

CHAPTER SEVEN

SUBJECTS OF THE LAW

1. INTRODUCTION

What constitutes subjects within public international law and Islamic international law is a significant question. Although both systems rely heavily on the legal status of their subjects, their legal characterizations vary considerably. It must generally be asserted that the legal concept of subjects in the system of international law is different from that of Islamic international law. This is because under Islamic law subjects are an integral part of the system and the system is an integral part of its basic subjects. However, subjects of international law have to be recognised, created or accepted within the system.

2. EVALUATION

Under Islamic law individuals are the main recognised subjects of the law while in the system of international law states are considered the main recognised subjects. The reason for this being that in the system of international law states are the masters of the law while in Islamic law, the nature of individuals is above the law and the jurisdiction of the spiritual existence of man above the latter.¹ Although we do not deny that certain aspects of the system of international law also relate to natural law, this

¹ “Islam believed ... in the universality of the Divine call with which Muhammad was commissioned. It was this conviction which led the Muslims to aspire at a world order, but we must distinguish between the domination of a nation based on race or language and between the nation aspiring to establish on earth the kingdom of God, where His word alone (the Quran in this case) should reign supreme. Obviously for Islam it makes not the slightest difference whether the ruler is an Arab or a Negro provided he is a Muslim. The Muslims considered as their own enemies only the enemies of God ... They wanted to conquer the world not to plunder it, but peacefully to subjugate it to the religion of ‘submission to the Will of God,’ religion of which they were not the monopolisers but which was open to all the nations to embrace and become equals. In a word, the Muslim aim was to spread Islamic civilization and to realise a universal *Polity*

has not been the original aim of contemporary international law regarding its subjects. Even international human rights constituting an integral part of international law, is not capable of application because of the limited position of the individual's characterization under national and international law. While some claims may arise concerning the strong movements for the accepting individuals as one of the basic subjects of international law, this is still in its beginning with the reservation that individuals are recognised as being the direct subjects of human rights law and international criminal law.²

The aim of international human rights law is to create equality between individuals, reduce inequalities before the law and prevent unjustified activities by states. Islamic international law has, however, a different characteristic. The practical enforcement of the law under Islamic law is in the hands of individuals, while in the system of international law, it is under state authority. The former is self-conductive while the latter is not. Nevertheless, great movements have been started between European states, the United States, Latin American, African and Asian states and other states in the world for the practical protection of individuals and their unavoidable rights against the unlawful acts of states. The Islamic nations have indeed been very slow in the application of the principles of human rights and their violations are therefore very frequent.

2.1. States

States in the system of public international law are recognised as being the main subjects and have therefore occupied especial position within the system. They have traditionally been the only primary subjects having rights and duties in international relations. They have therefore been capable of concluding international treaties and submitting claims to international entities.

The legal characterization of states is also of essential importance in Islamic international law but they are not necessarily considered primary subjects of the law. One of the essential reasons for this is that individuals are the most essential reason for the existence of Islamic law while states are the most essential reason for the existence of public interna-

based on the equality of the faithful and a system which provided the basic necessities of all the needy in the country, irrespective of religion, without in the least impairing private enterprise." Hamidullah, *The Muslim Conduct of State*, p. 73.

² See *infra* part on international criminal law.

tional law. Again, contrary to international law, individuals in Islamic law are considered the most capable legal persons and the capacity of Islamic states greatly depends on the capacity of the former. It is here that the most important differences between the two systems of international law appear. In other words, in one system, states have basically created international law, but in another system, the natural integrity of individuals is the reason for the creation of the law and its enforcement and development. In any event, Islamic international law deals with the rights and duties of different states. This means that it also recognises states as its subjects. Consequently, its fundamental philosophy does not preclude the acceptance of states as its subjects in order to protect the universal rights of individuals.

2.2. *Individuals*

Recognizing individuals as the full subjects of international law has yet to be established, although they have the most important function in the performance of the provisions and obligations of this law. A considerable number of writers differ upon the legal personality of individuals under this system. Some writers recognize individuals as subjects and others as objects, but the most recognised tendency since the creation of the Universal Declaration of Human Rights is to consider them as the beneficiary subjects of the law.³ This means that according to some writers, an individual has not received full international recognition for the independence of his/her international personality as a fully legal person.⁴ Some of the essential reasons for the non-recognition of individuals as full

³ According to one writer "the fact that rules of international law apply to individuals does not necessarily mean that individuals are legal persons in international law unless 'international personality' is given a definition sufficiently wide to include them. Closer to the realities of international life is the definition suggested that the attribute of personality should be reserved for those entities, primarily states and certain international organizations, which have an objective, and independent, capacity to operate on the international plane . . . The appearance of treaty rules bestowing rights directly on individuals destroyed the logical foundation of the 'object' principle, but the result was not the acceptance of individuals as 'subjects' of international law. Instead of 'objects' they became 'beneficiaries' of its rules. Therefore the position of the individual on the international plane is still at the whim of each state." D.W. Greig, *International Law*, 2d ed. (1976), pp. 115-119.

⁴ According to one writer "It is states and organizations (if appropriate conditions exist) which represent the normal types of legal person on the international plane. However, as will become apparent in due course, the realities of international relations are not reducible to a simple formula and the picture is somewhat complex. The 'normal

subjects of international law rely heavily on the political power of states and the high value of their international legal personality. Within the Islamic system of international law, it is the individual who causes the creation of the basic values of legal order and this is one of the fundamental reasons that individuals in the system of Islamic law constitute the reason of law or are, in other words, the reasons for proper or non-proper implementation of the law.

It must however be asserted that within the system of international law, the theory that individuals have to be recognised as primary subjects of the law is rapidly developing and one of the basic reasons for this development is the formulation of numerous international instruments governing the international human rights law. This is also true in the case of international criminal law and international criminal justice within which individuals are the direct subjects of the law.

Another important matter in Islamic international law is that the legal characterization of individuals is not based on subjectivity or nationality but on their spiritual nature. In contrast to this, nationality in the system of international law plays an important role in the recognition of individuals and if individuals have, for one reason or another, lost their nationalities, they may not any longer be protected by the provisions of their own original states. The system of international law does not even offer absolute nationality for those individuals unless a third state grants them appropriate legal protection. Thus, an individual may be expelled and recognised as a stateless person.⁵ According to the Arab Charter, “no one may be arbitrarily or unlawfully prevented from leaving any country, including his own, nor prohibited from residing, or compelled to reside, in any part of that country.”⁶ Equally, “no one may be exiled from his country or prohibited from returning thereto.”⁷

In other words, within Islamic international law, the existence of spiritual personality is a fact which cannot be denied by any state exercising the provisions of Islamic law, while in the system of international law, recognizing an individual as a subject of their jurisdiction is a right which exclusively belongs to states themselves. Individuals have been and are

types' have congeners which create problems, and various entities, including non-self-governing peoples and the individual, have a certain personality". Brownlie, *Principles of Public International Law*, p. 61.

⁵ Consult instruments governing refugee statute.

⁶ Article 27 (1).

⁷ Article 27 (2).

the direct subjects of Islamic law. It is for this reason that the recognition of individuals as subjects of international law is undermined by the legal power of states. For example, in the international legal system holding a passport appears to be a significant criterion for nationality while Islamic international law does not base its recognition of individuals, as primary subjects of the law, on the existence of an identified paper, but, on each individual being a person having obtained the substantial values of universal union.⁸ Contrary to the policy of Islamic philosophy, the rights of individuals are seriously violated under Islamic practices. The fact is that the rights of individuals within the present Islamic states are limited and their duties have been increased for the benefit of certain powerful authorities. The historical investigation also proves this unfortunate fact.

2.3. *Other Subjects*

Other subjects of Islamic international law are those international organizations, institutions or entities which have, for one reason or another, been organized to carry out specific functions. This means that Islamic international law, similar to public international law, has accepted the existence of different subjects of the law and their international legal personalities. But, individuals in Islamic international law are the basic subjects and no other subject can be given priority to their legal position. Any other subjects are therefore considered legal consequences and should base their purposes for the development and consolidation of the principles of brotherhood, equality and justice between individuals.

Islamic international law accepts other subjects within its legal system on the condition that they should not, in any case, take priority over individual rights. This includes, but not excludes, political, economic, religious, cultural, social and the right to integrity.

In the system of international law, rights and duties are an integral part of statehood and organizations. The defence of individual rights can only be brought before international courts by states. However, there are strong movements in different regions of the world to create certain

⁸ While the above theory refers to the spirit of Islamic law, the practice is quite different. For example, one of the most recognised Islamic states i.e. Iran violates the main aspects of the theory of Islam and expels or banishes individuals. This policy is practised regardless of what individuals believe. Similar policy has also been seen in other Islamic societies such as in the Hashemite Kingdom of Jordan, Libya, Tunisia, Algeria, Morocco, Egypt, and Sudan.

rights for individuals in order to submit complaints to certain regional courts. The European states have been more functional concerning this matter.

Yet, reparations and damages to individuals may not properly be requested from guilty parties unless sought by the state of nationality. It is for this reason that individuals in the system of international law are normally subject to states or organizations legal personalities while in Islamic international law rights and duties belong to individuals. The function of an organization as a subject of the law under Islamic international law does not diminish the responsibility of individuals because of their working in the organization. Similarly, the system of international law stresses the responsibility of individuals who are working for an organization. However, the concept of this responsibility is rather new and has been increased since the outbreak of the Second World War in 1939. In the contemporary system of international law, individuals bear the heaviest responsibility for the commission of war crimes, crimes against humanity, aggression and genocide. The system also has established the concept of responsibility of the joint criminal enterprise which has broadly been developed by the International Criminal Tribunal for the former Yugoslavia.