

Considerations on the Legal Status of the Individual in Public International Law

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Abstract: The problem regarding the quality of the subjects in international law relations occupies a central place in the researchers' concerns, as the determination of the entities with international legal status with the aptitude of holding rights and obligations within the international judicial order is absolutely necessary. If traditionally it is considered that the main subjects of international law are the states, and the international intergovernmental organizations are derived subjects in public international law, the recent doctrine developments record controversial opinions regarding the quality of international law subject of the individual. This paper aims at analyzing the contemporary doctrine and practice as well as determining the characteristics of the international status of the individual.

Keywords: international judicial personality; human rights; international law

1. Introduction

This paper analysis a subject that generated numerous controversies in the academic environment but not only in this environment and towards which a unanimous point of view hasn't been reached so far: the private person and its quality of subject of international law. Performing a short analysis of the evolution of this concept from an historical perspective we have underlined the passing from the concept according to which only the states can have the quality of subject of international law (the individual having in essence the quality of subject of internal law) to the opinions of certain authors that include the individual – private person- among the subjects of international law. More than that, we have brought to attention also the point of view of other authors that place the individual at the centre of the norms of international law.

Although combated, these latter opinions raise questions such as: If the intergovernmental international organizations or the national liberation movements are exceptions in the international capacity, why the individual- subject of law couldn't benefit from the same statute?

In the positive law, the term person is susceptible to two relational meanings: on one side, the human individuality and on the other side, the collectivity. *“In the judicial thinking the person represents the quality of the individual or collective human to be subject of law with various names in the branches of positive law: private person- judicial person (in civil law), employee (in labor law), citizen (in constitutional law), public servant (in administrative law), offender (criminal law) etc”* (Mihai & Mihai, 2005).

In the context of intensification of the relations between the states, an aspect that generated numerous controversies is the relation between the person- subject of internal law and person- subject of international law. Within the international society, many categories of entities are manifested, acting as actors of international relations: states, governmental and non governmental international organizations, nations or people fighting for recovering independence, transnational societies and private persons. In the international judicial order, the designation of the quality of subject of law is justified by the need to identify among these only those entities with the capacity to acquire international rights and obligations to participate at drafting the norms of international law, to participate at the reports governed by the judicial norm of international law.

The concepts regarding the quality of subject of international law relations have evolved in time and if at the beginning of the 19th century it was considered that the states are the only subjects of international law (Blüntschli, 1881, p. 64), the 20th century registers the theories of some authors like Georges Scelle and Leon Duguit, who asserted that only the individuals can be subjects of law, that the state as a person is a product of fiction, the only reality being the private person taken individually and the inter individual relations based on the so called “social solidarity” so that the international relations become relations between the individuals and groups of individuals, that the state is not a judicial person nor sovereign person but the historical product of a social differentiation between the classes, those who govern and those governed, thus the individuals, another distinct person does not exist but only a federalism of the classes (Dumitrescu, 2008, p. 72). This theory was rejected by H. Triepel, D. Anzilotti, W.G.F. Philimore and other positivist doctrinaires. Beginning with the post war period, the plurality of the subjects of international law theory is admitted (Moca & Duțu, 2008, p. 128). The issues of the quality of subject of international law of the states and intergovernmental organizations was solved, the first being qualified at the moment

as being main subjects and the second category as being “derived subjects” of international law.

The term state was formulated in very precise terms in the Montevideo Convention in 1933, concluded between the United States of America and the Latin American states, on the rights and obligations of the states, which provisions in article 1 that *“the states is a subject of international law with the following characteristics: a) a population, b) a territory, c) a government, d) the capacity to develop relations with other states”*. In the same context is placed the notification no.1 of the Arbitration Commission of the Peace Conference for the former Yugoslavia on November 29th, 1991, in which the state is defined as being *“a collectivity comprising a territory, a population subordinated to an organized political power”*. The international judicial personality of the state reflects its double quality, of creator and recipient of the international judicial norms. The doctrine established without equivoque that only the states have the capacity to acquire and assume the totality of the international rights and obligations in their quality of *“original, typical and fundamental subjects of international law”* (Anghel, 2002, p. 53).

The international organization is a judicial creation, defined by the International Law Commission of the UN as *“an association of states constituted by treaty, provided with a constitution and common organs and possessing a distinct judicial personality from the member states”*. The Vienna Convention in 1969 on the right of the treaties restrains this definition, expressly mentioning in article 2, i) that the collocation “international organization” defines an intergovernmental organization, clearly delimitating these entities from the non governmental organizations that are considered in general as being subjects of internal law, even if some authors state that some would benefit from a partially international statute or would have a certain degree of normative power (Carreau, 1994, pp. 29-30). If until 1945 there was still a contradiction in opinions regarding them as well in what concerns their judicial personality of international law, at present the fact that the international organizations have a “certain” international position is accepted, of course different from the one of the states. The content of the judicial capacity of the international organizations has to be expressly provisioned in the constitutive act and is limited and different from one organization to another.

It has been established also that in certain conditions the national liberation movements are considered subjects of public international law with limited and transitory capacity. An ambiguous situation is still maintained in what concerns the quality of subject of international law of the subject which remains an object of controversy between the doctrinaires. Next we will make an analysis of the international regulations, of the doctrine positions expressed in the judicial literature and the international jurisprudence in order to argue the necessity of reconsidering the position of the individual and his qualification as distinct

category among the subjects of international law, recipient of international rights and obligations.

2. Protection of the Individual through Norms on International Law and International Mechanisms through which the Individual can Claim the Protection of his Rights

In approaching this subject the fact that there are authors that recognize unconditionally this quality of the private person must be taken into consideration but on the other side there are many authors that contest its placement among the subjects of international law.

The first opinion is based on arguments such as the adoption by the states of a series of international documents that offer protection regarding the international rights and liberties, the establishment and development of mechanisms the individual can use directly at international judicial instances for the protection of his rights, the recognition of the individual as subject of international criminal liability.

The antagonists of this theory motivate their option on the mediated position of the private persons within the frame of the international law relations. If in the internal judicial law the quality of subject of law is inherent to the private person, it can appear in the international relations only if the states manifest their express desire in this direction; the individual will not be the titular of the rights listed in an international treaty unless the states give their approval in certain prerogatives in the international relations. The literature mentioned that even the private persons (same as the non governmental organizations) are “subjects whose presence is tolerated by states in the international order” (Blachèr, 2008, p. 80).

Ian Brownlie claims that in strict analytical terms it cannot be asserted that the individual is subject of international law but at the same time, there is no general rule according to which the individual cannot be subject of international law (Brownlie, 2003, p. 65).

Ideas regarding the rights intrinsic to the human nature according to which all humans are equal in dignity and any human being has eternal and immutable as well as obligations have appeared even in ancient times as the institution of the human rights knew a long process of crystallization and appearing in the present as a very complex institution in relation with the internal judicial order as well as with the international one. (Duculescu, 1994, pp. 18-19).

The historical evolution of the human rights institution was marked by documents such as Magna Charta Libertatum (1215), the Bill of Rights (England, 1689), the

Declaration of Independence of the United States of America (July 4, 1776), the Declaration of human and citizens' rights in 1789.

The creation of the League of Nations has led to an "institutionalization at international level" of the protection of human rights and was the first step towards their universalization but unfortunately this issue hasn't been followed with consistency except for some aspects (Moroianu Zlătescu, 2007, p. 16). Prior, through the Geneva Conventions (1864, 1906) and Hague Conventions (1899 and 1907) regulations were adopted, with the purpose of ensuring the protection of certain categories of people: injured, ill, prisoners, civil population etc.

All these considered, only after the Second World War we can say that the human rights have known an accentuated development, the problematic of human rights went beyond the borders of the national state and the state cooperation in this context has been concretized in adopting some fundamental texts.

The United Nations Chart, adopted in 1945, following the Conference in San Francisco proclaims in its preamble "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and has the great merit to have been introduced the human rights in the international order (Selejan-Guțan & Crăciunean, 2008, p. 101). Article 1, paragraph 3 of the United Nations Chart declares the following fundamental purposes of the UN: achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. To accomplish these purposes the UN member states commit to promote the universal and effective respect of the human rights and fundamental liberties for all, irrespective of the race, sex, language or religion and cooperate with the organization to promote the fundamental human rights and liberties.

But among these texts the Universal Declaration of Human Rights detaches being a document of emblematic value although it does not have judicial value (being a recommendation of the UN and not a treaty). In its content a list of civil, political, economic and social rights is mentioned, recognized to any person but not as a citizen of a state but as a human being: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (article 1), "Everyone has the right to life, liberty and security of person" (article 3). We can affirm that the adoption of the Universal Declaration of Human Rights marked the passing from "citizens' rights" to "human rights" (Moroianu Zlătescu, 2007, p. 25), the beginning of an assembly of international, regional and national instruments regarding the fundamental human rights and liberties, of a system of principles mandatory for the entire international community.

In 1966, the General Assembly of the UN adopted two acts on the human rights: the International Covenant of economic, social, cultural human rights and the International Covenant on the civil and political rights that have transformed the provisions of the Universal Declaration of Human Rights in judicial obligations for the signatory states. We can strongly affirm that the Universal Declaration of Human Rights has constituted actually the source of inspiration of all the instruments in this matter that form today the assembly of judicial norms on protecting the human rights.

The international legislation on human rights has developed subsequently to the adoption of this document with numerous regulations comprised in the conventions, covenants and treaties adopted under the aegis of international or regional organizations: United Nations, Council of Europe, European Union etc. In their content the individual is considered as being the recipient of norms of international law, is protected either as individual human being or as member of a group of people.

The doctrine has refused the quality of subject of international law to the private person, motivating that the individual is not the direct recipient of the norm of international law but benefits from the protection of the norm of international law but only through the state and only if that state assumed all the commitments by international treaties regarding the international statute of the private person (Scăunaș, 2007, p. 124).

In the matter of human rights thus, the international jurisdictions have stated the superiority of the international norms in relation to those of internal law, the more favorable norm of international law being able to exclude the norm of internal law, even if it has constitutional character. The constitution of Romania provisions for example that in case of an inconsistency between the covenants and treaties regarding the fundamental human rights to which Romania is part of, and the internal laws, the application of the international laws has priority. The constitutional dispositions regarding the rights and liberties of the citizens will be interpreted and applied in consistency with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is part of (articles 11 and 20).

On the other side, in order to ensure the respect of human rights, special mechanisms have been established, meant to guarantee the application of the regulations on human rights. These organisms have been created through international acts that represent the willingly approval of the states. We remind in this context the Optional Protocol of the International Covenant on civil and political rights in which the competence of the Committee for human rights is recognized, established based on dispositions of articles 28-45, part IV of the covenant, to receive and examine notifications presented by persons that belong to

the jurisdiction of a state, claiming to be the victims of violation by that state regarding the rights listed in the covenant and communicate the decisions to the interested party. Also, the Committee has the competence to study the reports presented by the states on the measures adopted in applying the dispositions of the Covenant, to elaborate general reports and make suggestions to the states. What is important to keep in mind is that the right to petition of the private persons provisioned in the Optional Protocol is presented as a mechanism of protection very relevant to the researched subject.

In the same context, the Committee for the racial discrimination was constituted which has the purpose to supervise the application of the Convention adopted by the General Assembly of the UN, through Resolution 2106 A(XX) on December 21st 1965, entered into force on January 4th, 1969 that provisions a similar right in article 14 but also the Committee against torture, created for the application of the Convention against torture and other punishments or cruel treatments, inhuman or degrading adopted by the General Assembly through Resolution 39/ 46 on December 10th 1984 and entered into force on June 26th 1987 (see article 22).

We can also mention the resolutions adopted by the UN and UNESCO that confers persons and groups of persons the ability to address to the organs of the UN. Procedures for the examination of certain situations or problems have been adopted regarding the human rights in the areas of competence of the UNESCO.

In order to exemplify at a regional scale, we remind one of the most well known documents, the European Convention on Human Rights concluded in Rome on November 4th 1950 and entered into force on September 3rd 1953. It represents an international treaty that institutes the Court and its functioning. The Convention contains a list of rights and guarantees that the states commit to respect. These rights are provisioned in the Convention itself, together with the protocols no.1, 4, 6, 7 and 13. The subjects that have the right to address the European Court of Human Rights are: any private person, nongovernmental organization or a group of private persons that pretend to be the victims of a violation coming from a party state. The Court will only be able to examine the requests pointing at one of the states that have ratified the Convention and Protocols. It is necessary that the complaints refer to the acts of one public authority from one of these states, the complaints pointing at a private person or a private institution not having any validity. Also the Court will only examine the complaints that respect the rule according to which the prior internal means of appeal have to be exhausted. In case the Court observes a violation of one or more rights by a member states it issues a decision. The decision is mandatory the state being obliged to execute it. The European Convention established a system of protection for human rights that has proved to be the most advanced and effective of the systems elaborated so far. Terry Davis, former general secretary of the Council of Europe declared that: *“The protection and defense represent the center of the activities of the Council of*

Europe whose vocation consists in protecting the rights of over 800 million Europeans in the 46 member states. Through the European Convention of Human right, we have created an efficient system of international judicial guarantees for the human rights and fundamental liberties, a system without equivalence in the entire world.”

Very important to take into account is the fact that each of these mechanisms are based on the recognition of the right of the individuals to address complaints to the mentioned international organs as human beings and not in relation to the quality of citizen of a state, fact that can represent an argument in favor of the idea that the individual is a subject of international reports. The private person can act as seen, for the protection of his rights addressing to certain organizations, institutions and international judicial instances, independently from the agreement of the state by situating themselves in the position of adversary of the state.

3. The Individual- Subject of International Criminal Liability

The international liability is one of the fundamental institutions of the public international law. The reality of the international relations includes, besides the international liability of the states and the liability of the international organizations, the one of the private persons, the institution of the international criminal law being consecrated already in the literature. Vespasian V. Pella defined criminal international law as being “the totality of substantive and procedural rules that govern the way of repressing the actions committed by states or individuals meant to disturb the international public order and the harmony among people” (Pella, 1926, p. 168).

In the attempt to make a delimitation between the international criminal law and the criminal international law it has been established that the first category designates the norms of internal law that have the role to solve the situations in which committing the crime involves a foreign origin (the citizenship of the perpetrator, the place of the crime etc) but also issues related to the recognition of the criminal decisions issued outside the country by the judicial instances of other states, to the judicial assistance in criminal matters, extradition etc, while the second category is part of the international judicial order, the norms being consecrated by states in conventional or customary manner.

According to the principle of individual and personal criminal liability, the criminal international liability is an attribute of humans, of private persons but the individual can be criminally liable. The state, although subject of international liability, cannot be subject of criminal liability. Claude Lambois asserted that “*it wouldn't be just to prejudice all the citizens without through a punishment like the loss of independency, which is the death penalty for states*” (Lombois, 1979, p. 99).

Although the elements of criminal liability can be found (in incipient state of course) in the work of Hugo Grotius (*De jure belli ac pacis*) only at the beginning of the 19th century, documents with international character have been adopted, documents that have established rules of criminal law: the Geneva Convention in 1863 on the improvement of the faith of injured militaries in the campaign armies, the Hague Conventions in 1899 and 1907, that have led to the codification of the customary law of armed conflicts, laws and customs of war, subsequent developments making possible that after the Second World War we had the possibility to talk about “modern criminal international law” (Crețu, 2001, p. 18). The period after the Second World War was marked by the conviction by sentences of the International Tribunals in Nuremberg and Tokyo of war criminals or persons that have committed crimes against humanity.

More recent are the International Tribunal for the former Yugoslavia and the International Tribunal for Rwanda. The first was established by the Security Council of the UN by Resolution 827 on May 25th 1993 for the sole purpose of punishing those responsible for the very serious violations of humanitarian law committed on the territory of the former Yugoslavia between January 1st 1991 and a date that will be established by the Security Council after the restoration of peace. The Criminal International Tribunal for punishing people responsible for genocide and other very serious violations of international humanitarian law committed on the territory of Rwanda and the citizens of this state between January 1st 1994 and December 31st 1994 was established by Resolution no.955 on November 8th 1994 of the Security Council, in virtue of Chapter VII of the UN, after the example of the International Tribunal for the former Yugoslavia.

The efforts that have been going on for decades for the establishment of a international criminal law, with permanent character and universal competency were successful by signing the Statute of the International Criminal Court, in Rome on July 7th 1998. This judicial instance is competent to judge and punish private persons guilty of committing serious crimes: genocide, crimes against humanity, war crimes and aggression as stated in article 5 of the Statute, if they are aged over 18. The Statute of the International Criminal Court consecrates the principle of individual criminal liability.

4. Conclusions

After this analysis, we can formulate a few observations with conclusive character. The individual, having the quality of person, is an absolute human being, endowed with conscience and acting in accordance with his own needs and percepts. At interior level, humans are the master of their own actions that manifest at the exterior. In order to be free and independent and in order to act according to their nature, humans need some material and spiritual goods. But this liberty and

independence, as much as they are wanted, are not possible if not offered within an order, be it moral or of law.

If in antiquity humans defined the citizens, the interests of the state as unique legitimacy being the most important, together with the natural law, the idea that the rule of law (internal or international) cannot be addressed but to humans appeared, as intelligent beings with the capacity to understand it and comply with it. We can assert now that the judicial statute of the individual- subject of law is determined starting from the internal regulations but at the same time, the general protection frame of the fundamental rights and liberties is regulated by international mechanisms and instruments. A separate set of international regulations refer to the individual liability in international law.

Thus, traditionally, the international law is understood as an exclusive inter state law, defined as an assembly of rules that govern the reports between the states, built based on the “theory of the two spheres” (Virally, 1969, p. 323), the evolution of the international society especially after the Second World War, has lead to the recognition, to a certain extent, of the international personality for other categories of subjects especially the role of the individual in international law. This idea is not accepted so far by all the doctrinaires and the quality of subject of international law of the individual is far from reaching unanimity.

We presented in the paper some arguments able to underline international rights and obligations whose titular is the individual, private person. Or this means subject of international law. The individuals are, according to the international regulations, the recipients and the beneficiaries of rights consecrated in international documents whose importance cannot be contested. They benefit from this type of procedures created using special mechanisms that allow direct access to international institutions and organisms with the purpose of protecting them. Also, individuals have obligations according to the international criminal law. We exclude *ab initio* that the individual could stand on an equal position with the states regarding the quality of subject of international law. The norms of international law are the result of a willingly agreement between the states. The states are the creators and recipients of the norm of international law.

But the international intergovernmental organizations do not fulfill these conditions either; they have the international capacity conferred by the states by their constitutive act. The national liberation movements represent also an exception in what concerns the international capacity. Why wouldn't the individual be considered as a subject of international law, with limited international capacity? The evolution of the international law starting with the period after the Second World War registered a change regarding the statute of the individual as titular of rights and obligations conferred by the international law. We assert that the arguments brought by us in favor of these ideas have the ability to tip the balance

towards what Andrew Clapham named in a recent article, a step that could help “to build an international community which properly recognizes the role of the individual in international law”. (Clapham, 2010, p. 30).

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