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Tiruchirappalli – 620102

Phone : +91 94896 71437 - info@iledu.in / Chairman@iledu.in

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STATE AND INDIVIDUAL AS SUBJECTS OF INTERNATIONAL LAW

Author - Aakriti Jaipuriar & Debapriya Biswas, Student at Amity Law School, Noida

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ABSTRACT

International law, in all its essence, is a set of rules that helps to regulate the relations between nations at a global level; most of which, if not all, are mutually agreed upon by the nations themselves through treaties, conventions and seminars. However, while international law may look like it only deals with the nations, it not only affects the States but also the individuals in the said States as well as any organisation made at an international level by them; especially since the dawn of the era of the internet.

This paper focuses on the question of whether individuals, who are affected by international law just as a State, are considered a subject. How individuals gained their position as a subject of international law is also explored in detail along with a brief historical view of their position in the 1900s.

The paper also compares the position as well as rights and duties of a State to that of an individual, drawing a stark contrast in the disposition of both the subjects despite being theoretically treated equally and in similar power. Other ancillary facts and aspects of international law are also briefly discussed in the context of the respective subject.

Lastly, the paper concludes with a critical analysis of the position of the State and individual as subjects of international law while drawing out a stark contrast between the weaknesses and strengths of each subject along with plausible solutions suggested in the conclusion.

INTRODUCTION

While the law is mostly associated with rules and regulations in a nation established by the legislation of the State itself, the scope of law extends well beyond the boundaries of only one State. The laws within the boundaries of a State are usually known as the 'domestic' law or the 'municipal' law which governs the citizens of that particular State. On the other hand, any laws that are applied beyond the boundaries of only one State, that is, the rules and regulations applied between the sovereign States and other non-state actors in a global scenario are usually what we call 'International law.'

In a nutshell, one can define international law as the law of the nations or the body of rules and regulations which are held binding upon the international bodies, let it be the states, international institutions, individuals or even multinational companies.[1609] Since all these bodies or members of the international community have a strong influence on global politics, their role as the subject of international law becomes quite vital and dynamic.

However, in this paper, we would only cover and highlight the role of individuals and the States as the subject of international law.

INDIVIDUALS AS A SUBJECT

There are many misconceptions and assumptions surrounding international law, one of which is that international law only applies and can be influenced by the States directly. This narrow line of thought, while supported as well as opposed by many scholars, does not account for many factors like the influence of non-state actors such as individuals. In fact, there are many people who do not even consider individuals as a subject of international law, assuming that only states

[1609] Charles G. Fenwick, Sources of International Law, 16 Mich. L. Rev. 393 (1918), available at: https://repository.law.umich.edu/mlr/vol16/iss6/2 (last visited 10 Sept 2022).

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have a vital role as a subject since the states are directly involved and affected while individuals are only affected through the influence of the international law on the states itself.

The claim of individuals as a subject under international law was not considered or given substantial weight until the emergence of Humanitarian laws, making its assertion quite hard since most scholars based such consideration on factors like the direct regulation and overriding nature of international law over the domestic or municipal law affecting the individuals. However, many scholars like George Scelle, Hans Kelsen and Lauterpacht still linked individuals to international law with the need for such recognition for Humanitarian aspects.[1610]

Meanwhile, many scholars like Oppenheim and Bentham advocated strictly against the idea of individuals as subjects of international law, holding that since international law regulates and directly affects the states and their conduct in a global scenario, only states can be the exclusive subjects of international law.[1611] Such a narrow definition of international law led to the traditional view of considering States as the only international personalities with their individuals only being an extension or representative of the state itself.

This led to international law being traditionally and exclusively defined as a 'law of the nations,' where the role of individuals was nothing but a mere abstract concept until 1945. Since then, non-state actors like individuals derived their status and international personality through derives means of international influence, unlike the States which attain their international personality as soon as it gains recognition of their sovereignty.

Morden international law and contemporary State practices have recognised individuals as not only the subjects of international law but also as participants or influencing forces of the law. While their roles and status are not as exclusive as the States or other international bodies, they have established themselves as an international legal personality mostly through human rights law in the international scenario.

Since the World Wars, the emphasis on humanitarian laws and fundamental rights at an international level helped individuals get an international presence to a substantial extent, changing them from an object of international law to one of its subjects of rights and duties. Before this, individuals were believed to be not capable enough to have rights and obligations under international law due to their lack of legal personality in a global scenario. However, the wars led to the contemplation of the legal responsibility of individuals under international law, let it be as prisoners of war, refugees or war criminals.

This change in the status of individuals led to many international regulatory frameworks and law-making Treaties being established to empower individuals in certain states or even in the whole world. However, they are still only seen as partial or secondary subjects to international law as compared to the state.

ROLE AND STATUS OF INDIVIDUALS IN INTERNATIONAL LAW

Before exploring the status and roles of individuals in the international scenario, one has to consider the legal context of the terminology. In simpler terms, the term 'individuals' under international law not only accounts for individual humans but also other legal personalities like foundations, legal commercial enterprises and communities, when considered on a broader spectrum.

Traditionally, the definition of individuals in international law only included people and distinct communities, whose only responsibility was considered under limited cases of international crimes like piracy. However, while such international crimes were considered

[1610] The Position of the Individual in International Law, Alexander Orakhelashvili, California Western International Law Journal, Vol. 31, No. 2 [2001], Art. 4, available at: https://core.ac.uk/download/pdf/232621243.pdf

[1611] *Id.*

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universally applied, they did not create any criminal liability or individual responsibility in practicality.

For an instance, in the case of piracy, its jurisdiction is covered under Articles 100 to 107 of the United Nations Convention on the Laws of the Sea or UNCLOS, which gives the jurisdiction of the prosecution to the respective States.[1612] This, unfortunately, does not assert the obligation to stop acts of piracy on the state while also not creating any international criminal liability on the individuals directly since they were not considered as a subject of international law at the given time.

It led to difficulty in the application of such international regulations which were made to prevent the criminal activity of individuals while not considering them a subject of international law at the same time, making no tribunal apply international law to the individuals involved up until very recently.

In the instance of the ***Danzig Railway Officials*** case,[1613] the Free City of Danzig raised pecuniary claims against the Polish Government in the Permanent Court of Justice (PCIJ) for the direct violation of Article 104 of the Treaty of Versailles, 1920 which both the parties were a signatory as a law-making treaty. The Court, in their advisory opinion, held that there was a need to create an exception to the general 'rule' of treating individuals as only objects of international law, especially when the parties adopt a treaty which creates rights and obligations of the individuals under the International law while it being enforceable by the Domestic Courts of the respective States.

With such Treaties made by expressed intention to treat individuals as subjects to its law-making nature, the PCIJ advised the idea for individuals to be treated as subjects of international law for the first time. This bold yet needed step taken by the Court led to a new possibility in the international scenario, giving the first step to the recognition of the individual as a subject of international law.

While it indeed started in the aspect of Criminal Law rather the Humanitarian law, its scope soon extended much beyond in the upcoming years. An immediate example of this would be the judgement of the ***Nuremberg Tribunal***,[1614] which prosecuted Nazi officials and other individuals involved directly in the Holocaust — creating criminal responsibility over the individuals for international crimes. The Court even stated that the crimes committed by these individuals affected the public at large in the international scenario and thus, by prosecuting them, individuals will not be treated as abstract entities but direct subjects on whom the provisions of the international law are to be applied.

Another case that established the role of individuals in international law was the ***Paquete Habana*** case,[1615] where the United States Navy had seized two Spanish-origin fishing vessels on the coast of Cuba, near Yucatan. Since this was during the Spanish-American War, the vessels were condemned as the Prize of War and to be auctioned as such, despite there being no knowledge or relation on the part of the vessels regarding the war.

The Supreme Court of the United States ruled that the (previous) lower federal Court had no authority or jurisdiction to issue a decree of condemnation and that whole international law is a part of the domestic law of US that cannot be ascertained and administered without proper jurisdiction or question for determination. This highlighted that it is difficult to exclude individuals from the provisions of international law.

[1612] Critical Assessment of Individuals as Subjects of International Law, LawTeacher.net, published on Sep 27, 2021, available at: https://www.lawteacher.net/free-law-essays/international-law/individuals-subjects-international-law-8836.php?vref=1 (last visited 28 Sep, 2022)

[1613] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3).

[1614] (1946) Nurnberg Military Tribunals Indictments Cases 1-12 . [Nuremberg: Office of Military Government for Germany US, to 1948] Retrieved from the Library of Congress, https://www.loc.gov/item/2011525463/

[1615] Paquete Habana.; The Lola, 175 U.S. 677; 20 S. Ct. 290; 44 L. Ed. 320; 1900 U.S. LEXIS 1714.

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By 1946, the General Assembly of the United Nations finally recognised and granted individuals the status of the subject under international law.[1616] Individual responsibility was established on the international platform, which included establishing genocide as an international crime. The Genocide Convention of 1948 reiterated that principle.

The case of ***Reparation for Injuries Suffered in the Service of the United Nations*** established that the integral part of any international personality or subject is their defined rights and obligations at the international level, giving another stepping stone to recognition of the individuals as a subject.[1617]

This followed the establishment of several Treaties and conventions like the International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966 which defined the rights and duties of individuals under international law, most of which was granted to ensure their protection in the global scenario.

Individual responsibility in International Humanitarian law was established by the Four Geneva Conventions of 1949 and the Additional Protocols I and II of 1977 which primarily dealt with international armed conflict. This was reiterated by Article 3 of the Draft Code of Crimes against Peace and Security of Mankind as well as the United Nations Security Council (UNSC), after the Balkan War in 1993 and the Rwandan genocide in 1994.[1618]

On the same principle, the UNSC proceeded to create International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) while the Rome Statute of the International Criminal Court (ICC) was adopted in 1998 to address the criminal responsibility of individuals under the international law, which may be limited to crime of piracy, genocide, aggression, war crimes and crimes against humanity.[1619]

While individuals may lack the power to assert the violation of the aforementioned Treaties on their own, many Treaties have allowed individuals the procedural capacity to directly access the International Courts and Tribunals, albeit limited. These remedies can be for both civil and criminal matters, with the civil ones known more to be covered under 'Private' International law.

DISPUTE RESOLUTION OF INDIVIDUALS UNDER INTERNATIONAL LAW

Any dispute arising from the infringement of the right of an individual in the international scenario is usually dealt with within the ambit of Private International law whose foundation was defined and established by the Hague Convention on the Civil Aspects of International Child Abduction.

This aspect of international law strictly deals with the regulation of affairs between private individuals across national bodies. A body of conventions, model laws, national laws as well as other instruments helps in resolving disputes between two individuals from two different nations. Disputes may also arise between two nations due to the conduct of two individuals from the respective nations, making them both countries parties to the dispute.

For an instance, in the case of ***Respublica v. De Longchamps,***[1620] where the defendant, an American citizen, was indicted for assaulting the Consul General of France to the US. While the dispute was directly between the individuals, both nations were also represented through them.

The nature of individual disputes on the international platform initially started with Criminal liability and responsibility, which then extended to Human Rights law or Humanitarian

[1616] The Individual in International Law: 'Object' versus 'Subject', Solomon E. Salako, International Law Research 8(1):132, published on July 2019, DOI: 10.5539/ilr.v8n1p132

[1617] Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr 11) (Advisory Opinion).

[1618] The Position of the Individual in International Law, Alexander Orakhelashvili, California Western International Law Journal, Vol. 31, No. 2 [2001], Art. 4, available at: https://core.ac.uk/download/pdf/232621243.pdf

[1619] *Id.*

[1620] Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. O. & T. 1784).

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law before introducing areas like Investment protection and Intellectual Property protection gradually. This led to individuals' rights and obligations as a subject being more defined in both civil and criminal aspects.

An individual is protected primarily under the regulations of the International Centre for the Settlement of Investment Disputes (ICSID) Convention of 1965 for International Investments. The rules of the North American Free Trade Agreement (NAFTA) as well as the United Nations Commission on International Trade Law (UNICTRAL) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) can be referred to in case of a legal dispute arising out of an investment made across the national borders.[1621]

For intellectual property rights, an individual can refer to the Berne Convention of 1886, the Universal Copyright Convention (UCC) and the World Intellectual Property Organisation (WIPO) as well as the Trade-Related Aspects of Intellectual Property Rights Agreement, which lays down the Foundation of Intellectual Property rights in the international scenario.[1622] Whereas for Humanitarian laws, one can seek protection under the Universal Declaration of Human Rights (UDHR) as well as regional Treaties and agreements like the European Convention on Human Rights of 1950 and the African Charter on Human and Peoples' Rights, 1981.[1623]

These Treaties and agreements either act as frameworks for the domestic laws of the signatory nations or law-making Treaties between two nations. The role of the nations as a subject of international law becomes very vital here to initiate such Treaties for the protection of rights to its individuals — except when the case is of Human Rights law, which is an essential part of *jus cogens.*

[1621] The Individual in International Law: 'Object' versus 'Subject', Solomon E. Salako, International Law Research 8(1):132, published on July 2019, DOI: 10.5539/ilr.v8n1p132.
[1622] *Id.*
[1623] *Id.*

STATE AS A SUBJECT

A subject of international law is such a body capable of possessing rights and duties under international law.[1624] Historically, only states were seen as the subject of international laws. International law was once only understood as an interaction between states. This is evident from various definitions designed by scholars when the concept of international law just started to take shape. For instance, Prof. L. Oppenheim defines international law as "the body of customary and conventional rules which are considered legally binding by the *civilized states* in their relationship with each other."[1625] While, in the case of *Regina v Keyn* in 1876, Lord Coleridge stated that the Law of Nations is a collection of usages that *civilized States* have agreed to observe in their dealings with one another.'[1626]

International law was formed in a period when politics and law revolved exclusively around the concept of sovereign states. Back then, trade and treaties between nations were the only reasons for invoking international law. Agreements between Lagash and Umma in 2100 BCE, Mesopotamia, and the agreement between the Egyptian pharaoh Ramses II and Hattusilis III, the king of the Hittites in 1258 BCE are some of the most ancient traces concerning international law.[1627] Many such laws have become the cornerstone of international law, such as Law Merchant and Maritime Law, which came from the active role of nations.

Therefore, until the late 19th century only states had an international personality that made them capable of exercising powers and fulfilling duties under international law. It was after the 2nd world war that it was recognized that the

[1624] Martin Dixon, International Law 116 (Online resource center 2007).
[1625] Tanu Mehta, Comparative Analysis Of The Traditional And Modern Definitions Of International Law, Legal Service India E-Journal, available at: https://www.legalserviceindia.com/legal/article-7224-comparative-analysis-of-the-traditional-and-modern-definitions-of-international-law.html (last visited on 10 Sept 2022)
[1626] R v. Keyn (1876) 2 Ex. D. 63
[1627] Malcolm Shaw, international law, Britannica, available at: https://www.britannica.com/topic/international-law (last visited 10 Sept 2022)

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existence of non-state parties is necessary for the international arena.

After the 2nd world war, the international community understood the fact that non-state actors also needed to be subject to international law because unless they were made subject to international laws, it was impossible to implement laws on human rights, war crimes, etc.[1628]

DEFINING STATES

Before understanding the role of the State as a subject to international law, we first need to know the defining characteristics of a state. The term state was properly defined in Article 1 of the Montevideo Convention on the Rights and Domes of the State of 1933, which provides the following:

A state as an international law person must have the following qualifications:[1629]

- permanent value (population);
- specified location;
- Government;
- the capacity to enter in relation with another country.

This means that according to the Montevideo treaty, a state is an entity that has a certain population, a fixed territory, a governing body, and the capacity to interact with other states. The importance of population and defined territory is obvious but a point to note is that a boundary dispute does not preclude statehood. Also, though the population cannot remain permanent and will change with time, a certain population must remain within the state.

Having a governing body is also very significant. A state is an entity that enjoys sovereignty in a complete sense. This means, that whether it is regarding the internal issue or external affairs, a state is autonomous with no external force interfering in any manner. Government represents the state and so it channelizes sovereignty for the smooth functioning of the state.

One thing to note is that the mentioned criteria (population, territory, government, and ability to interact with other states) are not clear-cut rules for retaining or gaining statehood. For instance, the international community (including the UN) has recognized some states while they were facing civil war (e.g., the Congo in 1960 and Angola in 1975), thus eroding the criteria of effective-government. Croatia and Bosnia and Herzegovina were also recognized as new states by much of the international community in 1992, though at the time neither was able to exercise any effective control over significant parts of its territory. Therefore, for statehood independence is required, yet it need not be more than formal constitutional independence.[1630]

Another significant criterion, the ability to enter into relations with other nation-states, can only be fulfilled if the said state gains recognition of other states. Recognition is extremely important because recognition gives the state an international personality which in turn makes it the subject of international law. This recognition is evidence of the fact that an entity (the said state) has legal status, acquired territory, and the ability to grant nationality.

There exist two theories regarding recognition. These include:[1631]

- Constitutive Theory- this theory states that the act of recognition creates a state.
- Declaratory Theory- this theory states that a state already exists and recognition is mere acceptance of the same.

[1628] Nuremberg Trial Archives The International Court of Justice: custodian of the archives of the International Military Tribunal at Nuremberg, The Registry (International Court of Justice), and the United States Holocaust Memorial Museum, 2018, available at: https://www.icj-cij.org/public/files/library-of-the-court/library-of-the-court-en.pdf (last visited 20 Sept, 2022)

[1629] Montevideo Convention of 1933, available at: Montevideo Convention of 1933 & UN Articles on Responsibility of States (2001) (harvard.edu)

[1630] States in international law, Britannica available at: international law - States in international law | Britannica

[1631] Theories of Recognition of States under International Law, Mansi Tyagi, LEXPEEPS, published on JUNE 2, 2020, available at: Theories of Recognition of State under International Laws | Lexpeeps

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RIGHTS AND DUTIES AS A SUBJECT OF INTERNATIONAL LAW

Once an entity gains statehood, it naturally gains international personality and this in turn makes it subject to international law. As a subject of international law, states have certain rights and obligations. These include[1632]–

Rights

- Sovereignty- a state that has complete independence and autonomy regarding all internal matters and external affairs. Therefore, no external force can interfere in the functioning of the state unless there are reasonable grounds.
- Equal sovereignty- this means that no state government can be superior to another. In other words, all and any government is an equal member of international communities, regardless of economic, social, political, or other differences.
- Right to defence- article 51 of the UN charter speaks of the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.[1633]

Duties

- Duty to not use force- this refers to the obligation to refuse war propaganda and aggressions, or the duty to refuse to organize and promote organizations for unlawful troops or armbands to be deployed in a foreign country.
- Duty to resolve any dispute peacefully- chapter 6 of the UN charter states that any parties to a dispute shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[1634]
- Non-interference in the sovereignty of another nation-state- a state shall not intervene in matters be it political, economic, social, or cultural of any other state unless the intervention is for reasons like gross human rights violation, treaty violation, etc.
- Other duties- taking responsibility for breach of obligation, even if such a deed was done by an internal institute by going ultra vires. Duty to make full reparation for any injury caused by its act internationally recognized. Duty to protect the international community from international crimes such as aggression, colonial domination, genocide, etc.

CRITICISM

As George Schwarzenberger rightly pointed out, individuals are the basis of society. The final effect of international will be felt by them. Hence, excluding them from the ambit of international law by just viewing them as objects to international law cannot be correct.

Besides, after the two World Wars, the world is already aware of the importance of the presence of non-state actors. Balance of power can never be truly achieved if international law is influenced only by the interests of the nation-states. Besides, the intervention of a third party, an institution, can bring more peaceful solutions to disputes such as mediation, negotiation, etc. also, it can bring proper expertise on the subject to the disputing parties.

Technological advancements have brought another factor to the equation which made the presence of non-state parties more vivid. Today, social media influencers, social activists, etc. can and do make ripples in the international landscape. Any single comment

[1632] State as a subject of international law, Shivam Sharma, Law Column, published on June 7, 2020, available at: State as a subject of international law | Law column

[1633] Chapter VII: Article 51 — Charter of the United Nations, available at: Chapter VII: Article 51 — Charter of the United Nations — Repertory of Practice of United Nations Organs — Codification Division Publications

[1634] United Nations Charter, Chapter VI: Pacific Settlement of Disputes, article 33, available at Chapter VI: Pacific Settlement of Disputes (Articles 33-38) | United Nations

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by them, or story on Instagram, or a tweet can act as a catalyst for multiple debates and can also bring different angles to present issues. The ripples created by all these non-state actors are too big to ignore. Therefore, in today's world, the state can no longer be the only subject to international law.

Lastly, trade and globalization have also forced international law to acknowledge that non-state actors are present and must be actively obligated under international law. If we are to keep the narrow-minded view of the state being the only subject to international law then it can only be seen as a denial of the obvious.

However, while many people may agree on the need for non-state actors in international law and politics, that does not make the State 'outdated' as a subject. In practicality, a wide gap still exists between the State and the other non-state actors as a subject of international law mainly due to the fact that most non-state actors, including individuals, still heavily rely on the State as a medium for their rights and duties.

In the instance of Individuals as a subject, most of their rights operate through the medium of the State as it is the State that has to be a part of the Treaties and Agreements that confer the rights to the individuals. Without the State's consent, the conferring of any international rights or individuals (except Human Rights) is next to impossible. This, in turn, creates an uneven field for the subjects, where the capacity of States stands at an entirely different character and degree.

While there may be theories advocating for the equal rights and duties of the subjects of international law, in practicality, non-state actors like the individuals fall short of their influence and rights at large when isolated from other international actors. Thus, making them act as a partial subject of international law at best and an object of the law at worst.

CONCLUSION

As the preamble of India reads "*we the people of India…*", it essentially entails that the true authority lies with the people of the nation and we transfer that authority to our constitution with their consent. In a similar fashion, for international law to have binding power, the states need to give it that authority. However, this is difficult in itself as states only gain their role as a subject as they gain their sovereignty.

This is where the concept of monism and dualism comes in. Monism believes that international and municipal laws are two aspects of the same system, while dualism believes that these two are two distinct legal systems. These theories explain how international laws are accepted and adopted in a nation-state. Most countries have a mixture of both these concepts, leading to the application of international law on the other subjects of the law as well, like the non-state actors.

While international law focuses more on harmony over confrontation, disputes are still inevitable to happen. And these disputes may happen between two States, two individuals from different nations or even two different subjects entirely. However, oftentimes, the parties to the dispute themselves want to resolve things peacefully. This is because in today's era the economy is a global structure which means that subjects, even the States, are all interdependent. One cannot exist without another.

Therefore, dispute resolution is done peacefully in most international disputes through a variety of regulatory frameworks, Treaties and Agreements that international law provides. These very laws confer the rights and duties to each subject while also providing them with remedies and injunctions in the case of violation.

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