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Nyssanbekova Lyazzat[1], Sairambaeva Zhuldyz[2],

[1]PhD student, e-mail: Nysanbekova.Lazzat@kaznu.kz
[2]Candidate of Juridical Sciences, acting Associate Professor, e-mail: Sairambaeva.Zhuldyz@kaznu.kz
Department of International Law, Faculty of International Relations, Al-Farabi Kazakh National University, Kazakhstan, Almaty

DEFINITION AND GROUNDS OF THE INTERNATIONAL LEGAL PERSONALITY OF INDIVIDUALS AS A SIGNIFICANT AND COMPLEX PHENOMENON IN INTERNATIONAL LAW

The question which is considered by us undoubtedly holds a specific place both in the theory of international law, and within the system of general law, in particular, the question concerns about legal personality of the natural person in international law. It is necessary to recognize that, in the theory, this problem isn't rather complete though some considerable attempts in this direction have been already made. In spite of the fact that the subject seems to one of classical objects of a research in the field of international law and also, there are various opinions among scientists concerning, both the status, and a legal status of the personality in international law, authors, analyzing legal doctrines in this direction, set the purpose, in clearing as studying of this problem is now. Therefore this article has been directed first of all to clarification of what makes a basis and limits of the legal provision for recognition of a new type of the subject of international law – the individual. First of all, in article focused attention on a variety of terms which are used by science of modern international law and, proceeding from it, have tried to open an essence and semantic value of each of them and also to define what of them are «suitable» at the characteristic of a legal status of the considered subject (individual).

Key words: individual, natural person, subject of international law, legal personality

Нысанбекова Ләззат[1], Сайрамбаева Жұлдыз[2]

[1]Phd докторанты, e-mail: Nysanbekova.Lazzat@kaznu.kz
[2]з.ғ.к., профессор м.а., e-mail: Sairambaeva.Zhuldyz@kaznu.kz
халықаралық қатынастар факультетінің халықаралық құқық кафедрасы,
әл-Фараби атындағы Қазақ ұлттық университеті, Қазақстан, Алматы қ.

Халықаралық құқықтағы елеулі және күрделі құбылыс ретінде жеке тұлғалардың халықаралық құқық субъектілігінің түсінігі мен негіздері

Өзіміз көргендей мәселе, әрине, халықаралық құқық және жалпы құқық жүйелерін теориясы ерекше орын алады, атап айтқанда, бұл мәселе халықаралық құқық бойынша жеке тұлғаның құқыққабілеттілігі туралы болып табылады. Айта кету керек, осы бағытта кейбір елеулі әрекеттер жасалды, бірақ теориялық тұрғыда бұл мәселе жеткілікті зерттелмеген. Яғни ғалымдар арасында халықаралық құқықта тұлғаның құқықтық мәртебесі туралы әр түрлі пікірлер бар. Халықаралық құқық саласындағы зерттеулердің классикалық объектілерінің бірі болғанына қарамастан, авторлары осы саладағы құқықтық доктринаны талдау арқылы өздерінің алдарына мақсат қойды, осы мәселенің ағымдағы зерттеуі арқылы түсініктеме беру. Сондықтан, бұл мақала халықаралық құқықта индивидті – субъект ретінде жаңа түрін тану үшін құқықтық ережелері шекарасын құрайды. Біріншіден, бұл мақалада қазіргі заманға сай халықаралық құқықта пайдаланылатын терминдерге көңіл аударды, оның әр түрлі бағытталған түрдегі мәні мен түсінігін анықтау қажет болды, сол арқылы құқықтық мәртебесін қайсысы «тиісті» болатындығын субъектке (адамға) анықтадық.

Түйін сөздер: индивид, жеке тұлға, халықаралық құқық субъектісі, құқықсубъектілік.

Нысанбекова Ляззат [1], Сайрамбаева Жулдыз[2]
[1]Phd докторант, e-mail: Nysanbekova.Lazzat@kaznu.kz
[2]к.ю.н, и.о профессора, e-mail: Sairambaeva.Zhuldyz@kaznu.kz
кафедра международного права, факультет международных отношений,
Казахский национальный университет им. аль-Фараби, Казахстан, Алматы

Определение и основания международной правосубъектности физических лиц как значительного и сложного явления в международном праве

Вопрос, который рассматривается нами, несомненно, занимает особое место как в теории международного права, так и в рамках системы общего права, в частности, вопрос касается о правосубъектности физического лица в международном праве. Следует признать, что в теории эта проблема не является достаточно завершенной, хотя уже были сделаны некоторые значительные попытки в этом направлении. Несмотря на то, что тема кажется одной из классических объектов исследования в области международного права, а также существуют различные мнения среди ученных касательно как статуса, так и правового положения личности в международном праве, авторы, анализируя правовые доктрины в этом направлении, ставили цель прояснить, как обстоит изучение данной проблемы в настоящее время. Поэтому статья была направлена прежде всего на выяснение того, что составляет основу и границы юридического положения для признания нового вида субъекта международного права – индивида. В первую очередь, в статье акцентировали внимание на разнообразии терминов, которые используются наукой современного международного права и, исходя из этого, попытались раскрыть суть и смысловое значение каждого из них, а также определить, какие именно из них являются «подходящими» при характеристике правового положения рассматриваемого субъекта (лица).

Ключевые слова: индивид, физическое лицо, субъект международного права, правосубъектность.

Introduction

Modern international relations are characterized by its complexity and in the current environment as generally considered developing under the influence of globalization «covering the entire spectrum of human activity, derived from in-depth degree of internationalization» (Ефремова, 2010:31-38) and under the influence of «convergence, assimilation and integration» various, particularly national and regional legal systems (Скурко, 2008:69). Of course, this complex process of «strengthening of interrelation and mutual influence of the main directions and components of the development of the world community» (Барихин, 2010:146) the formation of which is not completed and the receipt of XX1 century and therefore determined by complex economic, social, geopolitical, ethnic, religious and other factors are interrelated and interconnected components that have it's own positive and negative tendencies (Алексеев, 2000:225). However, it cannot be denied that in such above mentioned qualities it brings to the fore the need for objectively evident changes in the legal matter – « in public law and private law institutions, as well as in those structural features which distinguish between various legal systems, it's team, family,» the benefits and the dignity which, in turn, «it would seem different, almost polar opposite, incompatibility». In this context, it is actualized the issue of further transformation of the current international law, which is characterized by broadening and deepening the scope of its regulation and, as a consequence, the involvement of new persons in international legal processes (Мамедов, 2002:6). In a broad sense, significant changes in the structure of international relations, and accordingly, in the subject of international legal regulation encourage the theory of international law to change or, one might say, to change views in the evaluation of the concept and types of subjects of international law and, as the scientists, «there is nothing unexpected or unnatural in the evolution of international relations and change the approach to their subjects», considering again the fact that globalization directly affects the present state of international law. In other words, a situation associated not so much with the problem of determination of the subject structure of international law as part of the global legal complex, but with the recognition (and, perhaps, reluctance of recognition) international legal personality and coupled with its international independent legal status of separate categories of participants of international relations (Алексеев, 2000:225). The fact is that if a long time States were the only full subjects of international law, and in the twentieth century there emerged new actors – intergovernmental organizations, State education, as well as nations and peoples fighting for their independence (Бекяшев, 2009:204), in the twenty-first century according to the authors of the textbook «International public

law» as a new era in history, no doubt, will expand the volume of the legal personality of individuals, is recognized as the personality of other collective entities (e.g., international non-governmental organizations, transnational corporations, religious associations, in the aggregate of legal entities). It is noteworthy in this regard, in particular, adoption of the Canadian scientist R.F. Hansen, made in his study entitled «The international Legal Personality of the Multinational Enterprise and the Governance GAP Problem» (McGill University, Montreal, 2009), created on the basis of objective economic reasons: «multinational enterprises (which are generally recognized TNCs) now have international rights and obligations and the capacity to bring international claims», which ensures it's compliance with «the definition of a legal person under international law» or prove it's legal personality under international law»; as a result how legal entity TNCs are the unique subjects of public international law» (Hansen, 2009:23). This approach was earlier shared by J.I. Sedova too. In the thesis «International legal person as a subject of private international law» (Moscow, 2001) she wrote: today, at the turn of the Millennium «in a situation with need for the recognition of independent international legal status of separate legal entities under a unified legal form and created on the basis of self-executing international treaty» (Седова, 2001:32) . According to the views of other Western authors – H. Steiner & D. Vagts) in parallel with such a rapidly growing phenomena, as TNCs has been increasing for a long time and the number of international non-governmental organizations that play an active role substitution and represent the organization originally operated by the government or the interests of big business (Steiner H., Vagts, 1968:189). U.Yu. Mammedov to these «non-traditional» subjects of international law further classifies entities (parts) of federations and sub-national (autonomous) territories unitary States is more progressive and, perhaps, generalizing, in our opinion (Мамедов, 2002:6)., is sounding L.T. Djakeli the proposition that in legal relations in order to achieve certain results come first and foremost individuals, and then formed, or to its private and public purposes of all of the above organizations, i.e. state, enterprise ,institution, public association, etc. (Джакели, 2002:29). In this regard, the purpose of the science of international law (and other legal Sciences and science as such in general) «is not only to explore the only existing realities, but also to predict the further development of certain phenomena» taking into account ongoing changes, which sometimes is content, «a study of the existing (current) legal material»] and « moreover, in some areas, and in particular, on the question of international legal personality of individuals and their collective entity, has until substantial progress (Маргиев, 2005). It follows that «the task of the science of international law should lie not so much in a different interpretation of the international legal personality distinct from notions of general theory of law» this is how to strengthen the specific manifestation of that personality in relation to international relations, – mark individual experts (Лихачев). We believe that the above, therefore rightly can be attributed to natural persons (individuals), the extent, role and importance, as well as opportunities for engagement which in combination with the above entities in the system of international legal relations (because of the increasing in the framework of various areas of cooperation, convergence, erase barriers and differences, elimination forms discrimination), gradually increase.

Methods

As this work in essence is especially legal that for the characteristic of the main natural the phenomena and to their intrinsic understanding in work general scientific methods of a research are used. During the research the author used both general-theoretical, and concrete and scientific methods of knowledge. Researches lean on a formal and dogmatic (special and legal) method, a method of a concrete and legal research, a method of the logical analysis both other methods and receptions.

Results and Discussion

Meanwhile, as many authors write, «the question of international legal personality of individuals is one of the most contentious in legal science» or one of the most controversial (and really actively being discussed) in the science of international law (Самович, 2006:115). Thus according to Yu. V. Grigorovich «range looks really wide: from a complete denial of the international legal personality of the individual to the recognition of the last the only subject of international law» (Григорович, 2008:172-187). In the opinion of the famous Russian scientist S.V. Chernichenko, the discussion on the international legal personality of the individual is not completed, moreover, in the post-Soviet space it is, strictly speaking, only begins in earnest» (Черниченко, 1974:149). With him in solidarity and Chilean lawyer C. M. Assenza (Conrado M. Assenza), which conducted the analysis of the current

state of the practice and doctrine of international legal personality of individuals agree with the previous writer that « debates about the status of the individual in international law is as old as international law itself,» «however this never gets old» (Assenza, 2010:220). The evidence in relation to the last points of view are, for example, the following positions and facts. If L. Oppenheim in his famous treatise on international law published in London in 1905 wrote that in the XIX century, and still in the beginning of the XX, international legal doctrine could not see in the human person more than simply the object of international law» (Oppenheim, 1905:14)., wherefore to conclude Manner (American researcher) only and exclusively States recognized its subjects (Manner, 1952:46), which was based, incidentally, in line with the introduced in the XIX century the positivist dichotomy of «subject-object» or division into subjects and objects proved later in his «surface», «neglect», «inflexibility» and «inadequate»(Chen) in the definition of international law as «a set of rigid and autonomous rules, which would automatically solve problems without human intervention», at the beginning of the first periods of the XXI an individual is both scientific and officially started to be regarded by many scientists and international institutions as a frequenter (habitué), that is, as frequent and constant participant of international legal relations. Theoretical development of its legal and actual possibilities and also the recognition of potential resources as a subject of international law in the above context dedicated individual, specialized works of scholars such as Ian Brownlie, A. Cassese, McCorquodale, M. Shaw, Kay Hailbronner and many others. The International Court of Justice writes, «Schroeder Mueller has acknowledged that the Security Council universal organization if necessary can put international obligations and non-state actors, including individuals. In its Advisory Opinion on the unilateral Declaration of independence of Kosovo of 22 July 2010, the main judicial body of the UN also held that taking into account the relevant circumstances, the Security Council authorized to impose enforceable requirements (obligations) not only to member States and intergovernmental organizations but also to individuals . Thus, to K. Parlett, in his doctoral thesis, devoted to the status of the individual in the international legal system (The individual in the International Legal Cambrige, 2010), in the last hundred years, we witness a significant trend in international law where the place of the individual shifting from the established peripheral status earlier though still not in the center, but continuously into the inner circle of its regulation (Parlett, 2010:462).

All this shows, firstly, on the evolution of the Institute of international legal personality, in particular, and about the transformation of the international legal order as a whole, which, therefore, cannot fail to have implications for the relevant categories and concepts in the science of international law (Parlett, 2010:462). Secondly, «the established status quo and the systematic nature of international relations and their governing rules of international law presupposes the diversity and the consistency of the subjects participating in international relations» (Traisbach, 2006:34) that could mean: if an individual over many years «is usually associated with the government and was not considered as an autonomous subject of international law», now in this issue international law is moving from coordination to cooperation» (Friedmann, 1964:70). Thirdly, as some experts conclude, «trends in the allocation of the individual international legal personality predetermination predefined coordinate the development of liberal-democratic civilization as a community ideologically unidirectional States» (Нурумов, 2000:4), therefore, «to deny and not see these global changes at least pointless, but by and large it is dangerous» (Нурумов, 2000:4) and in this sense, the individual with the qualities of the individual under international law, «is absolutely perfect man, endowed with conscience and acting in accordance with their needs and perceptions» (Maftel, Coman, 2010: 102-112).

But what is actually legal (normative) content of the international legal personality of individuals? What are the boundaries of this element of the system of international law established to date, current international legal practice in comparison with other subjects? In addition, what are the main trends of its development in the future? All these issues need fleshing out in our research.

First of all, the work should focus on the variety of terms used by the modern science of international law and. on this basis, to disclose the essence and meaning of each of them and determine which ones are «appropriate» when characterizing the legal status of the subject (person). In reality, these terms are numerous. The most commonly known and used ones are: respectively the «person» («individual»), «personality», «persona», «man», «individual», «individual person», «physical entity» and «citizen». Based on these terms, perhaps it is conditionally possible to speak of an established species name of the analyzed entity, but not its generally accepted classification. Besides international law in all sources, regulating certain aspects of the legal nature of the legal personality specifically sets forth the gen-

eral and the particular, between these concepts. However, in the context of the regulated object or the subject of each of the above terms represents a logically designed their own understanding and information about the relevant phenomenon. However in a separate, so-called indirect sources and, in particular, in scientific research, all of these terms are often «mixed», and therefore, are used either as complementary (mutual understanding), or as interdependent concepts. For persuasiveness it is possible to note that the same word «entity» means in one case, «person, persona», in other case – «individual», «character», «natural person» (legally) and in the third – a legal entity (according to the definition of the French lawyer L. J. Morande – it is a Union collective non-personal interests» (Morandere, in contrast, however, I. B. Novitsky believed that «the Roman jurists had developed the notion of legal entity as a special subject..» they compared it « with a person with a physical person, and said that the organization was persona vice (instead of people)» (Новицкий), was with him in solidarity and Koretsky, who all believed that « legal abstraction of the legal person – the same person as a natural person, foreign legal persons are aliens , and foreign individuals» (Корецкий, 1989:416). «Person» in turn is the person or the person is a carrier of certain properties; «persona» in general, the same as person (in particular person or have a special status representative); «man» – a particular person with their personal characteristics and has the ability; «natural person» in the narrow sense can be interpreted as a variation of the concept of «man»; «individual» «individual person» means the person as an individual; «citizen» can be understood both as a person (adult), and in status of who has the set of rights and obligations due to the combination of constantly «supported connection with any government (hence accordingly ensues the concept of «citizenship» the legal status of the individual in relation to a particular state, expressed as a stable combination of continuing mutual rights and obligations, bearing a public character» (Бурьянова, 2006:29). Thus, if to summarize the foregoing, it can first be noted that these terms are subject to certain distinctive features are «the international law concerning related and equivalent, and secondly they, from the point of view of national positive law expressed characteristics of an individual and collective subject with different names» (Бурьянова, 2006:29) (in this case, as stressed by Mihai G., Mihai E., «individual» (man) defines «juridical person in civil law, the employee in labor law, a citizen in constitutional law, civil servants in administrative law and offender in the criminal law and so on, in principle, and S. Moroz, agrees with him who writes that «the subjects of legal relations are legal relations of the parties, having mutual rights and obligations» (Мороз, 2005:7) and traditionally they are divided into individual and collective; thirdly, it is impossible not to notice that in both legal systems does not exist as such uniform, or as noted by E. I. Buryanova, neutral integrative concepts , which would unite in its view, still different aspects , expressed in all these terms. It's hard not to agree with the last statement made by the last author. Actually, speaking strictly from the point of view of modern international law, the situations (or circumstances) when mainly used terms such as «person», «persona» and «individual» (rarely «natural person»). In our opinion, the scope of its regulation, each of them has installed both general and sectorial norms and principles of the function and including related in this regard, exceptions to the application will not be able to fully claim the role of generic concepts that expresses the essence of a person before the law with all specific features. For example, according to the position of the same author – E.I. Buryanova the term «person» is an extremely broad abstraction, the most abstract from the personal characteristics of a particular person, which is the same category of «legal capacity»(Бурьянова, 2006:29). Personality for its part reflects the «socially necessary qualities of individual maturity, responsibility, independence» then applies, in particular, to foreigners who, by definition, E. S. Smirnova as individuals (Смирнова, 2009:25) can implement and protect recognized and guaranteed by the legislator norm and the international legal order – the rights, freedoms, responsibilities and interests), but does not want to serve as a base for the integrated characteristics of the person as a subject of legal relations. The phrase «natural person» is also «universal» 1, as it is, with the exception of private international law «is used only in some industries,» 2, for example, in the context of international criminal law, international procedural law, and therefore cannot be regarded as «generalized theoretical categories» 3. Incompleteness and additionally a failure of this term was emphasized in the former Soviet legal literature. So, S. Bratus and A. Ioffe wrote that this concept creates «the impression that the individual becomes a subject of law not because of his social qualities, not because a certain class or member of the society, and because of its natural properties as a psycho-physiological specimens» (Иоффе, 2004:116). A somewhat different situation exists with the use of the term «individual». According to the views of individual researchers and Buryanova

E. and Yu. V. Grigorovich individual «is a single representative of the human race, which is the subject of law and as such who can act in different guises» as a person and as a personality and as an individual and as a citizen, as well as in other «legal roles» (special legal status), so far only the concept, is the most «well-established and frequently used» in international law (Бурьянова, 2006:29)). Myself also support this point of view, and affirm their objectivity and truthfulness. But at the same time, I want here to emphasize that, despite the deficiencies noted above, the term «natural person» also did not reject or not competing with the concept of «individual» can simultaneously be widely used in the system, the science and practice of international law as «a unifying category. Also on there is their objective conditions and cogent reasons, as well as the counterarguments from other scientists. First, referring to L. J. Morandi it should be noted that individuals as individuals – the same «human beings, as they, each separately, are subjects of rights» (Morandi, 1958:52). Secondly, they can simultaneously speak in other «roles»: as a person, individual citizen, and furthermore or moreover, as a foreigner and the stateless person (apatride) (Morandi, 1958:52). Thirdly, we should not deny the fact (and this is conceded by one of the above-mentioned authors (E. I. Buryanova) what, no «people who would not be individuals»(hence, it is obvious that the concept refers exclusively to all persons (including «persona»), with legal personality. Fourthly, undeniable is the fact that individuals, and individuals acting on its behalf. Based on the totality of this «evidence» leads to two important conclusions. The first conclusion : you can reasonably argue that the term «natural person under international legal interpretation unfairly given the limited scope and nature. The second conclusion: along with the notion of «individual» this category is quite legitimate to use for the description of the legal provisions of one or another actor in the status of the individual (citizen). Accordingly, in the present study, unlike many other similar works , in which priority and quite traditional is the use of the word ‘individual’, we give preference to this term as the most key concept. However, not begging (or underestimating) the role and the meaning of the term ‘individual’ I want to note that it is used in the context of the work as identical to «natural person» concept. Further it should be noted that the question of international legal personality of individuals from the point of view of methodology, is discussed in conjunction with the definition of international law and establish a circle of relationships that governed them. In turn, the positive result of the legal regulation of international relations «largely depends on the correct definition of the circle of subjects of these relations,» (Пантелеева, 1983:178-187) . In this regard, if you define international law as «a subsystem of the international system... in which it operates and the development of» (Тункин, 1994:7), as a system of «contractual and customary legal norms that expresses a coherent will of its subjects and aimed at regulation of inter-state relations for development cooperation and strengthening peace and security» (Усенко, Шинкарецкая, 2003:17) or as a system «of legal rules which primarily govern the relations between States» (Brien, 2001:13), we can definitely talk about the exclusion of the international legal personality of individuals. If we start from the fact that when «current international law consists of rules and norms regulating the behavior of States and other subjects of this law, international legal personality which is recognized (including international organizations and individuals) in their relations with each other» (Wallace, 2005:1-2), therefore, subject to regulation by international law are recognized « all the relationships that go beyond one state and the regulation of which is possible only joint legal means of participants of international relations, (Маргиев, 2005), or international relations are understood in a broad sense as the overall connection of the members of the international community, as «a manifestation of public life and the conditionality of the relations defined by the laws of development, coexistence, the requirements of the international community and dormitories, then there is already not denying the fact that «the most striking feature of contemporary transnational environment is the diversity of subjects (actors) of international law» (Кравченко, 1976:176).

Conclusions

The real actual position, when it should be borne in mind that international law governed not only by interstate relations, and international relations in general and « otherwise this process would be haphazard, chaotic» therefore, restriction of the subject of regulation of interstate international law, servlet name relationships (even in a broad sense) is contrary to the existing practice note currently, the majority of specialists. Therefore, we also support these and other authors, consider that today more than ever, there are problems with human relations, outside of a few States (Jessup, 1956:2), contemporary international law due to a number of objective

reasons can no longer be viewed solely interstate right and in «these conditions, you must abandon the dogmatic postulate of the special role of the state in international relations»(Нурумов, 2000:193), which is just dangerous and «simply does not allow scientific thought to be responsive to the realities of a rapidly changing global reality» (Нешатаева, 1998:81-86).

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