anna in November 1948 she spoke of her support for the Civil Rights Bill of 1948¹⁵⁷ and in her newspaper column “My Day” in October 1945 she spoke out against racial discrimination.¹⁵⁸ In American society during the 40s these views would have been especially liberal and as such her inclusion to the UN would bring a different mind-set to the US delegation. She was able to bring a new way of working and thinking to a new international organisation. Finally, it may have been the need for Truman to stay associated with the Roosevelt name for his re-election campaign. This association gave him the ability to call on Roosevelt for support and demonstrate

¹⁵³ James MacGregor Burns & Susan Dunn, *The Three Roosevelts: The Leaders Who Transformed America*, (Atlantic Books: London: 2001) pp.504-505

¹⁵⁴ Mary Ann Glendon (2001) p6

¹⁵⁵ Mary Ann Glendon (2001) pp.10-16

¹⁵⁶ James MacGregor Burns & Susan Dunn, *The Three Roosevelts: The Leaders Who Transformed America*, (Atlantic Books: London: 2001) p504

¹⁵⁷ Allida Black (ed), *The Eleanor Roosevelt Papers, Volume 1 The Human Rights Years, 1945-1948*, (University of Virginia Press: Charlottesville: 2007) pp932-933

¹⁵⁸ Allida Black(ed) (2007) pp118-119

that the Roosevelt legacy continued with Eleanor working within the United Nations as part of the US team.¹⁵⁹

The British approach to appointing Maxwell-Fyfe to the British team working on the ECHR was similar to that of Roosevelt, if not a bit less formal and far more within a British style of governance. Maxwell-Fyfe was approached by Churchill in the House of Commons smoking-room to ask him to join his committee on United European Movement, of which Churchill was chair. Maxwell-Fyfe agreed.¹⁶⁰ This committee formed the backbone of the government appointed delegation that was announced and selected by Prime Minister Eden to the European Movement that went on to prepare a draft of the ECHR.¹⁶¹ Alongside Teitgen, Maxwell-Fyfe is widely credited as being one of the key drafters of the convention.¹⁶²

Authorised individuals may also be selected by a single member of government, without ratification. For instance a lawyer or civil servant may be asked to join part of a delegation to the UN, but as they are not expected to take a leading role their positions will be authorised by the foreign secretary alone. As discussed earlier, diplomatic appointments below the highest level are made on an application basis, yet authorised individuals within terrorist non-state actors may also be on an appointment assigned by the group leader. Other authorised individuals, especially participants such as members of international organisations, are again undertaken on an application bases.

¹⁵⁹ Allida Black (2007) p158

¹⁶⁰ Maxwell-Fyfe, *Political adventure: the memoirs of Earl of Kilmur*, (Weidenfeld and Nicolson: London:1964) p174

¹⁶¹ Maxwell-Fyfe (1964) pp174-177

¹⁶² Bates (ed), *The Evolution of the European Convention on Human Rights, From its Inception to the Creation of a Permanent Court of Human Rights*, (Oxford University Press: Oxford: 2010) p52

VIII. Control Over the Authorised Individual

A key element of being an authorised individual is that they follow instructions of government and state policy as a matter of course; therefore, they can be appointed and deselected at a whim. If government policy is not followed they cannot be considered as a representative with a mandate from the state or actor. This does not mean they are not given any freedom to do as they wish, but they are instructed to ensure that certain limits are kept and certain ideas or concepts included or excluded from discussions. This role may be easily performed if the authorised individual is in a high position of power at the international discussion such as chairman and, therefore, controlling the agenda. This was an advantage that Eleanor Roosevelt enjoyed as chair of the Human Rights drafting sub-committee and also Maxwell-Fyfe who was chair of the Legal and Administrative Committee, to which the question of human rights was referred in Europe.¹⁶³

Authorised individuals are under sufficient levels of control from their home governments to follow the instructions they have received. They act, not in their own personal best interest, or the perceived best interest, but in the best interest of the government and state they represent. An incident highlighting the level of control that the US government had over its authorised individuals, especially Eleanor Roosevelt, occurred during the negotiations for the Covenants of Human Rights. In a *New York Times* article, Michael L. Hoffman sets states:

“It was learned that there had been changes in the instructions to the United States delegation on the matter of seeking an immediate convention. Mrs. Roosevelt has opposed trying to draft a convention at this session, arguing that it was enough to draft a declaration of rights. Now, however, it is

¹⁶³ Maxwell-Fyfe, (1964) p178

understood, the United States' position is that the efforts to complete both should be supported."¹⁶⁴

Roosevelt had felt and argued for one position on the covenants but the US government instructed her to undertake an action that she disagreed with.¹⁶⁵ This, of course, is the negative side of being an authorised individual. The individual must undertake all actions that the actor, to whom they report, asks them to undertake, even if it is against their own judgment. This is an example of Roosevelt moving closer to being highly controlled. At this stage of her career as an authorised individual, while being unhappy with the decision from the government she followed the instructions. This system of accountability, with the authorised individual having to follow the government's instructions on a particular issue shows the consequences of the role. It is a key part of being an authorised individual and, therefore, a fundamental point of difference between them and the independent authorised individual.

While Eleanor Roosevelt may have started out as a highly controlled authorised individual ranging between a nine to seven on the controlled scale,¹⁶⁶ as she developed in confidence and style, especially in her role as chair of the human rights commission and the sub drafting committee she gradually became more independent, moving lower down the controlled scale. Examples of her move down the scale are seen at numerous points during her time as a delegate. She was able to influence US policy into accepting the inclusion of social and economic rights in the draft UDHR, which she felt should be included in any such document. This was

¹⁶⁴ "U.S. Doubts Scored by Mrs. Roosevelt" Michael L. Hoffman, New York Times 14th December 1947, Ed Allida Black, *The Eleanor Roosevelt Papers, Volume 1 The Human Rights Years, 1945-1948*, (University of Virginia Press: Charlottesville: 2007) p687

¹⁶⁵ Mary Ann Glendon (2001) p38

¹⁶⁶ The scale refers to how authorised individuals can be ranked as to how much freedom they have been given by their home government. A nine to seven is highly controlled.

against the official US position which was to seek a document which only had civil and political rights.¹⁶⁷

Roosevelt's desire to move the draft UDHR through the drafting phase to be adopted by the General Assembly displayed what her independence could do. This personal desire to move things forward as quickly as possible is recorded in John Humphrey's¹⁶⁸ diaries when he was called to Roosevelt's hotel suite to discuss the best way to move the draft through the third committee^{169, 170}. Another example of her move down the scale is seen with her work towards the Human Rights Covenants, in which she was determined to oppose any document that could not pass muster in the US Senate.¹⁷¹ This desire to ensure that any future document could pass through the senate was not US policy, but a personal goal to ensure that the USA would actually ratify the document.

Eleanor Roosevelt's growing independence away from the control of the State Department is further demonstrated with her personal disagreement with the government over the Palestine question which arose in 1948. In disagreeing with the US government's stance on the issue she was prepared to speak publicly against the government, and as a consequence she placed her role as an American representative on the line. Truman would not accept her resignation as he felt she was too valuable to the human rights program to lose at such an important moment.¹⁷² She retained her position within the USA's UN delegation despite the major disagreement over US policy which demonstrates her growing independence

¹⁶⁷ Mary Ann Glendon (2001) p43

¹⁶⁸ John Humphrey was the first director of the UN Division on Human Rights

¹⁶⁹ The UN Third Committee is one of the General Assembly subsidiary organs. Within the Third Committee, agenda items relating to a range of social, humanitarian and human rights.

¹⁷⁰ A.J. Hobbins, *On the Edge of Greatness: The Dairies of John Humphrey, First Director of the United Nations Division of Human Rights Vol.1 1948-1949*, (McGill University Libraries, Montreal, 1994) p49

¹⁷¹ Mary Ann Glendon (2001) p195

¹⁷² Mary Ann Glendon (2001) pp.105-106

away from detailed instructions. This independence allowed her the ability to disagree, and with it moved her down the scale towards the independent authorised category. Eleanor Roosevelt's movement down the scale happened as she gained more confidence in her role, both within the delegation and within the UN. This demonstration of flexibility within the authorised individual role indicates that not all authorised individuals are under the same levels of control, with the same individual being under different levels of control at different points in time.

The authorised individual has an inherent risk and tension, as with many government positions, between when they represent themselves as private individuals, their home government's position, or the organisation in which they also play a significant role. This tension can cause issues on many different levels, primarily being in the authorised individual's public position. When do they represent their government's position on an issue, or their own personal viewpoint? This may also depend on the position of the individual on the spectrum. A tightly controlled individual may give a speech written by the government, while a less controlled individual may give a speech representing their own views on a particular matter. This issue can be further complicated by the invitation and event at which the individual is speaking. An invitation may request an authorised individual as the ambassador of a state, or the Chairperson of a UN body, or even as a private internationally recognised individual. Part of the skills of the authorised individual is in knowing which hat to wear when, and at what time. In Eleanor Roosevelt's role as an authorised individual she, at times, appears to have been unable to know when to act within her capacity as an authorised individual and when as an individual representing herself or as the chair of the Human Rights Commission or as chair of the sub-committee drafting the

UDHR.¹⁷³ In a speech at the Sorbonne, Paris, entitled "The Struggle for Human Rights",¹⁷⁴ Eleanor Roosevelt strongly attacks the Soviet Union, on a number of occasions:

"The USSR Representatives assert that they already have achieved many things which we, in what they call the "bourgeois democracies" cannot achieve because their government controls the accomplishment of these things. Our government seems powerless to them because, in the last analysis, it is controlled by the people."¹⁷⁵

"I think the best example one can give of this basic difference of the use of terms is "the right to work". The Soviet Union insists that this is a basic right which it alone can guarantee because it alone provides full employment by the government. But the right to work in the Soviet Union means the assignment of workers to do whatever task is given to them by the government without an opportunity for the people to participate in the decision that the government should do this. A society in which everyone works is not necessarily a free society and may indeed be a slave society; on the other hand, a society in which there is widespread economic insecurity can turn freedom into a barren and vapid right for millions of people."¹⁷⁶

"The world at large is aware of the tragic consequences for human beings ruled by totalitarian systems. If we examine Hitler's rise to power, we see how the chains are forged which keep the individual a slave and we can see many similarities in the way things are accomplished in other countries."¹⁷⁷

The question of what role Eleanor Roosevelt held, as authorised individual or private person, when asked to give her address to the Sorbonne is quite difficult to answer.

The root of the speech can be found in August 1948 at a meeting to discuss the future of US human rights policy with President Truman and Secretary Marshall in Washington. At this time, tensions between the emerging superpowers were growing

¹⁷³ The Human Rights Commission name was used between 1946-2006, when the name was changed to the Human Rights Council. Eleanor Roosevelt was Chair of the Human Rights Commission and the Sub Commission for the drafting of human rights instruments between June 1947 and December 1948.

¹⁷⁴ The transcript of this speech can be found in the Ed Allida Black (2007) pp.900-910. As this speech was not recorded the version is the one also published by the Department of State in February 1949 in publication 3416. The editor has also pieced together information from other sources in order to give the best reflection of the actual speech.

¹⁷⁵ Allida Black (2007) p901

¹⁷⁶ Allida Black (2007) p902

¹⁷⁷ Allida Black (2007) p904

with the on-going Berlin Blockade. At this meeting, Marshall urged Roosevelt to give a “major address in Paris” that would set out the US position.¹⁷⁸ With this pressure from above, she contacted Rene Cassin asking if he was still anxious for her to speak in Paris about Human Rights, Cassin was still keen and set up the address at the Sorbonne.¹⁷⁹ Roosevelt appears to have invited herself to give this speech, without it ever being made clear in what capacity she would be speaking. James MacGregor Burns and Susan Dunn argue that it was Cassin who sent the invitation and Truman and Marshall who urged her to accept.¹⁸⁰ This would change the view on this event that Cassin would naturally invite her in the capacity as Chair of the Human Rights Commission, being the role he would see her perform every day. This speech certainly underlines the difficulties of an authorised individual being invited to speak at a public lecture and in what capacity they would speak in.

These attacks on the Soviet Union were a new approach and out of character for Roosevelt as a review of the meeting records and of previous published works, such as in her newspaper column, show that she had not attacked the Soviet Union in such terms before.¹⁸¹ Mary Ann Glendon notes this speech for its “uncharacteristically harsh remarks”¹⁸² towards the Soviet Union. Even fellow authorised individuals from the USA to the UN had been critical of Soviet internal policy towards its citizens. John Peter Humphrey wrote in his personal diary that evening:

¹⁷⁸ Allida Black (2007) p898

¹⁷⁹ Allida Black (2007) pp898-899

¹⁸⁰ James MacGregor Burns & Susan Dunn (2001) p529

¹⁸¹ Sources such as Allida Black (2007) and Eleanor Roosevelt, *The Autobiography of Eleanor Roosevelt*, (Da Capo Press: New York: 1992) and Ed A.J. Hobbins, A.J. *On the edge of greatness: The Diaries of John Humphrey First Director of the United Nations Division of Human Rights Volume 1*, (McGill University Libraries: Montreal: 1994), show that up to this date Roosevelt had reframed from directly attacked the Soviet Union, in public and recorded works at any rate.

¹⁸² Mary Ann Glendon (2001) p138

"The crowd had come to hear the Chairman of the Human Rights Commission and the widow of a very great man. It heard a speech that had obviously been written by the state department and ninety per cent of which was devoted to an attack against the USSR. I do not blame the Americans for talking back; but I do regret that they are using Mrs R. as their spokesman in these polemics."¹⁸³

Humphrey believed that Roosevelt was not speaking as the Chairperson of the Human Rights Commission or as a private individual, but instead gave a political speech for the US government, and, therefore, failed to act as a private individual when given the opportunity. However, this can also be interpreted as Humphrey failing to understand in which role Roosevelt had been invited to give the speech, which is unclear.

These are the type of circumstances where the lines between being an authorised individual, representative of an international body and a private individual are hard to define. It was never made clear as to what role Roosevelt was asked to give her speech, mainly because she invited herself¹⁸⁴ and, therefore, the State Department may have felt that as an authorised individual they should use this time to hit back at the Soviets as relations broke down. Furthermore, by acting as a controlled authorised individual and representing the official line of the government she overlooked her growing independence away from the detailed briefings and instructions of the US state department and moved down the spectrum towards the one to three range, which had been a feature of her time during the UDHR drafting. In giving this speech, which had been drafted in the State Department and pre-approved by Secretary Marshall,¹⁸⁵ Eleanor Roosevelt moved back up the authorised individual range towards the higher ends of spectrum. The obvious danger of this swing back towards being a tightly controlled authorised individual is

¹⁸³ September 28th 1948, A.J. Hobbins (1994) p50

¹⁸⁴ Allida Black (2007) pp.898-899

¹⁸⁵ Mary Ann Glendon (2001) p137

that it can undermine an individual's credibility, or position within an international organisation. Humphrey certainly felt that the speech had undermined Roosevelt's position. Henri Laugier agreed that her position had been "compromised" and she no longer stood as a symbol "above this quarrel".¹⁸⁶

Did being an authorised individual prevent her from thinking she was able to give a speech independently of her role as an authorised individual, without seeking clarification from the state department? With anti-Soviet feelings building in America and the continual break down of east-west relations, it is likely that the US government used Roosevelt, exploiting her position as an authorised individual, by bringing her more closely under state department control and reducing her independence in order to provide an ideal platform to attack the Soviet Union. Therefore, the boundaries as to when an authorised individual speaks as a government representative and when they speak as an independent individual can easily become blurred, especially when pressures from home governments are placed on the authorised individual. This can affect both the authorised individual and their government. The danger of the authorised individual towards the individual themselves is that the control held by the actor places their reputation in jeopardy.

IX. Mechanism for Control of the Authorised Individual

Seeing the effect that controlling actors have over representatives, how control is exerted will now be considered. The authorised individual is controlled using a system of briefings and instructions. For example, Roosevelt was also briefed and given instructions from the US State Department. Glendon argues that Eleanor was nervous about her new role within the UN, having written in her "My Day" column "I

¹⁸⁶ A.J. Hobbins (1994) pp.61-60 and James MacGregor Burns & Susan Dunn (2001) p139

am told we will be "briefed" (whatever this may mean) during the trip".¹⁸⁷ This indicates that she was unsure as to her own independence that she would have as a delegate and a little unsure as to what her role would be within the delegation party. There is an important difference between briefings and instructions, which at this point should be clarified.

When an authorised individual is briefed by their home government they are being given the government's general position on a particular issue of the day, and the stance that they would like the individual to express within any meeting. Briefing gives the delegate some room to manoeuvre which can be very useful with the negotiations. This is likely to happen to an authorised individual who has a degree of freedom within their role. Glendon notes that on a day-to-day basis Eleanor Roosevelt relied on her state department advisers to keep her well supplied with briefings.¹⁸⁸ While Burns and Dunn note that she sometimes felt that she was walking on egg shells during her first few daily briefings being given the government positions of the issue of the day.¹⁸⁹ Therefore, briefings are far more general in nature and provide the authorised individual some room for interpretation when taking them into the day's discussions. When an authorised individual is instructed to do something they must take the position or make the argument which their government has asked. This means that they are not given any space to adjust the position during the course of negotiations.

Instructions or briefings to delegates may not always be positions to take on certain elements of document text within an agreement, but may also be how a delegate should act within a given situation. For example, when the head of the US delegation

¹⁸⁷ Mary Ann Glendon (2001) p25

¹⁸⁸ Mary Ann Glendon (2001) p82

¹⁸⁹ James MacGregor Burns & Susan Dunn (2001) pp.509-510

to the UN in London gave Eleanor Roosevelt instructions that she needed to vote quicker during the committee meetings when votes were called to ensure that as a leading state, other state delegates were aware of the USA's position.¹⁹⁰ Roosevelt followed these instructions, often formulating which way she would vote before the vote was called.¹⁹¹

Roosevelt's briefings started almost as soon as she embarked on her first UN delegation meeting, while on the voyage to England with the delegation she was presented with briefing documents and meetings:

"The first thing I noticed in my stateroom was a pile of blue sheets of paper on the table. These blue sheets turned out to be documents, most of them marked "secret," that apparently related to the work of delegates. I had no idea where they had come from but assumed they were meant for me so I looked through them. The language was complicated but they obviously contained background information on the work to be taken up by the General Assembly as well as statements of our government's position on various problems."¹⁹²

As well as paper briefings sent by the State Department, in which the US position on certain issues was made clear, there were also regular briefing sessions from the State Department.¹⁹³ In their briefings the head of delegation and experts on the day's issues would guide delegates and would actively discuss the US position in the various UN committees.

"Thereafter we had regular briefing sessions in which State Department experts – or perhaps Edward R. Stettinius, who later succeeded Mr Byrnes as head of the delegation – discussed each morning the important items on the day's program. These meetings were often held in a large room where around nine o'clock in the morning all the US delegates and their advisers would gather, perhaps forty or fifty persons in all. Normally the head of the delegation would preside and outline the high points of the work to be done

¹⁹⁰ James MacGregor Burns & Susan Dunn (2001) p510

¹⁹¹ James MacGregor Burns & Susan Dunn (2001) p510

¹⁹² Eleanor Roosevelt, *The Autobiography of Eleanor Roosevelt*, (Da Capo Press: New York: 1992) p300

¹⁹³ James MacGregor Burns & Susan Dunn (2001) pp.509-510

while the rest of us followed his remarks by reference to the printed or mimeographed documents that had been prepared for by the experts before the meeting. Then, when certain complicated problems were to be discussed in detail a State Department official with special knowledge of the subject would take over. If any points were not clear, the five delegates or their alternates would ask questions.”¹⁹⁴

These meetings were clearly an important aspect of the US delegations briefing procedure as they quickly become part of Roosevelt’s routine throughout her time at the UN; meaning that no matter which UN facility or meeting she was attending there was always a connection to the US government’s latest position on any particular issue. This level of connection is vital to the authorised individual as it allows for policy to be updated and for changes in strategy to be considered by the administration and, therefore, relayed to the authorised individual.

A further system of control used to keep authorised individuals in constant contact with the wider delegation is for them to be accompanied by technical, legal, and other delegation members to meetings. The influence of these assistants was certainly felt by Roosevelt, in a meeting of the Human Rights Commission it was noted that:

“These assistants [members of the USA delegation] sometimes overstepped their duties, Humphrey observed, in advising her how to conduct meetings. Once he was tempted to leave the chamber, embarrassed by her treatment of Dr. Pavlov. “I did not want the commission to think that the chairman was getting her advice from me” he wrote.”¹⁹⁵

This demonstration of influence of other delegate members and level of control expands the understanding of the authorised individual that their actions and words are always being monitored by other delegation members and that they can be

¹⁹⁴ James MacGregor Burns & Susan Dunn (2001) p304

¹⁹⁵ James MacGregor Burns & Susan Dunn (2001) p524

overly influenced by the advice that they are receiving from these members, be it good or in this case poor.

Information passed from actor to authorised individuals is not just a one way flow, with the authorised individual passing information back to the actor in order to help them make better informed decisions. This relationship between the authorised individual and the actor is vital, as without a good flow of information regarding events that the authorised individual has attended it makes it difficult for the actor to give clear, updated instructions to the authorised individual as how to best respond to situations that have developed within the on-going discussions. Eleanor Roosevelt had an advantage when compared to other delegates as she was able to feed information back at the highest level, “Her access to President Truman, however, gave her more influence over her country’s policy than most other delegates could ever hope to enjoy.”¹⁹⁶ For example, this happened with the inclusion of economic and social rights within the UDHR.¹⁹⁷

Without this, the limits and goals of the authorised individual would remain static; thus discussions would become very difficult with other states as no authorised individual would be in a position to compromise and start to form a broad international agreement based on consensus. Eleanor Roosevelt provides an insight into what happens when an authorised individual disagreed with their government:

“Of course, a delegate cannot express his disagreement publicly unless he resigns since obviously it would be impossible to have representatives of the same nation saying different things in the United Nations. But he may exercise his right to disagree during the private briefings. Before the start of a session we were told what subjects would be on the agenda. If you disagreed with the government’s attitude you had the right to say so and to try to get the official attitude changed or modified. You could, if necessary, appeal to the

¹⁹⁶ Mary Ann Glendon (2001) p82

¹⁹⁷ Mary Ann Glendon (2001) p43

President to intervene and you could, if there was no solution, resign in protest.”¹⁹⁸

Neither an authorised individual nor a government really wants a delegate to resign, as it looks bad both nationally and internationally, especially if the true reasons for the resignation are made public. The cost and difficulty in finding a replacement can be tough, especially when someone of similar experience may not be available or reluctant to take over. Therefore, both the authorised individual and government are likely to work hard to find a solution before the authorised individual resigns. The authorised individual is also unlikely to want to resign due to their position at the heart of their states international relations, even if they strongly disagree with the government’s position on any particular policy aspect.

This system of accountability and relationship between governing actor and authorised individual means that the individual is not directly accountable for what they have been instructed to undertake. The independent authorised individual bears responsibility for the action undertaken. Therefore, the relationship between the authorised individual and their governing actor requires both to take on board information from one another, with the authorised individual always required to undertake the actions of the actor even if they are not entirely supportive of the policy. The relationship between governing actor and representing authorised individual is as much a process as the actual international law creation.

X. Highly Controlled Authorised Individual

Highly Controlled authorised individuals may be needed when important matters of state are at stake. Often, issues of national security, questions that are of important self-interest or political ideology may require highly controlled individuals to provide a

¹⁹⁸ Eleanor Roosevelt (1992) pp.306-307

function on behalf of the government. Nowhere in the world of international relations and treaty negotiations can a more controlled authorised individual, ranking as a nine or ten on the scale, be more visible than during talks regarding international arms control amongst states.

This section will examine the highly controlled authorised individuals of the ABMT,¹⁹⁹ SALT²⁰⁰, SALT II²⁰¹ and START²⁰² treaty negotiations between the USA and the USSR throughout the latter part of the twentieth century. These treaty negotiations have been selected because of the availability of material and individuals now willing to talk regarding their experiences during the negotiation process. For reasons of national security, modern arms limitations talks are not usually disclosed, and due to the end of the cold war no longer occur as often, nor in as a high profile manner as during the discussions being evaluated here.

This paper will use examples from both the American and Soviet delegations from the SALT negotiating teams. The focus will be on the head of the American SALT delegation, and the Arms Control and Disarmament Agency (ACDA) Gerard C. Smith, and from the Soviet side the role of Deputy Foreign Minister Vladimir Semenov. Due to the nature of the talks and the large amount of individuals within both delegation teams included advisors, interpreters, administrators and guards. The American team to the first round of SALT discussions consisted of close to 100 people, while the Soviet delegation was roughly the same size and composition as

¹⁹⁹ Anti-Ballistic Missile Treaty 1972

²⁰⁰ Strategic Arms Limitation Talks (resulted in the ABMT and an agreement leading to the SALT II)

²⁰¹ Strategic Arms Limitation Talk Two 1979

²⁰² Strategic Arms Reduction Treaty 1991

its American counterpart.²⁰³ The size of delegation is an indication that the highly controlled authorised individuals extend into the back room staff.

In having an increased understanding of the higher end of the scale of the levels of control that governments can have over their authorised individuals it is important in understanding the level of influence that both governments and individuals can have in the highly sensitive process of international law creation. Control of authorised individuals can be broken down into different elements, each showing the control of the individual at each stage of negotiations. When authorised individuals are placed under a high level of control by their home governments the lines of communication are even more vital than in normal circumstances. As governments, often government leaders are making the decisions they need to be kept very well informed of what is going on during the actual talks. This required close discussions between the team on the ground and their government leaders. During the SALT I discussions, information was wired to Washington from secure, tap-proof conference rooms under Marine Guard. These communications would be information on the formal and informal talks between the two delegations.²⁰⁴ Informal talks were recorded and in being harder to verify, such documents were written up in the form of Memoranda of Conversation, during the two and half years of SALT some five hundred were written.²⁰⁵ The Soviet approach was very similar to the American approach, if not more detailed with in-depth reports written up on the progress of the talks, and actual transcripts of bilateral meetings being sent back to Moscow for analysis, the results being fed into reviewing the delegate's instructions.²⁰⁶

²⁰³ Raymond L. Garthoff, "Negotiating salt", *The Wilson Quarterly*, 1976, vol.1, No.5, (autumn 1977), p76

²⁰⁴ Raymond L. Garthoff (1977) p77

²⁰⁵ Raymond L. Garthoff (1977) pp77-78

²⁰⁶ Aleksandr' G. Savel'yev and Nikolay N. Detinov Translated by Dmitriy Trenin, Edited by Gregory Varhall: *The Big Five: Arms Control Decision-Making in the Soviet Union*, (Praeger: London: 1995) p16

Having a tight control on an authorised individual is not just on what they are saying but also how they are acted towards the other states delegation. Within the SALT II negotiations the Americans imposed a strict mandate on their authorised individuals saying that they must always be accompanied by a fellow delegate member to ensure that they did not exceed the instructions they had been given. This rule was also important in ensuring that reports were accurate and that information passed back was correct.²⁰⁷

The Soviet delegation was also given strict instructions on how to behave during these talks. One of their key strategies was the way that the authorised individuals were asked to perform within the opening rounds of SALT to give away as little information about the force structure, numbers, or quality of Soviet arms.²⁰⁸ This concern resulted from the insecurity that the Americans would use the additional information about Soviet military capability to seek some form of advantage.²⁰⁹ Being asked to undertake this action is difficult when you are trying to discuss an arms limitation treaty, as the information is vital to progress. Therefore, the authorised individual has to tread a careful path to ensure that they stick to what their government is asking them to do and appearing to move the discussions forward. If they failed in this later task the talks could easily collapse under the assumption that one side is unwilling to take a full and active part in discussions. The Soviet example here should be considered within the context of the early SALT rounds where trust and bridges had to be built between the delegations, and also the highly controlling governments on both side.

²⁰⁷ Raymond L. Garthoff (1977) p79

²⁰⁸ Gregory Varhall (1995) p173

²⁰⁹ Gregory Varhall (1995) pp.12-13

One of the most difficult elements of being so highly controlled is in having to follow instructions even when it's against the judgement of those actually on the ground. Gerard Smith notes this point when the White House issued instructions to him concerning the proposed arrangement for ABM and submarine-launched ballistic missile (SLBMs). These instructions proposed the Americans would accept the two-and-two arrangement²¹⁰ on ABMs if the Soviets agreed to put SLBMs into the agreement. The delegation was given no fall-back position from which they would be able to form an agreement if the proposal failed. Should this take place Smith and his team were instructed to return to Washington to make new recommendations.²¹¹ Even though he disagreed with these instructions on a personal level, feeling that a prepared fall-back would be of benefit he was forced to follow the instructions due to the nature of his position and the stage at which this occurred during the concluding round of the SALT I talks.

The final element of being a highly controlled authorised individual is in the ability to receive updated instructions from the state and acting upon it, even in the event that they are not the personal view of the delegate, or that they work against the position that a delegate has previously been asked to take, undermining their own credibility. On particularly divisive issues faced by the respective sides, updating was most likely to happen between sessions of talks, allowing both sides to consider where concession could be made. However, back channels can sometimes be used in order to make progress and then update those on the front channel discussions.

²¹⁰ The two-and-two arrangement refers to the acceptance that both sides, the USSR and USA, would only maintain two sites from where Anti-Ballistic Missiles could be used. These are in effect defensive missiles used for destroying Intercontinental Ballistic Missile before they reach their target. The rationale was to limit the amount of defensive weapons would mean that less offensive weapons would be required to maintain the balance of power. ABM system shouldn't be confused with Ronald Reagans Star Wars missile defence system. For more information regarding this element of limitation please see John Newhouse (1973) pp.203-270 or John Smith (1980), Chapter 6 "ABM only" pp.201-221

²¹¹ John Newhouse, *Cold Dawn: The Story of SALT*, (Holt, Rinehart and Winston: New York: 1973) p241

This occurred on the ICBM issue when a back channel working group made up of Andrey Gromyko, Henry Kissinger and Paul Nitze met several times to find solutions. Once agreement was reached at this level both sides sent updated instructions to their delegations who updated the draft text of the SALT agreement.²¹² This approach of updating can mean undermining the position of those in the room, and make them look poorly informed about an issue, especially if parallel back channel negotiations are taking place. These updated instructions to delegates can mean that the talks move forward in a constructive way, therefore, back channel negotiations should not necessarily be considered as negative if they can have an overall positive result.

Updated instructions may not be what a delegation wants to hear or receive. For instance, when seeking updating instructions the delegations are told to hold the current position, thereby preventing progression. During the opening round of SALT the Soviet delegation were instructed to maintain a position on the issue that the Americans would agree to account for delivery vehicles on the basis of data supplied by soviet states. The Soviet delegation held out on this point for a considerable time making it a non-negotiable point until they heard a different update from central government.²¹³ This meant that the delegates on the ground had to suffer some difficult moments without any progress being made on the issue. Therefore, updates to authorised individuals may not always be a good sign for those on the ground and cause difficulties in trying to reach agreement. The highly controlled, authorised individual is a mechanical form of representation.

²¹² Gregory Varhall (1995) p27

²¹³ Gregory Varhall (1995) p44

XI. Mechanism for Control of Highly Controlled Authorised Individuals

Having considered the mechanism of control for the standard authorised individual, the mechanism for the highly controlled authorised individual is slightly different and worthy of examination. Both the USA and USSR mechanisms for controlling their delegations and decision making process will be considered here. Even though each represents a different ideological approach, they are surprisingly similar as to how they functioned.

Initially the Soviet Union lacked a mechanism for the rapid implementation of issues raised by the SALT talks. All the documents to support talks were prepared by the Ministries of Defence and Foreign Affairs, at the request of the Politburo which requested that proposals be ready by set deadlines.²¹⁴ This gave rise to an ineffective process “all initiatives came from the top down, rather than from the bottom up.”²¹⁵ This mechanism was ineffective as different departments needed to have input into the discussions especially when detailed reports from the delegates arrived from Helsinki. These reports were sent to Central Committee, the Council of Ministers, the Foreign and Defence Ministries, and the Committee for State Security, and the KGB.

It became clear that a coordinated approach needed to be taken with so many agencies needing to have input into instructions. The Politburo proposed a recommendation in November 1969 to form a Commission of the Central Committee of the Politburo for the Supervision of the Negotiations on Strategic Arms Limitations.²¹⁶ This commission had representatives from the five departments the Central Committee of the CPSU; the Ministry of Foreign Affairs the Ministry of

²¹⁴ Gregory Varhall (1995) p15

²¹⁵ Gregory Varhall (1995) p15

²¹⁶ Gregory Varhall (1995) p16

Defence: the KGB; and the Military Industrial Commission (the VPK). This commission soon became known as the Big Five and took the important decisions regarding arms limitation and gave instructions directly to the highly controlled authorised individual.²¹⁷ This commission fitted into the centralised structures of Soviet government organs and, therefore, a direct and efficient mechanism of control was established within the Soviet State for the purpose of arms limitation talks.

The structure of control of the Soviet authorised individual was a three part structure of *Politburo-Big Five- Soviet Delegation to SALT*. The only significant development that the Soviet mechanism underwent was the introduction of the little five, or five. This was a working group of the Big Five and included representatives from the departments of the Big Five. This group was very much in a supporting role of the Big Five allowing for more in depth discussions without taking up department leaders time with basic questions of policy coordination.²¹⁸ The effectiveness and mechanism of the Soviet methods may be surprising in that the instructions did not come from the very top, but instead from committees and discussions. The mechanism is nicely summed up when Aleksandr' G. Savel'yev and Nikolay N. Detinov state:

“That mechanism drew upon the advice and expertise of all the agencies involved. The recommendations it produced were almost never questioned by the national leaders, including the General Secretary of the Communist Party.”²¹⁹

In contrast the American system was far more centralised from the President and his special advisers. The American mechanism, like the Soviet system had a committee that brought different departments together to formulate policy called the Verification

²¹⁷ Gregory Varhall (1995) p20

²¹⁸ Gregory Varhall (1995) pp.41-42

²¹⁹ Gregory Varhall (1995) p42

Panel. This panel consisted of Chair Henry Kissinger, Elliot Richardson, the then Under Secretary of State; David Packard, the Deputy Secretary of Defence; the Chairman of the Joint Chiefs, Admiral Thomas Moorer; CIA Director Richard Helms; Gerard Smith; and John Mitchell then Attorney General.²²⁰ The verification panel took many but not all the decisions, with some of the most difficult ones passed to the National Security Council (NSC) a pre-established body in American security policy. However, many of these decisions would already have been made by the President and Henry Kissinger before a NSC meeting. An unidentified source quoted in John Newhouse identifies the process as:

“Kissinger presents the NSC with a review of the Verification Panel discussions, after which Nixon raises a few questions, offers some comments, and conveys a mood. Then everyone goes away, and a decision is announced in the form of an NSDM. The decision is rarely announced in the meeting itself.”²²¹

Through this mechanism of control the really important decisions were not being made by experts such as in the Soviet system, but by the political figure of the President and his adviser, Kissinger. This process extended to the negotiating options given to the delegates. They were given four options with two more following later as to what would be acceptable to the White House and what the Soviet's had to agree to at each stage.²²² The expert committees did not have a direct link to the authorised individual, a clear weakness, and allowed for political rather than expert input. Therefore, while they were given options they were not given freedom to pick and choose between options in order to get the best overall agreement. The American mechanism was a far more centralised system than that of the Soviets,

²²⁰ John Newhouse (1973) p178

²²¹ John Newhouse (1973) p179

²²² John Newhouse (1973) pp.183-185

with decisions being made by the President and select advisers rather than experts in the areas affected by the SALT treaties.

XII. Challenges of highly controlled authorised individual

When authorised individuals are controlled as tightly as seen with these authorised individuals it can create issues and problems, from both the authorised individual perspective and that of the government. One particular issue, especially for this type of authorised individual, is that of deadlock within talks. With both sides being heavily controlled, those at the negotiating table are not in a position to give ground and find agreement. This happened during SALT when the American position of four-to-one on ABM sites²²³ was rejected out of hand by Semenov. The US delegation was not given instructions to change position, and were left with the only option of just having to repeat the offer that had already been rejected.²²⁴ The effect is that the authorised individuals were forced into an embarrassing time wasting situation. Due to their lack of freedom to move the talks forward it appears unprofessional and the discussions can quickly lose momentum²²⁵ which can be vital in treaty creation.

Further issues with controlling authorised individuals so closely is that human nature means that they will act in unauthorised ways thinking they are doing so for the good of the delegation. This can mean breaking protocol put in place to protect the secrecy of the talks and prevent significant leaks, or keep control of individuals centralised so they are not receiving instructions from elsewhere. An example of breaking communication protocols occurred when Paul Nitze wired the Pentagon to report that Smith had been negotiating face-to-face with Semenov without

²²³ This four to one standard relates to the relative defensive sites equipped by the USA (4) and USSR (1). For a full description of these events please see John Newhouse (1973) pp.206-208

²²⁴ John Newhouse (1973) p207

²²⁵ G.R. Berridge (2005) p56

authorisation or instructions.²²⁶ This was not true and in doing this Nitze had broken the delegation rules regarding individual and separate communications to Washington. This was not the first instance of Nitze breaking the rules, but with the American delegation operating a three strikes rule; he could no longer afford to break any further rules.²²⁷

A further frustration for this type of authorised individual is that it may appear that they spend just as long negotiating with their own government over concessions as with their opposite number across the table. This was an issue that Gerard Smith struggled with. While willing to follow instructions and not to embarrass Washington he found it hard to fight with the bureaucracy for a position of importance that needed to be changed. His anger was also aimed at the decision making at the top in Nixon and Kissinger who he found extremely difficult to deal with, as they made decisions without consulting experts and were very distrustful of nearly all the civil servants within Washington.²²⁸

Smith, the insider to the talks, agrees with John Newhouse's²²⁹ assessment that Kissinger "functioned as a kind of prime minister rather than a senior adviser."²³⁰ This Kissinger-Nixon controlling partnership also irritated Smith when the back channel negotiations between Kissinger and Dobrynin started producing draft documents and inputs into the SALT talks. In one instance when a new proposal was handed to Smith prior to a NSC meeting he noticed that the language and tone of the introductory clause had been changed without prior knowledge, therefore, undermining the original document produced during talks. On questioning this

²²⁶ Gerard C. Smith, *Disarming Diplomat: The Memoirs of Ambassador Gerard C. Smith, Arms Control Negotiator*, (Madison Books: New York: 1996) p156

²²⁷ Gerard C. Smith (1996) pp.156-157

²²⁸ Gerard C. Smith (1996) p157

²²⁹ John Newhouse (1973)

²³⁰ Gerard C. Smith (1996) p157

change by Kissinger, Nixon expressed anger towards the representative, expressing the questions of language were unimportant to them.²³¹ This level of control clearly caused issues for the American delegation they had operated within such a tight framework that it caused conflict when there was disagreement in view taken by the Kissinger-Nixon partnership.

Even when authorised individuals are highly controlled they can sometimes still slide down the scale towards the six to eight range in showing and demonstrating a certain amount of independence. Within the SALT II meetings, Paul Nitze's, independent nature got him in trouble by sending unauthorised communications to Washington during SALT I. He undertook a walk in the woods with the Soviet representative, Kvitsinsky, where he was acting on his own initiative and without the knowledge of the Reagan Administration. He reported that he had opened a new channel and acted in this way and was asked to keep the line of communication with Kvitsinsky open until a future change in discussions closed it off.²³² A highly controlled individual, who was acting more independently than their controllers would have liked, was responsible for a positive action, therefore, showing that even highly controlled individuals acting independently can assist treaty talks.

At other times both delegations broke away from being so highly controlled moving down the scale. This was during the informal probing and exchanges between sides at long luncheons and dinners preceding meetings. These dinners proved invaluable in terms of getting information from the opposition that would not normally come to the surface during formal talks.²³³ This type of authorised individual is useful in the

²³¹ Gerard Smith, *Doubletalk: The Story of the First Strategic Arms Limitation Talks*, (Doubleday & Company, Inc.: New York: 1980) p376

²³² Gregory Varhall (1995) pVII

²³³ Raymond L. Garthoff (1977) p78

formal settings of discussions when states want or need to maintain a high level of control. However, it's important to allow those on the ground a certain level of flexibility and independence as this will allow delegations to exchange information which would otherwise be held back or not shared as relevant during the more formal exchanges.

The final area that needs to be considered in line with the highly controlled authorised individual is that of the effect that using back channels and by-passing authorised individuals can have. The role of Kissinger during the SALT talks has been hinted at,²³⁴ but now the effect of his work will be fully discussed. Even within authorised back channels individuals must act within a framework set down from the top of government. Therefore, these individuals are fairly controlled, yet have more flexibility than highly controlled authorised individuals.

Kissinger's back channel during the SALT talks was with the Soviet Ambassador Anatoliy F. Dobrynin and was opened after Kissinger had gone to Moscow to discuss other business with Soviet officials. Dobrynin had no official role with SALT but discussions with Kissinger were given a special role in relation to the on-going negotiations. Even in this back channel Dobrynin always acted with the instructions that he received from the big five control committee, never giving away more than he was allowed to.²³⁵ Kissinger, of course, was not under such controls as he was part of the partnership with Nixon that was controlling the American side of discussions and, therefore, he had far more flexibility than any other negotiator who acted within the SALT talks. The danger of the back channels is that they can undermine the efforts and work being undertaken by the authorised individuals on the front channel.

²³⁴ Kissinger's back channel is discussed by Gerard C. Smith (1996) pp.157-160

²³⁵ Gregory Varhall (1995) p27

Gerard Smith, in his memoirs, writes about the issues he had with Kissinger's work. Smith argues that Kissinger, instead of creating a great breakthrough in May 1971 using negotiations undertaken on the back channel, had insisted "pushing on an open door" as the Soviets had placed a similar agreement which Kissinger introduced in December 1970, but Nixon and Kissinger had turned it down.²³⁶ Smith goes on to argue that the back channel not only cost time but was actually to the detriment of US interests due to Kissinger not being an expert in arms control. For instance, Kissinger told Dobrynin that Submarine Launched Ballistic Missiles (SLBMs) would not be included in any offensive arms agreement. This was against US government agencies who opposed this idea and which were eventually reversed in 1972 at the price of inclusion with Soviet forces gaining a numeric advantage in the number of SLBMs permitted.²³⁷ Smith sets out that while this did not cause any strategic difficulties for US forces, it did cost the US in a political sense that the strategic balance being largely psychological would come back to cause issues with the later SALT talks.²³⁸ While back channels may cause issues for the front channel authorised individuals they can also have a psychological impact that the authorised individual is no longer as valuable to the process as prior to the existence of the back channel.

The highly controlled authorised individual, ranking from nine to ten on the scale, has both its benefits and draw backs for governments. It allows for close control by government leadership while also given detachment from the talks in case they collapse, consequently saving the government leader from political embarrassment. However, the drawback of the tight control is that it requires an effective control

²³⁶ Gerard C. Smith (1996) p159

²³⁷ Gerard C. Smith (1996) pp.159-160

²³⁸ Gerard C. Smith (1996) p160

system with the ability to give updates to those delegates actually taking part. Taking away delegates' freedom can have negative effects on the authorised individual who may not be using all their abilities due to the levels of control, leaving opportunities unexplored and missed. Despite the obvious drawbacks, as long as governments require extensive control over treaty talks, there will be a place for such controlled authorised individuals.

XIII. Low Profile Authorised Individuals

So far, in exploring the different elements of the authorised individual there has been focus on the characteristics and policy of leading figures within important delegations as authorised individual. Focus will now switch to exploring authorised individuals who are members of delegations, but do not have the high public profile of those discussed above. By understanding who these individuals are, it will help build an understanding regarding their role. Authorised individuals form part of state delegations and, therefore, they come from backgrounds of civil servants, lawyers, diplomats, politicians, and even from specialist fields under discussion. State delegations tend to be increasingly made up of all these individuals. The first USA delegation to the UN that Eleanor Roosevelt was part of consisted of 120 advisers, secretaries, and technical experts.²³⁹ During the 2009 Copenhagen climate talks, the UK sent a 38 member team²⁴⁰ to the conference. Sadly, no breakdown of the individual's professions is available, yet it can be inferred from a press release by the British government²⁴¹ prior to the conference that seven of these individuals were high-level politicians, a further five were press officers, with the remaining 26

²³⁹ James MacGregor Burns & Susan Dunn (2001) p505

²⁴⁰ http://www.libdems.org.uk/news_detail.aspx?pPK=97b1882e-514c-469c-b8a2-002f33e74427&title=UK_delegation%E2%80%99s_Copenhagen_flights_ignores_alternatives_says_Hughes (accessed 15.3.12)

²⁴¹ <http://ukinindia.fco.gov.uk/en/news/?view=PressR&id=21393048> (accessed 15.3.12)

individuals coming from three other professions. The press release also indicates towards the hierarchy and different roles performed by the authorised individuals who made up the delegation by the statement in the press release outlining that:

“All comments by UK Ministers (Ed Miliband, Joan Ruddock, and Prime Minister) will be on-the-record, unless explicitly stated otherwise.

All comments by other members of the delegation, including negotiators and advisors will be off-the-record; they should not be quoted or attributed.”²⁴²

This indication underlines the different elements and strengths of various types of authorised individual that make up a delegation team sent to develop international law, in this case the aim being a binding environmental agreement. The composition of the delegation is created to give them a strategic advantage within the discussions by having enough authorised individuals of sufficient ability to be able to wield a political advantage.

These low profile authorised individuals make up the vast majority of individuals at international discussions. This is simply due to the amount of state delegations usually taking part in international negotiations. At the Copenhagen climate conference in 2009, there were between 3,500²⁴³ and 10,500²⁴⁴ government officials representing different states. Australia took a delegation of 114 individuals to Copenhagen but were heavily criticised in their national press.²⁴⁵ Bryony Worthington a senior labour peer identified the advantages of taking large delegations to international conferences and drafting negotiations:

“Negotiators for small countries will be at an automatic disadvantage with fewer people to cover all the negotiating sessions. It's a recognised strategy to

²⁴² <http://ukinindia.fco.gov.uk/en/news/?view=PressR&id=21393048> (accessed 15.3.12)

²⁴³ United Nations Framework Convention on Climate Change, Fact sheet: Copenhagen – Background information as found at http://unfccc.int/press/fact_sheets/items/4975.php accessed 15.03.12

²⁴⁴ Radoslav S. Dimitrov, Review of Policy Research, Volume 27, Number 6 (2010) p796

²⁴⁵ <http://www.theaustralian.com.au/news/nation/aussie-footprint-1817-tonnes-and-counting/story-e6frg6nf-1225809225797> accessed 15.03.12

win people round by wearing the opposition down through exhaustion. Large delegations can operate like a wrestling tag team. But small delegations just have to stick it out to the early hours when all the important decisions are likely to be made.”²⁴⁶

The larger delegations have the ability to outmanoeuvre those from smaller states.

The side effect of the need to bring ever larger delegations is that states will continue to grow their delegation side in order to seek an advantage, and maximise any advantages at the negotiating table. This is understandable as negotiations can cause states to have to make fundamental changes to comply with international law. A typical move by smaller states is, therefore, to put time limits on discussions stopping the larger states from utilising an advantage with the amount of authorised individuals that they bring to negotiations.

The United Nations General Assembly attempts to put limits on the number of authorised individuals that a state can bring. Under Rule 25 of The Rules of Procedure of the General Assembly of the United Nations a state delegation shall consist of no more than five representatives and five alternate representatives. However, this rule also allows for as many technical and expert advisers, and persons of similar status as may be required by the delegation.²⁴⁷ So, while limiting the number of representatives, states are free to bring as many expert advisers as they want, thus allowing the more powerful states to bring larger delegations to gain an advantage. This exploitation of bigger states to bring more authorised individuals is sadly a continued imbalance of the international system, and international law making. When treaty making can affect states in numerous ways, it will be inevitable that states will seek every available route to secure an advantage. Closing off one route will just push states to find an alternative method to exploit their position. With

²⁴⁶ <http://www.guardian.co.uk/environment/2009/dec/06/copenhagen-climate-summit-negotiation-tips> (accessed 18.03.12)

²⁴⁷ Rule 25, The Rules of Procedure of the General Assembly of the United Nations.

technology making communications ever easier the actual size of a delegation at talks is no longer a limitation, as individuals can have input to authorised individuals from anywhere on the globe.

XIV. Conclusion

An authorised individual within International law is, in its most simple form, a person who is authorised or mandated by an actor to perform a role in forming international legal agreements with other authorised individuals from one or more other actors.

They usually state the shape that international law should take. These individuals are mandated, and usually briefed and prepared by their home governments as to the best outcome that, a particular government wishes the form of discussions, and eventually international law, to take. These authorised individuals usually take part in this type of discussion at international organisations such as the United Nations.

They can also undertake discussions with other authorised individuals on a state-to-state basis, whereby no international organisation hosts the discussions, usually in the formation of bilateral treaties.

Authorised individuals usually have strict mandates to which they are expected to conform, and certain lines that they must not cross in discussions with other authorised individuals. However, this does not mean that they are unable to make certain concessions when they are in discussions with other authorised individuals, but it means that these concessions would have already been pre-decided by the authorised individual's home government in advance, or the authorised individual would be informed to make concessions during a briefing during the discussion process.

Authorised individuals make up the vast majority of those, taking part in discussions by states as to the development of international law through treaty agreements. This is simply through the number of governments and representatives that are needed for an international agreement by consensus to be reached by the international community, therefore, representatives from states are sent to undertake these discussions as to the shape of the agreement. The importance of the authorised individual with full powers is summed up by Aust when he states:

“Admittedly, it [Article 7] is not the most thrilling aspect of the law of treaties, but failure to follow the complex, but clear, rules on full powers can lead to much needless extra work, vexation and, indeed, even embarrassment.”²⁴⁸

This statement can equally apply to many other aspects of the authorised individual, if the state gets it wrong with selection, control, or they pick an ineffective individual. The work done may reflect negatively on the controlling actor of the authorised individual. Consequently, the traditional concept that international law is state centric is maintained as these authorised individuals are, generally, representatives of the traditional actor, the state.

The authorised individual has a strict mandate from their home government with specific aims and goals that they are attempting to achieve. Any changes in the position of the authorised individual have to be given authorisation from that government; therefore, a close relationship must exist between the individual and the government, leaving little room for disagreement between the two. The authorised individual is not strictly defined by a single position, but should be seen on a sliding scale. At the far end are tightly controlled individuals, such as those seen in the SALT negotiations, where governments require tight control over the individuals, as the result of the talks can have such an impact on domestic policy. On the other end

²⁴⁸ Antony Aust (2007) p75

of the scale is a loosely controlled authorised individual such as Eleanor Roosevelt at times, whereby the government control gave much more freedom in what instructions had to be followed. Overall control for actions and outcomes still remains with the government or controlling actor, and their desired conclusions.

The roots and philosophical background of the authorised individual can be seen within the development of diplomatic theory constantly evolving to reflect the international system, alongside the theory of representation and the legal basis for international actors. The diplomatic theory provides the background to how the system of authorised individuals has been constructed. Diplomatic theory is the basis for which the authorised individual has grown out of the development of the modern system of diplomacy in which international relations are conducted. Coupled with the theory of representation in which the authorised individual is a mixture of the substantive and mechanism theories of representation. These theories provide a theoretical framework which gives the authorised individual legitimacy for the work they undertake on behalf of the state and also gives some explanation to how they work in relation to instructions given by governments, whether it be a mechanical or trustee relationship.

The legal framework of the authorised individual comes from Article 7 of the Vienna Convention on the Law of Treaties. This article gives the authorised individual the ability to act in the name of the state for the creation of new international treaties. Article 38 of the Statute of the ICJ gives legal strength to the work that they undertake in the creation of treaties, however, still primarily important for any international law document is the backing of states. If states do not like, or disagree with part of international law they will not support it and, therefore, no matter what a court or any other international body does they will not conform to the measure.

The appointment of authorised individual is a process that, while similar, is unique to each state, such as Eleanor Roosevelt's appointment had to be ratified by the Senate, whereas Maxwell-Fyfe was appointed by the Prime Minister. However, the common process that gives them the authority to act is that they are appointed by the state to act on the states' behalf. The selection of low profile individuals, which make up the bulk of a delegation, is far less significant with them usually being requested to perform the role as part of their job within the civil service or government employment.

Control over authorised individuals varies and depends on where any given individual is placed on the sliding scale, whether highly or loosely controlled. The more highly controlled the individual, the more control that the government has over their actions during discussions. The very highly controlled authorised individuals, as seen in the SALT talks, had several briefings a day and could always contact high level government officials by phone to seek advice and query ideas. The less controlled the authorised individual, the fewer contact events and briefings that they would have with government officials. Authorised individuals may move up and down the scale depending on what stage of discussions they are involved in. The authorised individual may also move into a completely different category, therefore, they might be given so much freedom from their government that after a period of time they move on to become an independent authorised individual.

With international law creation, even in its most traditional conception, the law making process only uses states as a process of convenience; instead the individual in the guise of the state is the most important element of the international law creation process. In accepting this, it opens up the possibility of the individual with law creation. Within the next chapter the authorised individual will be taken a step

further with consideration of the independent authorised individual. The independent authorised individual is an individual appointed for by a state or government but has far greater independence than anything explored within this chapter on the authorised individual. Independent authorised individuals include Charles Malik, Rene Cassin and John Ruggie.

Chapter 3:- The Independent Authorised Individual

I. Introduction

The authorised individual chapter sets out the theoretical concept for individuals under control from their state or another authorised decision making actor. Even the freest, authorised individual is still controlled and takes instructions from their controlling actor in some manner. This leaves a theoretical gap between the authorised individual and the unauthorised individual, for those individuals more loosely controlled than the authorised individual category allows for, but not so far as the unauthorised individuals. This gap is filled by the independent authorised individual. These individuals tend to base their mandate to act on an authorised decision maker's authority but are given broad aims to accomplish within

international law creation. Often, these individuals may perform their roles as independent experts, or be representatives given a free hand to negotiate outcomes. Within this category are individuals such as international judges¹ or members of supervisory oversight bodies such as treaty body experts², special procedure mandate holders³ and some representatives to international talks⁴.

The first section will consider both individuals and organisations where this type of individual can be found undertaking a law creation role. These individuals vary between those given only a little amount of independence from their home state to those given vast amounts of freedom where the home state of the individual has no influence over the outcomes of their work. Charles Malik will be used as an example of an individual at the top of the scale and closest to being an authorised individual. His time at the UN and the independence given to him by Lebanon, as their representative in the drafting of the UDHR and the subsequent UN Covenants on human rights will be explored.

¹ Please see Article 2 of the Statute of the International Court of Justice:

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Or Article 21(2) of the European Convention on Human Rights:

The judges shall sit on the Court in their individual capacity

² Please see Article 17 (1) of the UN Convention against Torture:

There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

Or Article 29 (3) of the Un International Covenant on Civil and Political Rights

The members of the Committee shall be elected and shall serve in their personal capacity.

³ Please see UN resolution 5/2 Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council, Annex Article 3 (a) General Principles of Conduct

Act in an independent capacity, and exercise their functions in accordance with their mandate, through a professional, impartial assessment of facts based on internationally recognized human rights standards, and free from any kind of extraneous influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reason whatsoever, the notion of independence being linked to the status of mandate-holders, and to their freedom to assess the human rights questions that they are called upon to examine under their mandate;

⁴ For example delegates to the UN, such as Rene Cassin, and Charles Malik

Rene Cassin provides an excellent example of someone who had moved around within this categorisation on the scale⁵ during his career. Cassin provides a unique example of an individual who served at three different international organisations and, therefore, provides an excellent comparison of different levels of independence between institutions. This encompasses his time as part of the French delegation to the League of Nations representing the Veterans movement, to his role within the post-war human rights movement at the UN, and, finally, as one of the first judges of the European Court of Human Rights.

One area where the Independent authorised individual can be found en masse is in the area of international courts and tribunals. Within these international bodies these individuals take up the role of judges and independent experts within the process of international law. In considering these individuals to have a significant role within law creation, the notion of international judges as law making accepts the reality on the ground which some scholarly and theoretical narratives reject. The European Court of Human Rights judges and UN human rights treaty body experts will provide excellent examples of independent authorised individuals which are at the lower end of the scale and are the most independent individuals considered within this chapter. UN special procedures mandate holders provide a rich area of independent authorised individuals, where most are appointed by the collective will of states and mandated to work independently. Their input from the development of norms and UN guidelines will be considered to examine their law making competences.

⁵ The scale refers to the scale of freedom, i.e. it will be shown within Rene Cassin's career that he become more independent of control from the French government over the course of his career.

II. The Independent Authorised Individual

Having considered the authorised individual in its most classical form, a closely related but separate category of the authorised individual must also be considered with that of the independent authorised individual. An independent authorised individual is similar to that of the authorised individual, in that they have been mandated by a government or another authorised decision maker to perform a role within international law. The independent authorised individuals are different in three major respects. First, they are only given broad aims by their authorised decision maker, quite regularly a home government. Second, they have far more freedom in acting on broad aims in the creation of international law. Thirdly, while in the authorised individual category, these independent authorised individuals possess far more freedom than even the most free authorised individual.

There are some clear advantages to the independent authorised individual both for the state and for the international law making system, specifically in the drafting of international law and treaties. The primary advantage to the law creation process with the independent authorised individual is that they receive very little instruction from their government. They may be initially instructed about what aims the state has, but, generally, they have much more freedom to use their expertise, experience and instincts to get a good agreement for their state. This has benefits for the group as it allows for a state to make concessions and have far more room to manoeuvre around those politically and morally delicate issues. These concessions can help to move discussions forward and, therefore, are useful when negotiating the wording of new treaties as it can add momentum. This freedom means that the home government of the independent authorised individual must place a lot of trust and

faith with their representative, not only must they be politically aware, but also legally aware, of the implications of the treaty they are working upon.

The success or failure of the independent authorised individual is subject to the interpretation of the finished document against the original aims given by the state to the individual. Not only is a high level of trust needed by the state in the individual to deliver those aims, but also that it delivers against those original aims set out by the authorised decision maker. A strong two way trust is fundamental to a successful independent authorised individual. The independent authorised individual's own credibility is at stake by taking on this role as a perceived failure on his or her part may create discontent with how they performed, and, therefore, may exclude them from being asked to perform this role again in future.

The international judiciary is another area in which the independent authorised individual can be observed in law creation. In this role the independent authorised individual is nominated and elected by states to take on a role in which to judge their conduct against international law. Within these roles the independent authorised individual is highly independent and usually serving within an expert or personal capacity.

Due to the nature of the work these individuals are asked to perform in this capacity and the requirement to be significantly independent from state control ensures that these individuals acting in this capacity are usually uncommon. Generally, when important issues are being discussed states feel a need to control and influence from the centre as fully as possible. This tends to mean that this type of individual is, therefore, part of a large delegation and has a specific specialised role to perform, i.e. they may be an international law expert trying to draft the terms of the treaty. This

would require highly specialised knowledge with which the state may only hold general aims and ambitions to protect themselves from unnecessary burdens of conforming to the future document. Having less control on certain, perceived less important parts of treaties, i.e. the preamble or implementation, gives states the ability to focus resources and control in areas which they may understand as being central to defending interest or pushing for greater restrictions. The effect on the independent authorised individual is that they can be left to get on with the specific area and allows for better resources allocation at treaty and international negotiation events. These individuals are often difficult to find, and the role may be given to civil servants or low ranking diplomats. Classic examples of independent authorised individual within the drafting of international law can be demonstrated in Charles Malik and Rene Cassin, two contemporaries of the authorised individual Eleanor Roosevelt.

III. Charles Malik

“Indeed, few accounts of the development of the Universal Declaration of Human Rights (UDHR) have ignored Malik’s decisive influence, whether in shaping the specific language of any number of articles, or in shepherding the Declaration through the polarized Cold War bureaucracy of the United Nations.”⁶

Charles Malik, was the representative from Lebanon during the drafting of the UDHR and the UN Covenants on Human Rights⁷ staying at the UN until 1960, when he returned to an academic career. Malik’s independence, his substantive work, and his skill at managing procedures will be considered. Malik’s independence is recognised at numerous points by his colleague at the UN, John Peters Humphrey⁸. A biography

⁶ Glenn Mitoma, “Charles H. Malik and Human Rights: notes on a Biography”, *Biography*, Volume 33, Number 1, Winter 2010, p222

⁷ Mary Ann Glendon, *The Forum and the Tower: How scholars and Politicians have imagined the world, from Plato to Eleanor Roosevelt*, (Oxford University Press: Oxford: 2011) p202

⁸ John Peters Humphrey will be discussed at great length as an unauthorised individual within chapter 4

of Malik writes: “largely an independent operator in the HRC [Human Rights Commission], as the small and nascent Lebanese government saw fit to give him very limited instructions on human rights.”⁹ Humphrey was a prolific dairy writer, giving a unique insight into events at which Malik attended. Humphrey wrote of Malik:

“Malik believed that his chosen philosophy provided the answers to most, if not all, questions, and his thinking was apt to carry him to rigid conclusions. But he was one of the most independent people ever to sit on the Commission and he was dedicated to human rights.”¹⁰

“Some were more independent than their colleagues and some operated without precise or any instructions from their governments; and these were not the least useful representatives. One such representative was Charles Malik of Lebanon.”¹¹

While his independence was noted by Humphrey and he even considered it a useful trait to find in a representative as they would be willing to put forward ideas from the secretariat, Malik’s independence clearly had a negative side in a note scribbled to himself one evening:

“I went to the Council room this morning in the car alone. I sat there at the Council table alone. I almost sat at lunch alone, but for the kindness of the Yugoslav delegate who asked me to sit with him. Last evening I was all alone back at the hotel. When I returned this afternoon I returned in the car alone. I am now all alone eating at the restaurant of the hotel. A feeling of void and blankness overtakes me. I must bear my loneliness.”¹²

Malik’s loneliness is significant in two ways. First, it indicates that he was acting on his own at the United Nations and did not have significant support from a delegation. In accepting that this note is taken from the first few weeks of his time at the UN it demonstrates the lack of support that he faced and yet Glendon notes that this

⁹ Glenn Mitoma (2010) p225

¹⁰ John P. Humphrey, *Human Rights & the United Nations: a Great adventure*, (Transnational Publishers INC, New York, 1984), p23

¹¹ John P. Humphrey(1984) pp.17-18

¹² Mary Ann Glendon, *The Forum and the Tower: How scholars and Politicians have imagined the world, from Plato to Eleanor Roosevelt*, (Oxford University Press: Oxford: 2011), p212

loneliness was a source of strength to Malik and helped his reputation for independence.¹³ Second, it demonstrates that he did not have extensive contact with the Lebanese government. If he had, surely this link to his state and culture would have made him feel less alone? It would have given him someone to talk to, which surely would have changed his feeling of isolation.

Having established Malik's independence from the Lebanese government, his substantive work within international law creation will now be considered. Malik's influence in the scope of the UDHR is especially apparent in Article 16¹⁴ when his neo-thomist philosophy is seen within the part of the article: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."¹⁵ Malik, by profession, was a Philosopher-cum-Diplomat, whose own conceptualisation of human rights was neo-thomist. Curle¹⁶ and Morsink¹⁷ argue, Malik was the individual responsible for these concepts being seen within the UDHR. Perhaps the Lebanese government chose Malik as their representative due to his expertise within philosophy and, therefore, gave no instructions to pursue the document in any other way to what he sought fit. Alongside Article 16, Malik attempted to use the independence in other areas of the document, for example in discussions for Article 1:

¹³ Mary Ann Glendon (2011) pp.212-3

¹⁴ Article 16 of the Universal Declaration of Human Rights

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

¹⁵ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, (University of Pennsylvania Press: Philadelphia: 1999) p30

¹⁶ Clinton Timothy Curle, *Humanité: John Humphrey's Alternative Account of Human Rights*, (University of Toronto Press: Toronto: 2007) p36 & p101

¹⁷ Johannes Morsink (1999) p30

“...it was decided that the first sentence of article would read: ‘all human beings are born equal in dignity and rights’. The committee also decided that the words ‘by nature’ would be eliminated from the sentence: ‘they are endowed by nature with reason and conscience’. This represents a defeat for Malik to whom all these Thomist concepts in the draft can be traced. The question, however, is not finally settled; for following the vote there was a good deal of discussion regarding translations, etc., of this phrase; and an attempt will be made to introduce the phrase ‘by their nature’. That, of course, is precisely what Malik meant by the expression ‘by nature’.”¹⁸

The state does not appear to be considered by these neo-thomist references which give two possible conclusions, the first is that they gave Malik independence to work as he felt best. The second was the support of neo-thomist conception of human rights and Malik, being the philosopher, was allowed to use his judgement to incorporate these views in the UDHR.

Malik’s contribution also extended to other articles, notably in being the primary sponsor for Article 28¹⁹ which he willingly accepted and had, to a certain extent, already been expressed in the previously adopted Preamble.²⁰ Article 28 caused further conflict with Article 22 in which Malik felt that special reference to the economic, social and cultural rights should not be picked out as this would show a level of favouritism towards one type of right over another.²¹ This created a bias in favour of economic, social and cultural rights.²² Malik’s final major influence in the substance of the UDHR was his support for Article 30.²³ Perhaps the most important influence Malik had was the contribution to give the UDHR some standing in

¹⁸ A.J. Hobbins (ed), *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights Volume 1*, (McGill University Libraries, Montreal, 1994) p58-59 (October 11th 1948)

¹⁹ Morsink *Inherent Human Rights* pp.214-215

²⁰ UN Document SR.67/5 as cited in Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration*, (University of Pennsylvania Press: Philadelphia:2009) p212

²¹ UN Document SR.67/5 as cited in Johannes Morsink (2009) p212

²² UN Document SR.72/5 as cited in Johannes Morsink (2009) p212

²³ Johannes Morsink (1999) p273

international law by positioning the declaration as an amendment to the UN Charter.²⁴

Malik's independence was a useful link for others to make a contribution to the document, especially when they did not have a direct right to contribute. The UN Secretariat and John Peters Humphrey would often supply information and points for debate into the discussion for which they had no official capacity to provide, for example Humphrey writes in his diary:

"I had lunch with Malik chez Anna and discussed the speech (most of which is being prepared in the Division) that he will deliver during the debate. He was expansive and elated; but the speech we have prepared for him is anything if not sober."²⁵

Because Malik was not being directly instructed by his government he could take on information from others sources that would not usually be able to give input into meetings. Malik was not alone with the ability to receive ideas from the secretariat, writing in his autobiography Humphrey writes:

"The Secretariat has always worked very closely with him (Malik) and continued to do so. Representing a small country, he did not have rigid instructions and usually welcomed a good idea. When I or someone else in the Division had one, I often took it to him, and more often than not he picked it up."²⁶

Malik was not a traditional diplomat when he entered the UN; he was a philosopher and teacher by trade. This background is not one grounded in taking instructions from governments; his independence seems to stem from this usual background, with the Lebanese government more or less telling him to do his best but refraining from anything that might damage the state.

²⁴ Glenn Mitoma (2010) p225

²⁵ A.J. Hobbins (ed), *On the edge of greatness: The Diaries of John Humphrey First Director of the United Nations Division of Human Rights Volume 1*, (McGill University Libraries: Montreal: 1994) p90

²⁶ John P. Humphrey (1984) p141

Malik was a bridge between different cultures during his time at the UN, having grown up in Lebanon as a Greek Orthodox Arab, in a small village where his father was the local doctor. The Lebanon of the day was roughly equally divided between Christians and Moslems with a unique blend of Islamic, Christian, Arabic, and French cultures.²⁷ This background allowed him to understand different ideas and cultural concepts which would allow him to charm and bring fellow delegates around to his perspective. Fluency in Arabic, French, German and English²⁸ were an important part of his trade as a diplomat, he could, therefore, not only bridge nations with cultural similarities and knowledge but also without the need for interpretation. Importantly, these skills gave him an advantage in mastering the process of UN procedural bureaucracy within the various committees and assemblies. This mastery of the process is perhaps more important than Malik's direct contribution to the articles. Malik was appointed Rapporteur for the Human Rights Commission; within this role he became responsible for preparing official reports on the group's work and its conclusions.²⁹ Within this role, Malik would have an important role in controlling the process of the Commissions by having an important administrative role in how reports were presented and having input into the conclusions. Malik's chairmanship of the influential General Assembly's Third Committee, was perhaps more strategically³⁰ important than his other roles within the successful completion of the UDHR. The importance of the Third Committee was that it securitised the draft document with a fine comb.³¹ In chairing the Third Committee he managed to control an unruly body and produce a reasonably well drafted text.³² Malik's skill within the

²⁷ Mary Ann Glendon (2011) p209

²⁸ Mary Ann Glendon (2011) p215

²⁹ Mary Ann Glendon (2011) p202

³⁰ William Korey, *NGOs and the Universal Declaration of Human Rights*, (Palgrave: Basingstoke: 2001) p43

³¹ Johannes Morsink (1999) p30

³² A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford University Press: Oxford:2004) p362

committee processing and controlling the committee and ensured that process was made by holding members to time limits with the use of a stopwatch³³ and mercilessly limiting speeches to only three minutes.³⁴ He succeeded in fighting off the idea of work starting on a whole new draft of the declaration using procedural rules effectively. Brian Simpson summarises:

“Without Malik it is difficult to believe that a coherent document would ever have been produced.”³⁵

Malik’s origins became more important as he looked to marshal support and use UN procedure to great effect for the UDHR in the Third Committee. He struggled to point out to fellow delegates the places in which the declaration took influence from their country, region or culture.³⁶ With time his loneliness started to recede as he became a true diplomat inviting colleagues and others for lunch and dinner, building personal relationships which could be used when it mattered later on.³⁷ Malik was the independent authorised individual being able to explore personal ideas and imprint philosophy onto the UDHR, much to the annoyance of some colleagues who preferred a much more pragmatic approach.³⁸

Just as with the authorised individual the independent authorised individual, can be seen on a scale of independence, with some being relatively more controlled than others. Malik is at the upper end of such a scale for the independent authorised individual, if the Lebanese government had felt he had become too independent they could revoke his authorisation at any moment. Malik was given far more freedom than any authorised individual can ever have, being able to imprint his own ideas,

³³ A.W. Brian Simpson (2004) p362

³⁴ A.W. Brian Simpson (2004) p449

³⁵ A.W. Brian Simpson (2004) p449

³⁶ Mary Ann Glendon (2011) p215

³⁷ Mary Ann Glendon (2011) p213

³⁸ Mary Ann Glendon (2011) pp.205-206

and take on board speeches and memos from the UN secretariat at his own choosing. In summary, Malik was an independent authorised individual but one that was still aware that he was the representative of a state and understanding this responsibility, but also he felt that the state had placed trust in his judgement to create the UDHR into the best, feasible document.

IV. Rene Cassin

Rene Cassin was one of the most experienced delegates to international bodies of all time, having vast experience of not only international organisations but also having served on a multitude of international bodies such as the League of Nations, the United Nations, and as a judge at the European Court of Human Rights. Cassin provides an ideal example of how the process and evolution of the independent authorised individual can develop throughout a career, and how international law can be evolved at various points in time by the same individual. When working within these international organisations he had a hand in the development of the UDHR, the two UN covenants on Human Rights, and played a fundamental role within the creation of the rules of procedure for the European Court of Human Rights (ECtHR).

Much debate between scholars such as Winter and Prost,³⁹ Morsink,⁴⁰ Glendon,⁴¹ Hobbins,⁴² and Curle⁴³ surrounds who wrote the UDHR, and at this junction it may be helpful to wade into this argument. Morsink supports the Humphrey claim to be the primary drafter, and shunning Cassin's claim with the statement that "Cassin did

³⁹ Jay Winter & Antoine Prost (2013)

⁴⁰ Johannes Morsink (1999)

⁴¹ Mary Ann Glendon, *A world Made new – Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House: New York: 2001) & Mary Ann Glendon, *The Forum and the Tower: How scholars and Politicians have imagined the world, from Plato to Eleanor Roosevelt*, (Oxford University Press: Oxford: 2011)

⁴² A.J. Hobbins, "Rene Cassin and the daughter of time: the first draft of the Universal Declaration of Human Rights", *Fontanus*, Vol. 2, 1989, pp7-26

⁴³ Clinton Timothy Curle (2007)

not really enter the room until after the baby was born”.⁴⁴ However, Winter and Prost support Cassin’s claim, but also argue that “These paternity tests must stop”,⁴⁵ the primary evidence supports the conclusion that the original collections of rights was indeed Humphrey’s.⁴⁶ The subsequent work done by many other members of the Human Rights Commission as the draft document changed and evolved into the document that is recognisable as the UDHR. Cassin was indeed one of these members and while he was not present at the birth, if the Morsink metaphor is extended, he certainly schooled and shaped the document into what we now recognise as the UDHR. The Nobel Peace Prize was awarded to Cassin for his contribution to the Universal Declaration⁴⁷ but also a lifetime in serving not only human rights, but also veterans, and others disfigured by war⁴⁸ he was more than a worthy winner when all of contributions towards these causes are considered. When considering Cassin’s credentials as an independent authorised individual he is a classic individual that moves around on the scale depending on his career stage and what is being discussed. It is clear from early in his career as a teacher and diplomat that he was a free thinker and ready to voice his own viewpoint, irrespective of any briefings or instructions. This section will explore how Cassin evolved to become more independent within his work at different international organisations, and how this independence was important to the process of international law creation. His work at international organisations will be broken into three different phases, Cassin before and during his time at the League of Nations, Cassin at the United Nations, and finally during his time at the ECtHR.

⁴⁴ Johannes Morsink (1999) p29

⁴⁵ Jay Winter & Antoine Prost (2013) p246 n85

⁴⁶ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, (University of Pennsylvania Press: Philadelphia: 1999) & A.J. Hobbins, “Rene Cassin and the daughter of time: the first draft of the Universal Declaration of Human Rights”, *Fontanus*, Vol. 2, 1989, pp7-26. Also see UN Doc. E/CN.3/AC.1/3

⁴⁷ <http://www.udhr.org/history/Biographies/biorc.htm> accessed 26.07.13

⁴⁸ Jay Winter & Antoine Prost (2013) p263

IV.1. League of Nations

Cassin's education in international law creation started when he entered the League of Nations in 1924 as part of the French delegation. Being a relative minor member of the delegation, his place at the table was as the official representative of the French Veteran's movement.⁴⁹ Each year until 1938, when the League was effectively ended as a workable international organisation he would travel to Geneva to work on League business. Cassin's place within the French delegation was, specifically, to represent French veterans' opinion within the League. He was in a different position to his colleagues who spoke in the name of France. Being a minor member of the delegation gave him freedom to explore ideas, but he was aware that he did not have the full support of the French state.⁵⁰ This gave him great freedom to explore veterans' issues in ways that the French government would not necessarily have asked him to adopt, especially during his involvement with the international disarmament conference.⁵¹ The disadvantage being that he did not have the legitimacy to explore ideas outside of the veterans' cause. Cassin was learning the process of international law creation, seeing how international organisations functioned and how delegates interacted with each other.

While at the League, Cassin created a direct relationship between his work at the League and the veterans groups⁵², doing this created an unusual relationship for the time between members of civil society and an international organisation. This direct relationship between international organisation and the civil society is roughly similar to that seen with UN Special Procedural Mandate Holders and domestic stakeholders.

⁴⁹ Jay Winter & Antoine Prost (2013) p51

⁵⁰ Jay Winter & Antoine Prost (2013) p72

⁵¹ Jay Winter & Antoine Prost (2013) pp.76-77

⁵² Jay Winter & Antoine Prost (2013) p65

While at the League of Nations, Cassin was under much more control during this phase of his career, this level of control from the French government was such that he was an authorised individual, albeit an authorised individual with plenty of freedom, but still an authorised individual. He gained a valuable education at the League about the workings and make up of international organisation and no area was more important than the area of absolute state sovereignty:

“Working in the League, Cassin saw clearly why the theory of absolute state sovereignty was in need of fundamental revision. In the 1920s, in the glow of the Locarno agreements, there seemed to be a commonality of interest among sovereign states in finding alternatives to war as a means of settling conflicts between states. But after the economic crisis of 1929, the consensus – always precarious, though palpable enough in the Kellogg-Briand Pact of 1928 – evaporated. The Japanese invasion of Manchuria in 1931 opened a decade of disasters for the League of Nations, a sorry spectacle Cassin saw at first hand. While he and his colleagues continued to work on disarmament and other matters of common concern, the League crumbled, and then collapsed after the Munich accords of 1938.”⁵³

From the failure of the League, Cassin took a valuable lesson regarding the absolute concept of state sovereignty, seeing that the state should no longer be the sole arbiters of the rights of its own citizens, instead seeing rights as the common property of humanity.⁵⁴ The implementation of these lessons would become the primary focus during the next phase of his career.

IV.2. United Nations

Present at all sessions of the Human Rights Commission and the two meetings of the drafting sub-commission during the UDHR drafting process, Cassin would later go on to become vice-chair of the Commission in 1949, and chair in 1955 and

⁵³ Jay Winter & Antoine Prost (2013) p52

⁵⁴ Jay Winter, *Dreams of Peace and Freedom: Utopian Moments in the 20th Century*, (Yale University Press: New Haven & London: 2006) p116

leaving the HRC in 1971.⁵⁵ The Cassin who became the French delegate to the United Nations Human Rights Commission was much changed from when he had been a representative at the League of Nations. Cassin's work on the UDHR only truly began when he was asked to re-draft the Humphrey text⁵⁶ into a more logical arrangement. Morsink observes that the differences between the Humphrey and Cassin drafts⁵⁷ were minor and that they were roughly the same, apart from three new articles of Cassin's own invention.⁵⁸ The three new Cassin articles⁵⁹ included Article 29 in which Cassin attempted to introduce a super-state police force for the protection of human rights with the requirement for "the protection of human rights requires a public force. Such force shall be instituted for the service of all and not for the private use of those to whom it is entrusted."⁶⁰ Simpson calls this article an example of Cassin's "Loquacious style and bizarre thinking"⁶¹ and indeed it is an idea which was certainly ahead of its time. When considered in light of Cassin's desire to limit the sovereignty of states it begins to make more sense as a rather crude, almost Orwellian method of achieving this outcome. Article 40 introduced for those systems of social security: "Mothers and children have the right to special attention, care and resources".⁶² Cassin's final new article was Article 43 which introduced the moral rights of the author into the draft document.⁶³ Article 38 was not a wholly new article but did give a clear protection to Trade Union rights, which had been generally covered in the Humphrey draft but were now given greater clarity in

⁵⁵ Johannes Morsink (1999) p29

⁵⁶ This is sometimes known as the secretariat draft, see UN Doc. E/CN.3/AC.1/3

⁵⁷ The Cassin draft was delivered within three different documents E/CN.4/AC.1/W.1 and E/CN.4/AC.1/W.1/Rev.1 & E/CN.4/AC.1/w.2/Rev.2 and can be read as a whole in UN Document E/CN.4.21/Annex D

⁵⁸ Johannes Morsink (1999) pp.8-9

⁵⁹ All Article numbers made reference to, within this paragraph are those used within the Cassin Draft. UN Document E/CN.4.21/Annex D

⁶⁰ Article 29 in UN Document E/CN.4.21/Annex D

⁶¹ A.W. Brian Simpson (2004) p421

⁶² A.W. Brian Simpson (2004) p421

⁶³ A.W. Brian Simpson (2004) p421

the Cassin draft.⁶⁴ The work undertaken by Cassin in re-drafting and organising the UDHR giving it a sensible structure, reframing and merging similar articles helped give the Human Rights Commission and later Third Committee a good structured and logical document from which future discussions and changes were made. These technical skills gave the document a workable form and style in “an exemplary product of continental European methods of legislative drafting”.⁶⁵ Comparable to Malik’s procedural role, Cassin’s work should not be overlooked in the process of the UDHR creation.

The most disappointing element of his time at the UN was his attempt to place an effective limitation of the power of state sovereignty and learn from the lessons of the League’s failure.⁶⁶ His support for the individual right of petition during the drafting of the two UN Covenants caused conflict with the French government. While Cassin was deeply in favour of the right of petition, the French Foreign office opposed the measure believing it could be used as a tool by those in French colonies to protest over alleged human rights abuses. The opposition from the French government was not sufficient to prevent Cassin tabling a draft covenant including the right of petition at the Human Rights Commission in 1949, at odds with his government’s instructions.⁶⁷ With the freedom that Cassin had been given, he pushed forward an idea that personally meant a lot to him but with which his government disagreed. This pushed Cassin down the scale as a highly independent authorised individual. This disagreement between delegate and government, in the authorised individual would result in the delegate being sacked, however, due to Cassin’s independence

⁶⁴ A.W. Brian Simpson (2004) p421

⁶⁵ Mary Ann Glendon (2011) p210

⁶⁶ Jay Winter, *Dreams of Peace and Freedom: Utopian Moments in the 20th Century*, (Yale University Press: New Haven & London: 2006) p108

⁶⁷ Jay Winter & Antoine Prost (2013) pp.252-253

and expertise he had this freedom to pursue ideas which he personally felt benefited a new human rights document.

Despite the on-going conflict, he was re-nominated as the French delegate to the Human Rights Commission for a further three years in 1950. The French government issued instructions to the delegation to block the right of petition as this was not in their interest.⁶⁸ Cassin's freedom was, therefore, not total at times. The French government instructed him back towards the authorised individual end of the scale, as John Humphrey notes in his diary from 25th October 1950:

“Cassin is full of ideas, talk and enthusiasm. But this position must be maddening because his instructions do not permit him to do the things which he believes should be done. A less loyal Frenchman would take fewer pains to hide the fact that the position of France in this business of human rights is as reactionary as the worst of the other governments.”⁶⁹

Cassin's freedom was not unlimited; the French government always had a sufficient level of control that ensured Cassin would follow particular instructions when required. This pull towards government control ensured that he did not enter into becoming an unauthorised individual, going against his own government's instructions in the pursuit of his own held beliefs and ideas.

Cassin was often seen as the individual on the various committees who could find compromise when it could be sought, often finding the right words to secure the support and approval of the Commission.⁷⁰ This ability, developed from experience of working at international organisations, made him vital to the process of ensuring the document did not stumble. In a similar fashion to substantive content, this role is

⁶⁸ Jay Winter & Antoine Prost (2013) p253

⁶⁹ A.J. Hobbins (ed), *On the edge of greatness: The Diaries of John Humphrey First Director of the United Nations Division of Human Rights Volume 2*, (McGill University Libraries: Montreal: 1996) p124

⁷⁰ Jay Winter & Antoine Prost (2013) p245

vital within international law creation, as a document that loses momentum can easily fail.

Cassin's time at the UN was similar to Malik in that he was an instructed delegate with substantial freedom in achieving those broad instructions from the French government. Prost and Winter make the claim that Cassin served as an independent member of the Human Rights Commission up until the summer of 1947. ECOSOC changed the rules and members then served as state representatives.⁷¹ This would be an ideal time to correct this error, which appears to be a result of a misunderstanding, from an article by Loveday⁷² who states:

“Early last summer the Economic and Social Council of the United Nations took a decision which in the course of years is likely to have a very considerable and, in my opinion, a very damaging effect on its work and its efficiency. After a lengthy discussion it resolved by a majority vote that all its advisory commissions should be composed of government representatives — of persons, therefore, acting on government instructions rather than of persons acting in their individual capacity.”⁷³

The article, published in June 1947, makes references to the previous summer, i.e. 1946; therefore, with the Human Rights Commission not holding its first session until January 1947⁷⁴ Cassin would have already been a government delegate and never served in a personal capacity on the Human Rights Commission. This mix up may have been a result of Cassin having served as vice-chair⁷⁵ on the nuclear commission⁷⁶ for the making of recommendations concerning the structure and

⁷¹ Jay Winter & Antoine Prost (2013) p247

⁷² A. Loveday, “An Unfortunate Decision”, International Organization, June 1947, Issue 02, p247

⁷³ Jay Winter & Antoine Prost (2013) p279

⁷⁴ Mary Ann Glendon (2001) p35

⁷⁵ Johannes Morsink (1999) p29

⁷⁶ The UN Nuclear Commission was set up as at the first session of the UN Economic and Social Council. The Committees role was to propose terms of reference, term limits, size of membership and member status for the new Commission on Human Rights. For more on this committee please see http://www.un.org/Depts/dhl/udhr/meetings_1946_nuclear.shtml

functions of the permanent commission of human rights,⁷⁷ in which members served in their personal capacity. During Cassin's time on the nuclear commission in preparation for the full Human Rights Commission he was very much towards the lower end of the independent authorised individual scale, he even made the recommendation that individuals on the Human Rights Commission served as independent experts appointed by states, this was not to be the case.⁷⁸

Cassin's independence was also double edged, much like Malik, while being a delegate on behalf of the French government he felt isolated and without support. In a letter to Parodi he stated "he was working virtually alone, and the French foreign office seemed unwilling to send another delegate to ease his burden."⁷⁹ This lack of control certainly granted him the freedom to undertake actions which he personally agreed with. This gave him the opportunity to attempt to implement some of the lessons he had learnt from his time at the League of Nations, especially the limitation of state sovereignty.

IV.3. UN Human Rights Commission and the ECtHR

Cassin's career as an independent authorised individual took another step to becoming more independent. Still maintaining a position within the UN Human Rights Commission until 1971, he also served as a judge on the newly formed European Court of Human Rights becoming one of the founding judges from 1959 to 1968. During his time as first vice president of the court from 1959 to 1965 and later as president he was primarily involved in setting up the courts rules, procedures and competence playing a vital role within their creation.⁸⁰ Cassin was, at this time, the

⁷⁷ Mary Ann Glendon (2001) p31

⁷⁸ Jay Winter & Antoine Prost (2013) p349

⁷⁹ A. Loveday (1947) p247

⁸⁰ Jay Winter & Antoine Prost (2013) p255

most independent that an independent authorised individual can be, he was now serving in a position within his individual capacity at the nomination of the French State. Cassin's time as a judge was not marked with a profound judgement on the nature of human rights, his contribution on the three cases he heard, Lawless v Ireland,⁸¹ de Becker v Belgium,⁸² and "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v Belgium⁸³ were rather minor. Just by hearing the cases and giving judgements he was acting in a wholly new fashion helping set the future course of the Court. By hearing these cases he undertook an active role in limiting the absolute concept of state sovereignty, giving individuals an international body to take complaints to, with the power to make awards against the state. The effect of this was to go against the last 400 years of international legal practice, since the Treaty of Westphalia, and should not be underestimated as to its significance. His time at the ECtHR is summarised in:

"His achievements on the Strasbourg Court, though, was substantial. As in the case of the Universal Declaration, Cassin had helped establish the foundations of a new kind of international law, one in which the individual had standing to compel states to account for their actions."⁸⁴

In effect Cassin had at least managed to implement the lessons that he had learnt from the League's failings in the 1930s, and for which he had so campaigned for during the drafting of the UN covenants in the 1950s.

Cassin had three different, but important, phases within the process and evolution of international organisations and himself growing more independent. His time at the League of Nations was the ideal apprenticeship in the workings and internal politics of international organisation. The benefits of independence within delegations were

⁸¹ Lawless v Ireland (No.3) (application No, 332/57) 1961

⁸² de Becker v Belgium (application no.214/5) 1962

⁸³ Case "relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium" (application No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) 1968

⁸⁴ Jay Winter & Antoine Prost (2013) p258

learnt alongside the political workings of the relationship between representative and government. These important factors allowed Cassin to be a wiser delegate when he joined the UN. His independence can be seen within his re-drafting of the UDHR, putting his own stylistic changes into the document, and later coming into direct conflict with his own government over the inclusion of the right of petition in the UN Covenants. The final phase is that as a judge at the ECtHR in setting up of the courts rules and procedures and hearing the first cases Cassin quietly revolutionised the role of the individual within international law. In hearing these first cases the process of international law evolved with state sovereignty limited in effect. The process of learning from the League's failure, the failed attempt at the UN for the right of petition, had been achieved by hearing cases within an international court.

V. The Independent Authorised Individual within International Courts

Authorised independent individuals are also found within the role of judicial officers at international courts. The independent authorised individual can be found in this environment as they are mandated and nominated by states to take up the position as a judge within international courts but act independently of state control. Many theoretical narratives assert that international judicial bodies are not law making bodies.⁸⁵ This ignores the realities that many international courts, especially the ICJ, play a major role within law making.⁸⁶ The growth in international courts and tribunals since the end of the Second World War is surprising; the 2004 Project on

⁸⁵ For example please see James Crawford (2012) pp.40-41

⁸⁶ Alan Boyle and Christine Chinkin, *The Making of International Law*, (Oxford University Press: Oxford: 2007) p268

International Courts and Tribunals found that there were some 125 bodies with a wide range of judicial activities.⁸⁷

The role of an international judge requires that states give individuals the independence to perform in the role of the judiciary. Within the European Court of Human Rights each state party nominates an individual with necessary experience to become a judge.⁸⁸ The independent authorised individual requirement for being a government nominee is satisfied alongside the second criteria of broad aims. This broad aim criterion is satisfied as the state is asking them to perform the role of the judiciary, for example within the ECHR Article 21 (2):

“The judges shall sit on the Court in their individual capacity”⁸⁹

Or Article 2 of the Statute of the International Court of Justice:

“The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”⁹⁰

Within the process of international law, the judiciary are becoming law makers, despite theoretical objections that when the judiciary become law makers it is contrary to the rule of law and consent of states. The importance of law making of international judges is also observed within the ICJ as Higgins argues:

“Far from being treated as a subsidiary source of international law, the judgements and opinions of the Court are treated as authoritative pronouncements upon the current state of international law.”⁹¹

⁸⁷ Information found at http://www.pict-pcti.org/publications/synoptic_chart.html as found in Alan Boyle and Christine Chinkin, *The Making of International Law*, (Oxford University Press: Oxford: 2007) p263

⁸⁸ See Article's 20 and 23 of the European Convention on Human Rights

⁸⁹ Article 21(2) from the European Convention on Human Rights

⁹⁰ Article 2 of the Statute of the International Court of Justice

⁹¹ Rosalyn Higgins (1994) p202

Boyle and Chinkin make a similar argument that international courts do make law.⁹² By acknowledging the role of the judiciary as law makers the realities of the process of international law making will be more accurately reflected in the theoretical narrative. The impact of international courts and tribunals on the evolution of international law largely depends upon the number of cases brought before them and the significance of those cases in changing the existing law. Boyle and Chinkin conclude that the logical insight is that the greater the number of international courts, judges and cases, the larger the amount of judge made law that will supplement other sources of law.⁹³ How different international judges have developed international law will be considered below.

V.1. European Court of Human Rights

Judgements from the European Court of Human Right (ECtHR) have not only kept the Convention modern but also have used the Convention in ways the original drafters, such as Maxwell-Fyfe and Teitgen, could never have imagined. The ECtHR case law points to numerous examples of this, the most fundamental to this interpretation is Tyrer v. The United Kingdom, which gave the principle of the convention as “a living instrument which... must be interpreted in the light of present-day conditions”.⁹⁴ Marckx v. Belgium,⁹⁵ Dugeon v. The United Kingdom,⁹⁶ and Malone v. The United Kingdom,⁹⁷ all required the judiciary to interpret the convention in an unforeseen manner. The meaning of articles have been re-interrupted and, therefore, expanded over the life time of the convention, for example the judiciary

⁹² Alan Boyle and Christine Chinkin (2007) pp.310-311

⁹³ Alan Boyle and Christine Chinkin (2007) p269

⁹⁴ Tyrer V UK A26 (1978); 2 EHRR 1 para 31

⁹⁵ In Marckx v Belgium the court found a violation in connection with children born outside of wedlock by requiring further steps beyond mere registration at birth to establish maternal affiliations.

⁹⁶ In Dugeon v UK the court found a violation of on the criminalisation of male homosexuality

⁹⁷ In Malone v UK, the court found a violation in connection with phone tapping

have read a positive obligation for states under Article 3, Environmental Rights under Article 8⁹⁸ and, controversial in the UK, given prisoners the right to vote under Protocol 1 Article 3.⁹⁹ These examples illustrate that these independent authorised individuals within the international court are not interpreting international law, but actually law making institutions. The development of the ECHR has evolved further than before in the last ten years, this development has been extended to include extraterritorial jurisdiction of the convention outside Europe. The leading case on extraterritorial application is Al-Skeini and Others v. The United Kingdom¹⁰⁰, within this case the UK government advocated the previous standard for extraterritorial application being Banković and Others v. Belgium and Others¹⁰¹ which outlined that for extraterritorial jurisdiction by the State party the “effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent ... exercises all or some of the public powers normally to be exercised by that Government.”¹⁰² In Al-Skeini the court modified its position on extra-territorial application in this case extending convention rights to individuals during the British occupation of Southern Iraq:

“...the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.”¹⁰³

“It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an

⁹⁸ For instance in Lopez Ostra v Spain (1994) 20 EHRR 277

⁹⁹ Hirst v. UK [No. 2] (2005)

¹⁰⁰ Al-Skeini and Others v. The United Kingdom (2011) Application No. 55721/07

¹⁰¹ Banković and Others v. Belgium and Others (2001) Application No. 52207/99

¹⁰² Banković and Others v. Belgium and Others at para. 71

¹⁰³ Al-Skeini and Others v. The United Kingdom Para 149

obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.”¹⁰⁴

The court stated that in exceptional circumstances deriving from being the authority for maintaining the security in a given area the convention should apply. At a stroke the Court had extended the range of the Convention to an area outside of its traditional geographic remit, i.e. Europe. This issue was further explored in Al-Jedda v. The United Kingdom¹⁰⁵ in which the concept of jurisdiction applying to individuals held in Iraqi detention centres ran by British Forces was explored. The Court concluded that “The internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout”.¹⁰⁶ This had the effect that the court agreed with the House of Lords that the “applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.”¹⁰⁷ These two cases demonstrate that the judges have given effect to the Convention in unforeseen ways, to give extraterritorial effect changes a significant approach to the application of human rights moving away from a geographic sphere of accountability to one based on a sphere of influence for the actions of a state and its agents, and therefore a broader application of the ECHR.

At times, the international judiciary and a particular idea may not be able to be pinned down to a single judge, but the majority opinions within the Court have agreed with this conception of rights application. In dissenting opinions that have later been followed, it is far easier to identify the role of a single individual member of

¹⁰⁴ Al-Skeini and Others v. The United Kingdom para 137

¹⁰⁵ Al-Jedda v. The United Kingdom (2011) Application No. 27021/08

¹⁰⁶ Al-Jedda v. The United Kingdom (2011) at Para 85

¹⁰⁷ Al-Jedda v. The United Kingdom (2011) at Para 86

the judiciary who has had a role in law creation. Judge Françoise Tulkens¹⁰⁸ notable for her significant dissenting opinions often against the majority view either in the court or society, and which always focused on the fundamental values of the convention.¹⁰⁹ Some of these dissenting views have now become the majority view of the court in later cases. In the courts on-going attempts to grapple with the application of Article 6 in relation to those employed in public services Judge Tulkens joint dissenting opinion with Judge's Fischbach, Casadevall and Thomassen within Pellegrin v. France¹¹⁰ has largely been followed in the later Vilho Eskeline and Others v. Finland¹¹¹ giving public servants access to convention rights. Tulkens has given other significant dissenting opinions for example in N v. UK¹¹² alongside Judges Bonello and Spielmann arguing that deporting an HIV positive Ugandan woman to her home country would amount to two violations of Article 3.¹¹³ Also in the Austin and Others v. The United Kingdom¹¹⁴ Judges Tulkens alongside Spielmann and Garlicki argued that the indiscriminately applied tactic used in the practice of kettling did amount to a violation of Article 5. Judge Tulken's dissenting opinions can be compared to Lord Denning's within the UK domestic courts as to a prediction to the future development of the courts jurisprudence. Judge Tulkens is an excellent example of an independent authorised individual within the international judiciary, always keeping in mind the ideals of the convention, and prepared to develop the ideas of the court and the convention law to protect those fundamental principles.

¹⁰⁸ Judge Françoise Tulkens served at the ECtHR in respect of Belgium from 1998-2012. Vice-President of the ECHR with Sir Nicolas Bratza 1st February 2011- September 2012. Currently serving as a member of the Human Rights Advisory Panel of the UN mission in Kosovo

¹⁰⁹ <http://strasbourgothers.com/2012/08/14/thank-you-justice-tulkens-a-comment-on-the-dissent-in-n-v-uk/> accessed 1.04.14

¹¹⁰ Pellegrin v. France (1999) Application No. 28541/95

¹¹¹ Vilho Eskeline and Others v Finland (2007) Application No. 63235/00

¹¹² N. v. The United Kingdom (2008) Application No. 26565/05

¹¹³ N. v. The United Kingdom (2008) Application No. 26565/05 see Para 20-21 of the Dissenting opinion

¹¹⁴ Austin and Others v. The United Kingdom (2012) Applications nos. 39692/09, 40713/09 and 41008/09

V.2. International Court of Justice

The International Court of Justice (ICJ) has heard 156¹¹⁵ cases as of April 2014 and has another 10¹¹⁶ cases pending. The ICJ is made up of 15 judges serving for a term of nine years; judges are elected to the Court with the process set out in Article 4-19 of the ICJ statute, and as noted above serve in an independent capacity from the state. The ICJ and the judges serving have notably developed international law; some of the most significant developments will be evaluated.¹¹⁷ The South West Africa Cases¹¹⁸ set out the principle of respect for the protection of human rights on a non-discriminatory basis recognised by the court as part of international law. In terms of how the judges developed the law, the principle of racial discrimination already existed within human rights law, what was lacking was a “sound analysis of the principle of equality and the norm of discrimination in the international law literature.”¹¹⁹ In the judges individual opinions this is what they developed and, therefore, created international human rights law.¹²⁰ The court has also developed environmental laws in the Gabčíkovo-Nagymaros case¹²¹ which was the first contentious case in which, unrestrained by jurisdictional limits, the court pronounced on the importance of environmental protection, especially in light of aspect of international water law.¹²² The importance of the ICJ’s law making also extends to Advisory Opinions; while non-binding makes it clear how the court views the development of a particular area of the law. In Legal Consequences of the

¹¹⁵ <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> accessed 2.4.14

¹¹⁶ <http://www.icj-cij.org/docket/index.php?p1=3&p2=1> accessed 2.4.14

¹¹⁷ For a full account of the development of International law by the ICJ please see Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice*, (Oxford University Press: Oxford: 2013)

¹¹⁸ Two cases individually filed in 1960 by Ethiopia and Liberia against South Africa. Two judgements were delivered in 1962 and 1966

¹¹⁹ Shiv RS Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, (Hart Publishing: Oxford: 2007) p112

¹²⁰ Shiv RS Bedi (2007) p112

¹²¹ Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) 1997

¹²² As cited in Christian J. Tams and James Sloan (2013) pp.365-371

Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)

2004¹²³ within this case the court formulated the standards of the territorial scope of treaties. In the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)

1996¹²⁴ the court set out its views on the law prohibiting certain means of conduct.

A criticism of the independent authorised individual in the international courts is when making judgements against their own states. This is already what appears to happen with ad hoc judges on International Court of Justice (ICJ) cases for example Maritime Delimitation in the Black Sea case.¹²⁵ Under Article 31¹²⁶ of the ICJ it sets out the procedure for ad hoc judges to sit on contentious cases, in which state parties may nominate a judge to sit on the case.¹²⁷ The idea being the judge can provide local legal and cultural perspectives.¹²⁸ These ad-hoc judges have developed a trend to usually favour their particular state; this normally has the effect

¹²³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) 2004 As cited in Christian J. Tams and James Sloan (2013) P380-381

¹²⁴ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996 As cited in Christian J. Tams and James Sloan (2013) P380-381

¹²⁵ Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment, [2009] ICJ rep.

¹²⁶ Article 31 of the Statute of the International Court of Justice:

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.
3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.
4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.
5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.
6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

¹²⁷ J.G. Merrills, International Dispute Settlement, (Cambridge University press: Cambridge:2011), P136

¹²⁸ J.G. Merrills (2011) p136

that the ad-hoc judges cancel one another out.¹²⁹ This is not always a certainty, for instance in Application for Revision and Interpretation of the Judgement of 24th February 1982 concerning the Continental shelf made in the Tunisia/Libya case¹³⁰ 1985 ad-hoc judge, Bastid, from Tunisia found against Tunisia in favour of Libya.¹³¹ Also, in the Great Belt (Finland v. Denmark) case 1991¹³²¹³³ ad-hoc judge, Broms, found against Finland with the majority of the court.¹³⁴ These two examples are, notably, the exceptions with the majority of ad-hoc judges favouring their home state. The cynical argument can be made that these ad-hoc judges are clearly under influence from their state to vote in a particular way to ensure their future careers are a success, Rosenne has argued that these judges are open to “concession to diplomatic susceptibilities”.¹³⁵ The consequences for these ad-hoc judges are certainly questionable for an independent authorised individual, which needs the freedom of state interference to undertake the role assigned to them with full competence.

V.3.European Court of Justice

Judicial law creation can also be seen within the development of EU law and the principle of direct effect, established in Van Gend en Loos v Nederlandse Administratie der Belastingen (1963).¹³⁶

“The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this treaty is more than an agreement which merely

¹²⁹ J.G. Merrills (2011) p136

¹³⁰ Application for Revision and Interpretation of the Judgement of 24th February 1982 concerning the Continental shelf (Tunis.Libyan Arab Jamahiriya)

¹³¹ International Law Report 81 pp.420-425

¹³² Case Concerning Passage through the Great Belt (Finland v. Denmark) (Provisional Measures) 1991

¹³³ Both of these cases are cited in Malcolm N. Shaw (2008) p1062

¹³⁴ International law Report 94 pp.446-450

¹³⁵ Rosenne, “composition of the court” p407 as found in .G. Merrills, International Dispute Settlement, (Cambridge University press: Cambridge:2011) p136

¹³⁶ Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62

creates mutual obligations between the contracting states. Thus view is confirmed by the Preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects member states and also their citizens.”¹³⁷

The effect of this was:

“The European Economic Community Constitutes a new legal order of international law for the Benefit of which the states have limited their sovereign rights, albeit within limited field, and the subjects of which comprise not only the member of states but also their nationals.

Independently of the legislations of member states, community law not only imposes obligations on individuals but is also intended to confer upon them rights.”¹³⁸

The significance of this was that this was not a negotiated outcome by states, but the European Court of Justice established this principle within its own jurisprudence.

This was a transformative case for the EU with a significant impact within the application of EU law both domestically and within the Union, with the court’s reasoning that the principle was necessary to ensure the compliance of member states with their obligations. The principle of direct effect demonstrates the lasting effect and fundamental change that judicial creativity and law making has given, that in this instance it gave EU law supremacy.

The independent authorised individual within the role of the international judge can have a considerable law making role. The examples above, from a range of international courts, demonstrate some of those transformative cases and the role of judges within these significant changes to international law.

¹³⁷Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62

¹³⁸Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62 at Para 3

VI. The Independent Authorised Individual within UN Human Rights Treaty Bodies

“The practice of these various committees represents one of the rare instances in which bodies whose members are formally independent of governments (but which are not courts) play a significant role in international law-making.”¹³⁹

Authorised independent individuals are also seen in another significant area of international law in that of the role of human rights experts on UN Treaty Bodies. In a similar way to the ECtHR judiciary, human rights treaty body experts are also independent authorised individuals appointed by states to take up a position as independent experts on UN Treaty Bodies. The terms of appointment which underlines their credentials as independent authorised individuals show that these individuals are nominated as human rights experts by states for a fixed term of four years which is renewable.¹⁴⁰ They are mandated to perform the role of evaluating state performance when they come before the human rights treaty body committees on which the expert sits. This role requires that they evaluate reports from states, take NGO statements into account and question state officials on various issues to check compliance and how states are ensuring they meet human rights requirements set down in the various treaties to which they are party. These individuals are highly independent from the state and unlike the ICJ when examining their home state report will not take an active role. The effect is that these independent authorised experts have considerable law making competences in the area of the treaty that they serve.

¹³⁹ Alan Boyle and Christine Chinkin (2007) p157

¹⁴⁰ OCHR Fact sheet 30, p24 as found at <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf> 30.08.12

The independent authorised individuals who sit on UN Human Rights Treaty Bodies create new ways in which human rights are interpreted.¹⁴¹

“The UN human rights institutions provide a good example of how these independent specialist bodies can interact with states in evolving law making.”¹⁴²

This development of the law stems from the experts within their concluding observations. In which the human rights experts set out how the law should be applied and their interpretation of the standards within the articles. How a human rights expert interprets a particular treaty article, in part, depends on the state. For example, if it's a more developed state they may hold the state to a higher standard as they have far more resources to comply with the Treaty, while less developed states appear to be held to a lower standard. This can be seen with the Committee on Economic, Social, and Cultural rights interpretation of Article 15,¹⁴³ within sessions of the committee held in April and May 2012,¹⁴⁴ and the same months a year later.¹⁴⁵ These sessions involving Japan, Spain and Rwanda highlight the differences in interpretation, whereby in developing states, cultural impact is considered in light of protection and remedying, whereas in developed states article 15 is seen in terms of respecting or promoting cultural rights. This difference means

¹⁴¹ Alan Boyle and Christine Chinkin (2007) p155

¹⁴² Alan Boyle and Christine Chinkin (2007) p155

¹⁴³ Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

¹⁴⁴ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=443&Lang=en, accessed 24/08/13

¹⁴⁵ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=620&Lang=en, accessed 24/08/13

that in Western states article 15 is interpreted positively and in developing states negatively. If we compare the concluding observations for these states:

“While noting the position of the State party regarding the recognition of ethnic groups and indigenous peoples, the Committee is concerned at the possible adverse impact of the position of the State party. The Committee is also concerned at the lack of information on the impact of measures taken to ensure that different groups living in its territory enjoy full participation in cultural life as well as on measures aimed at promoting tolerance and understanding among the different groups living in its territory (art. 15).”¹⁴⁶

“The Committee thanks the State party for the information provided during the dialogue on the right to enjoy the benefits of scientific progress and its applications. In this context, the Committee requests the State party to include in its next periodic report more detailed information and specific examples on how this right is being implemented in practice.”¹⁴⁷

“The Committee is concerned that, in the context of the economic and financial crisis, budget cuts are a threat to the maintenance and development of creative and research capacity in the State party, as well as to opportunities for all individuals and communities to have effective access to take part in cultural life (art. 15).”¹⁴⁸

The first extract is from the concluding observation of Rwanda, while the two below are from Japan and Spain. These extracts demonstrate the different approaches taken by the independent human rights experts; the differences within the language seem to indicate a two tier system whereby those developing nations are examined to a negative impact, and western states to a positive impact. This process of concluding observation and recommendations means that states are left with opinions and ways in which they should improve their ability to comply with the various human rights treaties. Should treaty bodies hear individual complaints the response to these can increase understanding of requirements of treaties in particular ways. The statements of the treaty body committee are certainly

¹⁴⁶ UN document: E/C.12/RWA/CO/2-4

¹⁴⁷ UN document: E/C.12/JPN/CO/3

¹⁴⁸ UN document: E/C.12/ESP/CO/5

interpretative of the treaty provisions, or even seen as going beyond this into the development of new soft law.¹⁴⁹

Boyle and Chinkin point towards a major example of when the use of recommendations and general comments has led to the development of human rights treaties, the Committee on the Elimination of Discrimination against Women adoption of General Recommendation number 19 on Violence against Women which prevented them from enjoyment of convention rights. This made up for the omission of the original drafters for a measure aimed at the area. The recommendation also ensures that its legal authority is derived from the Convention itself in how it was drafted, therefore, states are expected to report on how they conform to the measure.¹⁵⁰ It is clear that none of these comments, observations, reports or recommendations are formally binding; however they do create a strong level of pressure that states would be unwise to ignore.

While these treaties are soft law, mainly aimed at getting states to protect and respect rights, when the various treaty bodies provide a united front on issues it strengthens a particular rights based strategy common to all treaty bodies.¹⁵¹

Therefore, the independent authorised individual, within the role of human rights treaty experts, has significant impact upon the development of the UN treaties on Human Rights. These individuals are fairly unique within the international system, largely down to their role within human rights law. This should not diminish from the impact that these individuals can have on the development of international law.

¹⁴⁹ Alan Boyle and Christine Chinkin (2007) p155

¹⁵⁰ Alan Boyle and Christine Chinkin (2007) p155

¹⁵¹ Alan Boyle and Christine Chinkin (2007) p156

VII. UN Special Procedures Mandate Holders

The criteria for becoming a special procedures mandate holder ensures that there is necessary independence for the individual to perform the role assigned to them which has been described as “crucial to their utility and influence”¹⁵² and for this particular categorisation. The UN Civil Society Handbook, published by the office of the United Nations High Commissioner for Human Rights,¹⁵³ sets out the criteria for independence as paramount in their work:

“Special procedures mandate-holders are either an individual (special rapporteur, special representative of the Secretary-General, representative of the Secretary-General or independent expert) or a group of individuals (working group). Mandate-holders serve in their personal capacity for a maximum of six years and do not receive salaries or any other financial compensation for their work. The independent status of mandate-holders is crucial to the impartial performance of their functions.”¹⁵⁴

Therefore, independent status is so vital that they do not receive salaries and serve within their personal capacity. While this ensures that they are independent, working under a particular mandate, it limits the amount of individuals that can perform this role as they must have another source of income in order to support themselves.

The criteria for the selection of special procedures mandate holders is set down in UN Resolution 5/1 Section 39; it states that the individual must have the following “(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity.”¹⁵⁵ Section 40 of UN Resolution 5/1 states that due consideration to mandate holders should be given to gender balance and geographic representation, as well as to an appropriate representation

¹⁵² Marc Limon & Ted Piccone, “Human Rights Special Procedures: Determinants of influence. Understanding and strengthening the effectiveness of the UN’s independent human rights experts”, *Universal Rights Group*, 2014, p12

¹⁵³ Working with the United Nations Human Rights Programme: The UN civil society handbook, as found at <http://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx>, accessed 28.07.12

¹⁵⁴ Working with the United Nations Human Rights Programme: The UN civil society handbook, p109

¹⁵⁵ Section 29 of UN resolution 5/1

of different legal systems.¹⁵⁶ Finally, individuals can be excluded from becoming a special mandate holder under Section 46 if they have a conflict of interest such as holding a decision making position in governments or other organisations such as NGOs, national human rights institutions, or any related interest group.¹⁵⁷ This has the effect to limit the eligibility of individuals as if they are an expert in a field as required, they are most likely to already be involved within the field in a decision making body. This creates a dilemma for individuals as they would be required to leave their existing work in order to become a special mandate holder. The independence can actually create further problems in limiting the quality and quantity of candidates open to taking up such a role. In the creation of the special mandate holders system they created a system that would encroach on state sovereignty in addressing sensitive domestic issues¹⁵⁸ that could not necessarily be given enough inspection within open debate.

With independence and expertise so important within this role, the following groups are able to nominate suitable candidates under section 42,¹⁵⁹ governments, regional groups operating within the United Nations human rights system, international organisations such as the Office of the High Commissioner for Human Rights, governmental organisations, other human rights bodies and finally individuals can nominate themselves. This criteria means that the individuals can still be selected knowing that they possess certain inherent views and objections by each of these organisations. The independence of these individuals can also create another problem of the resources needed to undertake their work, in this respect the OHCHR, provides mandate holders with personnel, logistical and research

¹⁵⁶ Section 30 of UN resolution 5/1

¹⁵⁷ Section 46 of UN resolution 5/1

¹⁵⁸ Marc Limon & Ted Piccone (2014) p12

¹⁵⁹ UN resolution 5/1

assistance in order to support the work being undertaken.¹⁶⁰ The levels of independence required by special mandate holders has the danger that these individuals could easily overstep the mark or worse “go rogue” and cause damage to the UN interest in which they have been tasked. In order to prevent this and give guidance to these individuals, the OHCHR has created a code of conduct which was adopted by the Human Rights Council in 2007. This code sets out the standards of ethical behaviour and professional conduct that those special procedures mandate holders must observe.¹⁶¹ The UN Manual of the Special Procedures¹⁶² sets out to provide those holding the roles with guidance and good practice in their efforts to promote and protect human rights. Special Procedures in using regular reports and recommendations to the Human Rights Council and the General Assembly have made a “significant contribution to the elaboration, interpretation, acceptance and internationalisation of those norms.”¹⁶³ The effect of this is to influence the Council and Assemblies Resolutions and, in some cases, the production of UN guidelines, such as the UN Guiding Principles on Internal Displacement. This development of normative framework has filled in the gaps left within the human rights system, for example, with specific application to particular groups such as women, indigenous people and prisoners.¹⁶⁴ In implementing these norms and guidelines it has made human rights accessible, and as one mandate holder has termed ‘the practicalisation of human rights.’¹⁶⁵

Special procedure mandate holders are individuals that are mandated to have a significant amount of independence in order to perform a role within one particular

¹⁶⁰ Working with the United Nations Human Rights Programme: The UN civil society handbook, p107 as found at <http://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx>, accessed 28.07.12

¹⁶¹ Working with the United Nations Human Rights Programme: The UN civil society handbook, p114

¹⁶² As found at www2.ohchr.org/english/.../special/.../Manual_August_FINAL_2008... accessed 28.08.12

¹⁶³ Marc Limon & Ted Piccone (2014) p26

¹⁶⁴ Marc Limon & Ted Piccone (2014) p26

¹⁶⁵ Cited in Marc Limon & Ted Piccone (2014) p26 n.155. “Interview with country mandate-holder”

area of international law, for example, John Ruggie on business and human rights or Olivier De Schutter on the right to food.¹⁶⁶ They must work within a particular mandate but do not take instructions from any government or group. They might seek views from these organisations but are under no obligation to do this or even to meet within them. A significant drawback with the special procedures mandate system is “the independence and effectiveness of Special Procedures is dependent to a large degree on the political latitude provided to them by states, and the degree to which states are willing to cooperate with them.”¹⁶⁷ This level of independence is far more than Charles Malik was given by Lebanon in the drafting of the UDHR, therefore, placing these special mandate holder individuals at the opposite end of the scale to Malik. The influence and success of these individuals highlights the importance that independent thinking can bring to international law in bringing ideas forward to difficult issues that states creating law by consensus and committee would fail to agree upon. In section two of this chapter a detailed investigation will be undertaken into the working methods and process of law creation as used by John Ruggie in the creation of the United Nations Guiding Principles on Business and Human Rights.

VIII. Conclusion

The independent authorised individual is an individual given a role within international law creation with the expectation that they will be independent, and at the most controlled only by being given sweeping aims from their authorised decision makers and at the far end of the scale have no interaction with authorised decision makers acting on their own judgement all the time. While these individuals only have

¹⁶⁶ Working with the United Nations Human Rights Programme: The UN civil society handbook, p117 as found at <http://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx>, accessed 28.07.12

¹⁶⁷ Marc Limon & Ted Piccone (2014) p12

limited contact, if any, with governments, they do owe their position within the international system to governments which, with representatives given large amounts of freedom, can withdraw at any time.

Those independent authorised individuals within a special procedures role or serving within a court or tribunal will be mandated to perform the role for a given length of time prior to needing state authorisation to continue. Any individual given so much freedom means that a gap has been created between their actions and the state, therefore, if things go wrong within the role the state can deny and cut off the individual as a political measure to ensure that damage is limited solely to that individual. This risk of personal reputation damage is one of the main risks in accepting the role of an independent authorised individual, if it goes wrong, such as with David Weissbrodt and the “Norms on the Responsibilities of Transnational Corporation and Other Business Enterprises with regard to Human Rights”, the individual’s credibility and questions over their judgement means that they are disregarded from the international system.

Charles Malik is the ideal independent authorised individual that sits the nearest to being an authorised individual. Within his role as representative to the UN he was only given broad aims by Lebanon, and was very much working alone without a delegation to support his efforts, and provided a useful conduit for unauthorised individuals to pass information and argumentative points into debates regarding the development of the UN human rights treaties. Malik’s position allowed him to develop into the ideal international politician, being able to work a group to coming around to his point of view, but also knowing when to give others ground. Rene Cassin, while also an independent authorised individual at the same time as Malik,

provides a different insight. Cassin over his career gradually became more independent, as he worked within three different international organisations.

Independent authorised Individuals given plenty of independence are those that work within international courts and tribunals, especially UN Human Rights Treaty bodies, the International Court of Justice and the European Court of Human Rights. These institutions have plenty of freedom to perform the role of the judiciary being able to interpret these documents as living instruments to ensure that these documents keep up with present day conditions. Of course this approach, at times, can infuriate states when the way an article is interpreted is changed in light of a new condition, as this is often seen as judges going too far in law creation which should be reserved for states. All independent authorised individuals, to a greater or lesser extent, owe their position to states. Therefore, they do have some influence over the individuals selected to these roles and should accept that these individuals will and do create law as they see fit.

UN Special Procedures mandate holders are in place, especially for their independence. This independence is essential for their work in order to provide reports or other measures on a given subject. The mandates of these individuals is usually specialised, therefore, the holder of the mandate is usually also an expert within the area. John Ruggie was one such individual; within his role as United Nations Secretary-General's Special Representative for Business and Human Rights he created the Protect, Respect, Remedy Framework and the Guiding Principles which gave effect to the framework. In the creation of both the guiding principles and framework, Ruggie created something that states were unable to. These two instruments set down a new standard for what independent authorised individuals can do when given the resources and mandate to succeed. An in-depth analysis of

John Ruggie and his work in the creation of the UNGPs will be the focus of the next chapter.

Chapter 4:- The Independent Authorised Individual: The Ruggie Process

I. Introduction

This chapter will take an in depth examination of one particular independent authorised individual, John Ruggie, within the creation of the UNGPs. Within this chapter this thesis will come the closest to methodologies used within International Relations (IR), however while this chapter examines the relationship between actors a notable feature of IR approaches. In this instance the methodical approach is always derived from the perspective of Legal Process Theory, with an additional focus on one particular individual with the goal of examining the formation of a set of international rules. Within this evolution the process of how Ruggie went about the creation of the guidelines will be the focus; this will provide insight as to how such individuals are able to create workable legal instruments in highly contentious areas.

“All had failed, I reminded the Council, because governments could not reach consensus. Here, I said you have an instrument that you could never have negotiated yourselves, given the diverse and conflicting interests at stake. All stakeholder groups support it. So seize the opportunity, I urged. Endorse it, and then move on. They did.”¹

The focus is on a highly detailed examination of the independent authorised individual in the role of a UN special procedures mandate holder, John Ruggie, to see how he performed this role in the creation of the United Nations Guiding Principles on Business and Human Rights (UNGP).² This closer look intends to set out the role of the modern independent authorised individual in the context of mastering a highly contentious human rights issue. It will expand on the ideas

¹ John Gerard Ruggie (2013) p xlix

² http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 14.01.13

expressed in chapter three looking at how independent authorised individuals have the ability to successfully use the law creation process.

The chapter will be broken down into several sections, each exploring different elements of the process within the creation of the UNGPs. The first section will consider the background as to why the UNGPs were needed, due to the failure of all previous efforts to find a solution to the human rights and business issue. The second section will examine the substantive content of first, the framework and then the final Guiding Principles. It will consider all three pillars, giving an understanding of how Ruggie managed to find a workable solution.

The third section will focus on why John Ruggie was chosen by former UN Secretary General Kofi Aanan to take up this role. What made him suited for the role, and why he was different to all those that had gone before him in attempting to find a solution to the issue. This will be followed by an examination of the mandates which were given to Ruggie. These mandates were open to interpretation due to the language used, this was taken as an advantage by Ruggie who often used this interpretation to support his argument whether the mandates gave him scope for his actions or not.

Next will be sections on the approach taken by Ruggie, the language used, and they will finally explore the concept of how Principled Pragmatism was used by Ruggie.

The approach taken by Ruggie was to engage with as many stakeholders as he could within the research phase of the project. Using inclusive language to encourage and engage stakeholders allowed him to bring them on-side with the project and its aims to create a workable legal instrument. The concept of Principled Pragmatism will require investigation to give a greater understanding of how this part methodology, part philosophy was used to ensure that the UNGPs were actually a

workable solution. This concept became one of the most important and central pillars of how the UNGPs were successfully created.

Finally, will be sections looking at the resources, both financial and kind, the team he created, the open debate and a willingness to consider and accept new ideas.

Looking at the resources that Ruggie managed to secure for the process is important, not only in understanding the scope of research that went into the UNGPs but also how he got business onside by allowing them to support the process financially. These resources allowed Ruggie to recruit a team from across the globe in order to aid his work. The need for the financial resources here is clear, due to the mandates giving very little financial support for the process. The team created allowed for specialised individuals to work on highly complex areas of the proposed soft law instrument, therefore, giving the process valuable expertise in the right areas. The willingness for an open debate and willingness to incorporate new ideas demonstrated the difference between the Ruggie process and that of how this issue had been tackled before. In allowing stakeholder input, especially from business, they had greater interest in ensuring the UNGPs were successful.

II. Background to the Creation of the UNGPs

In 2005, Secretary General Kofi Annan asked John Ruggie to become the Secretary-General's Special Representative for Business and Human Rights (SRSG).³ In doing this, Ruggie took on a challenge which had faced the UN for the best part of twenty years⁴ that had polarised debate between States, Transnational Companies, and NGOs on how best to align human rights with business practice within a globalised

³ UN Human Rights Resolution 2005/69

⁴ Larry Cata Backer, "On the Evolution of the UN Protect, Respect Remedy project: The state, the Corporation and Human Rights in a Global Governance Context", *Santa Clara Journal of International Law*, 38, 201, pp.45-50

business environment. A simplistic, yet worthwhile, analysis indicates that transnational companies can, in part, achieve bigger profits by the exploitation of workers and host states. Therefore, addressing this issue required that a new solution or strategy be decided upon to ensure that the balance was re-defined and that the resources were no longer subject to such over exploitation.

The issue of setting new international standards for business and human rights had caused nothing but trouble for all parties involved.⁵ Prior to Ruggie's mandate, several attempts had been made, including the United Nations Commission on Transnational Corporations established in 1973, to investigate the effects of transnational corporations and strengthen the negotiation capacity of countries in which they operated.⁶ This resulted in the unsuccessful attempt to draft an international code of conduct for business in the 1970s and 1980s.⁷ The Organization for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 establishing its first Guidelines for Multinational Enterprises,⁸ which have been revised five times most recently in 2011.⁹ In 1977 the International Labour Organization adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises.¹⁰ Finally, the Global Compact in 1999 asked businesses to voluntarily adopt ten core principles, dealing with issues such as human rights, labour standards, environmental protection and the later added anti-corruption.¹¹The

⁵ See Larry Cata Backer, "On the Evolution of the UN Protect, Respect Remedy project: The state, the Corporation and Human Rights in a Global Governance Context", *Santa Clara Journal of International Law*, 38, 201, p45-50 also see John Gerard Ruggie (2013), pp.xvi-xviii and pp.46-55

⁶ Patricia Feeney, "Business and Human rights: The struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda", *International Journal on Human Rights*, Vol.6, N. 11, Dec 2009, p162

⁷ UN Document E/1990/94

⁸ <http://www.oecd.org> accessed 12.02.013

⁹ <http://www.oecd.org/daf/inv/mne/2011update.html> accessed 29.04.13

¹⁰ http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm

¹¹ <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html> accessed 29.04.13

one underlining criticism of all these approaches is that “these various initiatives, however, failed to bind all businesses to follow a minimum human rights standard.”¹²

A new approach was required to tackle this issue, the UN asking the sub-commission on the Promotion and Protection of Human Rights to draft an international instrument based on human rights law to define the significance of human rights in the conduct of business. The sub-commission approved the “norms on the Responsibilities of Transnational Cooperation’s and Other Business Enterprises with Regard to Human Rights”¹³ otherwise known as “The Norms”. The Norms as a total failure cannot be understated:

“The reaction of business, however, was largely hostile. The Norms quickly became a lightning rod for counter-lobbying, spearheaded by various business associations.”¹⁴

“Several of the member states opposed holding non-state entities directly accountable for human rights violations as they felt this would dilute state responsibility.”¹⁵

“This endeavour produced a train wreck because much of the business community was vehemently opposed to it, as were many governments. The process started out as an attempt to codify, in a non-legal sense, appropriate principles for companies with regard to human rights, but as it evolved it got carried away. One industry association official told me that his organization dropped out when the topic of discussion became the shape of the table in the tribunal chamber where companies would be tried. Whether this was hyperbole or not, the remark effectively symbolizes how negatively the effort came to be perceived. On top of that, the conceptual and legal foundations of the Norms were so poorly conceived that, if adopted, they would produce utterly perverse consequences on the ground.”¹⁶

¹² David Weissbrodt and Muria Klruer, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”, *The American Journal of International Law*, Vol. 97, No 4, (Oct, 2003), p903

¹³ UN Document E/CN.4/Sub.2/2003/12/Rev.2

¹⁴ Patricia Feeney (2011) p165

¹⁵ Larry Cata Backer (2011) p46

¹⁶ Remarks by John Ruggie, Delivered at a Forum on Corporate Social Responsibility. June 14th 2006, as found at <http://www.reports-and-materials.org/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>

The Norms were totally toxic; the Human Rights Commission let them die a quiet death. The main driving force behind the Norms, David Weissbrodt¹⁷ and members of the United Nations Sub-Commission on the Promotion and Protection of Human Rights were not given an opportunity to reform the norms in response to overwhelming criticism. The Sub-Commission was abolished alongside the Human Rights Commission in 2006¹⁸ and replaced by an Advisory Committee to the new Human Rights Council. The failure of the Norms and other failed attempts left a gap within international human rights law, which was filled by the UNGPs which will be discussed in depth next.

III. Substantive Work of John Ruggie

Within the background leading to Ruggie's appointment as Special Representative for Business and Human Rights is the substantive work with which Ruggie filled the gap within the human rights framework. Ruggie's solution within this capacity as a special mandate holder and independent authorised individual was to create first, the Protect, Respect, and Remedy Framework and later build on them to create the UNGP.¹⁹ Simply put "the Framework addresses what should be done; the Guiding Principles how to do it."²⁰ In creating these two instruments Ruggie was the arch-type modern independent authorised individual, being very independent and towards the highly independent end of the scale. At no stage was Ruggie expressly mandated by the UN to create either the framework or the Guiding Principles yet

¹⁷ David Weissbrodt and Mira Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", *The American Journal of International Law*, Vol.97, No.4, Oct 2003, pp.901 -903

¹⁸ <http://www2.ohchr.org/english/bodies/subcom/> accessed 08-/10/13

¹⁹ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 14.01.13

²⁰ John Gerard Ruggie (2013) p81

took it upon himself to interpret the mandate in this way.²¹ The 2005 mandate was primarily about:

“...identifying and clarifying standards of corporate responsibility and accountability with regard to human rights.”²²

Ruggie is an individual who created soft international law, without mandate while being asked to perform a different function for an international organisation. He was not instructed by any state in what should be included or excluded from the UNGP, but he did have extensive consultations with all stakeholders.²³ He demonstrated a great deal of independence in producing soft law instruments which would have been impossible to create if states had come together to negotiate a similar instrument using authorised individuals.

Both the framework and the UNGPs rest on the same three pillar approach of Protect, Respect, and Remedy. Each of the Ruggie pillars, individually, require the other two to work effectively and they should all be taken as a whole. One pillar should not be pulled away from the others, as the tri-part structure is fundamental to the overall shape of the Framework and GPs. Should individual pillars be judged on their own merits the whole system is fundamentally being misunderstood. The fundamental goal of, first, the framework and later GPs was “to establish a common global normative platform and authoritative policy guidance as a basis for making cumulative step-by-step progress without foreclosing any other promising longer-

²¹A full evaluation of Ruggie’s mandates and how he actually how he went about creating new soft international law as an independent authorised individual can be seen in Chapter 6. This section on Ruggie intends to look at the substance of his creation.

²²<http://www.un.org/News/Press/docs/2005/sga934.doc.htm> accessed 26.10.12

²³ For examples with consultation with stakeholders please see John Gerard Ruggie (2013) pp. 23-24, 70, 74, 99-100, 112-119, 125-126

term developments.”²⁴ Therefore, the Framework and Guiding Principles are only the starting point for a wider long term program of human rights reform for this sector.

All three pillars should be considered as part of a whole, this section will consider each pillar in turn to give a better understanding of what they propose. The first pillar, Protect, “refers to the protection by the state against human rights abuse by third parties – that is by private actors.”²⁵ In many human rights documents, protection from third parties refers to protection from armed groups, or armed non-state actors; however, this definition equally applies to business groups. This duty to protect against third-party abuse, including business is based on international human rights law, both treaty and customary law.²⁶ This duty to protect is highlighted in both the framework and implemented within the Guiding Principles under GP 3a²⁷ which reminds states of the need to enforce existing laws that already regulate the business respect for human rights. Under GP 3c it states “Provide effective guidance to business enterprises on how to respect human rights throughout their operations” this GP may seem basic, however, it is important, as many businesses are not experts on human rights and do not have the ability to understand what they should be doing. With its inclusion, it demonstrates the basic level of prior knowledge that Ruggie felt had to be addressed through the protect pillar of the framework and UNGPs. The protect pillar, which is predominantly the first ten guiding principles set out “a series of regulatory and policy measures for states to consider in meeting this duty; stress the need to achieve better internal alignment among relevant national (and international) policy domains and institutions; and introduce the idea that in

²⁴ John Gerard Ruggie (2013) p81

²⁵ John Gerard Ruggie (2013) p83

²⁶ John Gerard Ruggie (2013) p84

²⁷ UNGPS 3a Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps”

some circumstance states should require companies to exercise human rights due diligence.”²⁸

While the first pillar “Protect” focuses on the state’s duty to protect human rights, the second pillar “Respect” is firmly aimed at businesses. As Ruggie argued in 2010:

“The corporate responsibility to respect human rights cannot be met by words alone: it requires specific measures by means of which companies can “know and show” that they respect rights.”²⁹

Part of this “know and show” is the human rights due diligence process created by Ruggie, and is set out in GP 17 and further elaborated in guiding principles 18 to 21. The due diligence process sets out a formalised method of business engaging in positive action in order to prevent human rights abuses. The concept should address “Human rights risks are understood to be the business enterprise’s potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation...”³⁰ Within this process the old adage of “Prevention is better than a cure” is mobilised; companies should ensure that they do not infringe rights even before they start their operations within a state. The benefits of the human rights due diligence is similar to that of financial due diligence undertaken by business when seeking a financial investment, as Ruggie states within the commentary of the UNGPs the benefit of undertaking such work:

“Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not

²⁸ John Gerard Ruggie (2013) p108

²⁹ Statement by Professor John Ruggie at the 65th session of the General Assembly Third Committee, 26 October 2010, New York, p4 as found at <http://www.ohchr.org/documents/issues/business/2010ga65remarks.pdf> accessed 20.08.13

³⁰ Guiding Principles on Business and Human Rights, (United Nations Human Rights Office of the High Commissioner: Geneva: 2012) p18

assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.”³¹

While the concept of due diligence is useful from a business perspective being a term that is familiar to their vocabulary, nevertheless there has been criticism of its use, Deva sets out a criticism stating:

“The SRSG rejected the Norms’ usage of ‘sphere of influence’ for being an imprecise concept and mooted ‘due diligence’ as an alternative. However, due diligence is merely an approach already well-known to companies; it does not settle the question of the scope or territory of responsibilities. A business entity is expected to conduct due diligence not in wilderness, but only in relation to its operation or entities connected to it. The commentary on the Guiding Principles, in effect, implies that due diligence will be relevant in the context of the sphere of influence of a company.”³²

Deva states that due diligence is merely a re-definition of the norms sphere of influence concept, it actually is a different concept and Deva is wrong with his assertion. Primarily, it sets out a physical process in which companies need to assess their impact, and it does this in language which is business friendly. Compared to the Norms, a legalistic approach may have sounded sensible to international human rights lawyers and activists but may as well have been written in hieroglyphics to a business that neither understood nor engaged with the concept. Therefore, the due diligence concept is far more accessible, easy to use, and transparent to the actual end users. The due diligence concept does form a major part of the respect pillar yet as Ruggie himself states the overall aim within this section was to:

“Stress the need to engage affected individuals and communities in a meaningful way at several stages throughout the process, thereby

³¹ Guiding Principles on Business and Human Rights (2012) p19

³² Surya Deva, *Regulating Corporate Human Rights Violations*, (Routledge: London: 2012) p108

strengthening the links between businesses and their workers as well as businesses and the communities in which they operate.”³³

Stressed throughout this section, including and excluding the due diligence concept is this underlining desire to get businesses talking to the local communities to ensure that impact can be discussed and measures taken. Emphasis is also placed on business to be pro-active, therefore, shifting the focus from what businesses should do to help in the event that they have committed rights violation, to what businesses should do to prevent rights violation. This shift may seem basic, but is a fundamental change in how businesses have been considering human rights. The Respect pillar is perhaps the most eye-opening to businesses requiring them to be pro-active in measures to limit impact.

The final pillar is that of “Remedy” covering Guiding Principles 25 to 31. Perhaps the most challenging pillar for Ruggie to create was in how to establish a mechanism for instances when the first two pillars have failed and rights have been violated. The principles in 26-30 cover various measures to encourage a remedy to a rights infringement situation these include state-based judicial mechanisms, and various non-state based non-judicial mechanisms, alongside non-state-based mechanisms and company-level grievance mechanism. Principle 31 states “In order to satisfy the effectiveness criteria, non-judicial mechanisms should be legitimate, accessible, predictable, equitable, transparent, right-compatible and a source of continuous learning.”³⁴ The importance of this pillar is highlighted by Ruggie when he argues:

“Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses they do occur, the State duty to protect can be rendered weak or even meaningless.”³⁵

³³ John Gerard Ruggie (2013) pp.112-113

³⁴ Surya Deva (2012) p108

³⁵ Guiding Principles on Business and Human Rights (2012) p27

This also underlines the important three part structure. Ruggie is aware that the remedy section is not as strong as it could be, yet he argues that “it was not possible to reach a consensus on it among governments at this time, and that my putting forward an overly prescriptive recommendation on the GPs could well jeopardize the entire initiative”.³⁶ Ruggie has sacrificed a certain amount of remedy strength in order to get workability, i.e. he was pragmatic over a desire to sort the problem out in one effort. This underlines that the guiding principles are a start and not a final solution to the problem of business and human rights, and that they should not close off any future attempts for a more robust system of rights protection. This tri-part structure, created out of Ruggie’s own desire to produce an outcome, actually had a real world effect, far more than his original mandate was expected to have produced.

The Ruggie Framework and UNGP’s, while voluntary, set new standards within the practice of Business and Human Rights. The importance of the new standards set down, can be seen within an effect that they are having on a new generation of Bilateral Investment Treaties (BIT). These treaties are drawn up between states and “Under the terms of these treaties the capital-importing country provides enforceable guarantees to investors from the capital-exporting country. The guarantees include standards of treatment to be applied to investors, and provisions for compensation in the case of expropriation.”³⁷ They have proved to cause difficulties for human rights as the treaties have tended to favour the investor rather than the receiving state. In a binding decision reached by international arbitration a BIT between Italy, Luxembourg, and receiving South Africa found that provisions within the Black Economic Empowerment Act, one of the most significant acts adopted by post-apartheid government was found not to comply with the BIT and, therefore, South

³⁶ John Gerard Ruggie (2013) p117

³⁷ John Gerard Ruggie (2013) p182

Africa was forced to pay monetary damages.³⁸ While the UNGP's haven't had a direct effect on the BITs, they have had a secondary influence on them. In April 2012 the US government issued a new model BIT that stressed the importance of protection for investment, but also striking that balance to allow for the receiving state government to regulate in the public interest.³⁹ These changes to BITs through the influence of the UNGP's help to prevent the modern gun boat diplomacy of TNCs. Whereby the TNC ensure they get their own way or threaten to remove investment within a state, or take it to a state willing to provide the conditions that they desire. This more responsible attitude towards BITs is an area that is indirectly linked to Ruggie's work but an area that he highlights as one of the next steps that need to be taken to provide better human rights protection within business investments.⁴⁰

The primary issue remained how to bring together Business, States and NGOs to create a workable document on upholding human right in business. John Ruggie managed to master all of the different interest groups in creating his Guiding Principles on Business and Human Rights, which were the implementation of his earlier "Protect, Respect and Remedy" framework. No single element of Ruggie's method in achieving this unparalleled success can be picked out and upheld as the magic key to the process of international law creation in difficult areas. By examining his working methods, mandate and skills we can build a picture of how he achieved the Guiding Principles, therefore, when all these elements are taken in combination we can see how Ruggie made so much progress.

³⁸ John Gerard Ruggie (2013) p59

³⁹ John Gerard Ruggie (2013) p185

⁴⁰ Ruggie's final Chapter within *Just Business: Multinational Corporations and Human rights* is entitled "Next Steps". Within this chapter he sets out the areas he believes that the process next needs to consider and where the UNGP's can be built upon. The case for improvements in BITS is set in pages 182-188.

IV. Selection

The choice of John Ruggie as the SRSG on business and Human Rights was in itself an unorthodox selection by Kofi Annan. As Ruggie tells us in his 2005 speech at the Wilton Park Conference on Business and Human Rights:

“I’m not trained as a human rights lawyer, or a lawyer of any kind. For better or worse, I am a political scientist who has spent much of his career trying to understand, and on a modest scale at the UN deal with, the impact of globalization on multilateral rule making and institutions.”⁴¹

The selection of Ruggie, a non-lawyer, can be seen as the results of the UN learning from the failure of the Norms and the role of David Weissbrodt in their creation.

Weissbrodt was the driving force behind the Norms,⁴² a trained lawyer, with a highly focused legalistic approach to the issue. In creating the Norms a supposedly binding set of rules on transnational companies and entering the murky issue of transnational corporations as subjects of international law, which in itself is highly contentious. The Norms failed to gain traction amongst states, and the business and human rights issue was increasingly bogged down in doctrinal debates split between for and against the Norms. It soon became obvious that for progress to be made a new figure would be needed to set a new course. Ruggie the academic in Political Science with some UN experience was, therefore, a vastly different choice.

Ruggie’s CV⁴³ showed he chiefly held academic positions, most significantly as Professor of International Relations and Pacific studies at University of California, and Professor of International Relations at Columbia University. Ruggie only took up

⁴¹ Wilton Park Conference On Business and Human rights, Opening Remarks, October 10-12, 2005 as found at <http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc> accessed 14.1.13

⁴² David Weissbrodt and Mira Kruger, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, *The American Journal of International law*, Vol.97, No.4, Oct 2003, p901 & p903

⁴³ Available at <http://www.hks.harvard.edu/m-rcbg/johnruggie/bio.html> accessed 14.1.13

a position within Harvard Law School in 2005,⁴⁴ around the same time in which he was appointed the SRSG. Ruggie as a pure academic is not strictly true either as he had experience working within the UN undertaking a role with the development of the UN Millennium Goals and UN Global Compact.⁴⁵ Also working from 1997 to 2001 as the United Nations Assistant Secretary-General for Strategic Planning, a post created for him by Kofi Annan.⁴⁶ Therefore, Ruggie was a different type of individual coming from a different background to David Weissbrodt, who while also an academic turned UN official, took a legalistic approach derived from his background within the law. This was in comparison to Ruggie, who took a practical policy based approach driven by his background within International Relations and re-affirmed by the successful work within the UN, under Secretary General Annan and in roles on the Global Compact and Millennium Goals. Ruggie sums up the situation so precisely in 2008 when stating:

“As some of you know, I was appointed in 2005, to pick up the pieces from an impasse reached when an expert subsidiary body of the then UN Commission on Human Rights proposed a set of draft Norms on transnational corporations and other business enterprises.”⁴⁷

V. Open Mandates

The 2005 Mandate,⁴⁸ which was extended by an additional year in 2007 and the 2008 Mandate⁴⁹ can both be seen as either a wide undefined mandate or narrow restrictive mandate. Ruggie appeared to consider it to be the former, but as will be seen was also prepared to see it as restrictive when the situation suited him. The

⁴⁴ <http://www.hks.harvard.edu/m-rcbg/johnruggie/bio.html> accessed 14.1.13

⁴⁵ <http://www.hks.harvard.edu/m-rcbg/johnruggie/bio.html> accessed 14.1.13

⁴⁶ <http://www.hks.harvard.edu/m-rcbg/johnruggie/bio.html> accessed 14.1.13

⁴⁷ Business and Human Rights: A Political Scientists guide to survival in a Domain where lawyers and Activists Reign. Remarks by John Ruggie: Annual Conference International law Association (British Branch) London, 17 May 2008: As found at <http://www.reports-and-materials.org/Ruggie-ILA-17-May-2008.pdf>

⁴⁸ UN Document, E/CN.4/RES/2005/69

⁴⁹ UN Document, A/HRC/RES/8/7

former approach was taken by him in a speech to a Business and Human Rights seminar at Old Billingsgate in London in 2005:

“Those of you who have looked at my mandate know how vast in scope it is. I have started to carve out different components of it in order to understand them better, and to identify the directions in which achievable objectives may lie.”⁵⁰

Further, in his annual report in 2008 he describes the mandate as:

“The mandate’s extensive, inclusive and transparent work programme has enabled the Special Representative to reflect on the challenges, hear and learn from diverse perspectives, and develop ideas about how best to proceed.”⁵¹

Closer examination of the mandates does not tally with this analysis. The 2005 mandate UN Human Rights Council resolution 2005/69 is, if anything, a very limited mandate of what is required from the SRSG. The substantive parts of the mandate are below:

- “(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises;”⁵²

⁵⁰ Remarks by John Ruggie: Business & Human Rights Seminar: Old Billingsgate: London: December 8th 2005. Found at <http://www.reports-and-materials.org/Ruggie-remarks-to-Business-Human-Rights-Seminar-8-Dec-2005.doc>

⁵¹ UN Document, A/HRC/8/5

⁵² UN Human Rights Resolution 2005/69

Nothing on this mandate speaks of anything vast or extensive in scope, point "a" requires identification and clarification, point "d" requires two terms to be clarified. Nothing within the scope is that much of an issue. If anything, the mandate should be seen as too narrow to deal with the issue of human rights and business. The 2008 mandate⁵³ is even less well defined than that of the 2005 mandate; point "b" in the 2008 mandate asks Ruggie "to elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders."⁵⁴ Point "e" invited him "To Identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact."⁵⁵

Both of these points are fairly narrow but flexible in terms of language as to what is inside and what is outside the scope of the mandate. Ruggie's genius was in taking these loose mandates and turning them into the framework and guiding principles. Ruggie's status as an independent authorised individual is clear from an examination of both mandates and the results achieved. At no point in the original objectives in the 2005 mandate⁵⁶ is there an express mandate for Ruggie to create a framework. At best, point "e" to compile a compendium of best practices of states and transnational corporations and other business enterprises" would, at a push, cover this achievement. As Ruggie set out in the Wilton Park Conference Speech "I don't have a precise roadmap or even a fixed destination for the mandate"⁵⁷ therefore, he created the Framework and because Ruggie had gained stakeholders' trust it was

⁵³ UN Human Rights Council Resolution 8/7

⁵⁴ UN Human Rights Council Resolution 8/7

⁵⁵ UN Human Rights Council Resolution 8/7

⁵⁶ UN Human Rights Resolution 2005/69

⁵⁷ Wilton Park Conference On Business and Human rights, Opening Remarks, October 10-12, 2005 as found at <http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc> accessed 14.1.13

acceptable to all sides. The flexibility within the mandate has achieved a very positive constructive result. Ruggie even points this out himself when describing his mandate as:

“I viewed the mandate not merely as a research and drafting exercise, but as a global campaign of sorts, to reframe a stalemated policy debate and establish global standards and authoritative policy guidance.”⁵⁸

Certainly, both mandates do not openly express these notions; therefore, Ruggie pushed his mandate to the limit in his capacity as an independent authorised individual.

At other times, Ruggie also played down the scope of the mandate. In 2008 at a conference on Business and Human Rights, in a transcript from a discussion with Devin Stewart he sets out the appeal of taking the SGSR post:

“The sucker lure was ‘this is a two-year assignment. It's basically desk-based. We want you to do some research on what are the prevailing standards out there, because there is great confusion. And then you'll be on your way.’”⁵⁹

Reinforcing this point in 2009 in a strongly worded letter to Jose Aylwin in response to the Buenos Aires NGO statement, stating that:

“In 2005, I was given a two-year desk-based mandate, intended to “identify and clarify” existing standards and practices.”⁶⁰

Further, indicated in his response to Submission to the UN Special Representative of the Secretary-General from the Civil Society Groups across Asia out that his role was allegedly part time and was entirely pro bono, that he had a full-time job

⁵⁸ John Gerard Ruggie (2013) pxlvii

⁵⁹ Transcript: Business and Human rights: Achievements and Prospects: October 28th 2008. As found at <http://www.policyinnovations.org/ideas/briefings/data/000089>

⁶⁰ Letter to Jose Aylwin, regarding response to Buenos Aires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

teaching at Harvard⁶¹ on top of the UN commitments. Ruggie's work was not as "desk-based" as he is making out above, but certainly from an examination of the mandates this conclusion could be reached.

The confusion as to the scale of his mandate is broadened by Ruggie himself as whether he was meant to be creating a new framework, in his interim report he stated:

"While the Special Representative of the Secretary-General indicated in his interim report that developing such materials and methodologies would be beyond the mandate's time and resource constraints, this report describes principles and characteristics of human rights impact assessments for business, including similarities to environmental and social impact assessments, and provides updates on current initiatives."⁶²

Later in 2009 in response to criticism that he was not doing enough, he argued:

"In short, initially I was given what looked very much like an "academic" mandate, and I turned it into a step-by-step process of policy development—quite the opposite of what you claim, as I hope you now see."⁶³

These different notions of whether he went beyond the mandate or not, is not completely clear. In part, it appears that Ruggie used the different interpretations of the mandate to his own benefit when it suited him, therefore, when the critical Jose Aylwin wrote to him⁶⁴ he was able to demonstrate he was doing far more than expected. From reviewing the mandates and what Ruggie created, it is clear that while his actions were within the spirit of the mandate he clearly went beyond what was expected of him. This was essential as it gave him the freedom to develop ideas and solutions without the pressure of expectation or the limits of a mandate holding

⁶¹ SRSG Response to Submission to the UN Special Representative of the Secretary-General from the Civil Society Groups across Asia. As found <http://www.reports-and-materials.org/Ruggie-response-to-Asian-NGOs-May-2009.pdf>

⁶² Summary from UN document A/HRC/4/74

⁶³ Letter to Jose Aylwin, regarding response to Buenos AAires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

⁶⁴ Letter to Jose Aylwin, regarding response to Buenos AAires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

or pulling the work in one particular direction. The loose nature of the mandate feeds into the very difficult issue that Ruggie was trying to deal with and the failure of finding a previous solution to human rights and business. In only giving a mandate open to the interpretation issues that can be seen above it gave him plenty of freedom to get the job done.

VI. Approach

Ruggie's approach to finding a solution to the issue was innovative and forward facing. In taking a research "evidence-based approach"⁶⁵ he addressed the concerns of all the stakeholders, i.e. Governments, TNC's, NGOs and victims. All elements of his work required turning the mandate "into a step-by-step process of policy development"⁶⁶ consultation with these different actors. Most important was reaching out to them all without alienating any particular group, across the globe, and ensuring that one particular group did not exert too much pressure upon the process. He held six regional consultations⁶⁷ over the course of both mandates. These regional consultations brought together all stakeholders under one roof for up to two day events discussing various elements of the mandate, with each consultation taking a particular focus. The Asian Regional consultation, for example, "brought together 76 participants from 20 countries, representing 44 non-governmental

⁶⁵ Statement by Prof. John Ruggie to the 63rd session of the General Assembly Third Committee Agenda Item 64 (b), 27 October 2008, New York, Transcript, p4. As found at <http://www.reports-and-materials.org/Ruggie-statement-UN-General-Assembly-27-Oct-2008.pdf>

⁶⁶ Letter to Jose Aylwin, regarding response to Buenos Aires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

⁶⁷ Regional Consultations were held in the following locations and dates:

Under 2005 mandate

Africa: Johannesburg: South Africa :27th-28th march 2006

Asia: Bangkok, Thailand: 26-27th June 2006

Latin America: Bogota, Colombia:18-19th January 2007

Under 2008 Mandate

Russia: Moscow: 16th March 2010, International Forum

Buenos Aires, Argentina: 14-15th May 2009

New Delhi, India: 5-6th February 2009

Source: <http://www.business-humanrights.org/SpecialRepPortal/Home/Consultationsmeetingsworkshops> accessed 30.1.13

organisations and trade unions; 20 representatives from the private sector and 12 “other” institutions.”⁶⁸ Whereas the Latin American consultation “brought together more than 90 participants from 12 Latin American countries, representing 21 different companies, 41 civil society organisations, trade unions and representatives of indigenous people, and 9 public institutions.”⁶⁹

Holding that many regional consultations is unprecedented by an SRSG mandate holder. This allowed him to reach out to all these stakeholders to build trust in the work that he was undertaking. It also allowed interaction, on a personal level, with many stakeholders, instead of creating policy from a distance in the academic ivory tower or the international organisation equivalent. This approach allowed for engagement which was open and honest, both from Ruggie’s perspective and those of the stakeholders.

Specialised consultations for different business sectors, financial and extractive, alongside a further six legal workshops focusing on the legal elements of the mandate, each considered a different question raised by the mandates. Less specialised consultations were also held each year between 2007 and 2010. These specialised consultations let important, but highly technical issues, be discussed by those with interest in these areas in an attempt to find solutions, without the fear of interference from groups who did not have the expertise and, therefore, may have found the discussions hard to follow. The approach taken also incorporated a series of legal workshops which addressed the pros and cons of various legal strategies and remedies, based in various locations across the globe. For example, the 2006 New York workshop discussed the principled basis for attributing human rights

⁶⁸ Asian Regional Consultation Summary Report p1

⁶⁹ Latin American Regional consultation summary report p1 <http://www.reports-and-materials.org/Ruggie-Latin-America-Consultation-report-18-19-Jan-2007.pdf>

obligations to companies under international law.⁷⁰ These legal workshops were important for the non-lawyer Ruggie but also showed his willingness to interact with the variety of opinion, academic and practical on such a difficult and challenging question. In total, he conducted some forty-seven formal consultations around the world, alongside numerous visits to key capitals, and close informal links to governments and other stakeholders.⁷¹ Through the multi-stakeholder and global consultations he fulfilled the role of letting everyone have their input. This allowed Ruggie to then cherry pick the best ideas to come out of these meetings or follow up on the concerns raised.

One theme that ran throughout the consultations was the willingness of the stakeholders to get involved within the consultations in order to produce a workable solution. The extent of the consultations was underlined in a letter from Ruggie to Jose Aylwin when he stated:

“five regional consultations to date, all in developing countries; some fifteen multi-stakeholder expert consultations addressing specific subjects and drawing on participants from all sectors of society and all regions; numerous personal site visits to communities and company operations; and a massive research effort that has clarified for all actors some of the most critical and controversial issues pertaining to business and human rights.”⁷²

This engagement with the consultations was important on a different level that it lowered the metaphorical barriers between those proposing a new UN framework and those actually going to be affected by it. Therefore, by getting all those stakeholders involved meant that they had a reputational cost in the process. In essence reducing the hostility towards an end result, which would not be exactly

⁷⁰ Remarks at Public session by John Ruggie at the National Roundtable on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries: Montreal November 14th, 2006: As found at <http://www.reports-and-materials.org/Ruggie-speech-Canada-National-Roundtable-14-Nov-2006.pdf>

⁷¹ John Gerard Ruggie (2013) p119

⁷² Letter to Jose Aylwin, regarding response to Buenos Aires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

what one particular group envisaged, and as such they all felt like contributors towards the final document. If the reputational cost⁷³ was significantly high enough, stakeholders would be more inclined to want a successful document, as no one wants (especially TNC's after pumping millions of dollars into the process) to be associated with failure.

A key stakeholder within the process was the victims of abuse. Therefore, special efforts were made to reach victims using relevant civil society networks, contacting national human rights institutions about the consultation and invited participants.⁷⁴ This extended to his personal involvement in meeting different groups and was underlined in a speech to the UN General Assembly in October 2008:

“I have met personally with indigenous peoples groups and other affected communities, with workers in global supply chains, and with labor leaders whose colleagues were killed by paramilitaries protecting company assets.”⁷⁵

Therefore, his consultations were not just with the TNC's and NGOs but also victims, giving a broad range of views and seeing the issue affecting people first hand.

Ruggie's approach was just one of many that he could have taken; the main other would have been to attempt to bring states together to create a new treaty on Business and Human Rights, especially after completion of the first mandate in 2008. In a May 2008 article to Ethical Corporation Magazine, Ruggie sets out why this would not be a great idea:

“But it is my carefully considered view that negotiations on an overarching treaty now would be unlikely to get off the ground, and even if they did the outcome could well leave us worse off than we are today.”⁷⁶

⁷³ Reputational cost will be discussed in Chapter 5

⁷⁴ UN document A/HRC/14/29

⁷⁵ Statement by Professor Ruggie at the 63rd session of the General Assembly 27 October 2008, Report, p1

⁷⁶ Treaty road not travelled, Ethical Corporation, May 2008, p42

“First, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. Second, and worse, a treaty-making process now risks under mining effective shorter-term measures to raise business standards on human rights. And third, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.”⁷⁷

“Even if we were to go down the treaty route, we still need immediate solutions to the escalating challenge of corporate human rights abuses. UN high commissioner for human rights Louise Arbour has put this well, saying: “it would be frankly very ambitious to promote only binding norms considering how long this would take and how much damage could be done in the meantime.”⁷⁸

The indication in this article appears that he believed the treaty creation process would be more of a hindrance than a practical help at this time. It would detract too much from his work and also place too much work on states having to take the lead, whereas if he maintained his previous approach of consultation and recommendation making he would retain far more control over the document produced.

The approach was not particularly innovative in terms of a radical departure from what might be expected, but was innovative in terms of an almost academic research project being undertaken, producing workable documents, the 2005 mandate creating the “Protect, Respect, and Remedy” framework. The desire for a common framework was underlined by Ruggie when at the UN General Assembly he stated:

“One theme ran throughout my consultations. Every stakeholder group, despite their other differences, expressed the urgent need for a common framework of understanding, a foundation on which thinking and action can build in a cumulative fashion going forward.”⁷⁹

⁷⁷ Treaty road not travelled, Ethical Corporation, May 2008, p42

⁷⁸ Treaty road not travelled, Ethical Corporation, May 2008, p42

⁷⁹ Business and Human Rights: A Political Scientists guide to survival in a Domain where lawyers and Activists Reign. Remarks by John Ruggie: Annual Conference International law Association (British Branch) London, 17 May 2008: As found at <http://www.reports-and-materials.org/Ruggie-ILA-17-May-2008.pdf>

This whole approach was centrally controlled by Ruggie and his team as they conducted and managed the process.⁸⁰ The team determined where and when consultations happened, how they happened, controlled the agendas of discussions, spoke to the NGO groups he wanted to listen to, produced the summary of discussions and decided who and when would undertake research. Therefore, he centrally controlled what issues were tackled, and which solutions best fitted into his conceptual solution. This meant the framework and guiding principles were a product of his educated view and refined by the research undertaken, though with the level of control he could push the process in the direction he desired.

VII. Language

As important as the consultations and approach to the work was the language, phrases and ability that Ruggie has as an orator. This section will explore some of the themes and choices of language that Ruggie used during his time as SRSG, considering how his choice of language and the charisma that he brought was fundamental to the success of the mandate. One of the key language based concepts Ruggie uses is reiteration. This happens numerous times through his work, often when speaking to different audiences and at different times during the mandates. This helped to reinforce the messages to the audience, a key tool to keep the focus on the work being undertaken, e.g. reminding people about the failure of the Norms.

One example of reiteration Ruggie points to is the importance of the mandate in making a comparison between the Victorian era variant of globalisation and the collapse of Laissez-faire politics with the rise of ugly “isms” which were bad for

⁸⁰ John Gerard Ruggie (2013) pxlxvii

business and human rights. This is similar to a concern that a failure to fill the gap between global markets and workers concerns could fuel a similar rise of intolerant nationalism.⁸¹ He later uses the same argument in his Interim Report⁸² in 2006, also using a very similar, but re-phrased argument in remarks delivered at a forum on Corporate Social Responsibility in Germany 2006.⁸³ He, again, used the same argument in his conclusion in the 2007 report.⁸⁴

One of Ruggie's favoured phrases to remind people that while he is the SRSG he does not have a magic solution to the issues of business and human rights, he uses the term "Silver Bullet". The importance of this phrase is underlined in Chapter 2 of his book reviewing his own work is entitled "No Silver Bullet"⁸⁵. Examples of its use in reminding people are:

"The extensive research and consultations conducted for this mandate demonstrate that no single silver bullet can resolve the business and human rights challenge. A broad array of measures is required, by all relevant actors. Mapping existing and emerging standards and practices was an essential first step."⁸⁶

"There is no single silver bullet solution to closing the global governance gaps in the business and human rights domain. But for the sake of the victims of corporate-related human rights abuse, and to sustain globalization itself as a positive force, they must be closed."⁸⁷

This phrasing is used throughout both mandates, at various different times in order to remind individuals that his work will take time, often tailoring it towards a particular

⁸¹ Remarks by John Ruggie: Business & Human Rights Seminar: Old Billionsgate: London: December 8th 2005. Found at <http://www.reports-and-materials.org/Ruggie-remarks-to-Business-Human-Rights-Seminar-8-Dec-2005.doc>

⁸² UN Document, E/CN.4/2006/97, p18

⁸³ Remarks by John Ruggie: Delivered at a Forum on Corporate Social Responsibility in Bamberg, Germany, June 14th 2006. As found at <http://www.reports-and-materials.org/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>

⁸⁴ UN Document A/HRC/4/35, Para. 83

⁸⁵ John Gerard Ruggie (2013) pp.37-80

⁸⁶ UN Document A/HRC/4/35, para 88

⁸⁷ Statement by Professor John Ruggie to the 63rd session of the General Assembly Third Committee Agenda Item 64 (b), 27 October 2008, New York, Transcript, p4. As found at <http://www.reports-and-materials.org/Ruggie-statement-UN-General-Assembly-27-Oct-2008.pdf>

group for instance in Copenhagen 2009 at a consultation on “The role of States in Effectively Regulating and Adjudicating the Activities of Corporations with respect to Human Rights” he stated:

“The SRSG explained in his opening remarks that he saw no “single silver bullet” solution to the many issues raised in his mandate, including states’ roles.”⁸⁸

It was also used in UN reports in 2008⁸⁹ and 2009,⁹⁰ additionally at the public hearing on business and human rights sub-committee on Human Rights European Parliament in Brussels.⁹¹ Further, it was used in speeches at the Yale Law School,⁹² in a keynote address in Atlanta,⁹³ and at the Trygve Lie Symposium on Fundamental Freedoms.⁹⁴ In using this phrase time and time again it helps to reinforce the idea that finding a solution is not easy or clear cut. By using the imagery of the silver bullet it brings to mind tough and difficult challenges, often silver bullets being associated with mythology. Ruggie is underlining that while the expectation levels are high, he is doing the best he can, and yet no easy solution is available to him and his team.

A different element of Ruggie’s skill as an orator is the charisma that he brings to public speaking, this is done in a number of different ways, but he is highly skilled

⁸⁸ The role of States in Effectively Regulating and Adjudicating the Activities of Corporations with respect to Human Rights, Copenhagen, 8-9th November 2007, at p1 found at www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf

⁸⁹ UN Document A/HRC/8/5, para 7

⁹⁰ UN Document A/HRC/14/29, para 69

⁹¹ Public hearing on business and Human Rights Sub-committee on Human Rights European parliament Brussels, 16 April 2009, p4, as found at <http://www.reports-and-materials.org/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>

⁹² Remarks by SRSG John Ruggie: “Reframing the Business and Human Rights Agenda”: Yale Law School: 30th October 2008: as found at: <http://www.reports-and-materials.org/Ruggie-remarks-Yale-Law-School-30-Oct-2008.pdf>

⁹³ Keynote address by SRSG John Ruggie: “Engaging Business: Addressing Respect for Human Rights”: Atlanta, 25th February 2010: As found at <http://www.reports-and-materials.org/Ruggie-keynote-address-in-Atlanta-25-Feb-2010.pdf>

⁹⁴ Opening remarks by John Ruggie: Trygve Lie Symposium on Fundamental freedoms: New York 24th September 2010: as found at <http://www.reports-and-materials.org/Ruggie-Trygve-Lie-Symposium-24-Sep-2010.pdf>

within this field. One method that he uses to break barriers down with audiences is to use humour, or a personal remark. In Montreal he uses a joke about supporting funding for himself:

“Among my favorite “actionable ideas” from previous roundtables is No. 5.4. I quote: “Canada should continue its ongoing financial support of the work of John Ruggie...Canada should also promote and extend diplomatic support to the outcomes of his mandate.” After careful review and consideration, I find myself able wholeheartedly to endorse that recommendation! All kidding aside, the government of Canada has been supportive right from the start, for which I am deeply grateful.”⁹⁵

A different example of the humour that he gives across is in explaining to an audience how he accepted the position of special representative.

“On the principle that no good deed should go unpunished, after I left the UN and Kofi Annan was asked to find a special representative for business and human rights, he called me up, right after I'd had serious surgery and was under the influence of drugs, and said, "I have just the job for you. You need to become my Special Representative for Business and Human Rights." And, not knowing any better, I said yes. That's how I got involved in this.”⁹⁶

Without really explaining his personal motivation behind taking the position, he again lowers barriers, telling them something personal, and then giving a humorous reasoning as to why he took the job of SRSG. He, therefore, closes any later questions as to the real motivations behind taking such a difficult role. Another method of breaking barriers down is when Ruggie talks himself down; he did this at Wilton Park in 2005 and performs the same trick in a speech in 2008 when stating:

“But being a mere political scientist by training, I am also somewhat humbled as I stand before you. It is true that my undergraduate college has bestowed on me a doctorate of laws—but the parchment also says honoris causa, which is probably some secret vow only other lawyers understand. And although I

⁹⁵ Remarks at Public session by John Ruggie at the National Roundtable on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries: Montreal November 14th, 2006: As found at <http://www.reports-and-materials.org/Ruggie-speech-Canada-National-Roundtable-14-Nov-2006.pdf>

⁹⁶ Transcript: Business and Human rights: Achievements and Prospects: October 28th 2008. As found at <http://www.policyinnovations.org/ideas/briefings/data/000089>

am an affiliated professor in international legal studies at Harvard Law School, this puts me in the unenviable position of having to teach law students things I was never taught.”⁹⁷

This is a clever idea as he is expressing that the difficult task he has been given is an area in which he is no expert, therefore, he needs the help of these in the room and wider stakeholders in order to accomplish the mandates.

At a different speech in London after the conclusion of the first mandate, Ruggie uses a personal event, the birth of his son in the city to connect with audience, after praising London as the place of so many innovative corporate citizenship initiatives.⁹⁸

Later in the same speech at Clifford Chance he makes a comparison between his recent work and the T.S. Eliot poem “Little Gidding”, focusing on the following lines and adding a postfix to reach a conclusion of his speech:

“We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

To which I would only add that the exploration was necessary. Now let the real work begin. And let us do it together, in the recognition that the stakes are incredibly high – for human rights, for business, and for governance on our ever-smaller planet.”⁹⁹

It may seem a simplistic analysis, but adding in these personal, humorous, or interesting remarks helped Ruggie to get the audience’s attention and keep their focus on what he was saying. These types of remarks help the speech to stick in the mind as the remark will, more likely, be remembered and brought up in conversation, allowing memories of the substance of the speech to be recalled alongside these other remarks. Finally, these observations help space out the important take home

⁹⁷ <http://www.reports-and-materials.org/Ruggie-ILA-17-May-2008.pdf>

⁹⁸ Prepared Remarks by John Ruggie at Clifford Chance, London, 19th February 2007, as found at <http://www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf>

⁹⁹ Prepared Remarks by John Ruggie at Clifford Chance, London, 19th February 2007, as found at <http://www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf>

message points of the speech, while not detracting from the overall themes, therefore, giving adequate time between the important and the less important information.

Ruggie's choice of language also comes into its own when dealing with issues or questions that are either attacking his work, or when he feels the need to defend what he was doing. When dealing with the Buenos Aires NGO statement, he uses conciliatory language to be firm that he believes they are wrong, but also respectful of their view point, seeking to correct a "misunderstandings or misinterpretations – before they take on a life of their own and are repeated as fact."¹⁰⁰ Also firmly making the point that:

"Everything I have described above is in the public domain and could easily have been verified prior to finalizing the "Statement." (For regular updates, please visit <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.)"¹⁰¹

Ruggie manages to strike that difficult balance between being firm that he is right, while also giving time to the points or issues that a concerned stakeholder had raised. It must also be considered that Ruggie did reply to this group, when it may have been easier to ignore them, and to continue with his work. At other times Ruggie expands his work so it is inclusive, in a letter response to NGOs after the Latin American consultations Ruggie writes:

"Many thanks again for your constructive participation at the Bogotá consultations. The dialogue was open and sometimes intense, but I feel strongly that everyone went away with a better understanding of the challenges we face – I know for certain that I did."¹⁰²

¹⁰⁰ Letter to Jose Aylwin, regarding response to Buenos AAires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

¹⁰¹ Letter to Jose Aylwin, regarding response to Buenos AAires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

¹⁰² 29th January 2007 Ruggie response to NGO letter post Latin American consultations

In this letter extract Ruggie uses language such as “we face” therefore, ensuring that those that sent him the letter feel as much part of the challenge in creating a business and human rights mechanism as himself. This helps reinforce the idea of the consultations to take stakeholders with him and feel included in the process.

Ruggie is very clever with how he uses language in order to gain trust and respect from all stakeholders. Talking to all stakeholders and Ruggie’s approachability can be seen in the widely recounted tale of Ruggie’s visit to the province of Cajamarca, in Peru,¹⁰³ in which a mining operation between Denver based Newmont Mining and Peru’s largest publicly traded precious metals company, Compania de Minas Buenaventura, had caused large amounts of hostility between its operation of a gold mine and the local population.¹⁰⁴ When visiting the area, Ruggie visited not only the companies area of operation speaking to company officials and the local Mayor¹⁰⁵ but also a former Priest called Marco Arana, known to his supporters as the red priest and acting on behalf of the local population.¹⁰⁶ Arana recalled the, now often repeated, line as why it was common practice to blockade the mine, “They don’t listen to us when we come with small problems, so we have to create big ones.”¹⁰⁷ Perhaps as important as the story itself is to the issues between TNC’s and local populations, is how Ruggie approached each different group getting them to tell him about the problems and issues that they were having. By talking, not just to the TNC’s, Governments, and NGOs, but by talking to the easy to forget local groups Ruggie managed to build relationships with all stakeholders. This methodology ensures that the often perceived image of taking sides when new individuals come

¹⁰³ John Gerard Ruggie (2013) pp.xxxvi-xlii

Ruggie also talks about this trip during the Sackler Lecture, University of Connecticut, Sackler Lecture, Delivered on 28/02/13, as found at <http://mediasite.dl.uconn.edu/Mediasite/Play/76c132b67e3e4aa0ad91295b041cbf381d>

¹⁰⁴ John Gerard Ruggie (2013) pxxxvi

¹⁰⁵ John Gerard Ruggie (2013) pxxxix

¹⁰⁶ John Gerard Ruggie (2013) pp.xl-xli

¹⁰⁷ John Gerard Ruggie (2013) pxli

into highly contentious situations is not started or built upon. In doing this he gained the trust and respect of stakeholders, especially individuals, who often feel isolated from these big international global projects. The approach of actually talking to people and gaining trust is vastly different to a legalistic approach that would be expected from lawyers, often associated with arrogance and a know-all mind-set. A typical joke that has been told on the arrogance of lawyers goes:

Q. What's the difference between a cat and a lawyer?

A. One's an arrogant creature that will ignore you contemptuously unless it thinks it can get something out of you. The other is a house pet.¹⁰⁸

Therefore, for an example of Ruggie's rather humble approach, consider the Wilton Park Speech "I'm not trained as a human rights lawyer, or a lawyer of any kind"¹⁰⁹ or, "At this point I don't have a precise roadmap or even a fixed destination for the mandate."¹¹⁰ This is anything but arrogant, but is essentially respectful and trust building. This use of language to talk to those not usually considered important enough or using humble language allowed Ruggie to build a far bigger picture than previous attempts at finding a solution.

Linked to this idea of the content of Ruggie's speeches, are the length of speeches that he delivers. He seems to always ensure that they do not take up too much time, so the audience's attention is not lost. On paper, the prepared remarks from speeches are usually between six to seven pages and the audio version is roughly around twenty minutes long. The speeches usually tend to always take the same structure, starting with an introductory statement thanking the place or people for

¹⁰⁸ This version of the old joke was found at http://www.archelaus-cards.com/?main_page=animals accessed 2.5.13

¹⁰⁹ Wilton Park Conference On Business and Human rights, Opening Remarks, October 10-12, 2005 as found at <http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc> accessed 14.1.13

¹¹⁰ Wilton Park Conference On Business and Human rights, Opening Remarks, October 10-12, 2005 as found at <http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc> accessed 14.1.13

hosting the event at which he is speaking. The opening section will generally focus on the failure of the Weissbrodt Norms and also the wider failures to create a solution to the business and human rights issue. Next, Ruggie explains the work to the point at which he is speaking, usually explaining back to an issue that concerns his mandate from the General Assembly or the Human Rights Council. Moving onto the main substance of the speech, this will normally be tailored to the audience. For example, at the International Institute for Conflict Prevention and resolution he spoke about conflict resolution between indigenous peoples and TNCs.¹¹¹ Ruggie will then outline a proposed solution to the issue, sometimes this may only be a loose idea but towards the end of both mandates usually a more concrete proposal that should help in future. Finally, he will conclude his speech with a positive aspect of his solution and sum up the rest of the speech. This speech structure is important as it allows for speeches to be tailor made for the audience, yet they are all part of the same series saving time during preparation of speeches, of which he gave many. The main take home points are, therefore, always easily accessible, and the message, especially about the importance of the work due to the failure of the Norms is always repeated. Within all his speeches, Ruggie has a talent of being able to take the listener with him. His delivery of speeches is very good; the confidence of his words comes across as if what he is saying should not be doubted. The delivery is exceptional and puts the right emphasis in the right places, to make the speeches dramatic and demonstrate his personal charisma.

¹¹¹ Remarks by SRSG John Ruggie, International Institute for Conflict Prevention & Resolution Corporate Leadership Award Dinner, New York, 2nd October 2008. As found in <http://www.reports-and-materials.org/Ruggie-speech-to-CPR-2-Oct-2008.pdf>

VIII. Principled Pragmatism

More important than a phrase or use of language, “Principled Pragmatism” was Ruggie and his team’s main methodology and working philosophy underpinning everything that was undertaken. This sub-section will explore what principled pragmatism means, and how this terminology was used to great effect. Principled pragmatism sounds like a phrase that a politician would use to describe how they work, or what political philosophy they subscribe to, and is perhaps the closest explanation to the term. This terminology is defined within the 2006 interim report.¹¹² Ruggie heads a sub-section of the report section setting out strategic directions entitled “Principled pragmatism” with this section of the report how he intends to accomplish the mandate. Setting out what this phrase means in the final paragraph:

“In the Special Representative’s case, the basis for those judgements might best be described as a principled form of pragmatism: an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people.”¹¹³

In 2008, Ruggie refines what he means by principled pragmatism stating:

“The very first time I ever made any remarks on this mandate I was asked to describe my approach to this, and I called it principled pragmatism. It is driven by principle, the principle that we need to strengthen the human rights regime to better respond to corporate-related human rights challenges and respond more effectively to the needs of victims. But it is utterly pragmatic in how to get from here to there. The determinant for choosing alternative paths is which ones provide the best mix of effectiveness and feasibility. That is what we have been trying to do with this mandate since 2005.”¹¹⁴

Whilst never giving a complete definition of what is meant by the concept he speaks about its success in 2010 interim report when stating:

¹¹² UN Document, E/CN.4/2006/97

¹¹³ UN document, E/CN.4/2006/97, p20

¹¹⁴ Transcript: Business and Human rights: Achievements and Prospects: October 28th 2008. As found at <http://www.policyinnovations.org/ideas/briefings/data/000089>

“The *Financial Times* reports that the Special Representative “has won unprecedented backing across the battle lines from both business and pressure groups for his proposals for tougher international standards for business and governments”. He is immensely grateful to everyone who has supported and participated in the mandate’s comprehensive and inclusive process, and the progress achieved to date. Principled pragmatism has helped turn a previously divisive debate into constructive dialogues and practical action paths.”¹¹⁵

Perhaps principled pragmatism is best defined and described as Ruggie’s response to a comment raised after meeting indigenous peoples in Latin America, when challenged that he needed to speak more from the heart, Ruggie responded with:

“I will let my heart drive my commitment to human rights. But I’ll need my head to steer the heart through the very difficult global terrain on which we are travelling.”¹¹⁶

While Ruggie uses this concept, to help explain the methodology of his work, the flexibility of the term has also allowed him to develop the meaning, therefore ensuring that he did not seem to contradict himself as his work progressed, and giving him room to explore the mandate but remain in control of the overall direction of the project. With using an ill-defined term he also meant he did not commit himself to doing anything that he would later regret. The concept is brought up again in Ruggie’s final report¹¹⁷ when he talks of the results of principled pragmatism, again refining the concept to encompass all the elements and directions that his work had taken off.

In essence, this terminology appears to be exactly what it sets out to be, not just a methodology but also a philosophical concept underpinning the direction from which Ruggie and the team were working from. Instead of taking a legalistic approach,

¹¹⁵ UN Document, A/HRC/27, para 15

¹¹⁶ John Gerard Ruggie (2013), p1 (This book has two page one’s, this refers to the page one at the end of the Introduction)

¹¹⁷ UN Document, A/HRC/14/27

which would be alien to the politically trained Ruggie, he intended to navigate the tricky task by sticking to Human Rights principles initially undefined as to what these were. The pragmatic part was ensuring that actual real progress is made in making progress towards a solution within the Business and Human Rights question. It seems to reflect the idea expressed by Schieder:

“Rather than viewing international law as a collection of norms that lay claim to a mental existence detached from their creation and application, pragmatism allows us to describe international law as an evaluative social process.”¹¹⁸

The loose nature of which Human Rights principles they would be encompassing or promoting within the Framework and Guiding Principles was not specified. As consultation with stakeholders progressed, the human rights documents which all stakeholders could agree on were the “International Bill of Human Rights (the Universal Declaration and the two Covenants), coupled with the ILO Declaration on Fundamental Principles and Rights at Work, all of which are widely endorsed by the International Community.”¹¹⁹ Therefore, as these documents and rights could be agreed upon it made sense to the pragmatic Ruggie to use the rights within these documents, therefore, meaning that he did not need to reinvent the wheel, instead using wheels readily available off the shelf.

“An authoritative “list” of internationally recognized rights already exists and does not need to be reinvented.”¹²⁰

This journey by Ruggie and his team towards picking these documents to form the principal part was a process which happened over many years and only after much consultation and legal research from the team. When Ruggie first used this

¹¹⁸ Siegfried Schieder, “Pragmatism and International Law” Harry Bauer & Elisabetta Brighi (eds), *Pragmatism in international relations*: (Routledge: Abingdon: 2009) p129

¹¹⁹ John Gerard Ruggie (2013) p96

¹²⁰ John Gerard Ruggie (2013) p96

terminology there was no indication as to what principles he would follow or even if this meant creating a new set of principles that would broadly reflect stakeholder's interest.

The pragmatism element towards the methodology possesses an even more important element to Ruggie, having seen the failure of the Norms and David Weissbrodt, he did not want to follow the same course. Ruggie, the political scientist, could see the failure of the legalistic norms which were created with little consultation and were very much a legal instrument symbolising how a lawyer would tackle the business and human rights issue, therefore, workability was far more important:

“The Guiding Principles are not an international treaty, although they include both hard and soft law elements. Nor are they intended to be a tool kit, its components simply to be taken off the shelf and plugged in, although they are meant to guide policy and practice. The Guiding Principles constitute a normative platform and high-level policy prescriptions for strengthening the protection of human right against corporate-related harm.”¹²¹

On a practical level during the development phase the pragmatic part of this methodology was that nothing would be committed to until agreement had been reached or tested by stakeholders as Buhmann states:

“The gradual development of findings and recommendations was made in a way that allowed stakeholders the possibility to make comments. That approach therefore also allowed the SRSG the opportunity to test ideas and proposals, and integrate them into later stages of the process and its written outputs (reports).”¹²²

The workability as part of pragmatism is seen with the strategic aim set out by Ruggie within the process, in his book he highlights that his strategic aim was not to

¹²¹ John Gerard Ruggie (2013) p124

¹²² Karin Buhmann, “The Development of the “UN Framework”: A Pragmatic Process Towards A Pragmatic Output.” As found in Ed Radu Mares, *The UN guiding Principles on Business and Human Rights: Foundations and Implementation*, (Martinus Nijhoff Publishers: Leiden: 2012) p102

provide a definitive fix all solution to all the issues, but initially to supply a focal point in a difficult area.

“I envisioned a model of widely distributed efforts and cumulative change. But for such efforts to cohere and become mutually reinforcing, they require an authoritative focal point that the relevant actors can rally around. Providing that focal point became my strategic aim.”¹²³

This deep rooted desire for workability, a key component of pragmatism ensured that the creation of the Framework and GPs did not get bogged down in legalistic issues in which Ruggie was not trained or had shown particular interest in grappling with long winded rights or doctrinal issues. Ruggie was concerned about the consequences of not following at this deep rooted workability leading to a pragmatic approach:

“Finally, I wanted at all cost to avoid having my mandate become entrapped in or sidetracked by lengthy intergovernmental negotiations over a legal text, which I judged would be inconclusive at best and possibly even counterproductive. It was too important to get the parameters and perimeters of business and human rights locked down in authoritative policy terms, which could be acted on immediately and on which future progress could be built. Therefore, I took great care to base the mandatory elements of the Guiding Principles on the implications of existing legal standards for states and business; to supplement those with policy rationales intended to speak to the interests and values of both sets of actors; and in addition to Human Rights Council endorsement, I also sought to have core elements of the Guiding Principles adopted as policy requirements by other entities with the authority and responsibility to do that. In short, I aimed for a formula that was politically authoritative, not a legally binding instrument.”¹²⁴

As seen in the quote above, pragmatism was central to working towards a solution which was workable, i.e. not legally binding but derived its authority from a political base. This was a notion that Ruggie, trained as a political scientist, would have been far more comfortable with, especially after his work on the UN millennium goals,

¹²³ John Gerard Ruggie (2013) pxlili

¹²⁴ John Gerard Ruggie (2013) pp.xlv – xlvi

which derive their authority from political commitments. The notion of political authority may also seem a far more workable concept to Ruggie in the business and human rights environment, due to the large quantity of actors and stakeholders. It would be impossible for a legally based system to hold any legal authority, especially if that legal authority was derived from a treaty or required states to implement certain legal standards. As Buhmann notes:

“The SRSG process is an example of a politically pragmatic process towards a legally pragmatic output. With the Human Rights Council’s endorsement of the Guiding Principles, legal work on normative details will deliver the compliance “pull” that will make them effective beyond simply coming into existence.”¹²⁵

While only being a political authority, this could be enough to get compliance with the Guiding Principles. The notion of opening up norms creation to non-state actors, not just in terms of political derived authority, but also in terms of a global governance role using a global public domain, was something that Ruggie had considered at length in a 2004 article.¹²⁶ Ruggie argues that non-state actors can influence the development of norms through their use of a global public domain whereby they can exercise their powers. Bringing TNC’s inside the Business and Human Rights process reflecting them as stakeholders was an extension and realisation of this argument.

The simplicity of this terminology is part of the genius of principled pragmatism, and as the term had not been used before, it allowed Ruggie to construct a meaning as to its application within international norm creation. By using the term, Ruggie could use his status as an independent authorised individual to take the mandate forward

¹²⁵ Karin Buhmann, “The Development of the “UN Framework”: A Pragmatic Process Towards A Pragmatic Output.” As found in Ed Radu Mares, *The UN guiding Principles on Business and Human Rights: Foundations and Implementation*, (Martinus Nijhoff Publishers: Leiden: 2012) p105

¹²⁶ John Gerard Ruggie, “Reconstituting the Global Public Domain – Issues, Actors, and Practices”, *European Journal of International Relations*, Vol. 10 (4) pp.499-531

in unforeseen ways, using principled pragmatism as the mechanism. The use of the terminology allowed for an evolution of policy in the direction which the consultations with stakeholders took the work. Therefore, by sticking to the methodology Ruggie did not have to commit to a particular outcome, certainly when he started he did not appear to have a strategic end goal in mind.

Principled pragmatism, should not be viewed as a completely original idea, pragmatism within international law has been around for a long time. Schieder provides two important insights into why pragmatism within international law, more generally, has been a useful tool:

“Legal pragmatism today includes such figures as Daniel Farber (1995), Thomas Grey (1998) and Judge Richard Posner (1995, 2003). This heterogeneous legal movement has in common that it emanates from the pragmatist conception of law, according to which law is above all, a social tool for the effective handling of problems.”¹²⁷

“Pragmatism provides yet another angle for viewing the matter, one in which the states’ right to sovereignty, on the one side, and the necessary protection of human rights, on the other, are weighed against each other in a political process in which decisions are questioned with regard to consequences.”¹²⁸

To the international relations expert Ruggie, these concepts would have been familiar. Ruggie adopted the first insight using law as an effective social tool to solve problems, certainly the Ruggie Framework three pillars approach is using law to solve on-going problem of businesses failure to take minimum Human Rights standards into account. The second insight is even more apparent to the issue of business and human rights, with the added ingredient of TNC’s, therefore, pragmatism provides the only workable solution.

¹²⁷ Siegfried Schieder (2009) p126

¹²⁸ Siegfried Schieder (2009) p137

Reflection of principled pragmatism is seen in the strategic paths taken by Ruggie and his team. Ruggie talks about these strategic paths in both the Sackler lecture,¹²⁹ and names chapter 4 of his book¹³⁰ after them. In total, Ruggie maps out six different pathways. These pathways underline how principled pragmatism can be used to set out a workable solution to the problem; for instance, the pathway creating a common knowledge base,¹³¹ was essential to finding a pragmatic way forward. Unless everyone shared the same common base lines, different ideas would mean different things to different actors, making it impossible to agree on the most basic ideas. Road testing the ideas was a great example of this concept. For example, human rights due diligence with 10 Dutch companies¹³² or grievance mechanism was tested by four companies in four different sectors.¹³³ Doing this got over the issue that “routine objections by those who would be affected by new rules and don’t like them is to claim that the rules won’t work in practice.”¹³⁴ The road testing was a pragmatic way in ensuring that the Guiding Principles were not rejected out of hand. The final example of strategic paths as a demonstration of Principled Pragmatism was “ensuring process legitimacy”,¹³⁵ which was essentially a pragmatic idea. The notion was to get businesses and other stakeholders on board with what Ruggie and his team were attempting to do, this would involve that notion already discussed that by getting stakeholders onside they were more likely to actually implement the Guiding Principles. A different example of the use of principled pragmatism in action was when Ruggie used it to turn NGO’s opinions on his work by openly engaging with

¹²⁹ University of Connecticut, Sackler Lecture, Delivered on 28/02/13, as found at <http://mediasite.dl.uconn.edu/Mediasite/Play/76c132b67e3e4aa0ad91295b041cbf381d>

¹³⁰ John Gerard Ruggie (2013) pp.128 -169

¹³¹ John Gerard Ruggie (2013) pp.129-141

¹³² University of Connecticut, Sackler Lecture, Delivered on 28/02/13, as found at <http://mediasite.dl.uconn.edu/Mediasite/Play/76c132b67e3e4aa0ad91295b041cbf381d>

¹³³ John Gerard Ruggie (2013) pp.154-155

¹³⁴ John Gerard Ruggie (2013) p151

¹³⁵ John Gerard Ruggie (2013) pp.141-148

them in order to undertake research on his and the mandates behalf. One example illustrated by Buhmann but worth repeating in full is:

“One particularly interesting example of the SRSG’s approach was his invitation in December 2005 to the IOE [Institute of Export] to develop guidelines for companies to deal with dilemma situations encountered in “weak governance zones”. In undertaking this work, the IOE would liaise with its members and other business organisations, including the ICC and the Business and Industry Advisory Committee (BIAC) of the OECD. Recall that the IOE and ICC had been strongly opposed to the draft UN Norms. Engaging them in work on human rights dilemmas in weak governance zones might look like letting the fox into the henhouse. As it turned out, the move resulted in a change in stances within those organisations and probably in the support among them and their members of the worked and recommendations of the SRSG, and a reference to international human rights law as a fallback position for companies working in areas where national law is lacking.”¹³⁶

This is not only an example of Ruggie’s ability to change minds, but also the practical effects that stakeholder inclusion can bring through the use of principled pragmatism.

From an objective point of view, principled pragmatism was the mechanism that allowed Ruggie to succeed where so many had failed before him. The use of this methodology raises a number of questions regarding how law should be created. The notion of principled pragmatism means that, at the outset, there is no idea of what the final concept is going to be, while this has been seen to be extremely useful to an independent authorised individual it has its shortcomings in several aspects. Firstly, it creates uncertainty for all actors involved, they have no idea what they could or might be supporting, and for instance TNC’s could have ended up supporting a document that actually hindered their business interests. Alongside this, it also creates legal uncertainty in terms of the final document, or when this will be produced. The Guiding Principles and Framework Ruggie refers to as “for its

¹³⁶ Karin Buhmann, “The Development of the “UN Framework”: A Pragmatic Process Towards A Pragmatic Output.” as found in Ed Radu Mares, *The UN guiding Principles on Business and Human Rights: Foundations and Implementation*, (Martinus Nijhoff Publishers: Leiden: 2012) p103

implementation aim to establish a common global normative platform and authoritative policy guidance as a basis for making cumulative step-by step, progress without foreclosing any other promising longer-term developments.”¹³⁷The UNGP are not the end game, so we are left in legal uncertainty as to what the final product of the business and human rights issue is or will be.

An examination of the mandate of the Working Group on the issue of human rights and transitional corporations and other business enterprises,¹³⁸ set up as the next step without Ruggie’s driving force the mandate does not set any definitive goals or outcomes for the Working Group. Without an individual willing, or able to step out and become an independent authorised individual progress could easily become stagnated. The working groups mandate promotes ideas of Ruggie’s Principled Pragmatism, establishing a forum to interact with stakeholders,¹³⁹ to receive feedback on the Guiding Principles and make recommendations upon information received¹⁴⁰ and to interact with all relevant international bodies.¹⁴¹ What the mandate is setting out is to use Ruggie’s concept of receiving information and acting upon it to create or modify a solution to the on-going issues. This notion can create uncertainty, unless the stakeholders trust the working group they will not get the endorsements from them. Unless the stakeholders trust the working group they will not fully commit to the forums or implement any suggestions that the working group give.

The difference of why principled pragmatism worked for Ruggie is that the independent authorised Ruggie gained their trust, and his personality and charisma

¹³⁷ John Gerard Ruggie (2013) p 81

¹³⁸ UN Document A/HRC/RES/17/4

¹³⁹ UN Document A/HRC/RES/17/4, see points 12-15

¹⁴⁰ UN Document A/HRC/RES/17/4, see 6(B)

¹⁴¹ UN Document A/HRC/RES/17/4 see 6(G)(H)

were central to this. For a working group, consisting of five individuals, with none presently becoming an independent authorised individual or the de facto group leader, such as Eleanor Roosevelt did in the creation of the UDHR, using principled pragmatism may be difficult to make actual progress. Presently, the Working Group is Ruggie's metaphorical child, yet the child is currently at the crucial phase of learning to stand and walk on its own. The outcomes of whether the working group stands and runs using principled pragmatism or continues to crawl along will expand our understanding of this methodology outside its use by a single independent authorised individual. If the principle has a long term future the Working Group will be able to embrace its use and take the Guiding Principles from strength to strength.

This uncertainty regarding the success of the methodology is part of the overall uncertainty about the legal outcomes that principled pragmatism can possibly bring. Ideally, in law creation predictability is a desirable element that all stakeholders would ideally like, in the human rights and business predictability was not possible due to the conflict of interests; however, with the Guiding Principles established predictability may be far more important. In other areas of international law and, more generally within the law, predictability is not just desirable but essential to an effective legal system. To create the Guiding Principles, predictability had to be traded for workability, but in the post Ruggie working group environment, where Ruggie plays no active role, a possible shift back towards predictability may be required to bring stakeholders back onside with the new mandate and authorised individuals within the working group, before a full mandate based around principle pragmatism can be pushed forward. The Working Group's mandate would have given the stakeholders more trust in their work if they had been given an achievable

target to work towards; however, this may have had the negative impact of being far too restrictive for the working group to get anything done.

The use of principled pragmatism has been somewhat of a double edged sword, it allowed for the successful creation of the Framework and Guiding Principles following a unanimous vote by the Human Rights Council which should never be underestimated. This has come at the cost that no one knows what the final end product of the process will be, therefore, taking away legal certainty and predictability. The advantages are summed up by Buhmann when concluding that the approach adopted by Ruggie was unusual in the development of an intergovernmental normative framework that was accepted by all stakeholders. The approach allowed for an open, frank discussion and prevented the discursive struggles that caused the failure of the Norms, allowing for a degree of deliberation on interests and their justification.¹⁴² Principled pragmatism was, in essence, as important to the process of the Framework and Guiding Principles as Ruggie himself.

IX. Research and Money

“I had no power but persuasion, and virtually no material resources to conduct the mandate other than those I was able to raise myself.”¹⁴³

This limitation proved to be one of the most important factors in Ruggie and his team’s success, being able to get Governments, NGO’s and TNC’s onside with financial and other donations. Most importantly, especially after the Norms, was getting TNC’s onside. This posed the question as to how does a business express an interest or support something. They do not have specialised knowledge in terms of human rights, and they are not good at taking part in discussions or working

¹⁴² Karin Buhmann, “The Development of the “UN Framework”: A Pragmatic Process Towards A Pragmatic Output.” As found in Ed Radu Mares, *The UN guiding Principles on Business and Human Rights: Foundations and Implementation*, (Martinus Nijhoff Publishers: Leiden: 2012) p105

¹⁴³ John Gerard Ruggie (2013) pxlvi

outside their domain. Businesses are best when they focus on doing business; therefore, in order to support, they give money or goods/services in kind. Therefore, with Ruggie getting donations from businesses indicates the levels of support for his work from the TNCs. One, off the record, source within the UN puts these donations towards his work at close to \$100million.¹⁴⁴ The voluntary contributions of money from actors were structured as research grants to Harvard's Kennedy School of Government, which then administered the entire project.¹⁴⁵ This ensured that the money was not held by the UN and, therefore, avoided the difficult issue of the UN accepting money and funding UN projects from private sources.

The reason for needing to have financial backing from these actors was that Ruggie's financial backing from the UN to undertake the mandate was very small, after all, this started out as a desk based mandate:

“Beyond limited staff support and minimal allowances for travel, these mandates are provided with no resources for their implementation. I began with the part-time assistance of a professional in the Office of the High Commissioner for Human Rights and three round-trip tickets between Boston, my home base, and Geneva, where the Human Rights Council meets and the High Commissioner is located.”¹⁴⁶

As Ruggie stated, the rest of the funds generated "I have done since then has been entirely at my own initiative."¹⁴⁷ The need for outside money was vital to Ruggie's notion of principled pragmatism; without the interaction with stakeholders on a personal level, the relationships and trust could not be built, therefore, without the required money the mandate would not have been able to be fulfilled as Ruggie wished. Funding issues are a common issue for special mandate holders, with many

¹⁴⁴ Conversion with Anonymous UN Official, (February 2013)

¹⁴⁵ John Gerard Ruggie (2013) p.xlvii

¹⁴⁶ John Gerard Ruggie (2013) pp.xlvi-xlvii

¹⁴⁷ Letter to Jose Aylwin, regarding response to Buenos AAires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

mandate holders feeling the lack of financial and other forms of support directly from the UN forcing them to raise funding using NGOs and other organisations. This raises questions about transparency, equality regarding mandates and the underlining independence of the mandate holder.¹⁴⁸

One way in which TNC's demonstrated their support for the work was by giving, not just finances, but other gifts in kind, such as the Coca-Cola company hosting a conference entitled "Engaging Business: Addressing Respect for Human Rights", in Atlanta 2010.¹⁴⁹ The notion of Coca-Cola hosting a conference may be a little bizarre to those that question Coca-Cola's human rights record¹⁵⁰ yet it outlines the willingness of the company to be involved within the Ruggie UNGP creation process.

One of the biggest costs but essential to Ruggie was the team that he built. Their roles were not funded by the UN, and the mandates make no mention of team building, therefore, this required external funding to ensure that the team was in place and could continue. Ruggie was always re-adjusting his team to ensure core skills, such as fund raising or specialised legal knowledge were always in place at the right time. This included adding to the team as and when the opportunity arose, for instance when Andrea Shemberg joined the team to specialise in research aimed at human rights of investment protection agreement.¹⁵¹ This work on investment protection being jointly sponsored by the International Finance Corporation (IFC),

¹⁴⁸ Marc Limon & Ted Piccone (2014) pp.21-22

¹⁴⁹ "Engaging Business: Addressing Respect for Human Rights" Atlanta, 25th February 2010 as found at <http://www.reports-and-materials.org/Ruggie-keynote-address-in-Atlanta-25-Feb-2010.pdf>

Also found at <http://assets.coca-colacompany.com/5a/61/158e6a534d94b67a0cddbda8a449/AddressingHumanRightsConference-02-23-10v16.pdf>

¹⁵⁰ Websites such as <http://killercoke.org/> , <http://www.naturalmatters.net/article.asp?article=1301&cat=219> and <http://org.ntnu.no/attac/dokumentene/cocacola/cokeinfopacket.pdf> outline the allegations against Coca-Cola company

¹⁵¹ 1st June 2007, Andre Shemberg joined the Ruggie team

therefore, the cost of the position being covered by an NGO.¹⁵² The Swiss government by way of the Federal Department of Foreign Affairs (FDFA) provided both funding and personnel to Ruggie's team.¹⁵³ The person provided by the FDFA was Gerald Pachoud, who proved to be extremely talented at raising further funds from governments and TNCs. The FDFA support also provided a grant for the website "<http://www.business-humanrights.org/Home>" which is the main portal for Ruggie's team's web presence, which allowed interaction with stakeholders on a whole new level and scale. Significant government support, both politically and financially, came from both Norway¹⁵⁴ and Canada.¹⁵⁵

An important element of the research was the outsourcing of certain components to law firms, universities, think tanks, and committed individuals throughout the world¹⁵⁶ who worked pro bono on the research questions set to them. This was a huge gain for Ruggie as it allowed the team to have access to high quality research on complex legal issues without having a financial or time cost to the budget of the project. This pro bono work was supplied from across the globe:

"The Special Representative is drawing on the support of Harvard Law School as well as pro bono research and advice from legal practitioners and scholars in the United States, the United Kingdom and Australia. He would welcome additional assistance from legal experts, in particular those from developing countries."¹⁵⁷

¹⁵² <http://www.politeia-centrostudi.org/forum/Ottavo%20Forum/Speakers/CV%20%20SHEMBERG.pdf> accessed 20.02.13

¹⁵³ <http://www.eda.admin.ch/eda/en/home/topics/human/humri/humcon.html> accessed 19.02.13

¹⁵⁴ Larry Cata Backer, "On the Evolution of the UN Protect, Respect Remedy project: The state, the Corporation and Human Rights in a Global Governance Context", *Santa Clara Journal of International Law*, 38, 201, p43

¹⁵⁵ Remarks at Public session by John Ruggie at the National Roundtable on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries: Montreal November 14th, 2006: As found at <http://www.reports-and-materials.org/Ruggie-speech-Canada-National-Roundtable-14-Nov-2006.pdf>

¹⁵⁶ John Gerard Ruggie (2013) p141

¹⁵⁷ UN Document, E/CN.4/2006/97

“We worked with networks of volunteers in numerous countries; benefited from pro bono research provided by more than two dozen law firms, and convened extensive consultations around the world.”¹⁵⁸

Additional pro bono work was supplied to the SRSG from Oxford University who undertook research on Corporate Social Responsibility soft law developments in the European Union.¹⁵⁹ Clifford Chance, with whom Ruggie spoke at a second conference held at their offices, was also involved in pro bono work for which he expressed his gratitude stating “I am very grateful to Clifford Chance for ... the extensive and invaluable pro bono assistance they have provided to my UN mandate”.¹⁶⁰ Clifford Chance being involved in pro bono work can be seen as an expression of wishing to be involved within the creation of new human rights and business best practice as corporate social responsibility being an area of specialism for the law firm. Ruggie also reached out to non-traditional stakeholders in the form of the corporate-law community, through the corporate-and-securities-law project and other similar projects, this project was truly global reaching out to companies across the world.¹⁶¹ Ruggie even states in his book that with all this help from outside research the strategic research that was undertaken could have been wider and particular areas could have been more intensely focused.¹⁶² This external research allowed Ruggie to gather information that was cost free, and, therefore, could gather far more information than if all research was done internally by himself and his small team. Outside pro bono research support did not just come from governments and TNC’s but also from NGOs. Financial support came from the Friedrich Ebert Stiftung, on a survey report conducted by Ruggie on *Human Rights*

¹⁵⁸ John Gerard Ruggie (2013) pxlvii

¹⁵⁹ Oxford University Pro Bono Punlico on Corporate Social Responsibility Soft law developments in the European Union, 30th July 2009 as prepared for John Ruggie SRSG

¹⁶⁰ Business and Human Rights: A Political Scientists guide to survival in a Domain where lawyers and Activists Reign. Remarks by John Ruggie: Annual Conference International law Association (British Branch) London, 17 May 2008: As found at <http://www.reports-and-materials.org/Ruggie-ILA-17-May-2008.pdf>

¹⁶¹ John Gerard Ruggie (2013) p150

¹⁶² John Gerard Ruggie (2013) p141

*Policies and Management Practices of Fortune Global 500 firms.*¹⁶³ The Norwegian Institute of Applied International Studies, a subordinate body of the Norwegian Ministry of Education and Research, working alongside lawyers in sixteen countries produced a survey of recent developments in national legal systems relative to corporate liability for the commission of International Crimes.¹⁶⁴

Empirical data was gathered during survey work which was sent to Fortune Global 500 companies asking “whether they have human rights policies and practices in place and, if they do, what standards they reference, whether they conduct human rights impact assessments and how they conceive of their human rights responsibilities towards various stakeholders.”¹⁶⁵ The empirical research into practices of companies was a key area to establish a base line for the current practices which varied differently in effectiveness. “In a similar empirical vein, I have asked legal teams in the US and UK on a pro bono basis to assess how American and European courts understand the concepts of complicity and sphere of influence.”¹⁶⁶ Therefore, the empirical research provided a broad assessment of the current practices, with work being undertaken on a pro bono basis it also freed up time and resources for more qualitative based research questions. The use of pro bono empirical work was, therefore, the ideal choice to farm out as this type of research which is highly time consuming and does not require the highly trained members of Ruggie’s team to supervise. Linked to the empirical work were also mapping exercises undertaken by numerous academics and other volunteers. These mapping exercises were equally time consuming as the empirical survey work, and,

¹⁶³ <http://www.reports-and-materials.org/Ruggie-survey-Fortune-Global-500.pdf>

¹⁶⁴ Statement by Professor John Ruggie, UN Secretary-General’s Special Representative for Business & Human Rights, at the official launch of the FAFO Report on Emerging Trends in Business Liabilities Under International Humanitarian and Criminal Law, Geneva, Switzerland, 6 September 2006.

¹⁶⁵ UN Document E/CN.4/2006/97

¹⁶⁶ Wilton Park Conference On Business and Human rights, Opening Remarks, October 10-12, 2005 as found at <http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc> accessed 14.1.13

therefore, ideal to give to outside institutions with large resources willing to support the Ruggie effort. This mapping work included research on the workings of regional human rights systems in the world, the impact of the international trade regime on human rights, and obstacles to effective judicial remedy specifically related to business and human rights.¹⁶⁷

Ruggie's success at getting governments, NGOs and TNC's to give financial and other resources towards the work and, therefore, supporting the creation of the Framework and Guiding Principles was as important as any other element in their creation. The broad range of support allowed more research to be done, thus allowing for a better theoretical background for the framework and later the Guiding Principles to be based upon it. By getting so much support from a range of different actors highlights the desire, across the board, for Ruggie to succeed. This also had the double edged effect that these actors were personally involved within the process and, therefore, there were reputational issues at stake. Should Ruggie and his work fail, it would reflect, in some ways, upon those that backed him.

X. The Ruggie Team

When viewing the Guiding Principles process, one element that must be considered was that while Ruggie was an independent authorised individual; he was also the leader and manager of a team of his own creation. This action of team creation not being mentioned within either mandate, further demonstrates his independent authorised individual credentials, also indicates that the team derived its authority from its association with Ruggie rather from the mandate itself. The importance of the team is summed up well by Ruggie when writing:

¹⁶⁷ John Gerard Ruggie (2013) p131

“Once I managed to raise sufficient funds from interested governments, I was able to recruit a superb team of professionals without whom it would have been impossible to construct the Building blocks for the Guiding Principles”.¹⁶⁸

While Ruggie was critical to the process, the work of those team members should not be underestimated. The eight members who worked with Ruggie as he finished the second mandate were Christine Bader, Rachel Davis, Gerald Pachoud, Caroline Rees, Andrea Shemberg, John Sherman, Lene Wendland, and Vanessa Zimmerman.¹⁶⁹ Others that were team members at some point included Amy Lehr, Michael Wright, David Vermijs, and Jonathan Kaufman.¹⁷⁰

Many of those involved within the team, were legal advisors and legally trained. Davis, Pachoud, Shemberg, Sherman, Zimmerman, Lehr and Kaufman all came from legal backgrounds and took a role giving legal advice to the politically trained Ruggie. The importance of bringing legally trained individuals on board was vital to the success of the project, the legal knowledge in understanding wider human rights law, but also in drafting the framework and Guiding Principles to ensure that they would stand up to legal scrutiny was a key component. Other team members, such as Bader, and Vermijs, brought experience from the world of business. The remaining member, Caroline Rees, brought experience from the arena of diplomacy and international relations, having spent 14 years with the British Foreign Office and having led the UK’s human rights negotiating team at the UN.¹⁷¹ Perhaps, critically for Ruggie, she chaired the UN negotiations on Business and Human Rights which led to the creation of the SRSG’s mandate in 2005.¹⁷² From 2003 to 2006 she led the UK’s human rights negotiating team at the UN and in 2005 chaired the UN

¹⁶⁸ John Gerard Ruggie (2013) pxii

¹⁶⁹ John Gerard Ruggie (2013) pxiii

¹⁷⁰ John Gerard Ruggie (2013) pxiii

¹⁷¹ http://www.gscpnet.com/gscpfiles/Caroline_Rees.pdf accessed 23.04.13

¹⁷² <http://www.shiftproject.org/profile/caroline-rees> accessed 23.04.13

negotiations on business and human rights that led to the creation of the SRSG's mandate.

Lene Wendland was a different type of team member to her colleagues, as a member of the United Nations Office of the High Commissioner of Human Rights since 2002. Wendland had an involvement within the Business and Human Rights process which pre-dated Ruggie's involvement, having worked on the Norms project with David Weissbrodt. This unique involvement in past projects gave her knowledge and an insight into the failures of the norms giving Ruggie important strategic information so that his work did not suffer the same fate. Further, her insider position within the human rights aspect of the United Nations Secretariat gave Ruggie the strategic information needed to manoeuvre successfully through this bureaucracy that can, occasionally, baffle outside individuals. Wendland's on-going influence continues as she advised the working group, therefore, giving some continuity between the Norms, Ruggie mandates and the working group. Being able to advise first Ruggie and then the Working Group on different areas that proved too difficult or divisive to cover under the Guiding Principles, or topics, individuals or actors proved to be especially useful.

Without assembling this team it would have been very difficult for Ruggie to have undertaken the quantity and quality of the research and consultations that he and the team did, not even including the pro bono work undertaken by outside individuals and institutions. Managing the team was not a simple task as they were not physically based in one location, but across the globe, as Ruggie wrote "we worked

together seamlessly as one team with good humour making us forget insane workloads and travel itineraries.”¹⁷³

Many of these individuals including Ruggie (as chair of the trustees), Rees, Davis, Sherman, and Vermijs have since used their expertise in the NGO sector having set up a new organisation called “Shift”¹⁷⁴ which helps businesses and governments put the guiding principles into action. Therefore, a large part of the team is still working together on helping actors with implementation, underlining the success Ruggie had at bringing these people together and that they have stayed working together within the same sector but from a different perspective.

The importance of the team to process is highlighted by Ruggie when writing:

“No mere words of thanks can do justice to their immense contributions.”¹⁷⁵

This simple, one line statement sums up the massive contributions that this team made and for which it is hard to award credit due to Ruggie being the figurehead and independent authorised individual.

XI. Open Debate

In opening debate on the issue of business and human rights, Ruggie was able to challenge the difficult issues head on, to argue what he thought of as the best position. By doing this it cuts off the arguments regarding non consideration of key issues, and also gives him grounds as to why certain things were or were not included within the Guiding Principles. The willingness to debate is rooted within his academic background, and unlike diplomats or politicians he is far more likely to

¹⁷³ John Gerard Ruggie (2013) p xiii

¹⁷⁴ <http://www.shiftproject.org/> accessed 23.04.13

¹⁷⁵ John Gerard Ruggie (2013) pxiii

listen and respond to issues and arguments raised. Whereas, with the politicians it is seen as a weakness to be willing to engage in such matters as it may lead to changing of minds.

Ruggie and his team were always prepared to debate issues; this was seen in the extensive consultation with wider and varied stakeholders. He was prepared to listen and respond to suggestions. As part of this, a new mind set for international norm creation had to be established from the very start and he stressed the importance of this by stating, “in order to get the conversation started”.¹⁷⁶ This notion of aiming for as much interaction and debate as possible is reflected in how the consultations were constructed:

“To allow for maximum interactivity, each session were introduced by brief presentations from speakers from various stakeholders group and followed by a 90 min. open discussion.”¹⁷⁷

This construction allowed for all stakeholders to be heard without one particular party dominating a consultation. This was, of course, in contrast to the Norms where little collaboration was made with TNCs and governments and Human Rights Groups and lawyers dominated the drafting process.¹⁷⁸

Part of being open to debate was also being strong enough to disagree with stakeholders. Two notable occurrences of this were after the Declaration of the Social, Non-Governmental and Union Organizations and Indigenous and Affected

¹⁷⁶ Wilton Park Conference On Business and Human rights, Opening Remarks, October 10-12, 2005 as found at <http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc> accessed 14.1.13

¹⁷⁷ Summary Report of Latin America Consultation, Bogota, 18th & 19th January 2007. As found in <http://www.reports-and-materials.org/Ruggie-Latin-America-Consultation-report-18-19-Jan-2007.pdf>

¹⁷⁸ Karin Buhmann, “The Development of the “UN Framework”: A Pragmatic Process Towards A Pragmatic Output.” As found in Ed Radu Mares, *The UN guiding Principles on Business and Human Rights: Foundations and Implementation*, (Martinus Nijhoff Publishers: Leiden: 2012), p86

Communities¹⁷⁹ in which they made demands upon what Ruggie should include within his work, such as:

“Recognize, respect, and enforce the collective rights of indigenous peoples, in conformity with the norms established by Convention 169 of the International Labor Organization.”

“Exhort States to establish mechanisms to prevent, investigate, sanction, and compensate for abuses committed by companies”¹⁸⁰

In response to this document, Ruggie answered the stakeholders with a letter on 29th January¹⁸¹ thanking them for their input but, importantly, did not commit towards any of the ideas expressed within the document. Keeping the tone of the letter friendly but firm as to the extent of the involvement of these ideas, will be considered in a report of the consultation. A stronger rebuttal of concepts that Ruggie disagrees with is in a letter to Jose Aylwin, which not only provides great insight into Ruggie’s work, but also shows his strength of character. The letter concerning an NGO statement following the Buenos Aires Consultation in 2009, in which it called on Ruggie to take a greater account and listen to victims far more than he already was undertaking.¹⁸² Within Ruggie’s letter he states that he disagrees with using language such as “before they take on a life of their own and are repeated as fact” and “quite the opposite of what you claim, as I hope you now see.” He finishes the letter with “please be so kind and circulate this letter to everyone who signed on to your “statement,” and please post it wherever you post the “statement” itself.”¹⁸³ These

¹⁷⁹ <http://www.reports-and-materials.org/Joint-NGO-declaration-on-Ruggie-Lat-Am-consultation-19-Jan-2007.pdf>

¹⁸⁰ Declaration of the Social, Non-Governmental and Union Organizations and Indigenous and Affected Communities Convened at The Regional Consultation of the Special Representative of the Secretary General of the UN on the issue of Human Rights and Transnational and other Businesses Enterprises, Bogotá, Colombia, January 18-19, 2007. As found at <http://www.reports-and-materials.org/Joint-NGO-declaration-on-Ruggie-Lat-Am-consultation-19-Jan-2007.pdf>

¹⁸¹ <http://www.reports-and-materials.org/Ruggie-response-to-Latin-American-civil-society-declaration-29-Jan-2007.pdf>

¹⁸² NGO statement following the Buenos Aires Consultation in 2009 as found at www.business-humanrights.org/Documents/NGO-statement-after-John-Ruggie-Buenos-Aires-consultation-May-2009.doc

¹⁸³ Letter to Jose Aylwin, regarding response to Buenos Aires NGO statement. As found at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

two incidents demonstrate that Ruggie was prepared to hold his own against those with different ideas. Being prepared to maintain his own viewpoint against those with alternative or hostile arguments. No doubt the continuous debate surrounding the topic prepared Ruggie for this inevitable outcome against NGOs who desired a legally binding outcome and thought they had achieved that with the Norms. In Ruggie, as with the SPSG, the world of academia had giving him a superb grounding in being able to argue and debate.

Another way of engaging in open debate was when he floated ideas in the public domain in order to receive feedback, therefore, being able to judge whether a particular concept was viable with all the different stakeholders. Several notable examples happened throughout his mandates; one such example was the idea of human rights impact assessment when expressing: “Human Rights impact assessment today is an underdeveloped as environmental impact assessment was a generation or so ago, but the extractive industries are under such social and environmental stress that the time available to catch up is short.”¹⁸⁴ This comment was taken from early March, as this idea appears to receive positive reception; the idea becomes a theme of speeches and consultations throughout the later part of 2006 and early 2007. A different example of ideas being floated in the public domain was the issue of treaty creation. While not being the first time it was mentioned by Ruggie, it was one of the first times it was stated in the traditional media that a treaty creation was not a desirable outcome and was set out in the article in Ethical Corporation entitled *Treaty Road Not Travelled*. Within this article, Ruggie sets out why a treaty would “be unlikely to get off the ground, and even if they did the

¹⁸⁴ Plenary Remarks at World Mines Ministries Forum, Toronto, Canada, March 3rd 2006 as found at <http://www.reports-and-materials.org/Ruggie-World-Mines-Ministries-Forum-3-Mar-2006.doc>

outcome could well leave us worse off than we are today.”¹⁸⁵ Instead setting out four different options as to the outcome of his work, these being an International Court, Enforcement of Rights by a host state, Enforcement of Rights by a home state, and establishing a new treaty body.¹⁸⁶ None of these ideas being floated, received many positive reviews from the stakeholders, therefore, none were really fully utilised and put into action. The closest being the establishment of the Working Group on business and human rights to the creation of a new treaty body. The willingness to float these ideas in public was important in receiving feedback and tackling the problems of implementation. So while ideas were floated in the public domain, not all were used. A final example of Ruggie floating ideas in public before using them was the issue or lack of an authentic focal point for business and human rights which was questioned at the Trygve Lie Symposium in September 2010.¹⁸⁷

This notion was followed up with Ruggie pushing for the Human Rights Council to set up a department and later the Working Group on business and human rights. These developments seem to spring from this question about the lack of a focal point. This is a critical moment to ask such a question with the second mandate coming to an end and Ruggie nearing the six year limit for special procedure mandate holders. In a similar vein to floating ideas in public was Ruggie’s practice of road testing controversial new practices that the guiding principles would introduce.¹⁸⁸ As previously noted when considering principled pragmatism, this got over the routine objection that the ideas would not work in practice. Therefore, new concepts such as human rights due diligence, and operational-level grievance

¹⁸⁵ Treaty Road not Travelled, Ethical Corporation, May 2008, p42

¹⁸⁶ Treaty Road not Travelled, Ethical Corporation, May 2008, p43

¹⁸⁷ Opening remarks by John Ruggie at the Trygve Lie Symposium on Fundamental freedoms: New York: September 2010 as found at <http://www.reports-and-materials.org/Ruggie-World-Mines-Ministries-Forum-3-Mar-2006.doc>

¹⁸⁸ John Gerard Ruggie (2013) p151

mechanisms, went through this process. The process not only prevented the “it will not work in practice” argument but also allowed for minor improvements to be made when they were rolled out within the guiding principles. This pragmatic approach of testing and reflection is a new method of international norms creation.

Ruggie was prepared to listen to any stakeholders and respond to open debate on any relevant issue. Clearly his academic background had an effect on his willingness to debate. Ruggie did attempt to limit the scope of doctrinal debates when stating:

“I hope to avoid doctrinal debates as much as and for as long as possible. Doctrinal debates create echo chambers. People hear their own voices bouncing back at them and think they’re having a dialogue. Besides, doctrinal debates rarely solve real world problems. My mandate is intended to contribute to greater clarity, deeper understanding and eider consensus. I believe that those are best achieves when posturing is left at the door.”¹⁸⁹

Later, setting out the problems that he had with doctrinal debates:

“Debates tended to be doctrinal, and doctrinal preferences tended to reflect institutional interest: business stressed its positive contributions to the realization of human rights coupled with the rapid growth of voluntary initiatives, while activists groups focused on the worst abuses and, with some of their academic supporters, demanded that some overarching global system of corporate liability be established.”¹⁹⁰

Ruggie was prepared to debate ideas, as long as the debate was actually progressing. Certainly the need to move forward was very evident with the business and human rights being bogged down for the past 20 years, and linked to the notion of principled pragmatism. This willingness to avoid unnecessary doctrinal debates shows how Ruggie ignored the notion of TNC’s being directly accountable under international law. As has been demonstrated, he was willing to engage in debate when the substance of the debate stood to further his mandate. This second form of

¹⁸⁹ Wilton Park Conference On Business and Human rights, Opening Remarks, October 10-12, 2005 as found at <http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc> accessed 14.1.13

¹⁹⁰ John Gerard Ruggie (2013) p130

debate was central in the discussion of ideas which could be later incorporated into the UNGPs.

XII. New Ideas

The openness to new ideas is linked to the willingness to debate. This was central to the success of the UNGP. In seeking out ideas from the TNC's and other stakeholders, he actively sought out new ideas which would give the process fresh ideas to make it workable. Ruggie was open to these new ideas, taking the best parts or concepts from the ideas generated by the stakeholders and using them for the Guiding Principles.

Part of this willingness to accept new ideas and concepts was seen when he embraced several countries who “referenced the framework in conducting their own policy assessments, including France, Norway, South Africa and the United Kingdom. Several global corporations are already aligning their due diligence processes with the framework.”¹⁹¹ This fairly unusual practice of states using the framework before the mandate was finished, indicates the willingness of states to have a workable solution but also at Ruggie’s ability to give the basics and let the stakeholders get on with actually using the framework. One innovative idea that Ruggie used to explain the value and advantage of soft law declarations was the “Hotel California Rule”:

“At the same time, so-called voluntary initiatives may include legislative or contractual requirements, such as the Kimberley Process and the Voluntary Principles on Security and Human Rights, respectively. And even companies participating in initiatives with no mandatory elements at all still are subject to the “Hotel California” rule: for those of you who don’t remember that Eagles

¹⁹¹ UN Document, A/HRC/14/27

song, the words go “you can check out any time you like but you can never leave.” That is to say, systematic non-compliance or exiting is not costless.”¹⁹²

This innovative approach to explaining the benefits of soft law instruments to the annual conference of international law association shows an openness to explaining old ideas in new ways. This gives fresh insight to the old debate regarding the effectiveness of soft law documents. This engagement with this idea was crucial during 2008 as Ruggie was pursuing the soft law solution to the Business and Human Rights issue; therefore, he needed to gain support for the general concept.

Not so much a new idea, but the rejection of an old idea, in side stepping the issues of which rights should be included within any final document. This has the effect that the document succeeded and was not dragged into a dogmatic rights debate about which rights should be included and should be implemented by whom and how they should be held to account. Ruggie summed up this issue in 2008 interview when saying:

“Now, one tricky thing here is that much of the preceding debate focused on which individual rights ought to be included in an instrument that would govern companies. So yes, labor standards should be in there, certain community rights should be in there, and so on and so forth, and you end up with a list of 27 or 42. Some companies say that's too many, and some other actors say that's too few.

We try to sidestep that altogether. We did that by analyzing 400 public charges against companies and then coding what human rights were allegedly being violated. The obvious inference that the research shows is that companies are capable of violating any human right, even the right to jury trial, by interfering with a jury trial, or bribing a judge or bribing a lawyer or bribing a juror.”¹⁹³

¹⁹² Remarks by John Ruggie at the Annual Conference International law Association (British Branch), London, 17th May 2008. As found at <http://www.reports-and-materials.org/Ruggie-ILA-17-May-2008.pdf>

¹⁹³ Transcript: Business and Human rights: Achievements and Prospects: October 28th 2008. As found at <http://www.policyinnovations.org/ideas/briefings/data/000089>

The openness to new ideas can be seen as a result of the challenges faced in finding a solution to the problem as stated in the 2010 report to the Human Rights Council:

“It is too complex and requires all of us to learn to do many things differently. This is a complex systems design challenge: developing the components of an interrelated, dynamic system and structuring them in such a way that they interact in a cumulative process to induce progress.”¹⁹⁴

Therefore, the only way to be able to do this was to accept ideas from stakeholders and embrace them into the Framework and Guiding Principles.

XIII. Conclusion

Ruggie and his team’s unparalleled success at creating the Guiding Principles cannot be underestimated, negotiating a difficult path between competing interests of different actors they succeeded in getting a unanimous vote in the Human Rights Council. The process of how the independent authorised Ruggie achieved such success is what is of great interest. The selection of Ruggie was completely different to David Weissbodt who had preceded Ruggie in drafting the Norms. The politically trained Ruggie had no formal legal training and only an honorary doctorate in law. Mainly from an academic background, but with essential UN experience having worked on the Global Compact and the UN Millennium Development Goals, Ruggie can be seen as a vastly different choice of individual in becoming the SGSR on Business and Human Rights. The choice of Ruggie, who became this independent authorised individual, is one of the fundamental reasons behind the successful creation of the Guiding Principles.

¹⁹⁴ Paragraph 16, UN document A/HRC/14/29

As fundamental to the success of Ruggie as an individual, was also the mandate and approach that he was given and, therefore, took. The initial mandate given to Ruggie, while setting out rather generally what he was to do, did not set any targets or an ideal outcome. The second mandate building on the success of the outcome of the Framework in the first continued the loose ideas of the first not setting out any hard or difficult to achieve expectations. This approach to the mandates was important as it did not put pressure on Ruggie and the team to pursue a solution in one particular direction, it allowed for the evidence based approach and principled pragmatism to define where the mandates reached within the time limit. The language of the mandate was sufficiently uncertain in order for Ruggie to create first the framework and then the Guiding Principles. The language of the mandate's, especially the first would have allowed Ruggie merely to have researched the issues and made recommendations; but clearly, his own motivation and will to succeed meant he pushed on to create something new. The mandates did not specify an approach that Ruggie had to take; therefore, he undertook an evidence based approach, a pragmatic approach. This method meant Ruggie and the team would undertake a massive amount of consultation, with all the different stakeholders. The approach was based on finding a workable solution to the issue, not necessarily a final solution. It quickly became clear to Ruggie that a soft law document would provide the solution that the mandate required.

This approach from Ruggie had its origins in his underlying methodology and philosophy of principled pragmatism. The terminology underpins all of Ruggie and the team's work which allowed them the flexibility the approach required. This meant the work could push ahead in unforeseeable ways and re-enforced that evidenced based approach. The principles that Ruggie would stick to were soon unearthed in

using core UN documents to form the basic rights in which to hold TNC's to account using soft law. Principled pragmatism has since been used within the mandate for the Working Group on Business and Human Rights, this idea with a mandate for a Working Group is new and time will tell whether it will be successful.

The language that Ruggie used was a key component to his success. His choice and use of language brought stakeholders onside, he made clear he wasn't a miracle worker and had no "silver bullets", in effect lowering expectations to find a perfect fix. He often used personal remarks or humour to bring the audience at speeches to his way of thinking. He never used lawyer talk, and was anything but arrogant. The plain speaking in his speeches, reports, and at the UN clearly put him on a unique level whereby people would actually listen to what he said instead of an outright rejection of ideas based on previous experience of the business and human rights project. With being an SRSG, this entailed limited UN backing for the project, especially as the project appeared to be originally conceived as a research based role to establish base levels, i.e. a desk-based mandate. The independent authorised Ruggie went much further than this, having numerous consultations and visits he required funds to undertake this work. Raising funds from governments and TNC's, structuring them as research grants to Harvard, therefore, avoiding the contentious issue of private funds within the UN. The support from actors was just financial but law firms, universities, think tanks, all provided pro bono research in aid of the project. The most intensive and time consuming research work such as empirical survey, or mapping research was farmed out to institutions able to provide the man power and time to undertake it. The financial backing allowed Ruggie to build a high quality team; therefore, he could bring in the legal experts, former diplomats and UN officials to give his team all the qualities that it needed. As important as Ruggie was to the

process, without the team that he created and managed, the Guiding Principles would never have been produced. The team assembled at his own initiative, and funded out of the research grant money paid to Harvard made the task manageable and achievable once Ruggie had pushed the mandates to their limits.

Throughout the process Ruggie was always prepared to debate ideas with any of the stakeholders, no doubt his academic background coming to the fore here. He was not prepared to get into doctrinal debates which had limited the development within the field in the past, instead preferring to debate areas in which actual progress could be made. As part of this, Ruggie was prepared to float ideas in public, and road test them with small groups of TNC, therefore closing off the possible “it doesn’t work in practice argument”. This willingness to road test and modify again is different to diplomats and lawyers who have the perception of always having to be right first time out. These ideas, coupled with the willingness to find new ideas and solutions, links back to the principled pragmatism concept and workability. Ruggie demonstrated that by working with all the stakeholders and drawing them into the process he gained support for a common solution that they were happy with.

The independent authorised individual takes our understanding a step further in the type of individuals that influence and create international law. In the next chapter we will step out of the familiar of the authorised individual, and this new take on those that make up the independent authorised individuals category. Instead we step into the unknown and consider the unauthorised individual in depth for the first time; these individuals go beyond anything seen so far and will bring light to a minority grouping of individuals that have affected the developing of international law. Such individuals as John Peters Humphrey, and Raphael Lemkin will be consider and bring the previous unrecognised grouping to light.

Chapter 5:- The Unauthorised Individual

I. Introduction

The previous three chapters have considered individuals, who to a greater or lesser extent have authorisation, and are generally representatives of authorised decision makers in a particular capacity. The category to be evaluated in this chapter is that of the unauthorised individual. The unauthorised individual is an individual who does not normally owe their role within the international system to a state based authorised decision maker, i.e. a governmental assignment. This has the effect that these individuals should not ordinarily have a role in the creation of international law. Using past examples from international practice, it will be demonstrated that they played a role (and still do) in creating international law.

An exploration of the unauthorised individual will be undertaken, where they are likely to be found, and how they embark on unauthorised actions in law creation is vital to a full understanding of this categorisation of individual. The international civil service is one of the most likely places where they can be found, especially within roles just below political appointees. Another area where candidates for unauthorised individual status can be found is within academia. This is likely to occur when asked by authorised individuals to anonymously contribute to reports, commissions and by governments due to a political instability.

Specific examples of unauthorised individuals, Raphael Lemkin,¹ John Peters Humphrey,² and D.A. Henderson,³ will be used to explore unauthorised individuals

¹ Raphael Lemkin (1900-1959), A Polish Lawyer, who emigrated to the USA in 1941. Best known for his work in creating the Genocide Convention.

² John Peters Humphrey (1905-1995), A Canadian legal Scholar, who was the first Director of the UN Human Rights Division

and what particular contributions they have made towards international law making. Lemkin was the author of the Genocide Convention, who worked for many years to first see it adopted by the UN, and then ratified by states, all the while without holding a formal position within a state delegation or international organisation. D.A. Henderson was an international civil servant who worked for the World Health Organisation and was in control of the smallpox eradication program, in which he broke normal procedure many times in order to achieve his goal. Henderson, while not directly involved within law creation, demonstrates how those within an international organisation have the opportunity and means to break established procedures. John Peters Humphrey was the first director of the UN Human Rights Division. Within this role he drafted the first version of the UDHR, and created the original idea for the UN High Commissioner for Human Rights. By exploring these particular individuals, a greater knowledge of this categorisation can be built up and this will allow for a stronger evaluation.

With an improved knowledge of the substantive contribution of selected unauthorised individuals, an assessment can then be made of the skills used by these individuals in achieving their outcomes. The evolution of these skills used and developed by the unauthorised individual are perhaps the most revealing of the processes for the creation of International law. The skills that will be focused on are how the unauthorised individual gains access, persuades, and interacts with authorised individuals. Unauthorised individuals have to be political shrewd in order to know when to bring ideas forward, who to give information to, and how to bring important authorised individuals onside. There are two final elements of working methods of the unauthorised individual, that of using proxies at meetings in order to have input

³ Donald Ainslie Henderson (1928-), An American Physician, best known for his work in heading international efforts to eradicate smallpox.

during discussions and negotiations. While gaining publicity and outside support they could use this popular appeal to further the cause for which they champion.

The final section will consider the different characteristics of the unauthorised individuals charisma and determination. Borrowing from Weber's theory of charismatic authority will help provide insight into why others, especially authorised individuals follow their unauthorised counterparts. Charisma should not be seen as the vital element, not all unauthorised individuals have such gifts yet fortitude and determination can make up for any such shortcomings.

II. The Unauthorised Individual

In setting out the theoretical understanding of the unauthorised individual, the first element is that of who these individuals are. They are usually not government representatives, delegates, or nominees of a state and are distinguishable from the authorised or independent authorised individuals. These individuals are those that would, under conventional standards of international discussion, not be expected to have an active position or role within the law creation process. These individuals may be at discussions under the mandate of a different aspect of the meeting, meaning that these individuals could be part of a secretariat, a consultant of an NGO, or an academic.

Many unauthorised individuals hail from backgrounds within the international civil service and work for major international organisations such as the UN, the International Labour Office (ILO), the European Union (EU), African Union (AU), the World Bank or the World Health Organisation (WHO). As these individuals are intended to undertake the role of an international civil servant, they normally should not be taking an active role in the creation of international law, instead they should

be facilitators providing secretarial support, administrative, and in some case technical or legal advice. Under Article 100 s(2) of the UN Charter it states that:

“Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities”

While the First Consolidated Report into the UN Secretariat in 2005 set out the role of the secretariat as:

“The duties carried out by the Secretariat are as varied as the problems dealt with by Member States of the United Nations. These range from administering peacekeeping operations to mediating international disputes, from surveying economic and social trends and problems, to engaging issues of human rights and sustainable development. Secretariat staff also inform the worlds’ communications media about the work of the United Nations, and organize and manage international conferences on issues of worldwide concern.”⁴

International civil servants working within international organisations after numerous years of service on a particular issue, tend to become highly competent within that field. A consequence of this is that the international civil servant is in a strong position and has a good knowledge of this particular topic and, therefore, has the potential to give significant, meaningful input into any discussions on the topic in which they have specialised. This has the effect that they tend to have greater knowledge and ideas on the topic than those authorised individuals that states have sent to discussions or problem solving sessions on the subject. This is often due to states sending career diplomats, negotiators, or even politicians who do not have the expertise of someone working within an international organisation. Those that work in the given area tend to be better informed as they think and work in an environment, where they understand the problems that any particular agreement is

⁴ M. Humayun Kabir, Charles Rosenberg, Cass DuRant, Aimee Leung, Tony Proscio, and PrinekaSuri, *United Nations Secretariat: First Consolidated report 2005*, (United Nations Publication: New York: 2006) p6

attempting to tackle. The unauthorised individual can easily be drawn into helping the discussions through the use of their specialised knowledge even without a mandate or position in which to undertake this work. As these individuals do not report to their national governments they are in a position to make arguments and pull strings in order to get certain items included within agreements which would not appeal to states to include.

Not all international civil servants can be classed as unauthorised individuals, due to the makeup of the UN secretariat and other international civil services each state has a quota of personnel that can work in the UN Secretariat so that the secretariat is a reflection on international society. Within the early years of the UN state pressure on the secretariat and influencing policy was apparent with states withdrawing their support for a candidate to have their contract renewed at the UN if they felt that they were not pushing that state's agenda sufficiently. This was more apparent from the Soviet Union than other states; though the effect of McCarthyism⁵ on the UN is a good example.⁶ The investigation into American personnel working at the UN during the McCarthyism period and the investigation into un-American activities ensured sufficient pressure was placed on the UN not to renew contracts of individuals that worked against, or were perceived to work against American interests.⁷ Those members of the secretariat that were not in a senior position had to be seen to follow their state of origin's government policy on issues or face having their support for their position within the UN Secretariat removed. As an effect of this policy, the

⁵ McCarthyism was the process in 1950s America whereby individuals were accused of disloyalty, subversion or treason without evidence, towards the USA. Please see Albert Fried, *McCarthyism, The Great American Red Scare: A Documentary History*, (Oxford University Press: Oxford: 1997)

⁶ A.J. Hobbins, "Human Rights inside the United Nations: The Humphrey Diaries, 1948-1959", Fontanus IV, 1991, p158

⁷ Dean Acheson, *Present at the Creation: My Years in the State Department*, (Hamish Hamilton: London: 1970) p698 also see A.J. Hobbins, "Human Rights inside the United Nations: The Humphrey Diaries, 1948-1959", Fontanus IV, 1991, pp156-163

unauthorised individuals need to be in a sufficiently senior position that it was not easy for a state to remove support for them, and their seniority grants them sufficient freedom to have both influence and be effective in their undertakings. The recruitment policy of the early UN made it difficult for some experienced individuals to get jobs within the Secretariat because their own state had, in effect, blacklisted them. This can be seen within the extracts below, from John Peters Humphrey's diaries when recruiting for the Human Rights Division:

“Thur. 11 Aug. [1949, Geneva]

Živković, late of the War Crimes Commission and a man who was very highly recommended to me by Lord Wright and Col. Ledingham, came to see me today. I would have taken him into the Division long ago were it not for the fact that he is persona non grata with his government (Yugoslavia) and I recommended him very highly for a post at the McGill Law Faculty.”⁸

“Wed. 2 Nov. [1949, Great Neck]

In the afternoon I worried about recruiting problems. Including the posts that will be open on Jan 1, 1950, there are about a dozen posts to be filled; but there is not one candidate in the whole list that I saw this afternoon over whom I can work up any enthusiasm. There is certainly something wrong here. Nobody can tell me that it is not possible to find competent people in the 60 member countries who would jump at the chance of being appointed to these posts. Unfortunately our personnel Bureau is quite useless.”⁹

These extracts highlight the employment practices of the Secretariat in that positions became politicised and that candidates required state support in order to maintain and progress within the organisation. This had the effect that well supported members could easily become unauthorised individuals as they were under no pressure to conform to a particular set of political values, having freedom to push their own ideals into secretariat research documents and debates.

⁸ A.J. Hobbins (ed), *On the edge of greatness: The Diaries of John Humphrey First Director of the United Nations Division of Human Rights Volume 1*, (McGill University Libraries: Montreal: 1994) pp.198-199

⁹ A.J. Hobbins (1994) p235

In the past the UN secretariat was open to state abuse by pushing supporting candidates who were willing to support a particular viewpoint within the secretariat. The Secretariat has undergone modernisation in the post-cold war environment. Under current procedure for entry into the UN secretariat jobs are allocated in equal distribution and upon merit to States under regulation 4.2 of the UN Staff Regulations and Rules of the United Nations:

“The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to be the importance of recruiting the staff on as wide a geographical basis as possible.”¹⁰

Therefore, about 180 countries have individuals working within the secretariat. The effect is that the UN secretariat does not take too many individuals from any particular state or a particular candidate pushed forward by a government. For example, the young professionals programme is only recruiting from a limited number of states in 2013 to ensure that the global geographic distribution is maintained.¹¹ The UN secretariat is now much freer to act in its interest than at any previous point; therefore, the scope for an individual to become an unauthorised individual is perhaps at its greatest. This can be especially apparent within the modern secretariat when the individual is from an underrepresented state.

The other major area in which unauthorised individuals can be found is that of academics who push and develop their ideas until they become international law. Many academics in universities and other research based institutions are writing and researching on topics that states and international organisations are involved in. What academics are proposing within research papers are solutions or observations

¹⁰ UN Staff Regulations and Rules of the United Nations [ST/SGB/2002/2] p24 as found at http://www.un.org/en/ga/search/view_doc.asp?symbol=ST/SGB/2002/2

¹¹ <https://careers.un.org/lbw/home.aspx?viewtype=NCE> accessed 06/09/13

regarding the practice and development of international law. The ideal outcome for any academic would be for these proposals or observations to be adopted or cause a change in international law, with their work cited as the cause for this change. As a result, the academics work has a real world impact and not just a change within the theoretical narrative of the subject. This is, of course, the ideal model for recognition and effect. At politically sensitive times the academic may be asked to contribute to the development of international law, but due to the situation their contribution may have to remain anonymous. In this sense, the academic is an unauthorised individual, because although invited to participate within law making by one particular group, be that international organisation or delegation, the organisation may not have a mandate from all participants for their intervention. This places them closer towards the independent authorised individuals nonetheless without support, or at least acceptance, for their interventions from all participants remain as unauthorised individuals.

Some specific examples of unauthorised individuals are Raphael Lemkin, D.A. Henderson, and John Peter Humphrey. Raphael Lemkin, who is credited as being the driving force behind the Genocide Convention, described himself and his role perfectly in naming his unfinished autobiography "*unofficial man*".¹² Henderson was in charge of the smallpox eradication program, given very little mandate he was forced to create a whole structure and program in order to fulfil that aim. John Peter Humphrey was director of the Division on Human Rights, and played a pivotal role in the drafting of the Universal Declaration of Human Rights and the original idea for the High Commissioner for Human Rights. From a historical perspective, an argument can be made of William Wilberforce, who in a similar way to Lemkin, set

¹² Raphael Lemkin autobiography title, as found in John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, (Palgrave Macmillan: Basingstoke: 2008) p271

about trying to abolish the slave trade.¹³ As seen with the authorised and the independent authorised individuals, the unauthorised individual can be seen on a scale of independence. On this scale D.A. Henderson and John Humphrey are far more towards the upper end of the scale in a position actually working within international organisations, as such far freer than an independent authorised individual, but still working within a formal structure. Whereas Lemkin was very much at the other end of the scale, totally free to do as he wished not working within any normal frameworks.

III. Lemkin, Humphrey & Henderson

This section will explore examples of the unauthorised individuals in depth, setting out why they should be considered as unauthorised individuals. This will consider what activities they were authorised to undertake, their substantive contribution to international law, and why their actions caused them to become unauthorised individuals.

III.1. Raphael Lemkin

The outbreak of the Second World War marked a watershed moment in the history of the world, and with Lemkin it was no different, providing the most eventful and traumatic time of his life. With the end of war Lemkin started his one man mission to change international law by introducing and getting his crime of Genocide recognised in law. Scholars such as Power and Shaw have argued that Lemkin had been arguing for such a creation for much of his life.¹⁴ Cooper's comprehensive biography argues that he gave little thought to such things prior to the outbreak of

¹³ Please see William Hague, *William Wilberforce: The life of the great anti-slave trade campaigner*, (Harper Perennial: London: 2008)

¹⁴ Martin Shaw, *What is Genocide?*, (Polity: Cambridge: 2008), p18 and Samantha Power, *A Problem from Hell: American and the Age of Genocide*, (Harper Collins: London: 2002) pp. 22-23

the war, with the exception of when he proposed the notion of barbarity and vandalism at a conference in Madrid in 1933, but due to Polish appeasement to Nazi Germany could not attend himself.¹⁵

Cooper argues that this early insight into the issue of state mass killings of its population must be seen within Lemkin's conceptual framework of Jewish History, with numerous pogroms taking place within close proximity to where the young Lemkin lived.¹⁶ Cooper's argument is supported, not only by Lemkin's published works which focused on criminal or company law in which he was a successful academic and practitioner, but that he does not publish anything regarding the concept of Genocide prior to *Axis Rule in Occupied Europe*¹⁷, where in chapter eight he puts forward the concept. With the end of war, Lemkin found himself working within the American War department and in this role he was sent to the Nuremberg Tribunals where he managed to persuade the prosecution to charge the defendants with the crime of genocide.¹⁸

Lemkin's true starting point for the Genocide convention was when the United Nations met at Lake Success in 1946, he successfully sought a resolution on Genocide, which was adopted under resolution 96(1). He did this with the help of a young man from Ecuador,¹⁹ working within the Secretariat, who pointed out to Lemkin the significant group of states in South America who would be open to supporting such a resolution.²⁰ Lemkin, in turn, asked these delegates to sponsor his resolution which gained a significant section of UN state backing at this early stage.

¹⁵ John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, (Palgrave Macmillan: Basingstoke: 2008) p23

¹⁶ John Cooper (2008) p19

¹⁷ Raphael Lemkin, *Axis Rule in Occupied Europe*, (Howard Fertig: New York:1973)

¹⁸ Samantha Power, *A Problem from Hell: American and the Age of Genocide*, (Harper Collins: London: 2002) p50

¹⁹ This individual in all accounts doesn't name this official, despite this authors efforts I have been unable to discover his identity

²⁰ Raphael Lemkin, *Axis Rule in Occupied Europe*, (Howard Fertig: New York:1973) p79

With a foot in the proverbial UN door, Lemkin stepped up his campaign for a full Genocide Convention. Lemkin left paid employment to move to New York to be in a better position to promote, persuade and publicise the need for the convention among delegates. Lemkin was successful with his approach, apart from a brief period while he left his position as an unauthorised individual becoming an independent authorised individual for a brief period, moving completely out the scale of unauthorised individual and into the above category at the behest of the Secretary General Trygve Lie.²¹

As with all international law, the final document was adopted and ratified by states. This is the same for the independent authorised individuals work as Special Procedures Mandate Holders when they issue guidelines. Trygve Lie asked Lemkin to form part of a three man UN commission alongside two other international lawyers, Professor Donnedieu de Vabres from France and Professor Vespasian Pella from Romania,²² in order to draft a genocide convention.²³ Within this role Lemkin proved to be the main figure and he largely persuaded the others to follow his lead.²⁴ When this work was completed, despite offers to remain working within the UN he felt his aim of the Convention would be better achieved working on the outside.²⁵ Once back as an unauthorised individual the Convention reached the committee stage of drafting, he often used his ability to change minds to ensure the convention remained on tracks despite an “unholy alliance”²⁶ of the British and Soviet attempts to stop or delay it at every opportunity. The convention was passed

²¹ Samantha Power (2002) p54

²² John Cooper (2008) p89

²³ The Draft convention can be found at UN Document E/447

²⁴ Raphael Lemkin (1973) p88

²⁵ Samantha Power (2002) pp.54-55

²⁶ John Cooper (2008) p231

into international law on December 9th²⁷, one day before the UDHR, making it the first human rights treaty agreed by the UN.

Lemkin did not consider his work finished; he moved his campaign towards ratification of the treaty by as many states as possible. By the end of his life in 1959, he had spent the last 15 years of his life in order to bring about a change in international law. He managed to succeed on an unprecedented level for a private individual, who had no real place or power within the traditional domain of states. Lemkin's only major regret and failure is that he did not, within his life time, get a superpower, especially the USA, to ratify the Convention. This failure should no way undermine his work. Lemkin is the essential unauthorised individual, having no place within the traditional system for the development of international law, yet having a massive effect on international law.

Lemkin provides an example of an unauthorised individual at the far end of the spectrum and is the most unauthorised individual that this chapter will consider. He was acting outside a formal system, yet still strongly influenced the creation of international law, and its later ratification within states.

III.2. John Peters Humphrey

John Peters Humphrey was the first Director of the United Nations Human Rights Division, between 1946 and 1966. Humphrey is at the opposite end of the scale to Lemkin, he is closest to the independent authorised individual category. While spending most of his time working within the UN secretariat performing the role of international civil servant and running the Human Rights Division, there are notable examples when he went beyond what is expected of someone serving within this

²⁷ <http://legal.un.org/avl/ha/cppcg/cppcg.html> accessed 06.04.14

role and becoming unauthorised in his actions. Humphrey, a Canadian lawyer by trade, had previously practised in Montreal and went on to teach at McGill University. It was through his time at McGill he met Henri Laugier a war refugee from France. When Laugier took up the position of deputy Secretary General at the UN, responsible for Social and Economic affairs, he asked Humphrey to join the UN as the head of the Human Rights Division.

Two notable events can be seen within John Humphrey's career at the UN that demonstrate his credentials as an unauthorised individual, and perhaps more importantly as examples of on-going, less notable behaviour which reinforce this classification. The most significant event perhaps is that of Humphrey creating the original draft of the UDHR, something he was not authorised to do, but went on to form the backbone of future Drafting Committee meetings. The origins for Humphrey writing the declaration stem from a drafting committee meeting involving three members of the Human Rights Commission (HRC), who were chosen to form a sub-drafting committee. This three member committee considered of Roosevelt, Malik, and Chang²⁸ with secretariat support from Humphrey. The reports of the meeting in which Humphrey is asked to write a draft declaration is widely available in Humphrey's,²⁹ and Roosevelt's autobiography,³⁰ and also Glendon's,³¹ and Morsink's³² works. The meeting held at Mrs Roosevelt's apartment in New York, involved the infamous tea party in which plans were discussed, however Malik's and

²⁸ Peng- Chun Chang (1893-1957) was the Vice-Chair of the Commission on Human Rights during the drafting the Universal Declaration of Human Rights. He was the representative from China, and was a playwright, philosopher, educator and diplomat. For more information on Chang please see http://www.un.org/Depts/dhl/udhr/members_pchang.shtml

²⁹ John P. Humphrey, *Human Rights & the United Nations: a Great adventure*, (Transnational Publishers INC, New York, 1984) p29

³⁰ Eleanor Roosevelt, *The Autobiography of Eleanor Roosevelt*, (Da Capo Press: New York: 1992) p317

³¹ Mary Ann Glendon, *A world Made new – Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House: New York: 2001) p46

³² Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, (University of Pennsylvania Press: Philadelphia: 1999) pp.5-6

Chang's philosophies were too far apart for them to write a document themselves.

This debate led Mrs Roosevelt to observe:

“As we settled down over the teacups, one of them made a remark with philosophic implications, and a heated discussion ensued... By that time I could not follow them, so lofty had the conversation become, so I simply filled the teacups again and sat back to be entertained by the talk of these learned gentlemen.”³³

At this tea party meeting the three member group of Chang, Malik, and Roosevelt asked Humphrey to prepare a documented outline for the proposed International Bill.³⁴ In asking Humphrey to prepare this document they had no authority in which to ask him to undertake this action. This group of three had been asked by the HRC to undertake the work, by passing the work off they acted without authority from the commission and, therefore, pushed Humphrey into acting unauthorised. The Secretariat was designed to provide support to individual's action on behalf of governments at the UN, under the UN Charter.³⁵ Humphrey was not authorised to actually do the work for the group, as the instructions from the group were not, strictly speaking, authorised by the full HRC. After this infamous tea party meeting there were objections from the Human Rights Commission that the drafting committee did not include any representative from Europe or the Soviet Union, mainly these complaints came from Cassin.³⁶ In response to this Mrs Roosevelt broke UN procedure by increasing the number of the drafting committee members to eight so that it included both a Soviet representative and Rene Cassin of France.³⁷ The now enlarged drafting committee again asked Humphrey to prepare a

³³ Eleanor Roosevelt (1992) p317

³⁴ Mary Ann Glendon, *The Forum and the Tower: How Scholars and Politicians Have Imagined the World, From Plato to Eleanor Roosevelt*, (Oxford University Press: Oxford: 2011) p209

³⁵ See the UN Charter: Chapter XV: The Secretariat, Article 97- 101.

³⁶ Jay Winter & Antoine Prost, *Rene Cassin and Human Rights: From the Great War to the Universal Declaration*, (Cambridge University Press: Cambridge: 2013) pp.243-245

³⁷ Mary Ann Glendon (2001) p49

documented outline; Humphrey wilfully interpreted this as to prepare a full draft bill of rights.³⁸

Humphrey's unauthorised individual status hinges on how these factors are interpreted, firstly that those asking him to produce a draft in the first instance had no authority or right to make such a request of a member of the secretariat. Second, that a documented outline is a document much more basic and distinctive in nature than what can be considered a full draft document. Humphrey in completing his draft either through, at best, intentional miss-interpretation or, at worst, purposeful desire to ensure the UDHR project had a solid base produced the first draft of the UDHR in time for the June 1947 meeting of the now expanded drafting committee. At this meeting the Humphrey draft was not alone, the British had also prepared a draft document for consideration,³⁹ the committee, no doubt under the influence of Humphrey through Roosevelt, Chang, and Malik, agreed to take his draft as the basic working document.⁴⁰

This draft held several important elements that if it had not been for Humphrey drafting this document would not have made it into the UDHR. The most significant inclusion into the UDHR was that of economic, social and cultural rights. The balance of power in the early UN was such that Western states held an advantage, therefore, these states held a desire for the inclusion of only civil and political rights. This inequality within rights was not acceptable to Humphrey who felt that civil and

³⁸ John P. Humphrey (1984) p30

³⁹ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford University Press: Oxford:2004) p410 also available as UN Document E/CN.4/AC.1/SR.1.

⁴⁰ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford University Press: Oxford:2004) p414

political rights had little meaning without economic and social rights,⁴¹ therefore, he included them within his draft.

The power that Humphrey had with this original draft was underlined by Geoffrey Wilson, Lord Dukeston's alternate representative on the Drafting Committee, and recorded by Humphrey:

“He said that once the Secretariat had included something in its draft, it was very difficult for governments to object to its being there, an obvious reference to economic and social rights which significantly enough were not mentioned in the draft convention which the United Kingdom presented to the Drafting Committee.”⁴²

The inclusion of these rights made it almost impossible for delegates opposing them to remove them completely. Fully advocating for their removal would have created reputational damage to the authorised individual and their state, which would have affected their status in the drafting process.

III.2.1. High Commissioner for Human Rights

A less well known exploit is that Humphrey was the original architect for what is today the High Commissioner for Human Rights. The role of High Commissioner for Human Rights as we generally know it today only came into force in 1993 in the second human rights dawn,⁴³ of the early 90s following the collapse of the Soviet Union and end of the Cold War. Humphrey's basic idea for the High Commissioner for Human Rights stems from meetings with the US delegation, and was renewed after a visit to Vietnam in 1963 reviewing human rights issues on the ground. The

⁴¹ John P. Humphrey (1984) p32

⁴² John P. Humphrey (1984) p32

⁴³ Human Rights dawns are periods of time when international political conditions are ideally suited for great leap forwards in instruments in the field of Human Rights Protection. The first was in the immediate aftermath of the Second World War, when all the major powers came together and created both the UN Charter and the Universal Declaration on Human Rights, prior to the start of the Cold War. The second dawn was in the early 90s after the collapse of the Soviet Union and end of the Cold War, events such Vienna Conference on Human Rights in 1993 and the creation of the UN High Commissioner for Human Rights happened during this time span.

meeting with the US delegation was instigated after an address made by President Kennedy in the General Assembly in which he indicated that the USA wanted to take a step forward in the human rights program. The step forward turned out to be rather underwhelming and for the mandate of the Chairmen of the Human Rights Commission to be extended so that the chairman could act between sessions of the commission. Humphrey advised the US delegate Harlan Cleveland when discussing the proposal that this would not be a good idea as this appointment was purely a political one.⁴⁴ This opened the door to Cleveland asking Humphrey what he thought would be best, Humphrey indicated to give him a few days and he would get back to him with an idea.⁴⁵ Little more than a week later a meeting occurred between Humphrey, Ambassador Bingham, Marietta Tress and Richard Gardner. In this meeting Humphrey set out the basic idea for the High Commissioner for Human Rights.⁴⁶ “The upshot of the meeting was that the Americans left my office full of enthusiasm for my suggestions, and I was pretty sure that the High Commissioner would be President Kennedy’s long step forward.”⁴⁷ The new idea for the High Commissioner Humphrey emphasised was vastly different to that of Moses Moskowitz for a United Nations General Attorney which was taken up by the Uruguayan delegation.⁴⁸

With President Kennedy’s assassination in November 1963 the idea dropped from view within the Johnson administration. After Humphrey visited Vietnam as a Human Rights official investigating allegations that the Buddhist Community was being

⁴⁴ A.J. Hobbins (ed), *On the edge of greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights Volume 4 1958-1966*, (McGill University Libraries: Montreal: 2000) p62

⁴⁵ John P. Humphrey (1984) p296

⁴⁶ A.J. Hobbins (2000) pp.62-63

⁴⁷ John P. Humphrey (1984) p297

⁴⁸ John P. Humphrey (1984) p297

persecuted by the Roman Catholic government,⁴⁹ he was reassured about the need for a high commissioner for Human Rights. Humphrey revised his idea brought about by the experience of his visit, the refined High Commissioner role:

“What was needed, I thought, was an independent officer of great authority who would be available to act in a situation like the one in Vietnam if asked to do so by a government or by some United Nations Body. But he would not be a United Nations ombudsman or have the kind of powers proposed for the United Nations Attorney General. If the idea were to be accepted by a majority of states one would have to be careful not to propose for the high commissioner any powers that would make the office politically unacceptable. I figured that if the office could be created, it would take on importance and increased powers by the operation of time chiefly through the instrumentality of an annual report on his activities which the high commissioner would make to the General Assembly and the debates to which it would give rise.”⁵⁰

With the Americans no longer interested in taking on the idea of the High Commissioner, Humphrey felt the idea was too important to abandon and attempted to find a replacement state sponsor. After fine tuning the concept with NGO's in London and Geneva, he asked the Costa Rican Delegation and Ambassador Ferando Volio Jimenez to become the primary sponsor, mainly as the ambassador had been part of the team alongside Humphrey who had visited Vietnam.⁵¹ Humphrey then moved to start a campaign for the High Commissioner role, when asked to write a speech for Jacob Blaustein an American businessman who was speaking in the Dag Hammarskjold series at Columbia University, and due to Blaustein's connection to the US State department Humphrey put the idea of a High Commissioner into the speech.⁵² With Bluestein becoming the front man of the idea it is, therefore, widely credited that he had the original idea.⁵³

⁴⁹ John P. Humphrey (1984) p297

⁵⁰ John P. Humphrey (1984) p297

⁵¹ John P. Humphrey (1984) pp.297-8

⁵² John P. Humphrey (1984) p298

⁵³ Please see Andrew Clapham, “Creating the High Commissioner for Human Rights: The Outside Story”, *European Journal of International Law*, No 5, 1994, pp.556-568

A discussion of the difference between lobbying and the feeding of ideas is now crucial to the understanding of the unauthorised individual. The lobbying of individuals is fine within international law making, providing that this is acceptable within the profession in which the individual is employed. The feeding of ideas is more than lobbying, especially if the professional remit in which the ideas come from is focused on supporting and administering the international organisation in which those ideas will effect. In this case Humphrey fed the idea of the high commissioner to notable individuals, the idea for which had been developed within his professional life as head of a UN division. The creation of ideas, unless within an official review structure, was outside of his remit, otherwise he would have been able to propose the idea himself. If the idea had been given as a private citizen outside of the UN, then this would have been lobbying and would have been acceptable. It is a fine distinction between the two concepts, but when an idea is managed by a civil servant within an international organisation who does not have a remit to do such things, this is when that individual moves into unauthorised individual territory within the process of international law creation.

The Soviets soon discovered that the High Commissioner was Humphrey's invention and they did not forgive him for passing the idea to the Americans. The effect was to cause a rapid decline with his personal relationship with the Soviet delegation and secretariat staff.⁵⁴ The cost for Humphrey was that the last years of his career within the secretariat culminated when seeking election to the expanded Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in a personal capacity and the Soviets made it clear he did not have their support or vote.⁵⁵

Humphrey retired from the role of Director of the Human Rights Division in 1966 and

⁵⁴ John P. Humphrey (1984) p299

⁵⁵ John P. Humphrey (1984) pp.337-338

without his guidance the proposal to create the High Commissioner was pushed between the Human Rights Committee and the General Assembly and back again without significant progress.

By 1977 the Third Commission had a draft resolution before it, but the Cuban delegation put forward a procedural motion suggesting that the whole issue be passed back to the Human Rights Commission which succeeded.⁵⁶ From this position the concept gradually slipped out of view, to be only revisited with any serious attempts during the early 1990s. The original concept of the High Commission is truly Humphrey's but without him at the UN in a position to ensure its adoption it took until 1993 to come to any sort of reality. The limits of the unauthorised individual can be seen, while he created the idea, and gave it to both state sponsors and interested parties to push. Without him on the inside pulling more strings and pushing the idea on a daily basis those parties and states did not have the willingness to ensure that it became reality sooner, mainly because fundamentally they did not have ownership of the concept.

III.2.2. Day to Day Unauthorised Activities

The final, on-going, element was Humphrey's willingness to get involved with feeding information and holding private meetings with individual delegates to persuade, inform and debate with them; to bring them round to his point of view. While this may only be for minor matters they all add up to give Humphrey considerable input into the development of Human Rights. The first element was Humphrey's consultation with delegations regarding their ideas or proposals for the UN human rights program. Numerous examples of this occur and are well recorded within Humphrey's personal

⁵⁶ Andrew Clapham, "Creating the High Commissioner for Human Rights: The Outside Story", *European Journal of International Law*, No 5, 1994, pp.556-557

diary and autobiography. A classic case of this is with Jamil Baroody, the delegate from Saudi Arabia, whom Humphrey disagreed with on many things and often consulted him before taking some initiative.⁵⁷ Other meetings include one on October 13th 1948 brokering an agreement regarding the wording of Article 2 of the UDHR which was acceptable to the Russian (Pavlov), American (Sandifer), and French (Cassin) delegation.⁵⁸ Being consulted by delegates shows the influence and respect in which delegates held Humphrey, wishing to inform him of the ideas and hoping that he might be able to provide an insight into difficulties that the delegations were having as seen when he met with the Russian, America and French delegates to help formulate a solution. This goes beyond secretariat support, which was within his remit.

Closely linked to being consulted about ideas, Humphrey often held private meetings with members of delegations. While there is nothing wrong with this within a supporting capacity, but these meetings often went beyond such a role. These meetings would be delegates wishing to find out Humphrey's and the divisions viewpoint on a particular idea, or what the secretariat was thinking. One such meeting with Miss Bowie, a member of the UK delegation to the Human Rights Commission in the 1950s, who was having difficulties with the instructions issued by the UK government over the Covenant on Economic and Social rights, she was being given highly detailed instructions on every question with the foreign office closely watching her voting.⁵⁹ The accounts of this meeting seem to be expressions that Miss Bowie wished to let Humphrey know about the difficulties she was facing within her position. Other, less formal, private meetings occurred between Humphrey

⁵⁷ John P. Humphrey (1984) p135

⁵⁸ A.J. Hobbins (1994) pp.59-60

⁵⁹ John P. Humphrey (1984) p145

and delegates. A meeting with Sir Samuel Hoare, again another member of the UK delegation in 1957, raised the prospect that Humphrey even admired those arguing for positions others than his own:

“I heartily wished that I had him on my side. Our intimacy was such that I could talk to him frankly. One night over a bottle of pinot noir, I told him I thought the role he was playing in the commission as doing incalculable harm to Britain. The fault, however, was not with him but with his instructions. On 23 April he nearly torpedoed the seminar program when he suggested that each participating country should pay the expenses of its own participants. I could never have got the program moving on that basis.”⁶⁰

These examples show that Humphrey was good at forming close relationships with those that worked within the Human Rights Commission and delegates that represented their governments. This relationship building was important to Humphrey being able to openly discuss and bring these members around to his viewpoint. The effect of this was when requiring support he had built the relationship required for authorised individuals to support his unauthorised ideas.

III.2.3.Appointments

The final part of Humphrey’s minor unauthorised individual behaviour stems from getting delegates into positions where he felt they could do good jobs, even though it would be for the Human Rights Commission or the Economic and Social Council to appoint an individual by vote. An example of this was when the Economic and Social Council decided to undertake a second study on the issue of Slavery. Humphrey wanted the new rapporteur to be someone who could be a pivot around which any further negotiations were designed to bring an end to chattel slavery, which at this time was largely an Arab problem, and Humphrey believed a Moslem would be

⁶⁰ John P. Humphrey (1984) p232

perfectly suited to the job.⁶¹ Humphrey, therefore, arranged to have Mohammed Awad of the United Arab Republic appointed as the special rapporteur.⁶² Awad took up this position but never really fulfilled the role that Humphrey had dreamt up for him to become the pivot for action. When it came to present his report he was in hospital after suffering a heart attack on his way from Cairo.⁶³ The appointment of individuals into position such as this may appear a minor aspect, but getting the right individual into the job that suits their skills is essential in a highly effective international organisation. In demonstrating the power the unauthorised Humphrey had, being part of the secretariat he should not intervene in pushing a particular candidate into a position, when this is for states to elect.

III.3.D.A. Henderson

D.A. Henderson is not strictly involved within law creation, he does provide an important insight into how an unauthorised individual can bend and break the rules and regulation of an International Organisation, and as such is worthy of analysis. While Henderson was authorised to eradicate Smallpox as part of his work within WHO, he had to create new protocols and rules while also acting outside existing expected protocol in order to fulfil this goal. Henderson's unauthorised credentials are as much in the creation of new protocol of disease eradication as in terms of the implementation of these protocol that he created.

The beginning of the Smallpox eradication program was just one of many attempts by WHO to eradicate a disease. This particular program was not considered as anything special or above or below other efforts to eradicate disease on a global

⁶¹ John P. Humphrey (1984) pp.200-201

⁶² John P. Humphrey (1984) p295

⁶³ John P. Humphrey (1984) p326

scale. By the mid-60s the WHO smallpox eradication program was on the verge of being dissolved to focus resources on areas where goals were seen as achievable.⁶⁴

In November 1965 President Johnson announced a USA five-year program to eradicate smallpox and control measles over a contiguous bloc of Western Africa.⁶⁵

Henderson working in the American Centres for Disease Control was placed in charge of the new US project. This American project proved to be the impetus that the World Health Assembly required to renew their global campaign of eradication.⁶⁶

WHO backed a replenished program in which the General Director Marcelino Candau⁶⁷ requested Henderson take the lead role. Candau did not feel the effort would succeed and would just suck funds from the struggling malaria program being undertaken by WHO.⁶⁸ Perhaps this played a role in the appointment of Henderson, someone without experience of running a campaign of this size, combined with only giving WHO financial support for one-seventh of the total cost.⁶⁹ The one major difference between this program and others, undertaken by WHO, was that the Soviet Union and the USA⁷⁰ both supported it.

The original proposal for the WHO campaign came from the Soviet Union.⁷¹ In undertaking the Smallpox eradication campaign Henderson had no legal authority to make any state comply with the program, and acted on goodwill and his ability to persuade states into cooperating.⁷² One of the main issues which forced Henderson into becoming an unauthorised individual was that there was little support for the program from within WHO and especially from Director General Candau. The power

⁶⁴ Gareth Williams, *Angel of Death: The Story of Smallpox*, (Palgrave Macmillan: Basingstoke: 2010) p341

⁶⁵ D.A. Henderson (2009) p69

⁶⁶ D.A. Henderson (2009) p25

⁶⁷ The Director General of WHO 1953-1973

⁶⁸ Gareth Williams (2009) pp.341-342

⁶⁹ Gareth Williams (2009) pp.341-343

⁷⁰ D.A. Henderson, *Smallpox: The Death of a Disease*, (Prometheus Books: New York: 2009) p93

⁷¹ D.A. Henderson, *Smallpox: The Death of a Disease*, (Prometheus Books: New York: 2009) pp.61-65

⁷² F. Fenner, D.A. Henderson, I. Arita, Z. Jezek, I.D. Ladnyi, *Smallpox and its Eradication*, (World Health Organization: Geneva: 1988) p422

that Candau had as Director General was that he was the agenda setter for the Annual World Health Assembly meetings, on the draft agendas the smallpox campaign was regularly omitted, as he felt the goals of the program were too ambitious.⁷³ The importance of being on that agenda for the scope of a project was crucial to its success, this was because it was the primary opportunity to discuss the project with state representatives. If a project was to “capture the attention of ministers”⁷⁴, it had to be on the agenda. Fortunately for Henderson, the authorised individuals of the USA and USSR board members of WHO, had the power to ensure the program was included on the final agenda. This support, combined with the visits from US and Soviet delegations before the assembly to ask which questions it would highlight the difficulties faced by the program.⁷⁵ Henderson’s string pulling ensured that the program remained within the eye of state members.

Henderson was authorised to eradicate Smallpox as head of the team working on that project for WHO. What made him an unauthorised individual were the methods and process procedures that he used to accomplish the task. These methods and processes are not strictly law making, but they demonstrate how the actions of an individual serving within a role within an international organisation can have a massive global influence by acting in ways that were not permitted. Henderson and the project came to be seen as “a square peg in around administrative hole.”⁷⁶ Three examples of the process based actions undertaken by Henderson highlight why he has been credited as being an unauthorised individual. The first example was that Henderson went against the official WHO procedure of the era to use mass population wide vaccination, considered the only acceptable method for successful

⁷³ D.A. Henderson (2009) p99

⁷⁴ D.A. Henderson (2009) p99

⁷⁵ D.A. Henderson (2009) p99

⁷⁶ D.A. Henderson (2009) p107

elimination. Instead Henderson issued instructions for members of the smallpox team to use a process of his own creation, which was a “surveillance-containment”⁷⁷ technique which was effective, economical and socially acceptable.⁷⁸ Another example of procedural initiative was when Henderson purchased the corpse of a smallpox victim in order to prevent it being thrown into the Ganges.⁷⁹ Buying the corpse of individuals is something that WHO generally does not support. Finally, other procedural policies instigated by Henderson such as strategies, plans, targets, priorities and accountability were not welcomed, even being resented as unnecessary and infringing on the authority of the WHO regional directors.⁸⁰ Details of how he undertook this role as an unauthorised individual within an international organisation will be discussed in more detail below when the working process of unauthorised individuals are securitised. These examples of unauthorised procedural changes and breaches highlight how individuals within international organisations can have a significant effect upon the international system. Working outside the rules set up by the authorising state in how they should work and perform the international roles assigned to them.

IV. The Process of the Unauthorised Individuals

Each unauthorised individual has been considered in terms of why they are unauthorised individuals and their contribution to international law. Each of the unauthorised individuals at various times used different processes and methods of operating to get their ideas incorporated into international law or international organisational procedural rules. This section will explore and evaluate these

⁷⁷ Using this process instead of vaccinating everyone globally against smallpox they focused the vaccine on areas around inflected individuals. This prevented the spread of the disease, and without effective carriers the disease naturally died out.

⁷⁸ Gareth Williams, *Angel of Death: The Story of Smallpox*, (Palgrave Macmillan: Basingstoke: 2010) p346

⁷⁹ Gareth Williams (2010) p347

⁸⁰ D.A. Henderson (2009) p108

methods of how, without a formal place or mandate to actively take part within international law creation, they managed to make a significant contribution.

IV.1. Access and Persuasion

To the academic Lemkin, the most natural route after his success at the Nuremberg trials, in which he arranged as part of the prosecuting team to get the defendants indicted with “deliberate and systematic genocide”⁸¹. His route was to get the crime of Genocide recognised in international law by his fellow academics and the wider international community at post-war peace conferences in England and France.⁸² This was a total failure with many rejecting his proposal as he was “trying to push international law into a field where it did not belong.”⁸³ With the now, relatively simple, route of getting genocide recognised as part of the immediate post-war reconstruction closed off, Lemkin turned to the newly created UN in an attempt to persuade delegates to support his idea. Being a single individual without authority to introduce or create international law at an international organisation, caused Lemkin to develop skills to persuade and influence those authorised individuals to take up his cause.

One of the most important aspects of Lemkin’s ability to persuade authorised individuals was that he was able to get direct access to delegates and at the UN buildings. In a move that would be considered a major security breach today, security guards were prepared to look the other way when the unaccredited Lemkin attempted to access the buildings, and even allowing him to turn any empty UN staff office into his home for the day.⁸⁴ The first draft for resolution 96(1) was written by

⁸¹ Samantha Power (2002) p50

⁸² Samantha Power (2002) p50

⁸³ Samantha Power (2002) p50

⁸⁴ Samantha Power (2002) p51

Lemkin in the Delegates lounge, where he had almost unlimited access to state delegations, and, therefore, was in the perfect position to push his draft resolution into the hands of waiting delegates eager to distinguish themselves at the new international organisation.⁸⁵ This access to UN office space, and delegations gave him the space and opportunities needed to meet and persuade delegates as to his cause. Without this access to persuade, Lemkin would have found it considerably more difficult to get his initiative into international law.

Lemkin's need for direct access to the authorised individuals at the UN caused him issues with the different organs of the UN moving between Geneva, Paris and New York during the early years. This had the effect to cause Lemkin significant travel and accommodation costs between UN meetings, which had to be met from his own pocket, albeit with the help of generous supporters. Lemkin understood the necessity of being in person where the action was taking place, writing in his autobiography:

“It was clear that I had to go to Geneva at once. Every action at the UN must be prepared. One must know the distribution of sympathies and animosities in advance in order to get favourable results.”⁸⁶

Lemkin understood that access to delegates at the UN was of vital importance to ensuring that the Convention was accepted. Other unauthorised individuals who already work within international organisations, such as Humphrey, already had almost unlimited access to delegates and, therefore, have far more opportunity for direct discussions with the authorised individuals. Even within the unauthorised individual category those without a legitimate role within the international system face more challenges than those working inside of the system. Lemkin was one of those outside the system, and it was much harder for him to have the access

⁸⁵ Donna-Lee Frieza (ed), *Totally Unofficial: The Autobiography of Raphael Lemkin*, (Yale University Press: New Haven & London: 2013)

⁸⁶ Donna-Lee Frieza (2013) p133

required to persuade those authorised individuals with the power to bring changes into international law.

IV.2. Breaking Procedure

Unauthorised individuals, if already working within an international organisation, may have to act against the operating rules of procedure or standard protocol, in order to achieve their goals. This is where Henderson provides such a good example of an unauthorised individual behaving in such a fashion. Accepting that Henderson has limited law making credentials, his use within this work is purely in what he did in breaking produce and these ideas having the potential to be transferred to law making international organisations.

Henderson had a willingness to interpret rules of procedure in a highly flexible manner and in some cases break these rules altogether. Examples of this are seen when he implemented a new policy on vaccine potency standard, traditional WHO policy stated that all vaccine should be accepted and used no matter its quality; Henderson issued his own policy and set a standard for vaccine potency that had to be met by those donating or producing vaccines to be used in his eradication campaign.⁸⁷ At other times, Henderson felt he had to act outside the mandate of WHO in order to be successful. For instance, when a Soviet produced vaccine was found to fail to meet Henderson's international standards he was denied access to visit Moscow to discuss the matter further with Soviet officials. This was due to it being against WHO's rules of procedure, with WHO taking the approach not to get involved within international relations. The fear was that Henderson's complaints regarding vaccine potency would be interpreted as an American complaint.

⁸⁷ D.A. Henderson, *Smallpox: The Death of a Disease*, (Prometheus Books: New York: 2009) p105

Henderson waited a couple of months and went to Moscow under the ruse of a different reason in order to meet the officials to correct the problem.⁸⁸ Often going against the standard protocol had a negative effect and was resented by officials, one example from Henderson's biography states:

“Our particular ideas of strategies and plans, of targets priorities, and accountability were not welcomed, nor were some of our creative solutions. Some were openly resented as being impingements on the authority of the regional directors. Not infrequently, it was made apparent that we were considered an annoying, irrelevant nuisance.”⁸⁹

Henderson's acting against procedure easily built resentment from colleagues within WHO and those working in regional offices. This can be the negative side of breaking procedural rules within international organisations that it can build negative thoughts regarding the project. The examples used here to illustrate the breaking of procedural rules and regulations in order to achieve a goal when inside an international organisation, can be transferred to other organisations with more law-making competencies such as the UN or WTO.

IV.3. Information Seeding

Unauthorised individuals have no authority to speak or attend meetings in any other capacity than an interested party, observer or in a supporting capacity being employed by the international organisation. Not having the direct right to contribute to law making is fundamental to the unauthorised individual. Part of Lemkin's method, as has been previously examined, for getting the Genocide Convention into international law was to attend every meeting of the different committees dealing with the drafting process. When at these meetings and with access to the delegates,

⁸⁸ D.A. Henderson (2009) p102

⁸⁹ D.A. Henderson (2009) p108

Lemkin went further than the persuasion seen above, to information seeding the delegates with ideas, detailed information and occasionally speeches. At the legal committee in Geneva he prepared memos for delegates, and passed them to delegates prior to and during meetings in order to influence the direction of discussions.⁹⁰ He also worked in close connection with a former colleague within the state department James Rosenberg who was part of the US delegation team, this connection allowed him to feed the legal committee with comments and suggestions.⁹¹ His information seeding also took on other shapes such as talking to, even bordering on harassing delegates in the corridors of the UN, trying to get them to support his ideas. Cooper remarks that:

“...journalists frequently spotted him in the UN cafeteria cornering delegates, but they never saw him eat. In his rush to persuade delegates to support him, he frequently fainted from hunger.”⁹²

It indicates the lengths Lemkin was prepared to go to in order to persuade and seed delegates with information. At other times, less extreme measures were required using his friendship with Dr Hans Opprecht, a publisher and influential Swiss MP, he secured a meeting with the Swiss Foreign Minister.⁹³ This meeting brought sympathy for his cause, but more importantly a large press conference was arranged by the foreign minister for him to publicise the convention throughout the Swiss media.⁹⁴

John Humphrey used a different technique for information seeding, favouring talking to authorised individuals at lunches and dinner meetings when discussing and persuading delegates on important issues. From Humphrey's diaries there are numerous examples of this happening, notable examples are when he lunched with

⁹⁰ John Cooper (2008) pp.56-57

⁹¹ John Cooper (2008) p172

⁹² John Cooper (2008) p52

⁹³ John Cooper (2008) p140

⁹⁴ John Cooper (2008) pp.140-141

Archie McKenzie part of the UK delegation they “discussed the work of the Assembly in the field of freedom of information.”⁹⁵ On another lunch meeting with Malik at which it “discussed the speech (most of which is being prepared in the division) that he will deliver during the debate. He was expansive and elated; but the speech we have prepared for him is anything if not sober.”⁹⁶ This last example demonstrates the depth to which Humphrey gave, not just information on topics, but also complete ideas to the authorised individuals. Humphrey also held informal meetings over dinner with delegates, for example with UK delegate Miss Bowie,⁹⁷ and even less informally had a frank and opening discussion over a bottle of Pinot Noir with Sir Samuel Hoare.⁹⁸ In 1949, Humphrey held a meeting with the British delegation on the way into central New York this being the only opportunity that they had to meet to discuss information about the proposal to set up the Section on the Status of Women as a separate Division.⁹⁹ Lemkin used the advantage of delegates being away from home to spend time with them as they would have more time and be more willing to listen. When meeting the delegates at their hotel, Lemkin would first discuss items such as philosophy, art, music and finally the subject of the genocide convention would come up.¹⁰⁰ Therefore, the use of the lunchtime or dinner meeting cannot be underestimated as a means to influencing information, planting ideas, and changing policy.

IV.4. Political Shrewdness

One of Lemkin’s most important skills was his political shrewdness, knowing who to persuade at the right time, knowing when to intervene and when not to take a

⁹⁵ A.J. Hobbins (1994) p50

⁹⁶ A.J. Hobbins (1994) pp.89-90

⁹⁷ John P. Humphrey (1984) p145

⁹⁸ John P. Humphrey (1984) p232

⁹⁹ A.J. Hobbins (1994) p174

¹⁰⁰ Donna-Lee Frieza (2013) p135

backseat role. Often his political shrewdness saved the convention from being delayed or stopped altogether. In a demonstration of these skills “He had deftly sidestepped the obstructive tactics of the Arab states, which regarded his scheme as a tactical weapon of the Zionist”.¹⁰¹ He also “outsmarted the British and the Russians in the General Assembly, when they had wanted to consign the Convention into oblivion – no mean feat for a solo player with only a few allies.”¹⁰² His greatest political moment came early in the process when attempting to get a resolution on genocide, when he challenged the Soviet delaying tactic by approaching Pswalfo Aranha of Brazil, then president of the General Assembly asking for more time:

““Mr President”, said Lemkin, “who is making international law for the world – Vishinsky or the General Assembly? I ask this now because in 12 minutes you will begin presiding over a meeting which may decide to destroy the genocide convention by postponing it indefinitely. I appeal to you to hold off the vote.””¹⁰³

These examples of political shrewdness demonstrate the abilities that unauthorised individuals require, not only must they see the dangers posed by delegates to their ideas, but they must also move to protect them. They must be the unseen person pulling the strings at the right moment. As the Genocide Convention passed to the legal committee, Lemkin faced fresh opposition to the convention, primarily from the United Kingdom. A former supporter of the convention Dr Karim Azkoul, part of the delegation from Lebanon was no longer part of the UN legal committee and had been asked to represent Lebanon elsewhere at the UN. Lemkin pulled some strings to get a meeting with the Lebanese Prime Minister, in which he persuaded him to

¹⁰¹ John Cooper (2008) p109

¹⁰² John Cooper (2008) pp.109-110

¹⁰³ Herbert Yahraes, “He gave a name to the World’s Most horrible Crime”, *Collier’s*, 3rd March 1951, p51 As found in John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, (Palgrave Macmillan: Basingstoke: 2008) p103

move Dr Azkoul back into the legal committee.¹⁰⁴ This gave his own position a twofold increase, firstly he moved a supporter into a committee in which the convention was struggling, and also put someone in place that he had a personal relationship with and could feed information to.¹⁰⁵ Lemkin increased support by approaching friends within foreign offices asking them to instruct delegates in Paris to support the Genocide Convention; this tactic received a positive response with Sweden backing the convention in this way.¹⁰⁶

Humphrey's political shrewdness was as important to him as it was to Lemkin and this political shrewdness developed over time. During the passing of the UDHR when Malik was chairing a Special Committee on Human Rights under the Economic and Social Committee, Humphrey was disappointed with Malik's skills at chairing the meeting as he allowed debate and was only slowly moving through the agenda, leaving the UDHR without significant committee time.¹⁰⁷ Later accepting and praising Malik's procedural skills by getting the UDHR passed to the Third Committee without the special committee having any significant input.¹⁰⁸ Over time this developed into getting the appointment of the right individuals into the right place, this has been seen with the appointment of Mohammed Awad of the United Arab Republic appointed as the special rapporteur on Slavery in the mid-1950s¹⁰⁹ as previously noted. Another moment of great political shrewdness was when Malik attempted to delay the Genocide Convention in the Economic and Social special committee. Humphrey strongly advised against this course of action because of Lemkin's efforts,

¹⁰⁴ Donna-Lee Frieza (2013) pp.157-158

¹⁰⁵ Donna-Lee Frieza (2013) pp.157-158

¹⁰⁶ Donna-Lee Frieza (2013) pp.156-157

¹⁰⁷ A.J. Hobbins (1994) p24

¹⁰⁸ Mary Ann Glendon (2011) p214

¹⁰⁹ John P. Humphrey (1984) p295

and the public support for the convention, with any delay having the effect that it might affect the council's prestige.¹¹⁰

IV.5.Utilisation of Support

Publicity and outside support from pressure groups was a vital part of Lemkin's role in pushing for the convention and its subsequential ratification campaign. Being on the outside, raising the public profile of the convention was vital to getting public support into pushing governments into supporting his work. The public campaign was carefully managed by Lemkin, being careful not to overly link the convention to a reaction to the events that would become known as the Holocaust and as a protection measure for Jews. This was due to his desire to gain the broadest range of support as possible from UN member states. Also, the Palestine question caused much debate and concern in the early years of the UN, which may have upset the conventions process in international law. Cooper sets out the importance of the support that he managed to obtain from the major American newspapers which he argues was critical to the success of the project.¹¹¹ Lemkin further also utilised support from the Trade Unions, Women's organisations, Jewish and church organisations to add further outside pressure on governments across the globe. All this support had Raphael Lemkin at the centre. Humphrey also used outside support to gain interest in his idea for the High Commissioner for Human Rights. In writing the speech for Jacob Blaustein he gave the idea to a popular businessman that held influence both with the public, and the US State Department.¹¹² The support building outside the UN is something that is certainly out of the remit of an international civil service.

¹¹⁰ A.J. Hobbins (1994) p30

¹¹¹ John Cooper (2008) p172

¹¹² John P. Humphrey (1984) pp.297-8

IV.6.Relation Building

As the unauthorised individual tends not have the power required to speak and introduce ideas or concepts at meetings, they must often use agents or proxies in order to put those ideas forward. Due to the freedom and the powers which they pose, the independent authorised individual can be used by the unauthorised individual for the mutual gain of both parties. This requires the independent authorised individual to have a good and trusting relationship with the unauthorised individual as both will be aiming to create a mutually beneficial agreement. This may involve the independent authorised individual taking credit for putting forward ideas and concepts, while the unauthorised individual gets the benefit of being able to put forward ideas under the guise of an individual with the power to do this. Humphrey noticed the value of finding such a person in Charles Malik:

“Some were more independent than their colleagues and some operated without precise or any instructions from their governments; and these were not the least useful representatives. One such representative was Charles Malik of Lebanon.”¹¹³

In a similar approach Lemkin found useful independent authorised individuals in Dr Evatt and James Rosenberg, representative of Australia and USA respectively, both acted as a collaborators and conduits of information.¹¹⁴ In Dr Evatt, Lemkin found his ‘go to man’ when he needed to put a point across at meetings, or felt the convention needed to take a different route. This partnership was a success with them working together until the early part of 1950, well into the ratification campaign. Not all delegates could be used in this way; for example, Lemkin attempted to utilise Norwegian delegate, Professor Frede Castberg, to sponsor his resolution. Castberg failed to obtain authorising instructions from his government in time to undertake this

¹¹³ John P. Humphrey, “The memoirs of John P. Humphrey, the first director of the United Nations Division of Human Rights”, *Human Rights Quarterly*, Vol.5, No.4, p391

¹¹⁴ John Cooper (2008) p186

action.¹¹⁵ Thus Castberg was not independent enough to be useful to the unauthorised individual, Lemkin. This failure underlines differences between the authorised and independently authorised and their suitability as proxies for unauthorised individuals' ideas.

The unauthorised individual is not a new creation, but recognising the concept is a new approach to how international law is made. The practice of the unauthorised individual has been happening within international law for many years, yet the academic literature does not reflect this. With bringing this concept into the light it makes it easier to understand how international law is created, and how individuals can have such a large influence even without formal place amongst a table of State representatives. This concept may not only bring good ideas to international discussions on new international law, but also opens the door to the system being abused and having a negative effect on international law. The same can be true for any of the other categories discussed above, International meetings are always open to negative individuals, be they authorised or unauthorised. As international law creation is based on the consent and approval of states we must hope that this prevents the effect that negative individuals may have.

V. Charisma, Determination and the Unauthorised Individual

In considering the unauthorised individuals and, to a lesser extent, the independent authorised individual raises questions as to how these individuals get others to support and take on their ideas. Above has been a discussion of some of these skills required or used by these individuals. The discussion now moves to examine not so much skills, but characteristics that cannot be acquired, such as charisma and

¹¹⁵ John Cooper (2008) p79

determination. In the examples considered within this work, especially in the last two categories it's striking that some of these individuals, such as John Ruggie, Charles Malik and John Peters Humphrey, all seem to be very charismatic individuals. While others, such as Lemkin, seem to totally lack any charismatic appeal, but instead have a steely determination to succeed. This section intends to explore these ideas to how important they are to the success of the unauthorised individual and the independent authorised individual in law creation.

V.1. Charisma

This section starts with an investigation and exploration of what is understood by Charisma. There are certain individuals within world politics who can be identified as being charismatic, such as Tony Blair, John F Kennedy, Fidel Castro and Mahatma Gandhi. But what is it about these individuals that give them that extra something, what makes people want to follow the ideas that these people set out, what is it that sets these people apart from others in the same situation? For example, Tony Blair, former UK Prime Minister, is widely agreed to have been highly charismatic¹¹⁶, but the same could not be said about his predecessor John Major, or his successor Gordon Brown. Identifying these individuals does not increase the understanding of what is meant by Charisma. Within John Potts' *A History of Charisma*¹¹⁷ he provides an inside into the development of the term charisma and what it means in modern society. Pointing towards the early beginnings of the term within early Christianity and the writings of Paul, the term Charisma is used to signify the various gifts, including spiritual and supernatural abilities ensuing from a divine grace.¹¹⁸ The

¹¹⁶ <http://news.bbc.co.uk/1/hi/6506365.stm> accessed 07.04.14

¹¹⁷ John Potts, *A History of Charisma*, (Palgrave Macmillan: Basingstoke: 2009)

¹¹⁸ John Potts (2009) p23

modern understanding of charisma is much more aligned with that taken from Max Weber's writing¹¹⁹ in which Weber defines Charisma as:

"The term "charisma" will be applied to a certain quality of an individual personality by virtue of which he is set apart from ordinary men and treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities. These are such as are not accessible to the ordinary person, but are regarded as of divine origin or as exemplary, and on the basis of them the individual concerned is treated as a leader."¹²⁰

Weber's focus within this definition of charisma is rooted within a wider centre on the political and institutional charisma from which he derived the concept of charismatic authority which he clarifies as:

"Charismatic grounds – resting on devotion to the specific and exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him (charismatic authority)."¹²¹

This is further elaborated by Weber as:

"In the case of charismatic authority, it is the charismatically qualified leader as such who is obeyed by virtue of personal trust in him and his revelation, his heroism or his exemplary qualities so far as they fall within the scope of the individual's belief in his charisma."¹²²

Weber argues for the first modern definition of the term charisma, and gives the term significant connection to the political arena. This understanding of individuals that society is willing to obey due to some level of personal trust, and admiration.

Therefore, society believes that these individuals are perfect for leadership roles whereby they then are in position to create law. One final definition that should be considered at this moment, is a more modern definition set out by Pott's and while largely derived from that of Weber, expands upon his original definition:

¹¹⁹ Max Weber On Charisma and Institutional Building, Selected Papers, edited and with an introduction by S.N. Eisenstadt (the University of Chicago Press: Chicago: 1968)

¹²⁰ Max Weber (1968) p48

¹²¹ Max Weber (1968) p46

¹²² Max Weber (1968) pp.46-47

“The contemporary meaning of charisma is broadly understood as a special innate quality that sets certain individuals apart and draws others to them. I have composed this definition following extensive study of the word’s usage not only in recent media, particularly newspapers, magazines and websites, but also in the discourse of various academic disciplines, including sociology, psychology, management theory, media studies and cultural studies. The definition offered here derives largely from Weber, attesting to the power of his formulation of the concept of charismatic leadership. However, the current meaning has shifted away from the restricted range of charismatic authority elaborated in Weber’s sociology. Charisma in contemporary culture is thought to reside in a wide range of special individuals, including entertainers and celebrities, whereas Weber was concerned primarily with religious and political leaders.”¹²³

This definition is good as it still maintains that authority derived from that inner gift, that something special that allows them to lead and to draw others along. But it also moves theoretically on from Weber, taking into account the changing technology of the age, and the rise of charisma outside of the religious and political leaders. This has the effect to give a far broader understanding than the sense that Weber argued for, conversely that does not mean that every celebrity has Charisma. Celebrity can be manufactured and constructed within an individual, while actual, true charisma is that innate gift of genuine quality.¹²⁴

Coming up with a final definition of charisma, or even what it fully entails is difficult. To know if someone has charisma is as much a judgement of them against those also in a similar position. Nevertheless, someone with charisma, appears to be someone who has a natural ability to lead and stand out from the crowd, this charisma gives them a natural authority, rather than a traditional or legal authority to do this. When considering the unauthorised individual and the independent authorised individual we can see that these are individuals who have stepped away from the crowd and have people who follow and support what they are doing, not

¹²³ John Potts, *A History of Charisma*, (Palgrave Macmillan: Basingstoke: 2009) p2

¹²⁴ John Potts (2009) p181

based on a legitimate understanding of authority, but based on charismatic authority. Therefore, the concept of charisma can help, in part, explain why these individuals come forward as they do to have such an impact.

Having understood what charisma is, this work will examine unauthorised and independent authorised individuals that demonstrate this trait. Unauthorised individual, John Peters Humphrey, used charismatic authority as an aid to getting his ideas implemented. Humphrey is described as an individual that did not have the temperament of a diplomat; he was outspoken, straight-talking, bi-lingual, the perfect balance for an international civil servant.¹²⁵ The language skills that Humphrey had in being able to communicate in both French and English gave him a significant edge in the world of international organisations. This allowed for personal conversation with delegates from all around the globe gaining respect and an insight into these delegations, and their cultural perspectives. The ability to discuss matters with individuals in their own language cannot be underestimated, and the gratitude in doing this is important. Humphrey was also prepared to meet delegates and attend the social occasions; this all builds relationships with delegates. The relationships that Humphrey built and maintained went beyond this, with individuals seeking his opinion and looking to him for advice and assistance.

Independent authorised John Ruggie, while not unauthorised, is an individual with considerable personal charisma and, therefore, worthwhile of discussion at this time. Ruggie's charisma is almost undeniable, Ruggie certainly has that ability to walk into a room and everyone will focus their attention upon him. When he gives speeches he manages to captivate the room, not just with what he is saying and arguing but

¹²⁵ Jay Winter & Antoine Prost, *Rene Cassin and Human Rights: From the Great War to the Universal Declaration*, (Cambridge University Press: Cambridge: 2013) p235

with his body language. The same speech as a transcript does not have the same influence as when Ruggie is actually delivering the work. Ruggie's charisma is also apparent when making small talk with individuals in the context of a drinks reception.¹²⁶ The charisma of Ruggie is reflected in how TNC's and academics have reacted to the Framework making reference to it as the "Ruggie Framework", not just as a colloquial term but also in academic¹²⁷ and professional texts.¹²⁸ At other points his charismatic influence has been that a law firm, to attract business, uses the term "Ruggie-Proof" to determine if those in the extractive industries comply with the UN Guiding Principles.¹²⁹ The term has also been used by other stakeholders to see if they comply with the UN Guiding Principles.¹³⁰ The charisma of one individual to have a major international standard judged against their name is an example of how much people were willing to follow Ruggie and go along with his ideas, just because of who he was and his charismatic authority.

The identification of these charismatic individuals, combined with their contributions to international law¹³¹, demonstrates the influence that charismatic individuals can have on the law making process. Having a charismatic independent authorised individual in the role of a Special Procedures Mandate Holder, such as John Ruggie, had the ability to take stakeholders along with his vision of the mandate. This has the effect that the implementation of the international law is more likely to be successful,

¹²⁶ This effect was witnessed by this author at Ruggie's book launch in 14th March 2013 at the Royal Society, London.

¹²⁷ Mary Dowell-Jones and David Kinley "the Monster under the Bed: Financial Services and the Ruggie Framework" As found in Ed Radu Mares, *The UN guiding Principles on Business and Human Rights: Foundations and Implementation*, (Martinus Nijhoff Publishers: Leiden: 2012) pp.193-216
And

Tara J. Melish and Errol Meidinger, Protect, Respect, Remedy and participate: "New Governance" Lessons for the Ruggie Framework" As found in Ed Radu Mares, *The UN guiding Principles on Business and Human Rights: Foundations and Implementation*, (MartinusNijhoff Publishers: Leiden: 2012) pp. 303-336

¹²⁸ Many business initiatives use this term when describing the framework and Guiding Principles for example <http://www.ethicaltrade.org/news-and-events/blog/steve-gibbons/ruggie-framework-protect-respect-remedy> accessed 29.4.13

¹²⁹ John Gerard Ruggie (2013) p151

¹³⁰ <http://www.hks.harvard.edu/news-events/publications/insight/markets/john-ruggie> accessed 21.05.13

¹³¹ See chapter 3 for John Ruggie's contribution and see earlier in this chapter for John Peters Humphrey's

as individuals have brought into the creation process and its substantive outcomes. For the unauthorised individual, such as Humphrey, they can use charismatic appeal in the process of law creation to influence and lead authorised individuals who are actually in the position to make the law. This appeal can be used by the unauthorised individual when talking to authorised individuals so that they not only wish to hear what the unauthorised individual is suggesting, but also fully endorse the ideas, and wish to see them made into law. What can be seen is that if individuals have charismatic authority they will, more likely, appeal to the authorised individuals, and as such their ideas are more likely be taken on board and made into international law.

V.2 Determination

Not all individuals have the characteristics to be described as charismatic, other individuals' characteristics may lean far more towards a determination and inner driving force to succeed. Raphael Lemkin is a good example of an individual without the charisma of those discussed above. Lemkin's lack of charisma can, in part, be seen within his failed campaign in getting the USA to ratify the Genocide Convention during the 1950s. Lemkin quarrelled with his loyal supporters such as James Rosenberg and the members of the United States Committee for a Genocide Convention.¹³² These disagreements with supporters, alongside a mistimed illness forced Lemkin into a defensive posture to protect the convention against encroachment of rival human rights projects,¹³³ which may have been more constructive to work with instead of defending a dogmatic position. Lemkin had public disagreements with the most notable human rights activist and likely allies of

¹³² John Cooper (2008) pp.207-208

¹³³ John Cooper (2008) p208

the time, including Eleanor Roosevelt, Roger Baldwin, Rene Cassin and Hersch Lauterpacht.¹³⁴ Lauterpacht disliked Lemkin and the Genocide Convention to the point when he dismissed his work to a mere footnote within his treaties on international law.¹³⁵ His time teaching at Yale during the late 40s and early 50s, which culminated with his teaching contract not being renewed in the summer of 1951, also indicates this lack of charisma. During this period Lemkin was in conflict with the Dean of the faculty due to his long absences from academic duties, the cost incurred in excessive charges for telephone calls, and telegrams furthering the campaign for the Convention ratification across the globe.¹³⁶ He also failed to win over the student body with one rumoured instance of a good student who had achieved good grades being given a low mark by Lemkin because they disagreed and contradicted with his viewpoint on genocide.¹³⁷ One unnamed source in Cooper's work describes Lemkin and his lack of charisma as "He struck one sympathetic observer as a 'loner', a man obsessed with a single idea."¹³⁸ Lemkin lacked the charisma that others contemporaries such as Humphrey or even Malik had, yet what he lacked in charismatic authority he made up for in persistence and determination.

Lemkin worked tirelessly for the Genocide convention attempted everything to get it created first, and later ratified by states. Lemkin's single mind-set to do everything for the convention blinded him to his own issues that this created. The amount of time he spent working on the ratification of convention meant he was unable to hold down a teaching job,¹³⁹ afford the rent on his flat, and in pursuit of ratification borrowed

¹³⁴ John Cooper (2008) p229

¹³⁵ John Cooper (2008) p229

¹³⁶ John Cooper (2008) p207

¹³⁷ John Cooper (2008) p207

¹³⁸ Footnote 89 Private information as found in John Cooper (2008) p207

¹³⁹ Donna-Lee Frieza (2013) p213

money from friends to travel to Washington only to have to borrow money from friends in Washington to pay back the money he owed to those in New York.¹⁴⁰

Lemkin found himself in the situation that friends within the UN would, as he stated “plot” to see that I eat at least one meal a day. I am ashamed and try to limit myself to a bowl of soup when I am their guest.”¹⁴¹ Lemkin’s determination to see ratification of the Genocide Convention can be seen as his undoing, he focused so hard on just that, he failed to consider his own wellbeing and future. His greatest strength of persistence, determination and fortitude made up for the lack of charisma; this was also his greatest weakness.

Perhaps what can be learnt for law making here is a warning, especially for the unauthorised individual, that determination and desire can only take law creation by the unauthorised individual so far. Not knowing the limits of how far you can push the authorised or independent authorised individual to create the law as desired, can start to have a negative effect that they no longer wish to listen to the ideas, or actively work against them. The positive aspect is that with determination the unauthorised individual can push ideas into international law successfully.

VI. Conclusion

The unauthorised individual is an individual that neither has mandate or capacity to have an active role at negotiations or discussions within the international law creation system. These individuals may be at discussions or negotiations in a procedural capacity, or as the member of an international organisation hosting talks. They have no mandate or government instructions and, therefore, are acting either in a procedural role, or at the grace of government representatives allowing an

¹⁴⁰ Donna-Lee Frieza (2013) p213

¹⁴¹ Donna-Lee Frieza (2013) p221

unauthorised individual to be present. Up to the point of creation, the Ruggie process in the formation of new legal rules should be considered a success, yet the true value of this legal instrument will only be discovered after the completion of the mandate of the Working Group on Business and Human Rights. This will give a suitable length of time to evaluate how the UNGPs are working in practice and allow any questions regarding their formation come to light. For example, the African Consultation, based in Johannesburg, was conducted on a small scale when compared to the other consultations undertaken in Europe, the Americas or Asia.

Often, unauthorised individuals can be found within the international civil service, although this type of unauthorised individual is perhaps the least independent. Those working within the international civil service are required to be sufficiently senior within the system to have effect as unauthorised individuals. This is needed to have the influence and access to delegates, and also be sufficiently secure within that position. Other unauthorised individuals are found outside of the international civil service and are more independent than any other actor within the international system. These individuals can be academics asked to contribute to the formulation of new law documents, which need to be drawn up by natural parties or in highly sensitive political situations where individuals cannot be associated with outcomes.

Examples of the unauthorised individual, Lemkin, Humphrey and Henderson, all show individuals who contributed to the creation of international law or international policy and procedures when they had no expectations to undertake such a role.

Lemkin's Genocide Convention is perhaps the most remarkable, given he worked outside the UN system but, through sheer persistence, managed to get the genocide convention adopted and ratified. Humphrey's achievements in drafting the first draft of the UDHR is praise worthy, if he had not included economic and social rights

within that draft the document would have taken on a wholly different conception.

The creation of the original idea of the High Commissioner for Human Rights comes from Humphrey and his experiences in going on an observation mission to Vietnam, while the Commissioner did not come into force until years later, the essence of the idea was Humphrey's. Henderson's creation of new procedure, breaking protocol, and actions ensured that the WHO campaign to eradicate Smallpox was a success. In bringing a new procedure and protocol that was not unsupported by WHO he created new methods for disease eradication.

The skills used by these individuals were fundamental to their success, without access to authorised individuals they would never have been able to succeed. With this access they persuaded whenever they had an opportunity to interact with delegates be that at a formal meetings, over dinner, or when getting a ride in a car. With access to authorised individuals also came the need to develop a level of political shrewdness, the unauthorised individuals needed to know when the right moment to ask a favour was, or perhaps offer to write a speech, or give them a few lines of argument during an important debate. Unauthorised individuals, who manage to build strong relationships with authorised individuals, can use these as proxies during debates and meeting sessions. Information can be given to them and they will argue a particular line on the instructions of the authorised individual. This brings the unauthorised individuals as close as possible to be actually involved within a meeting. Finally, by the unauthorised individual gaining support outside a particular international organisation, or law creation event, they can bring direct pressure onto authorised individuals to bring an idea into international law.

The personal characteristics of the unauthorised individual to inspire authorised individuals, or have the determination to keep pushing an idea are vital. The ability of

the unauthorised individual to inspire others seems to be an expression of Weber's charismatic authority, while important, is not essential. Determination and persistence can make up for a lack of charisma. Not all unauthorised individuals can be said to be charismatic, as this is an innate gift. Determination to succeed and get an idea included as part of international law can make up for any such absence.

These unauthorised individuals discussed here are mainly people that are pragmatists with ideas, but lack the authority to put them into practice themselves. They become unauthorised individuals in order to get their ideas into the international system because they believe that they would bring a collective benefit. The working methods of the unauthorised individual speak of pragmatism rather than a grand plan. The power of the unauthorised individual can be seen in a rather simplistic argument, which does not take into effect many other factors, yet in the drafting of the UDHR an unauthorised individual had a significant role in the drafting process which was accomplished within two years. Compared to the UN Covenants on Human Rights, in which there was limited input from the unauthorised individual, it took sixteen years to be concluded. This argument does not take account of any of the political factors, but the influence of the unauthorised individual during this period should not be underestimated.

Having now set out the authorised, independent authorised and unauthorised individual over the last three chapters, a new system of categorisation has been examined. The next chapter will consider the theory of the individual within theoretical decision making in international law. Doing this will reflect on how decisions are made by individuals, when law is being made and how the choices that they make can have a great effect on the document produced.

Chapter 6:- Theory of the Individual Decision Maker in International Law

I. Introduction

“Strictly speaking, because individuals make these decisions on behalf of states, consent only ensures that these individuals prefer the agreement to the alternative of no agreement. If these decision-makers pursue private objectives that are inconsistent with the general welfare of their citizens, even consensual agreements need not improve welfare. Nevertheless, we expect consensual agreements to improve the lots of the parties involved with greater frequency than non-consensual, coercive agreements. After all citizens (at least within democracies) have at least some check, through the ballot box, on the international activities of their politicians.”¹

This chapter intends to examine the theoretical model of the individual decision makers within the process of international law creation. Using theoretical models of decision making the chapter will seek to propose a greater understanding of the

¹ Andrew T. Guzman, *How International Law Works: A Rational Choice Theory*, (Oxford University Press: Oxford: 2008) p60

behaviour of the three categories of individuals discussed in the last four chapters. Many of the theoretical concepts that will be applied to this work are more familiar to other social science disciplines; nonetheless, they provide insight into behavioural analysis of the individual. These theoretical concepts will show how the individual within their decision making can have an effect on the creation and development of international law. These models should also demonstrate the effect and impact that the unauthorised individual can have on decision making, and wider law creation.

It will start by linking the process of international law to the individual decision making. Considering the absence of democracy within the creation of international law setting out that this is not essential within successful document creation. Setting the space for strong individuals able to make good decisions due to the absence of a direct link between state citizens and actor's within the international system. The traditional approach to international law decision making will be examined to give an understanding of how the theoretical method that international law should be created within, be this multilateral or bi-lateral agreement.

The tragedy of the commons will be examined as a multi-player model of the international law creation system. In exploring the tragedy model and the different solutions to the problem, its application to contentious law making situations will become clear. In solving this theoretical model and real world counterpart it will demonstrate the value that independent and unauthorised individuals can have. This chapter will turn to the issue of reputation and consider how reputation works in relation to the different individuals. Reputation will be seen as fundamental to the success of the independent and unauthorised individual, but less important to the authorised individual.

Game theory uses logic and consideration, to demonstrate different outcomes to find the best possible outcome to a decision making process. Within this work, after an understanding of game theory is demonstrated, and how these models and there outcomes can be understood. They will be used to model the three different categorisations of individuals, and how they approach decision making within the creation of international law. For the authorised individual this may be in a situation needing to fulfil instructions by picking the right moment to introduce a new concept. For the independent authorised individual this might be how to ensure that stakeholders remain interested in a project as law prevents their bad practice. While for the unauthorised individual the decision may be regarding what authorised individual to pick in order to persuade them to take up an idea. Four models, Prisoners Dilemma, Stag Hunt, Battle of the Sexes, and Dove/Hawk will provide the ideal theoretical models for this purpose. Each game will set out to explain why it is relevant to the individual within international law creation and the different aspects that it can help demonstrate as an analytical tool. These games will demonstrate the decision making of all categories of individual, and consider the unauthorised individual; the effectiveness in their decision making will be underlined.

This work has, so far, set out the three different categorisations of the individual within the process of international law creation. At times, individuals will be required to make decisions that can have huge consequences for themselves as state authorised individuals and for international law. These decisions may have to be made when instructions cannot be obtained or they are given freedom within their role. Examining how these decisions are made will be the primary focus of this chapter.

II. Theoretical Effective International Law Making and State Centric Decision Making

The state-centric nature of traditional international law creation is one in which states come together to discuss, negotiate, and draw up agreements between themselves, which are then opened to signature and ratification by governments of states. With the move towards the modern foundation of international law and the treaty of Westphalia, a growth in states undertaking negotiations with other states using authorised individuals is seen. Increasingly, treaties and the creation of treaties have taken over from customary international law, with the creation of the UN and the International Law Commission established in 1949 with the intention of restating, clarifying and revising customary international law into treaties.² Further, the UN Charter Article 13 (1) (a)³ encourages the development and codification of international law. A trend has developed, especially since the end of World War Two, to move towards an international codified system of law. What is involved within all international law creation is a decision making process. This is underlined by the development of international law.

The Caroline case,⁴ often cited as the earliest example of modern customary international law, the US secretary of state Daniel Webster and the British Minister in Washington Henry Fox discussed the legal position of their relative states through letters regarding the sinking of the Caroline steamship.⁵ Both were authorised individuals representing their respective governments and, therefore, were authorised to undertake this action. This type of negotiation is simplistic as there

² Alan Boyle and Christine Chinkin, *The Making of International law*, (Oxford University Press: Oxford: 2007) p163

³ UN Charter, Article 13 (1) (a)

⁴ The Caroline Case (sometimes known as the Caroline affair) 1837. Extracts of the major letters of the case can be found at http://avalon.law.yale.edu/19th_century/br-1842d.asp accessed 10/6/14

⁵ Timothy Kearley, "Raising the Caroline", *Wisconsin International Law Journal*, Vol. 17, No. 2, pp.325-326

were only two parties, each seeking to get the other to agree to their particular concept of the right of states to self-defence, the decision making was narrow and self-interested. With this approach to the creation of international law it tends to mean that each state is aiming to create or define the law as to increasing or defending their particular interests.

When these discussions are undertaken the state usually sends its top diplomats, legal advisors, and politicians to international events to work out treaties between the different authorised individuals. These types of negotiations and discussions works well when there are a limited number of states taking part, who all have a limited ambition as to the type, scope, and implementation of the document intended to be created for the benefit of the states involved. A document limited in scope allows for easier decision making by the individuals involved. This document may well have either a limited or mutually beneficial payoff for the states undertaking the work. Other factors may play a role in the outcome and influence the decisions being made such as the strength of a particular state, the influence a particular state may have, or the skill of the negotiator or diplomat sent to undertake the work. The authorised individuals are best placed to undertake this type of negotiation and are best placed to make decisions that reflect the state instructions. This is due to the state government giving them clear expected outcomes and the strategies employed to get the best deal, and when required can make good decisions, which met these expected outcomes.

Traditionally, using this system of authorised individuals for bilateral and limited multilateral treaty partners would have been the best way for a state to produce an international agreement. The pre-World War One international community, especially, only consisted of a far smaller pool of state actors that were officially

recognised by each other and only a limited number were able to take part and enter into agreements. This limited the number of bilateral treaties that could be made between states, and those states' ability to join international organisations. For instance, the League of Nations, at its largest, only had 57 state members⁶ and the original UN only had 51 member states with that number rising to 60 by 1950,⁷ and with South Sudan becoming the 193rd member in 2011.⁸ With an increased number of actors the decision making process for all becomes more complex as different influences and desires have to be taken into account.

When considering the legitimacy of the unauthorised individual within this decision making process a criticism of the concept is that the individual has no democratic position to undertake their actions. This criticism would be valid in an environment which required a direct form of democracy, between individuals and international law creation. But the present system of authorised individuals does not, and many state administrations have no form of democracy between the governed and the government, yet their authorised individuals are accepted into the international system of law creation.

If democracy was a norm required for the creation of international law then we would have to discount those states that are authoritarian regimes, or that do not meet the required standard of democratic control. In James Crawford's *Democracy in International law*⁹ he explores this subject matter, he comes to the conclusion that "under international law (apart from treaties), there is no general endorsement of a principle of democracy. There is no requirement that the government of a state, to be a government, should have been democratically elected or even that it should have

⁶ <http://www.un.org/cyberschoolbus/unintro/unintro3.htm> accessed 09/10/13

⁷ <http://www.un.org/en/members/growth.shtml> accessed 09/10/13

⁸ <http://www.un.org/en/members/growth.shtml> accessed 09/10/13

⁹ James Crawford, *Democracy in International Law*, (Cambridge University Press: Cambridge: 1996)

the general support of its people.”¹⁰ And “other features of classical international law were deeply undemocratic, or at least were capable of operating in a deeply undemocratic way.”¹¹ Crawford indicates that the rise of democracy within international organisations,¹² alongside these organisations working on the one vote per nation system, means democracy is becoming more assorted within international law. Certainly, it seems there is a trend towards a more democratic way of international law creation but there is no norm as to its requirement either within states or between states.

Even with states with democratic systems Crawford sets out “there can be different kinds, ideals or versions of democracy.”¹³ Therefore, which systems would count towards a state being sufficiently democratic? For example, would America’s two party system in which left wing parties were destroyed by propaganda during the cold war be considered democratic enough, or any first-past-the-post system such as that used by the UK? The criticism below of the American two party system sums up many of the issues with this system and in doing that highlights the weaknesses inherent in any such system of governance.

“Herein lies the central tension of the two-party doctrine. It identifies popular sovereignty with choice, and then limits choice to one party or the other. If there is any trust to Schattschneider’s analogy between the elections and markets, America’s faith in the two-party system begs the following question: Why do voters accept as the ultimate in political freedom a binary option they would surely protest as consumers? Douglas Amy has put it this way: “just as it would be ludicrous to have stores that provide only two styles of shoes to two kinds of vegetables, it is no less absurd to have a party system that provides only two choices to represent the great variety of opinions in the United States.””¹⁴

¹⁰ James Crawford (1996) p7

¹¹ James Crawford (1996) p8

¹² James Crawford (1996) p17

¹³ James Crawford (1996) p4

¹⁴ Lisa Jane Disch, *The Tyranny of the Two-Party System*, (Columbia University Press: New York: 2002) p7

By starting to pick and choose between which regimes we allow to have authorised individuals, international law starts to fall apart and is no longer truly international but selective. Support of the acceptance of unelected individuals within states enforced on them by the international community is the rise of the bureaucrat and technocrat during the euro crisis. Elected heads of states in Italy¹⁵ and Greece¹⁶ were forced to step aside for technocrats in order for that state to be given the bailout needed to keep the country afloat.¹⁷ The power of the international community in forcing these changes and that of the markets demonstrates that democracy and the power of international system are not intrinsically related. Just because the international system allows authorised individuals from non-democratic states, does not mean that the assumption can be made that the unauthorised individuals is also acceptable as they too are unelected but wish to work in bettering international law. This notion of bettering international law is closely related to the notion individuals working for the common good which is questionable in the first place. There is no universal meaning for this phrase. As Garrett Hardin sets out in his famous article on the tragedy of the commons:

“We want the maximum good per person; but what is good? To one person it is wilderness, to another it is ski lodges for thousands. To one it is estuaries to nourish ducks for hunters to shoot; to another it is factory land. Comparing one good with another is, we usually say, impossible because goods are incommensurable. Incommensurables cannot be compared.”¹⁸

In the same notion as Hardin, what one unauthorised individual may see as the common good may not actually be that of the state parties, or those people that the international law is aimed at helping. Any unauthorised individual must be considered on their own merits, the past actions of one of these individuals cannot

¹⁵ <http://www.guardian.co.uk/world/2011/nov/10/berlusconi-pm-successor-alfano-monti> accessed 30.10.12

¹⁶ <http://www.bbc.co.uk/news/business-13856580> accessed 30.10.12

¹⁷ <http://www.guardian.co.uk/world/2011/nov/08/silvio-berlusconi-to-resign-italy> accessed 30.10.12

¹⁸ Garrett Hardin, “The Tragedy of the Commons”, *Science*, vol.162, No.3859, Dec, 1968, p1244

be considered as a justification for the future of this role or for people to take up the mantle of this type of individual.

III. Reputation

This section will consider the importance of the individual's reputation in law creation. In taking each of the categories of individual in turn it will discuss the significance of reputation to each, and to the system as a whole. Reputation is significant to all individuals within the international law creation process. Reputation of the individual provides them with authority and credibility within debates and gives others around them certainty in the process of law creation.

This work intends to use Guzman's definition of reputation as "reputation as judgements about an actor's past behaviour used to predict future behaviour."¹⁹ This definition is applied within the context of state based compliance, but it can equally be applied to the individual within the creation of international law. Guzman makes the observation that reputational arguments have been long used in the field of political science and economics, but are significantly underdeveloped in the legal literature and have yet to be applied to the area of international law.²⁰ Those works considering reputation deal with the concept within the theoretical framework of the state centric conception of international law. Reputation enters into the narrative when examining state compliance with international law such as works by Keohane²¹ and Downs and Jones²². Downs and Jones come to the conclusion that within state based compliance to international law "Reputation matters, just not so much as

¹⁹ Andrew T. Guzman (2008) p73

²⁰ Andrew T. Guzman (2008) p34

²¹ Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, (Princeton University Press: Princeton New Jersey: 1984)

²² George W. Downs & Michael A. Jones, "Reputation, Compliance and International Law", *The Journal of Legal Studies*, Vol. 31, No. S1, January 2002, pp.S95-S114

some might like.”²³ Some of these arguments set out regarding state based reputational compliance can be transferred to the individual. Reputation is important for states in compliance to international law:

“When entering into an agreement, states want their promises to be credible, and they must ultimately rely on reputation for that credibility. As the expected costs of performance increase, states require more credibility and, therefore a stronger reputation for the associated promises to be believed.”²⁴

This equally applies to the individual that without a strong reputation they have little credibility at the negotiating table. A consequence being that others will be unwilling to work with them to create a document that is successful.

Guzman’s argument about how reputation keeps states from breaking international law, using reputational sanctions can again equally apply to the individuals in the making of international law, he states that:

“Reputational sanctions, then, are not punishment at all, or at least they are not intended as such. When a state makes a compliance decision (i.e., when it chooses to comply or violate) it sends a signal about its willingness to honour its international legal obligations. Other states use the information in this decision to adjust their own behaviour. A state that tends to comply with its obligations will develop a good reputation for compliance, while a state that often violates obligations will have a bad reputation. A good reputation is valuable because it makes promises more credible and, therefore, makes future cooperation both easier and less costly.”²⁵

In applying this to the three categorisations of individuals requires that each individual must have a sufficient reputation, otherwise what they are proposing is not credible and makes the international law creation process more difficult. When considering the reputation values of significant individuals the value can be seen. For example, George Bush’s reputation was forever damaged by the 2003 war in Iraq,

²³ George W. Downs & Michael A. Jones (2002) pS113

²⁴ Andrew T. Guzman, (2008) p74

²⁵ Andrew T. Guzman, (2008) p33

therefore, unlike other former presidents, such as Clinton, he has not taken on a peace envoy role for the United States. Clinton has made trips to North Korea²⁶ in order to free prisoners taken by the North Korean state. Another example would be Tony Blair, whose reputation will forever be tarnished by the UK's involvement again in Iraq, and while he has taken on a Middle East envoy role,²⁷ his reputation has forever been damaged with Harold Pinter²⁸ and Desmond Tutu²⁹ both publicly urging that Blair is tried for war crimes.

Reputation is something that can be gained or lost by an actor's behaviour. For a state to acquire a positive reputation for compliance they must do more than just sign treaties and abide by them. These international law documents must also have relevance to the state. For example, landlocked Bolivia cannot expect to build a strong reputation for compliance by agreeing to keep its ports open.³⁰ In a similar way, individuals cannot gain a strong reputation by agreeing to commit the state to particular items with the creation of international law, only for the state to later reject the overall document. Or, they would be unable to build a credible reputation by ignoring instructions from their authorised decision makers. If they were unable to follow their instructions from their authorised decision makers this will not accurately reflect the desired document, and therefore, the authorised individual would develop a negative reputation, being considered as untrustworthy and not undertaking their role. The example here portrays the authorised individual, but this also extends to the other two categories of individual. Compliance using reputation ensures states abide by international law due to concern out of the reputational damage if they did

²⁶ <http://news.bbc.co.uk/1/hi/world/asia-pacific/8182716.stm> accessed 18.10.12

²⁷ http://news.bbc.co.uk/1/hi/uk_politics/6244358.stm accessed 18.10.12

²⁸ <http://www.guardian.co.uk/world/2005/dec/07/iraq.booksnews> accessed 18.10.12

²⁹ <http://www.guardian.co.uk/politics/2012/sep/02/tony-blair-iraq-war-desmond-tutu> accessed 18.10.12

³⁰ Andrew T. Guzman, (2008) pp.73-74

not. Individuals require a strong reputation in building international law for these documents to be credible, and as representatives of the abstract state a commitment by that state that they will adopt and be compliant with the document.

III.1. Reputation and the Authorised Individual

For the authorised individual a strong reputation built on trust is important for their credibility in creating international law. Without this reputation the arguments that the individual makes in order to follow their instructions within negotiating would not be credible and are likely to be ignored by the other authorised individuals. A strong reputation within the group gives credibility to the individual and, therefore, is a factor in why they may be able to have greater influence over the development of international law. Reputational damage can occur for the authorised individual if they are perceived to be blocking a particular concept, or that their home state acts contrarily to what they are saying.

Reputation for the authorised individual is a two-way flow between the individual and, usually, the home government or authorised decision maker. Due to the nature of the relationship of the authorised individual and the state means that if an authorised individual's reputation is diminished when undertaking law creation this can reflect on the state's reputation. Should a home government of the authorised individual fail to sign, ratify, or comply with the international law document then the state can negatively affect the reputation of the authorised individual who helped create the document. This is due to it raising questions about the role of the authorised individual and the home government. Why has the state undertaken this action? Did the authorised individual not undertake their role correctly on behalf of the state?

Were there issues with the instructions from the state? Or, did the individual not follow them correctly?

Often, to take up the role of an authorised individual, especially one leading negotiating within international law creation, will already have a strong reputation within the state in order to get support for their appointment to the position.³¹ This positive reputation may carry through into the international negotiations; for instance, Eleanor Roosevelt before undertaking a role within the UN, had already developed a strong reputation for civil liberties within her newspaper column “My Day”. Further to this was the reputation of the Roosevelt name, for which was held in high acclaim by many states and individuals. This perceived reputation by authorised individuals within the creation of the UDHR caused her to be elected as the chairperson of the Human Rights Commission and the de facto leader of the sub-committee drafting the UDHR.

Compared to the Soviet representatives during the same period of the UDHR creation process their reputation was considered to be neutral, if not negative. This was caused partially by a reflection of the state on representation and partially with issues with the authorised individuals. The issue with the authorised individuals to the UDHR negotiations was that they kept on changing who was present at discussions. In total they used four different authorised individuals during the discussions for the UDHR, Alexander Bogomolov,³² Vladimir Koretsky,³³ Alexei Pavlov,³⁴ and Valentin Tepliakov.³⁵ This had the effect of preventing reputation building of the authorised individual, without building this reputation with other

³¹ See Chapter 2

³² Mary Ann Glendon (2001) pp.93-94

³³ Mary Ann Glendon (2001) pp.59-60

³⁴ Mary Ann Glendon (2001) pp.110-111

³⁵ Mary Ann Glendon (2001) pp.33-34

authorised individuals this affected the relationship, and thus made it unlikely for them to gain support for ideas and conceptions of rights to be included. In reflection, reputational damage caused by the Soviet government also impaired the reputation of their authorised individuals, especially amongst Western states. The Soviet philosophy to pursue world-wide revolution, coupled with an increase in their sphere of influence, and the emergence of the iron curtain all gave a negative image of the Soviet Union. These factors caused the image of the Soviet Unions authorised individuals to be negatively perceived by other states' authorised individuals. The final reputational damage to their authorised individuals was in being instructed to abstain from approving the UDHR; this damaged reputation of the authorised individual in that their reputation was one not supporting the development of human rights within the early years the UN. Western states held a negative reputation of the Soviet authorised individuals. Conversely for fellow communist states, these authorised individuals enjoyed a high reputation due to the common political viewpoints held.

For the authorised individual the importance of the individual's reputation can be, like the individuals themselves, on a sliding scale. For the highly controlled individual, reputation is perhaps less important than those authorised individuals which have considerably more freedom. This is due to these individuals having to take highly directional instructions and, therefore, the individual is less central to the law creation process. Whereas the freer authorised individual requires far more reputational credibility to have weight and sway within the creation process.

Reputation of an individual is effected by their past behaviour, and, to a certain extent, the reflected behaviour of their home government. The knowledge that their present conduct will affect their reputation in the future is what gives value to an

individual's reputation. When a significant decision is made regarding the individual, the impact upon their reputation and the value that reputation has to the process of international law creation is taken into account. This means that the individual may need to manage their reputation over time. For example, the authorised individual's reputation may be damaged by not following state instructions, and it may have to be re-built over time. For the authorised individual reputation within decision making is important but perhaps not central to their success.

III.2. Reputation and the Independent Authorised Individual

For the independent authorised individual reputation is even more important than for the authorised individual. With significantly more freedom for the authorised individual there is less reflected reputation from the established state, therefore, they must build and maintain their own reputational credit with those they are working with. This strong reputation allows them to have support and credibility in what they are pursuing within the law creation process, a negative reputation will lead them to be ignored and side lined.

Without a strong reputation, independent authorised individuals mandated as UN special representatives would find their work much more difficult. For example, John Ruggie's engagement with all stakeholders allowed him to create and maintain a positive reputation when creating the UNGPs. This strong reputation was one of the most significant factors which allowed Ruggie to get all stakeholders to endorse them, without feeling the need to re-draft or work the document. This reputation was built out of inclusion of stakeholders and listening to concerns, his final document was built on a reputation for fair dealing with all stakeholders and this extended to

the outcomes of the process. A failure to build a strong reputation can prevent the mandate from being renewed or reappointment to the post may be prevented.

International Judges also require a strong reputation in order to uphold the values of the courts in which they sit. Without a strong reputation, the international judicial system would suffer from a lack of confidence and, therefore, decline. Considering the reputation of the ECtHR in the UK in recent years, the reputation of the court and, therefore, of the judges has taken a dent³⁶, due to its judgements in recent years relating to the deportation of foreign nations suspected of terrorism³⁷ and prisoners' rights to vote³⁸. This negative reputation can be seen that the Court and the individual judges are interpreting the convention into ways which state governments are no longer entirely comfortable with. Partly, this is the law creation process that international courts and governments will sooner or later get used to the higher standard of accountability. But while this process is being undertaken governments will continue to express concern over the direction of judicial reasoning, and may respond with the appointment of more conservative candidates to the court. This can be seen in the appointment and election of the new UK judge Paul Mahoney over his liberal rival, Ben Emmerson QC, for the position.³⁹ The importance of reputation can further be seen within the advisory opinion of the ICJ and the judges that make up the court, as these rulings are non-binding on states, but an observation of the law, without a reputation for sticking with these judgements and a the court being held in high regard, governments would not abide by them.

³⁶ <http://www.theguardian.com/law/2013/dec/22/britain-european-court-human-rights> accessed 22.04.14

³⁷ *Othman (Abu Qatada) v. The United Kingdom* 2012 (Application no. 8139/09)

³⁸ *Hirst v. The United Kingdom (No.2)* 2005 (Application no. 74025/01)

³⁹ <http://www.theguardian.com/law/2012/jun/27/paul-mahoney-european-court-judge> accessed 22.04.14

III.3. Reputation and the Unauthorised Individual

Reputation to the unauthorised individual is critical to their success, without a strong reputation there is no reason for authorised or independent authorised individuals to listen to, or take any actions that the unauthorised individual asks of them. This reputation needs to be built around a strong understanding of the issues at stake, a credible solution to the problem, and a workable strategy to ensure the solution can be implemented into international law.

For the unauthorised individual to have any weight or pull with authorised individuals within the process of law creation their reputation must, fundamentally, have credibility. The unauthorised individual's reputational credibility works in a similar fashion to that in which Guzman identifies state credibility:

“[The] greater a state's reputation, the more credibly it can commit to a particular course of action, the easier it is for it to enter into cooperative arguments, the more it can extract from other states as part of a bargain, and the more likely it is that it can find other states with which to cooperate.”⁴⁰

When applied to the unauthorised individual the higher the reputation the more credible they appear to be within their work or knowledgeable regarding the topic, the more likely that states will be willing to support and promote their ideas during international law creation events. For example, Lemkin invented the concept of Genocide and as an unauthorised individual his knowledge of the area was the most comprehensive having dedicated years of study to the area. As such, his reputation and credibility was highly positive.

When the unauthorised and independent authorised individual is bringing authorised individuals into an agreement they are using their reputation, not only to bring authorised individuals together, but this also forms of bond or guarantee to work

⁴⁰ Andrew T. Guzman (2008) p35

together for the collective interest. Guzman argues that reputation as a form of bond brings states together and increases the likelihood that they will comply and makes the promises more credible. They will not want to undermine the bond as this will damage their reputation; therefore, states will be less likely to enter into agreement with them in future should they be aware that they have broken an agreement before.⁴¹ The effect of this is best summed up in Guzman's own words when he argues:

"The result of this logic is that states will at times be prepared to forgo short-term opportunities to violate the law and extract higher payoffs in the hope of building or preserving their reputations and thereby enjoying higher payoffs later."⁴²

In an identical fashion to states' reputation, the unauthorised individual's reputation works like a bond between him and the authorised and independent authorised individual. Should the unauthorised individual be unable to, or fail to keep what they are pledging to do, then the bond is broken and their reputation is damaged.

Reputational damage for the unauthorised individual is similar to Guzman's state reputation, not just in terms of the loss of credibility but the effect this can have on their future work:

"The loss of reputation matters because it makes future promises less credible. Potential partners will have less confidence that the state will resist opportunities to violate the agreement and capture some immediate gain."⁴³

Should the reputation of the unauthorised individual be damaged then his role can start to fall apart, the very concept requires the authorised individuals to go along with what the unauthorised individual wants them to do, or where to start from. This, partially, can be seen with Humphrey's original creation and promotion of the UN

⁴¹ Andrew T. Guzman (2008) p40

⁴² Andrew T. Guzman (2008) p40

⁴³ Andrew T. Guzman (2008) p38

High Commissioner for Human Rights in which once he retired from his post as Director for the Division on Human Rights his reputation was no longer there to support the idea. Without this credibility for the idea, authorised individuals and their home governments lost faith in the concept. Without this level of credibility and trust between them, there is no reason for the authorised individuals to follow the unauthorised individuals advice, reducing the unauthorised individual from this powerful role in leading authorised individuals in the creation of international law to one in a supporting, back room role, or just another external voice attempting to give guidance to the authorised individuals. Therefore, the reputation of the unauthorised individual is even more essential than to others who also may find recovering from a damaged reputation a lot easier.

Lemkin's reputation certainly suffered after he had successfully completed the genocide convention. Work on ratification of the convention by states caused his reputation to take a nose dive and his attacks on his natural allies, in those supporting and working on the creation of Human Rights,⁴⁴ pushed him into isolation. He quarrelled with all the leading individuals, Eleanor Roosevelt, Roger Baldwin, Rene Cassin and Hersch Lauterpacht. Lauterpacht considered Lemkin as a crank and reduced the Genocide Convention to a footnote within his extensive works on international law.⁴⁵ Lemkin suffered with his reputation being unable to get access to those he would need to persuade to get the Genocide convention ratified by the USA and being unable to secure teaching work, or book contracts that would be able to provide him with a suitable income.⁴⁶ By the time of Lemkin's death his reputation had plummeted so much that, instead of the respect and admiration that he

⁴⁴ Samantha Power (2002) p76

⁴⁵ John Cooper (2008) p229

⁴⁶ John Cooper (2008) See Chapter 14

deserved for someone that did so much in the protection of individuals, his funeral was only attended by a handful of friends and, from the international community, a Korean ambassador and a diplomat from Israel.⁴⁷ From these conceptions of reputation it seems that a good reputation is important to an authorised individual but for an independent and unauthorised individual it is essential.

IV. Tragedy of the Commons Application to the Process of Law Creation

Having considered the value of reputation to the individual within international law creation and the importance that it has within the process, the argument will now switch to consider the value of the tragedy of the commons model on the individual decision making within law creation. The name “tragedy of the commons” was first given to a situation where many individuals use a finite resource without restriction for their own interest. This was first expressed in Garrett Hardin’s article *The Tragedy of the Commons*.⁴⁸ An example is provided of rational herders grazing animals on the commons. If each herder acts in a rational self-interested way then each will add as many animals to his herd in order to maximise his profit, therefore, reducing the amount of grazing land available to other, and ensuring that the commons is overgrazed.⁴⁹ Hardin nicely sums up the tragedy in the widely quoted extract:

“Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.”⁵⁰

⁴⁷ John Cooper (2008) p271

⁴⁸ Garrett Hardin, “The Tragedy of the Commons”, *Science*, vol.162, No.3859, Dec, 1968, pp.1243-1248

⁴⁹ Garrett Hardin (1968) p1244

⁵⁰ Garrett Hardin (1968) p1244

This concept has been used to highlight many different issues, but Snidal's article looks at the tragedy in connection with international cooperation.⁵¹ Dodge sums up the issue of the commons and the harm it does on his chapter on cooperation when he writes:

“The commons model captures a wide variety of situations in which people harm each other by pursuing their own personal interest, when the situation for the group would be better if they restrained, or cooperated, but there is no personal motivation for them to do so. Often, no one gains individually by self-restraint.”⁵²

He continues to highlight the failure of an international law in a commons dilemma when discussing the international ban on fishing and hunting of whales. The ban introduced in 1986 to protect whales has been violated by Norway, Japan, and Iceland who have killed some seventeen hundred whales annually, including endangered species. With less competition from other states they would have found hunting whales easier than before and had greater choice in choosing which animals to go after.⁵³ This is a real world tragedy of the commons and demonstrates the issues, which states face, while choosing to protect whales several states have taken advantage for their own benefit, therefore, preventing the benefit that would have happened had all states kept to the agreement protecting whales as a common pool resource. John Ruggie's work creating the UN Guiding Principles on Business and Human Rights put a system of soft law in place which gave a measure of protection to workers that could be over exploited by transnational corporations. Therefore, the tragedy of the commons is a theory that takes into account many of

⁵¹ Duncan Snidal, “Coordination versus Prisoners’ Dilemma: Implications for International cooperation and Regimes”, *The American political Science Review*, Vol. 79, No.4, 1985, pp.923-342

⁵² Robert V. Dodge, *Schelling's Game Theory: How to make decisions*, (Oxford University Press: Oxford: 2012) p189

⁵³ Robert V. Dodge (2012) p189

the aspects of international law creation, essentially how do you get states to act for the group rather than in their own self-interest.

So far there has been identification of the tragedy of the commons and some examples from international law, the work now moves to identify how the different categories of individual interaction within the tragedy framework and how they can help provide a solution. Ostrom's Nobel Prize winning work *Governing the Commons*⁵⁴, looks at different tragedy situations in the context of common pool resource (CPR) management. While not giving any definitive solutions to all the issues of CPR management it does give different specific solutions to each CPR issues that she covers. Overall, Ostrom suggests that the solution does not rely on external enforcement but on contracts and self-organisation.⁵⁵ This is where the independent authorised and unauthorised individuals can have a significant role within the creation of management scheme, this being on an international plane either as soft law instrument or treaty. Within contentious law creation situations, states work towards preserving their own self-interest, in order to defend their own sovereignty and national interest.

When authorised individuals are defending self-interest there can be little room for an agreement to be found between the parties, with the effect that the tragedy continues without agreement to prevent its overexploitation. This is where the unauthorised individual and, to a certain extent, the independent authorised individual can have a significant influence by highlighting the group interest. This can be done by highlighting a group interest, not as an external authority telling the authorised individuals what to do, but acting as an independent adviser or feeding

⁵⁴ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, (Cambridge University press: 2006: Cambridge)

⁵⁵ See chapters 3,4,5 when Ostrom examines three different CPR cases studies, Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, (Cambridge University press: 2006: Cambridge)

the group with information. This can highlight the group interest in the forefront of authorised individuals' minds and controlling authorised decision makers to limit the effect of the self-interest of states. For example, Humphrey included economic and social rights within the UDHR, which was not in the interests of western state authorised individuals' minds. In doing this the unauthorised or independent authorised individual can help get over the biggest issue of the tragedy of the commons by helping states realise that their individual rational behaviour, which leads to collective irrationality, is not desirable by showing them the bigger picture and, therefore, ensuring the individual behaviour considered irrational leads to collective rational behaviour.

The unauthorised individual needs to keep focus on the collective group interest, or the outcome with the highest mutual payoff. If this notion is considered and introduced into human rights treaty discussions they can have a significant impact. Most governments within negotiations will only want to do the minimum, and hopefully not have to change how they perform everyday activities when conforming to these treaties. Guzman argues a more positive view that:

“States may be prepared to invest in human rights agreements as part of an effort to change the preferences and priorities of other states or of other actors within states. Under this view, the agreements do not have a direct impact on state behaviour, but instead influence conduct indirectly by encouraging the internalization of certain norms.”⁵⁶

In either case it requires states to put forward different levels of rights, i.e. the wording of articles can dictate what is acceptable. Whether by desire or the result of realities many states may attempt to negotiate to a lowest acceptable common denominator, i.e. a position which costs the state, economically or politically, nothing

⁵⁶ Andrew T. Guzman (2008) p12

to implement. If an unauthorised individual drafts a document which is ambitious in scope and scale it can provide a good starting point for further discussions. If the document is ambitious in nature, authorised individuals will attempt to reduce the scope of the document to bring it back in line with their governments' instructions. Once a document has a particular concept or right included in it, states have a difficult time removing that from the draft document due to the reputational damage it may bring with being associated with its removal. As demonstrated in chapter four, John Peters Humphrey included economic and social rights within the UDHR. Therefore, states felt that even though parts of the Universal Declaration went beyond the scope of what they felt was acceptable to produce, they did not want the damage to their reputation as the state that held back a more inclusive or detailed document from being produced. The power of reputation perception by one state to another cannot be underestimated in terms of its significance when trying to get states to agree to measures that they are not completely comfortable with

All three categorisations have a role to play with breaking a tragedy using law creation, the authorised individual following instructions from the authorised decision making body on their own are unable to find a solution. But, by being present at the law creation event it demonstrates a willingness to find a solution, and if a solution is presented may be given flexibility after consultation with their authorised decision maker. The Independent authorised individuals have the ability to be part of the solution to break the tragedy, they have freedom in instructions to undertake actions which can bring the group to find a solution. The unauthorised individual can break the tragedy of the commons so that the self-interest of the state is no longer the dominant motivation and the group interest becomes the focus. The unauthorised

individual can provide a solution, be it draft document, private discussions with authorised individuals, or information seeding.

V. Game Theory Models

Within the law creation process, especially during treaty and soft law documents, the decision making process is important. How do those individuals involved in all categories make decisions to get the best outcomes from their perspective, be it the state perspective or the international organisation's viewpoint? Various decisions have to be made, such as when an authorised individual follows their instructions to introduce a continuous issue to a discussion process, or when to call a vote on an idea. For the independent authorised individual how do they make the decision as to the timing of an injection of an idea into a document so it does not lose momentum? For the unauthorised individual as to when do they start information seeding authorised individuals, or how do they interject into discussions, who do they approach? In using game theory the active choice is being made to consider theoretical models in which rational logical outcomes are considered by the actors before decisions are made. This takes our understanding of the individual within the creation of international law a step further.

Different theoretical models first need to be introduced as the majority of game theory within the context of law and international legal theory is not mainstream.⁵⁷

Game theory uses different models to help explain the decision making process, each model is examined and there are examples of how it can be used to illustrate a decision making process within international law. The most common model used

⁵⁷ For an outline of game theory and the law in general please see Ian Ayres, "Playing Games with the Law", *Stanford Law Review*, Vol.42, May 1990, p1291-1317 or Ed Eric B. Rasmusen, *Game Theory and the Law*, (Edward Elgar Publishing Limited: Cheltenham: 2007)

within game theory is the Prisoners Dilemma, as Richard McAdams argues in his article *Beyond the Prisoners' Dilemma: Coordination, Game Theory and Law*, that “for legal scholars to use game theory only by using the Prisoners' Dilemma. And this outcome is like only using mathematics when the problem involves odd numbers between twelve and two hundred.”⁵⁸ This brief introduction to game theory intends to include other games such as Stag Hunt, Dove and hawk and the Battle of the Sexes. Different games must be used in different circumstances in order to reflect the decision making process for example a Prisoners Dilemma Game is far more appropriate to difficult negotiations such as the SALT treaty talks between the USA and USSR. Other games are more appropriate when discussions are being undertaken with more co-ordination and cooperation. For example, the Battle of the Sexes game shows levels of cooperation between parties, as seen in the international regulation and allocation of radio frequencies and policies addressing satellite communication.⁵⁹

V.1. Prisoner's Dilemma

The first model that should be considered is that of the classic Prisoners Dilemma game. This classic game is hopefully familiar. Within this game two individuals or players are separated and are unable to or reluctant to coordinate. If they both cooperate they get the highest payoff, if neither cooperates they both get a reduced payoff. If one side cooperates and one side does not cooperate, whoever did not cooperate will get the higher payoff. “The familiar result is that in a one-shot game

⁵⁸ Richard H. McAdams, “Beyond the Prisoners' Dilemma: Coordination, game Theory and law”, *Southern California Law Review*, No 82, 2008-2009, p211

⁵⁹ Andrew T. Guzman (2008) p28

the only equilibrium is for both parties to defect, leading to a low payoff for both players."⁶⁰ This can be seen in the table below:

Fig 1

		Player B	
		Cooperates	Does not cooperate
Player A	Cooperates	4,4	1,5
	Does not cooperate	5,1	1,1

Many authors have used the SALT treaty talks as a classic example of prisoner's dilemma, within international law examples include Schelling's⁶¹, Guzman⁶² and a simple JSTOR search returns just under 1500⁶³ hits with the search terms "Prisoner's Dilemma and SALT". The SALT treaty negotiations provide the perfect example of this theoretical model within the real world. These treaty negotiations, as discussed in chapter two, witnessed deep ideological rivals the USA and USSR, attempting to reduce weapons stockpiles. These rivals agreed to the overall aim of the treaty talks in cooperating to reduce the stockpiles of nuclear weapons. But the cooperation in how to achieve this aim and to ensure that the other side did not gain a strategic advantage with reduced weaponry was difficult.

Placing this example within context is important, as the result for a single play of this game usually results in both parties choosing to violate the agreement and cooperation failing. Within international law, in a one shot game outcome, without a

⁶⁰ Andrew T. Guzman (2008) p30

⁶¹ Robert V. Dodge (2012) p143

⁶² Andrew T. Guzman (2008) pp.36-40

⁶³ JSTOR search done using terms "SALT and Prisoners Dilemma" returned 1407 when undertaken on 22/10/12

system of courts or police capable of enforcing the rights of the parties, the exchange of promises has no impact on behaviour of states.⁶⁴ In the context of the SALT treaty talks the repeated nature of the game ensured that both sides cooperated and did not violate the agreement.⁶⁵ The repeated nature within the SALT negotiations prevented violation within this context, and this is a significant factor within the decision making process.

The individual within the prisoner's dilemma is the most important part of the game. They are the players who follow the instructions of their home government. For example, in the SALT talks this was Gerard C. Smith and Vladimir Semenov⁶⁶.

These authorised individuals must follow the instructions of the state, but they must also ensure that the talks are progressive. These individuals must make the critical decisions about when to make concessions and when to refuse. The prisoners' dilemma model is ideal for the individuals as for the state, in that it demonstrates the advantages or disadvantages of cooperating at any given moments of discussions. As discussions are on-going this game is repeated many times over the course of a series of negotiations.

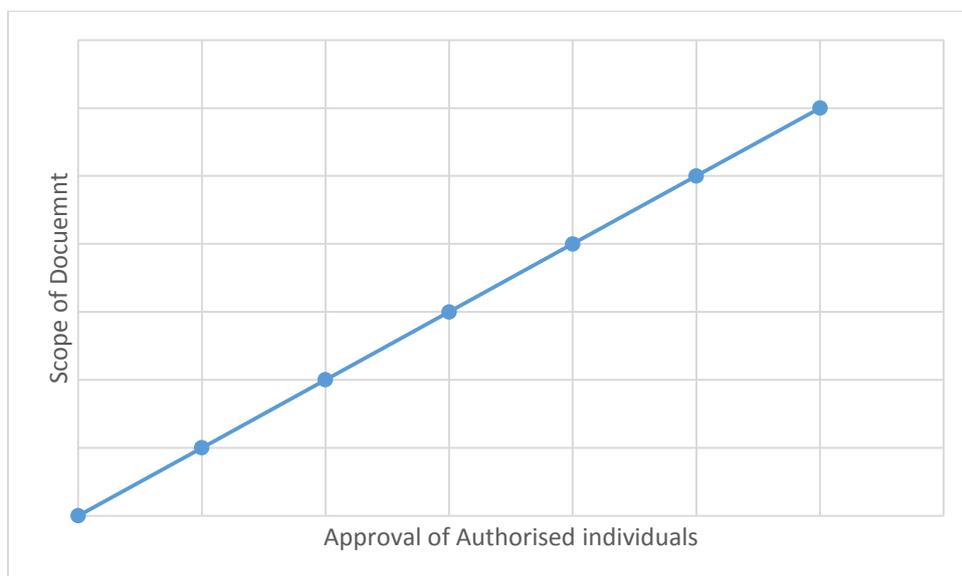
When an unauthorised individual is engaged in a prisoners' dilemma situation it provides an insight into their decision making process. Let's consider Raphael Lemkin at this moment. Lemkin is the most extreme unauthorised individual, having no place within the international system. Lemkin had to find which of his ideas were acceptable to the authorised individuals who actually had the power to put these concepts into international law. For example, the issues of cultural genocide were dropped from the convention because it was unacceptable for the authorised

⁶⁴ Andrew T. Guzman (2008) p32

⁶⁵ Andrew T. Guzman (2008) p32

⁶⁶ Please see Chapter 2 for more on this.

individuals.⁶⁷ For Lemkin he had to make decisions on the scale of the document, when to give ideas, to which authorised individuals and when to make decisions. All these decisions had different consequences. Lemkin had to use a rational plan, not just for each decision, but for the overall project.



Consider the graph above. The x axis refers to the authorised individual's willingness to cooperate with Lemkin's ideas. The y axis refers to the scope of the document. Lemkin needed to ensure that the decisions he made were below the line, i.e. the scope of the document should ideally never be above the level of authorised individuals' approval. Turning to the issue of cultural genocide, which failed to get approval from the UN Legal Committee, Lemkin questions the wisdom of engaging in another battle for the concept as it may have endangered the passage of the whole convention.⁶⁸ The scope of the document is above the line of approval by authorised individuals.

The other effect that the unauthorised individual can have is in assisting the authorised individual's decision making, this can be done through the use of

⁶⁷ Donna-Lee Frieza (2013) pp.172-173

⁶⁸ Donna-Lee Frieza (2013) pp.172-173

meetings to persuade authorised individuals and the exchange of information. One of the main issues with any prisoner's dilemma game is:

“It appeared that when both players were attempting to maximize their personal outcomes, the rational thing for the two sides to do would be cooperate. Though that might lead to better results, the game seemed to show that with rational actors, cooperation would not happen, and the best results would not occur. This obviously would be significant in a decision that had serious real world implications.”⁶⁹

The apparent likelihood of cooperation is limited, but in a repeated game, cooperation becomes more likely as the players build trust and relations to work together.⁷⁰ Although, with a fixed number of games, such as the number of decisions that an authorised individual will need to make to form a working agreement, this can set in motion a race to be the first to defect, therefore, securing an advantage.⁷¹

Therefore, the best way to ensure cooperation in repeated games is to ensure that each player does not know how many games will be played, this being increasingly difficult in a law creation process whereby the finished document signals an end of the creation process. In international law creation, when treaties are being made, it can become too late for a state to object to a particular concept as it would do too much damage to that states creditability, therefore, defecting late in the game can have negative impact. But defecting early in a repeated game may cause distrust amongst the group of states. The solution to prevent a race to defect and a partial solution to the dilemma is:

⁶⁹ Robert V. Dodge (2012) p138

⁷⁰ Robert V. Dodge (2012) pp.147-148

⁷¹ Robert V. Dodge (2012) pp.148-151

“In a world where there was effective third-party enforcement of agreements, the response to the prisoner’s dilemma is obvious: the parties would enter into a binding agreement to cooperate, thereby modifying the payoff structure and escaping the prisoner’s dilemma.”⁷²

Perhaps this is the role that the unauthorised individual can play. In acting as bond between the authorised individuals they use their reputation to ensure cooperation and help break the dilemma.

The unauthorised individual can have another role within breaking the prisoner’s dilemma. In a similar method to the unauthorised individual role within breaking tragedy of the commons they can break the prisoner’s dilemma by highlighting the group interest to the authorised individuals.

“The Prisoner’s Dilemma demonstrates that in game theory terms, decisions that are rational from the point of view of an individual and decisions that are rational from the point of view of a group may diverge.”⁷³

From a creation of international law perspective the individuals’ preferred outcome is very different from that of the group; therefore, the unauthorised individual can push the individuals towards the group outcome. The influence of the unauthorised individual would be to highlight the group interest and using the methodology described in chapter 4 to ensure this outcome. An example of the prisoners’ dilemma being broken in this way was during the SALT talks, within these negotiations the USA and USSR had back channels open between the two governments. Kissinger was conducting talks with Soviet Ambassador Dobrynin.⁷⁴ Here were third parties not directly involved within the talks, discussing what they wanted, and then instructing the parties to change approaches on various issues.

⁷² Andrew T. Guzman (2008) p83

⁷³ Robert V. Dodge (2012) p140

⁷⁴ John Newhouse, *The Story of SALT: The Definitive and Revealing Account of the Strategic Arms Limitation Talks*, (Holt, Rinehart and Winston: New York: 1973) p203

V.2. Stag Hunt

Within the Stag Hunt game the two parties have a choice of varying degrees of cooperation or non-cooperation. The quantity of cooperation will reflect the quantity of payoff for both players. If one player chooses cooperation and the other non-cooperation, the person who chooses cooperation gets nothing. This is illustrated with the classic example for this game, from which it takes its name. Two hunters can decide to either hunt a stag together or each hunt hare on their own. The stag represents the biggest payoff, while the hare a smaller prize. Whoever chooses to hunt hare will always end up with the lowest payoff of the hare, but whoever chooses to hunt stag requires the cooperation of the other player otherwise he is unable to hunt a stag and goes without. This is represented in the following game:

Fig 2

		Player B	
		Stag	Hare
Player A	Stag	2,2	0,1
	Hare	1,0	1,1

Trachtman gives an example of this model working within international law and the prevention of terrorism:

“The analogy to international cooperation in the case of certain types of public good is as follows: each state prefers its share of the global public good, such as the elimination of terrorist safe havens (stag), but may be distracted by the opportunity to obtain local protection from terrorism (rabbit), especially if it is unsure of the commitment of other states. If the global public good is the

elimination of terrorist safe havens, nonparticipation by even a very small number of states can eliminate the gains.”⁷⁵

This game sets out why, at times it’s important for inter-state cooperation when creating international law, they must all act as one, or the system does not work when dealing with issues that have a global significance. This game can also be used to model the decision making process in law creation.

The authorised individual may use this decision making process in determining what items should be included within an international law document, should the authorised individual pursue an item that no other authorised individuals want included they will get out voted and the concept removed. But should they push an idea which is acceptable to others the item will get included. This game can also be seen within timing of when authorised individuals introduce ideas and follow instructions.

The unauthorised individual on the stag hunt game is even more apparent, the unauthorised individual can give the individuals a mutual group leader who is not taking part in the actual hunt to bring the sides together so that they are willing to go after the higher payoff and hunt the stag, decreasing the concern that the other player may withdraw from going after the higher payoff. The unauthorised individual removes some of the uncertainty that the players feel towards each other, especially when they do not know each other or there is limited trust between players. The unauthorised individuals use their reputation as a bond between players.

The unauthorised individual on the stag hunt game can have a similar effect as in the prisoners’ dilemma game in breaking the dilemma, or here pushing the players towards full cooperation. The unauthorised individual in selecting and pushing

⁷⁵ Joel P. Trachtman, *The Economic Structure of International Law*, (Harvard University Press: Cambridge: 2008), pp.135-136

candidates into jobs can be demonstrated within this game. This can be seen with Humphrey pushing for Mohammed Awad of the United Arab Republic appointed as the special rapporteur on Slavery in the mid-1950s.⁷⁶ Humphrey's chosen candidate, Awad, represents the stag and the other candidates represent the hare. If Humphrey's candidate was elected there is a maximum payoff as he is seen as the ideal individual for the role from all parties, and an authorised individual that Humphrey felt he could work with. While other candidates could also have done the job, Humphrey's perception of the candidates work would have been lower and, therefore, a reduced payoff.

The unauthorised individuals can also find themselves using the stag, hare game to model their decision making process, for example, when deciding which authorised individual to approach with an idea. This can be seen when Humphrey approached the USA instead of the USSR in coming up with the idea for the High Commissioner on Human Rights. In this decision Humphrey ended up with the hare instead of the stag as he lost support of the USSR for his later works due to this decision. Perhaps, in order to get the highest payoff, Humphrey needed to approach both authorised individuals from the USA and USSR or a natural state.

V.3. Battle of the Sexes

The Battle of the Sexes game requires coordination between two individuals who must coordinate to work together in order to maximise their payoff. Should they fail to make an agreement then they both get nothing. Within this game the users must decide which of the two will get a larger payoff than the other. The classic narrative of this game, from which it takes its name, is that a husband and wife can either go

⁷⁶ Please see Chapter 4 for more on this

to the theatre or cinema. The husband would prefer to go to the theatre and the wife to the Cinema. Whoever gets to go to their preferred place of entertainment gets a higher payoff, while the others get a smaller payoff as they prefer the other form of entertainment. If they cannot decide where to go together they both get nothing as no activity will be undertaken. As a result they must coordinate and one player must be prepared to take a smaller payoff for the benefit of the other party involved. Guzman sums up the issue when he states “they both strictly prefer coordinating their actions to not coordinating, but the players prefer to coordinate on different equilibria.”⁷⁷

Fig 3

		Player B	
		Theatre	Cinema
Player A	Theatre	3,1	0,0
	Cinema	0,0	1,3

An international law example is seen in the regulation of radio frequencies and other global communications.⁷⁸ Guzman also gives an example:

“Trains running from Spain to the rest of Europe must pass through France, yet historically Spanish rail gauges were wider than the international standard rail gauges used by France. The result is that trains travelling on the broad-gauge Spanish railways must pass through gauge-change installations when crossing the border. To address this inefficiency, new high-speed trains and rails connecting Spain to France and the rest of Europe have been built using the international standard-gauge width.”⁷⁹

⁷⁷ Andrew T. Guzman (2008) p28

⁷⁸ Stephen D. Krasner, “Global Communications and National Power: Life on the Pareto frontier”, *World Politics*, Vol. 43, No. 3 (Apr., 1992) pp.336-366

⁷⁹ Andrew T. Guzman (2008) p28

This game is especially useful when the decision making process requires the authorised individuals to consider differences in the payoff that their actions will achieve. Authorised individuals must decide if they are prepared for others to have a greater payoff than themselves in order to get a smaller payoff. This can be seen in the contribution of the independent authorised individual, Charles Malik, and his neo-thomist conceptions during the drafting of the UDHR.⁸⁰ While Malik was in favour of inclusion of these philosophical concepts, other authorised individuals, most notably Chang, were against them. Had they been unable to find agreement, a document would not have been formed and, therefore, there would be no payoff. When Malik succeeded, and Chang actually got a document, Malik's payoff would be higher than Chang's.

For the unauthorised individual, Henderson's, decision making was an example in breaking procedure to visit USSR officials regarding the strength of their Smallpox vaccine. Henderson's decision making, if successful, was that he had a large payoff and WHO had a successful program. If he had not broken procedure WHO would have been happy that their policy was observed and Henderson's smaller payoff would be that he at least had some vaccine.

V.4.Dove and Hawk

The final game to be considered is the classic Dove and Hawk game, sometimes known as the chicken game. This is another coordination problem in a similar vein to the Battle of the Sexes. This game requires both players to coordinate in order to enjoy an equally high payoff; therefore, for optimal payoff they must both take a positive strategy. If they both choose to take a negative strategy then they will both

⁸⁰ For more on this please see chapter 3

get a negative payoff. If they disagree and one side takes a negative position while the other player takes a positive strategy, the negative strategy will win out with a higher payoff than if they both coordinate in a positive way. The traditional narrative that goes with this game is reproduced below:

“The “chicken dilemma” comes “from the teenage duelling practice depicted in 1950s movies, in which two teenagers drive their cars at each other, the one who turns away being “chicken”. There are four possible outcomes in this game. The best outcome is you drive straight and other fellow blinks: You win; he is humiliated. The next best is both blink: Both are “chicken”; neither is humiliated. The next-to-worst outcome is you blink, but the other fellow drives straight: You are humiliated. But live; he lives and gets to gloat. And the worst is both drive straight: Both avoid humiliation; both die. At first glance, since it is better to be alive than dead, it might seem that the logical thing to do would be to blink and trust the other fellow would too. But it is not so simple.”⁸¹

This is illustrated in figure 4 below.

Fig 4.

		Player B	
		Dove	Hawk
Player A	Dove	2,2	0,4
	Hawk	4,0	-1,-1

This game suits decision making reflecting international regulation. Charles Whitehead gives an example of a dove/hawk game playing out in the international financial market regulations sector during the 1980s. Setting out that during the 1980s global competition caused bank-capital levels to get dangerously low, these capital levels provide the security for the banks should markets and other factors go against them. The higher the capital levels the less money they have to use at the

⁸¹ Robert V. Dodge (2012) p76

markets, therefore, reducing profitability. The Basel Capital accord adopted in 1988 called for regulators to impose minimum capital levels on banks. The Accord favours a dove/dove situation whereby all regulators impose the same capital levels, therefore, allowing banks to compete on a fair footing and not put financial security at risk. As this capital reduces profitability one state setting a higher level (a dove) would give banks in other states (hawks) an advantage giving a dove/hawk pay out favouring banks that were subject to a lower capital requirement. Allowing banks to continue without higher levels of capital would yield a hawk/hawk situation putting the global finance system at risk.⁸²

Authorised independent individual Cassin's decision making in the debate with the right of petition during the drafting of the UN Covenants can be seen within this game.⁸³ Had he been successful his payoff would have been greatest, had the French government been successful as they were, their payoff was the most. If they had failed to agree it would have had negative consequences for both.

This game model can also be seen within Lemkin's decision making, when he managed to persuade the President of the General Assembly to hold off an attempt by the Soviet Union authorised individual, Vishinsky, to stop the genocide convention. This required Lemkin preventing a vote on the contents of the sub-committee draft until he had brought other authorised individuals from Panama and Cuba onside to give his ideas enough votes.⁸⁴ In delaying the vote, the dove situation is seen with equal payoff, whereas if he failed the double negative hawk is seen. If the Soviets were successful they would have destroyed the convention,

⁸² Charles K. Whitehead, "Destructive Coordination", *Cornell Law review*, Vol. 96, 2010-2011, pp.333-334

⁸³ See chapter 3

⁸⁴ Cooper p102-104 also please see chapter 4

meaning a double payoff for them. Whereas Lemkin was successful, causing the convention to proceed forward, therefore, a double payoff to him.

These game theory models can help increase our understanding of how the authorised, independent authorised and unauthorised individuals make decisions within the creation of international law. In modelling these decisions we can see the different, rational outcomes available to the individuals at various times of the process. If these ideas have further applications a greater understanding of when the optimum time to introduce new ideas to discussion, or when to hold votes, or how the unauthorised individual knows the ideal moment to feed an authorised individual with information can be attained. These models can also demonstrate how the unauthorised individual can aid in breaking these dilemmas and increase cooperation between authorised individuals and increase the effectiveness of the international law creation process.

VI. Conclusion

This chapter demonstrated the importance of the individual's decision making within the process of international law creation. The importance of the decision that they make can have a huge influence on the final document produced and also whether they have acted in line with their instructions. Examining the decision making process also highlighted that once an unauthorised individual is introduced to work alongside authorised individuals, they can bring to the attention the group interest which can easily be undermined and forgotten. Adam Smith's theory on economics indicates that the best outcome for individuals within a group is when everyone does

what is best for themselves within that group.⁸⁵ This theory has been overtaken and replaced in economics by Nash's solution that the best outcome occurs when everyone in the group does what is best for themselves and for the group. In international negotiations each authorised individual is only likely to do what is best for themselves and not for the group. If the unauthorised individual represents the group interest and keeps that in mind, the best overall outcome can be achieved. Nash's theory has become popular with economists, yet has been overlooked in other fields, by expanding the use of this theory into the field of international law it will allow for group interest to be taken into account and gives the unauthorised individual a basis for their actions of getting involved within international law creation.

The models explored within this chapter highlight the importance of good decision making from all categories of individual. The decision making process is important for the authorised individual in following instructions, but perhaps good decision making is even more important for the independent and unauthorised individual whereby their reputation can hinge on making good decisions.

What can be seen within the unauthorised individual throughout these models of decision making is that they can act to keep the group interest at the forefront on the document under consideration. This ensures that the document produced does not overly reflect the work of one state, but is a document that truly represents the combined group interest. This means that states with conflicting ideologies can be brought together to find a compromise that also takes into account the views of smaller powers that can easily be overlooked. The use of the game theory and the

⁸⁵ This idea is expressed by Smith in his concept of the invisible hand in economics. Smith illustrates this concept in the often cited passage "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages" Adam Smith, *Wealth of nations*, (Oxford World Classics: Oxford: 2008) p22 This concept is expressed throughout book 1, chapter 2, with influences throughout the work.

tragedy of the commons underline the impact that the unauthorised individual can have, not just theoretically upon games, but also within the real world. The unauthorised individual has the ability to push the authorised individual towards the best payoff situation, preventing states losing out.

Reputation is the key as to how the unauthorised individual can have the impact that they do have. Without a good reputation no authorised individual or independent authorised individual would take them seriously, or even consider putting their ideas forward at law creation events. Reputation is perhaps more important to the unauthorised individual than to states.

Conclusion

This work has set out to investigate the role that the individual can have in the process of international law creation. In order to fulfil this primary aim this thesis has identified three new categorisations of individual: the authorised, independent authorised and unauthorised individual. This new framework provides an accurate reflection of the realities of the international system to the individual's role, previously not seen within international law scholarship. In the identification of these categorisations this work rejects the traditional narrative of the state-centric approach to international law creation. Instead it chooses to highlight, not only the importance of the individual, but one that has decision making at the heart of the process. This deliberate focus ensures that the realities of the international system are placed at the centre of the theoretical narrative of international law, instead of the theory being isolated and apart. This project argues for the individual as a distinct actor within international law, and is a significant leap forward to the subject/object debate which has been the primary focus in connection to the individual since the turn of the twentieth century.

In making a choice to consider international law away from the state-centric nature gives theoretical room for understanding the individual in being far more than a mechanical representation of the state. This move also brings a new perspective to legal process theory that it is the individual within the process which is central to the success or failure of international law creation. This gives individuals far more weight than previously believed, and the theoretical narrative required re-adjustment to accommodate such an outcome. By giving greater weight to the role of the individual the realities of the international system will be better reflected within the theoretical narrative.

The adoption of these categorisations allows, not only for the identification of an individual's contribution to international law, but also within each category that relatively broad spectrum of individuals that are actors within international law creation. Each category allows for a spectrum of behaviour, with each definition of what makes an individual fit within a category broad enough to occupy a range of individuals, but definitive enough to give distinction to each. This spectrum can accommodate any individual actor on the scale of control. Individuals may move around on the scale depending on circumstances and the matters of the day in which they are actively engaged.

One conclusion, that this work gives rise to, is that the state is no longer needed. That is not the objective of the work to assess the continued value of the state, yet this work, while advocating the recognition of the individual, is not aiming for the individual to replace the state. States are still needed to perform governance roles and give members of states a voice at international summits. The authorised individual is still working on behalf of the states government. The independent authorised individual, at times, is nominated by the state, such as when working for international courts. The state is still an important unit within international law, and greatly aids the organisation of the international system.

I. Framework for the Individual

The authorised individual is one that is under instruction for an authorised decision maker; these are usually home governments of the authorised individual. This category of individual is the work horse of the international system, representing governments and other actors at international law creation events. They must follow the instructions given to them, and in the strictest cases this can be to ensure an

idea or concept is included or excluded from a document under creation. At other times more flexible instructions may be given to the authorised individual, in an attempt to move the process forward. The authorised individual is the individual that almost all scholars to international law would recognise and they make up the majority of all individuals within the international system. The authorised individuals can work for states, international organisations, or non-state actors; they perform roles within these groups following instructions given to them by those that run these actors on a day-to-day basis. The authorised individual is not just an individual employed by a state, but appointed to perform a role within the international system by an authorised decision maker. This categorisation can include non-state actors, and even terrorist organisations. This type of individual will always have a place in the international system; they are needed to represent governments of states at international events and in international organisations. Perhaps, greater transparency is needed with their appointments to the role with greater democratic scrutiny from legislature; this applies especially in the UK.

The independent authorised individuals have far more freedom from their authorised decision makers. While given general aims they are not instructed to the extent of the authorised individual. This gives them freedom in what is included within the document but also the strategy employed during the process of law creation. This category of the individual can be found in increasing numbers and in varieties of areas, including government representatives, international judiciary, independent experts, be that on a UN treaty body or as a special representative. Due to the wider range of places that this individual is found means that the influence and significance of international law being developed without direct state instruction is on the rise. As a result, this category of individual is the future of international law creation in highly

contentious areas, where authorised individuals are unable to form agreements. The methodology employed by John Ruggie within the creation of the UNGPs, demonstrates how this category of individual, given sufficient freedom, can successfully create new international law. This Ruggie methodology has, so far, only been used by himself within the creation of a soft law document, yet it has enormous potential for the future. The methodological concept of Principle Pragmatism is, perhaps, the most important lesson that can be taken from the Ruggie process and has potential with its application to other areas to change the law creation process. With the identification of international judiciary within this category, the acceptance of them as international law makers is also accepted, and, therefore, the influence over state selection of candidates for the posts will become increasingly concerning to state governments.

The independent authorised individual, especially the special procedures mandate holders, demonstrate a model and framework for how future contentious international law can be created. By mandating an expert individual to undertake the law creation process, and taking this traditionally state-driven area into a new domain, may allow for new law to be created which is issue focused and not driven to protect interests. This is, perhaps, where the Ruggie's example of principled pragmatism within wider international law creation will play an increased role. An independent authorised individual mandated to create law, using previously agreed international law as the base, therefore, remains principled, but willing to find a pragmatic solution to the issue. This may mean small steps, but small steps are at least moving forward towards a better solution. As stated, this model has only been used within soft law creation, but the willingness for states unable to find legal solutions amongst themselves (especially when drafting of legal documents that can

take extended periods of time); provides a realistic prospect to drive international law forward. Possible future areas for the model to be applied include regulation of climate change and other environmental issues.

The unauthorised individual is under the traditional narrative of state-centric international law creation and has no place within the international system. They are usually found within the secretariats of international organisations, but can also be found in exerting pressure on international law creation process as a private individual. This classification of individual is rare, and the most independent unauthorised individuals acting to get an idea into international law are almost never seen, the primary example being Raphael Lemkin. To have an effect on the international system these individuals use a variety of skills and personal characteristics in order to ensure that those with the power, the authorised individuals, are brought onside to their ideas for them to become part of international law. These individuals must have a strong, long term strategy, but also be sufficiently flexible to react to events that are occurring in order to ensure their ideas are adopted. The unauthorised individual's contribution goes beyond that of lobbying authorised individuals, into a process of giving ideas, writing speeches and attempting to ensure authorised individual support is sufficient should a vote be undertaken. This category of individual raises questions of legitimacy within the process of law creation, but due to the rarity of these individuals this does not cause too many issues. These concerns regarding this individual are perhaps the most important; here is an individual acting totally without authority and mandate. They do have to use state actors in order for their ideas to be recognised within international law

The decision making elements of the individual is significant to all categories of the individual, as is reputation. When international law creation is broken down to an individualist level, reputation becomes important to all categories to work together to form an agreement, it has the power to act as a bond for the group. In considering the theoretical elements of the individuals decision making brought a new approach and application of game theory. With this application the process of individuals became clearer but also how each category made decisions and reached logical conclusions had been assessed. This examination of theoretical decision making also highlighted another useful element of the unauthorised individual, being that they can keep the group focus away from self-interest of state governments but on the interest of the group. In examining the decision making process, how the different categories of individual interact with each other becomes clear, the unauthorised individuals require the assistance from either the authorised or independent authorised in order to get their ideas adopted into international law. This decision making by the unauthorised individual, therefore, means that the concept is acceptable to the actor which he is using as a proxy to get the idea approved by other authorised individuals. The unauthorised individual, when embedded within the secretariat of the UN and taking part within discussions within a supporting role, may be able to add ideas to reports. Once these ideas are within the general framework of talks, it may become very hard for the authorised individuals to remove them from discussions without sustaining reputational damage.

By identifying these categorisations of individual it brings greater transparency into the development of international law. Prior to this research, the acceptance was that the state created international law, yet now with the acceptance of a greater role of the individual we can trace ideas back to individuals. This increased transparency

means that the development of international law can be understood. Greater transparency in international laws creation also allows for better implementation of the law due to a better understanding behind its creation. With recognising the individuals' roles, across all categories, gives greater transparency to how international law is created. No longer is international law created by the face entity "the state" but by individuals within different roles.

II. Value of Outcomes

This thesis has interacted with five broad themes: consent, legitimacy, authority, process and the abstract nature of the state. These themes have engaged with the theoretical framework of the individual, and also the different ways of perceiving international law making. These themes demonstrate that the framework fits into the international system of law creation.

At first glance it may appear that this thesis is arguing that consent is not important to the creation of international law. This could not be further from the case, consent is a major part of international law creation, and the identification of the authorised individual underlies a commitment to the continued success of international law from the consent of state government representatives. The independent authorised individual, no matter how independent on the scale, still requires consent of authorised individuals, whether in the form of a mandate or as nominee of an international judiciary. The unauthorised individual is where consent by others is perhaps best demonstrated with a return to the idea that in order to get ideas into international law they require the authorised individuals to support and accept them. Perhaps, the closest the unauthorised individuals come to working without consent is when working on reports as part of the secretariat, and include new ideas which

push international law into places that authorised individuals have not consented to. Consent is needed from all categories of individual in order to get ideas accepted as international law, but for the unauthorised individual, consent is perhaps less important.

Along the lines of consent, these categorisations raise concerns about legitimacy within International law creation. While legitimacy and legality should not be confused, having a legitimate international law is important to ensure the law is respected. This legitimacy is, partially, derived from its creation. Having a strong insight into how the law is created and how actors interact with each other can only make this stronger, especially when the law is made with consent and authority of states' authorised individuals. It should not matter if the process of law creation has come from a mandated individual asked to investigate and find solutions to a particular difficult idea, or an unauthorised individual expresses ideas, due to them gaining legitimacy from the authorised individuals.

Questions are raised about authority and authorisation for creating international law. The authorised individual is an identification of the on-going position, and does not pose questions. Individuals are required by authorised decision makers to be present to negotiate and sign new international law documents. The independent authorised individual poses a different sort of question. The international courts regularly create new law, those independent authorised individuals of a judicial nature are nominees of states, and as such derive authority for their actions from this and from the international court itself. Others within this category, such as special procedure mandate holders, are mandated to undertake the work. But as has been seen with how John Ruggie interpreted his mandates, they can be open to interpretation and possible abuse. Therefore, by placing trust within these individuals to create new

international law and giving them authority, this may undermine international law should these individuals fail to meet the high standards expected.

This thesis underlines the importance of examining international law as a process. The interaction between different individual actors outlines that process used within the creation of international law is similar to the process used within the application of law. This links back to the work of the Yale school, which identified the international law as a process. Therefore, this work fits closely into that theoretical narrative, but brings with it a closer examination of one particular actor or authorised decision maker. By considering international law, and especially its creation as a process, the difficulties, and often subtlety of its creation which are often reflected within the final documents can be better understood, giving a better understanding of the law. Further, by understanding the process of law creation, lessons of how and why it is difficult to create new international law can be drawn out more easily. These lessons can be applied to future law creation events, therefore, improving the process.

This work has argued that the abstract nature of the state means that to increase understanding, the theoretical perspectives need to look beyond the state to the actors actually undertaking work in the name of states. This links back to the idea of the international law as a process, in understanding the actors actually at the heart of creation events. By looking beyond the state to the individual, the decision making of those individuals starts to be given more insight and understanding. In knowing how decisions are made within the negotiation process of law creation different styles and types of negotiations and decision making can be identified. This is important as it would allow individuals to re-adjust their tactics as to how other individuals were behaving. Decision making is also important as it means that reputational issues that

may occur during discussions can also be a two-way flow, the individual within the room may be tarnished by the reputation of the state, but also the state's reputation may be tarnished by the individual's decision making. The idea of reputation and the influence that it can have on decision making is another reason to look beyond the abstract notion of the state. There may be no reason if an individual is sufficiently independent of their home government for reputation to be shared, or at least for reputation to be damaged by poor instructions or decision making.

III. Lessons & Challenges

With this model arises several lessons and challenges, one of the biggest challenges with any such law creation model which emphasises the individual, away from soft law instruments, is the perception by states of an encroachment of international law into state sovereignty, and the imposition of a third party forcing change onto states. This challenge is met, partially, by the mandates for independent authorised individuals would need to be agreed by state authorised individuals as to consent to the individuals work, further the final proposed document would also require passing by state authorised individuals and ratification by states themselves. Just like the international courts could be seen to damage state sovereignty, the growing realities of the international system has seen an explosion in the number of international tribunals as effective ways to settle disputes. This proposed system merely sets out a solution to the issue of international law creation within contentious areas of law, in creating workable international law in the first instance. Despite these drawbacks this model for future international law development, given the necessary space, the right mandates, and the appointment of the right individuals could have a lasting impact upon this area.

The independent authorised individual requires a trade-off between the transparency and democratic creation of international law, and effectiveness of future law creation. Mandated independent authorised individuals have enormous potential for changing how international law is created, but their success may come at the price of democracy within international law. No longer will state based authorised individuals be able to have a significant input into new legal instruments, but instead only into the creation of mandates. While the authorised individuals require a final vote and acceptance to the new legal instrument, especially if it was dealing with a formal treaty this would leave it open to being changed during those final discussions by authorised individuals. This would then have the potential to undermine the work of the mandated independent authorised individual, therefore, the authorised individuals may have to make an active choice to let works, unchanged by them, pass into international law, as such undermining democracy.

One area for future investigation is the pressure that a modern, private individual could have as an unauthorised individual. While following as Lemkin did, by gaining access to delegates, getting UN security guards to let him into UN buildings, and using unoccupied desks, just would not happen in the age of counter-terrorism. Instead, the modern unauthorised individual may have to build a campaign for a new international law instrument online, using social media to gain support and interest. Many authorised individuals working within organisations have social media profiles; for example, Sir Mark Lyall Grant the UK Permanent Representative to the UN is on Twitter “@Lyall Grant”. The use of social media allows for a direct relationship between private individuals attempting to introduce a new concept into international law and the authorised individual. This type of relationship was fundamental to the success of Lemkin and Humphrey who used close relationships with authorised

individuals to advance their own ideas. Without daily direct face-to-face access, available to potential unauthorised individuals, online contact may be the only open communication for individuals.

The general growth area for unauthorised individuals is not in the production of new big ideas or treaties, but within an area which requires further investigation into how the modern secretariats within international organisations influence the development of the law. A suspicion that this is undertaken in secretariats writing reports on behalf of experts, along the organisations positional lines and asking experts to sign off reports would be the most obvious root of this happening. The expert mandated to perform this role and their ideas is, therefore, side lined in favour of the unauthorised individual's ideas.

The unauthorised individual also raises questions of legitimacy and democracy within international law creation. Why are these individuals able to create law without a democratic or legitimate mandate? This is partly derived from the final creation actually falling to the authorised individuals and partly through the effectiveness these categories of individual can have in creating effective law.

IV. Future Questions?

This work is just the start of a new method of viewing the work of individuals within the creation and development of international law. The framework gives rise to further questions and areas considered within this thesis require more investigation which goes beyond the scope of this document. Such questions raised are:

The ever increasing numbers of UN Special Procedures Mandate Holders, what can they learn from the UNGP process and would the UN be willing to use the Ruggie model in other areas? If so, are the factors highlighted within chapter four

transportable to different areas, where stakeholders may not have the financial resources that TNC's had in the creation of the UNGPs?

With success of the independent authorised individual; should the international community in continuous law making situations trade some transparency, consent and democracy, for workable solutions?

How does a positivist conception of the individual in international law, which has dominated the theoretical narrative, move forward with an increased recognition of the individual, especially from a creation perspective?

Has a sufficient balance within the framework been struck between the role of the individual, especially the authorised individual, and the dominance of the state? Has this work gone too far in undermining the need to states?

Can the unauthorised individual have as much success in today's world, with a desire of accountability, transparency, and democratic controls as the likes of Lemkin and Humphrey?

The new theoretical model for the individual may be a shift towards a greater understanding of how individuals have a significant role in the creation of international law. With a new understanding will bring challenges to the model, no doubt supporting of a strong state-based approach to international law will reject the model outright. The model does not seek to do away with states as international actors, but seeks to give increased understanding to how the abstract ideas of states practically operate using individuals within the international system. At other points within the system the individual has far greater scope for law creation than previously seen, especially from the independent authorised and the unauthorised individuals.

The actions of these two categories of individual is perhaps the most remarkable in that these individuals can have as much power in creating law as the positivist narrative would reserve solely for the domain of states.

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