CHAPTER III

MEANING, TYPOLOGY AND LEGAL PERSONALITY
OF NON-STATE ENTITIES

This chapter consists of three parts. The first part deals with the meaning of non-state entities (NSEs), the second part points out the typology of NSEs, and the third examines the legal personality of those entities.

I. MEANING OF NSEs

In the broadest possible sense, the expression "non-state entities" means all those entities which are not a State. Hence, we find that "entity" and "State" are two key words in the meaning of NSEs. As for the word "entity", it means "a complete, separate thing that is not divided and that is not part of any thing else." But the meaning of the word "State" differs from context to context. We shall confine our attention to the context of international law, where both the words have a restricted meaning. Then, the word "entity" refers to only that entity which is relevant under international law, meaning thereby only an actor in the international arena and recognised under international law. And "State" is a legal entity represented by a government empowered to make decisions and enforce rules for people residing on particular portions of territory. On the other hand, the term "nation" refers to a collection of people who identify

psychologically with one another on some basis, such as perceptions of ethnic or cultural uniformity." And the term “nation-state” means a polity controlled by member of some nationality recognising no authority higher than itself, whereas “non-state nations” refer to ethnic groups, such as Indian tribes in the United States or Palestinians residing in the Middle-east, composed of people without sovereign powers over the territory they occupy.

Therefore, some nations are States and many States are made up of many nations. Today, countries are commonly referred to as nation-states. Nation-states imply a growing coincidence over time between States as legal entities and the psychological identification of people with particular pieces of territory. As Kegley and Wittkopf, point out, “although this convergence is of relatively recent origin, States as legal entities have been principal actors in world politics for over three centuries.”

Under international law, the term “State” has been used at least in two senses: general and strict. In general sense, State includes both the sovereign and non-sovereign States. But, in the strict sense, it means only sovereign States. The expression “non-state entities” may also be used in two senses. In general or broad sense, it includes, non-sovereign States and individuals. But, in strict or narrow sense, it does not include both the things – non-sovereign States and individuals.

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4 Ibid., p. 65.
5 Ibid.
6 Ibid., pp.65-66.
7 Ibid., p. 66.
8 Ibid.
10 Ibid.
II. TYPOLOGY

Under international law, NSEs include the following types of entities:

1. Entities *sui generis*. 11
2. States less than sovereign. 12
3. States in *status nascendi*. 13
4. Subdivisions of States. 14
5. Non-self-governing Peoples. 15
6. Legal Constructions. 16
7. Insurgents and Belligerents. 17
8. Interstate Entities. 18

Under this type, three categories of NSEs may be included:

(A) Governmental Interstate Entities: Under this category, following subcategories fall:

(1) Organizations

These may be divided under two groups:

(a) International governmental organizations (in short, IGOs), having only government membership. These organizations may be:

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13 For details, see Brownlie, n. 11, pp. 79-80.
15 For details, *ibid.*, p.64.
16 For details, *ibid.*, p.81.m
17 For details, *ibid.*, pp. 64-65 and 88-93.
(i) Limited in membership with or without formal NGO links (for example, WTO, having general or specific purpose(s); and

(ii) Unlimited or extensive in membership and with or without formal NGO links (e.g., the United Nations), having general or specific purpose(s)

(b) National governmental organizations having international involvement. They may be:

(i) Corporation of a State having international involvement in their functions; and

(ii) Other forms of national governmental organizations of intentional involvement, but not incorporated.

(2) *Internationalized territories*, e.g., a special kind of an area within a sovereign State having certain rights of autonomy under a treaty without leading to any separate sovereignty. This was the case with the Memel Territory, which enjoyed a special status during the period 1924-39, but remained a part of Lithuania.

(3) *Condominia*, e.g., great Britain and France exercised a condominium in the New Hebrides from 1887 until its independence in 1980.

(4) *Non-organized governmental interstate entities*

These entities may be divided into two groups:

(a) Associations, e.g., OPEC, ITC;

(b) Institutions, e.g., GATT.

(5) *Any other form of governmental interstate entities* recognized under international law.

(B) Quasi-non-governmental Interstate entities
They may be divided into three sub-categories:

(1) *Governments dominant status*, e.g., ILO.

(2) *Governments and NGOs (equally) dominant status*, e.g., International Committee of the Red Cross (ICRC).

(3) *NGOs dominant status*, e.g., International Council for Bird Preservation (ICBP), a hybrid organization like ILO or International Red Cross, of different government and private bodies involving independently in authoritative decision-making for bird preservation.

(4) Any other form of quasi-non-governmental interstate entities recognized under international law.

(C) Non-governmental Interstate Entities

This type of entities may belong to six subcategories:

(1) *International companies or multinational corporations*.

(2) *Transnational non-governmental organizations* (in short, TRANGOs).

(3) *Transnational organized labours*, e.g., International Confederation of Free Trade Union (ICFTU).

(4) *Transnational political groups*, e.g., guerrillas and liberation fronts.

(5) *Other forms of non-governmental interstate entities recognized under international law*.

(6) *Non-governmental organizations* (NGOs), but to distinguish with national NGOs, we can say international non-governmental organizations (INGOs).

They may be divided into two groups:
(a) Limited in membership; and

(b) Unlimited in membership.

They may be:

(i) INGOs where the government funding is welcomed (e.g., International Planned Parenthood Federation) having general or specific purpose(s); and

(ii) INGOs where the government funding is not routinely accepted (e.g., Amnesty International) having general or specific purpose(s)

9. Intrastate Entities\(^\text{19}\)

Intrastate entities may have two categories:

(A) Governmental Intrastate Entities

These may have two sub-categories:

(1) Those consisting of personnel from the agencies of a single central government, For example it has been alleged that the Central Intelligence Agency (CIA) has, on some occasions, formulated and aimed at policy independently and without the complete knowledge or approval of elected officials;

(2) Those composed of personnel from regional, parochial or municipal governments within a State or of colonial officials representing the State, e.g., confederacy.

(B) Non-Governmental Intrastate Entities

Non-governmental intrastate entities include non-governmental group or individuals located primarily within a single State, e.g., the

\(^{19}\) For details, ibid., Mansbach, p.42; Falk, pp.98-108.
Jewish Defense League with the principal task of physical protection.

Agencies of States or Organizations, e.g., the International Joint Commission set up under an agreement concerning boundary waters between Canada and the United States in 1909 and the European Nuclear Energy Agency, as an organ of OECD.

11. Entities neither wholly Interstate nor Intrastate

This type has two categories:

(A) Governmental

This category has two sub-categories:

(1) Supra regional entities formed under national law; and

(2) Regional entities formed under national law.

(B) Non-governmental, which can be categorized further in the same way as (A) is categorized.

12. Individuals, in particular context, can be treated as legal persons.

13. Any other type of NSEs recognized under international law

14. Conglomerate system of above NSEs, e.g., the UN – International Red Cross (Palestine)

III. LEGAL PERSONALITY OF NSES

Legal personality means, in short, capacity to be bearer of rights and duties. Under international law, such personality is called international legal personality or simply international personality. An entity which

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20 For details, see Brownlie, n. 1, pp. 63-64.
21 For details, see Taylor, n. 2, p.22; Mansbach, n.18, p.42; Falk, n.18, pp.98-108.
22 For details, see Lauterpacht, n. 18, pp. 510-33; Brownlie, n. 11, p.67.
23 For details, see Mansbach, n.18, pp. 41-45.
possesses international personality is called international legal person or simply international person or subject of international law.\textsuperscript{24} International law applies only between international persons and sovereign States endow entities with international personality.\textsuperscript{25} International personality may be unlimited, as in the case of sovereign States, or limited, as in the case of NSEs. Starke rightly points out that the term “subject of international law” is capable of meaning:

(a) an incumbent of rights and duties under international law;
(b) the holder of a procedural privilege of prosecuting a claim before an international tribunal;
(c) the possessor of interests for which provision is made by international law; and
(d) the capacity to conclude treaties with states and international organizations.

These four meanings are not always kept-distinct in the literature on the question whether individuals and non-state entities may be subjects of international law.\textsuperscript{27}

Jurists differ on the question as to what entities are deemed to be subjects of international law.\textsuperscript{28} The theory of recognizing an entity as a subject of international law or an international person on the basis of the capacity of rights and duties under international law appears to be sound.\textsuperscript{29} A few jurists who had earlier taken the stand that States only and exclusively are the subjects of international law have changed their stand

\textsuperscript{25} Ibid., pp. 3,9.
\textsuperscript{27} Starke, n. 9, p. 58, n.2 there.
\textsuperscript{28} See Westlake, \textit{Collected Papers} (1914) vol. 1, pp. 7-8; Oppenheim, n. 2, pp. 119-126.
\textsuperscript{29} Ibid.
and now recognize other entities also as subjects of international law. Rights and duties may be conferred on NSEs because of customary rules of international law or by virtue of conclusion of international conventions.

After dealing with the meaning of international legal personality, we can come to the question of the international legal personality of individuals, apply the test propounded in the case of "Reparation for Injuries Suffered in the Service of the United Nations," to individuals which are "ultimate unit" of every NSE, and examine briefly the role of NSEs and more particularly that of NGOs in the international sphere. If we analyse the interdependence of States which requires regulation under international law, we find that it is the interdependence of individuals who compose them. And this element of individual is common to both the States and non-state entities. Hence, international law which disregards this fact is bound to be artificial. Hersch Lauterpacht rightly points out:

As far as the Charter of the United Nations is concerned, it expresses in a more direct manner than it was expressed before, that the individual is possessed of inalienable rights independent of the law of the sovereign States. It recognized these rights and pledged the members of the United Nations to their promotion and encouragement by just and collective action.

He points out:

It is in the Charter of the United Nations that the individual human being first appears in his full stature as endowed with fundamental human rights and freedoms... The Charter of the United Nations is a legal document its language is the language of law, of international law. In affirming repeatedly the 'fundamental human rights' of the individual, it must of necessity be deemed to refer to legal rights - to legal rights recognized by international law and independent of the law of the State. These rights are only imperfectly enforceable, and, in so far as the availability of a remedy is the hall-mark of a legal right they are imperfect legal rights. Yet in

30 Ibid.
31 Ibid.
33 See Lauterpacht, n. 18, Ibid., pp. 166, 528
the sphere of international law the correlation of right and remedy is not so close as within the State.\textsuperscript{34}

According to Lauterpacht, "similar considerations apply to the question of subject of duties imposed by international law."\textsuperscript{35} About international practice regarding the persons and bodies other than States as subjects of international law, Lauterpacht says:

International practice shows that persons and bodies other than States are often made subjects of international legal rights and duties; that such developments are not inconsistent with the structure of international law, and that in each particular case the question whether a person or a body is a subject or not must be acknowledged and answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from a preconceived notion as to who can be subjects of international law.\textsuperscript{36}

He further states:

Above all, with regard to both international rights and international duties, the decisive factor has been the change in the character and the functions of modern international law. The international law of the past was to a large extent of a formal character.\textsuperscript{37}

The international law of the past has derived much support from the rule that only States have the right to go before an international court or tribunal.\textsuperscript{38} This rule has found the expression under Article 34 of the Statute of the ICJ. However, the importance of this provision ought not to be exaggerated. It is a provision defining the competence of the Court. It is not intended to be declaratory of any general principle of international law. No such principle prevents States, if they do wish so, from securing to individuals and other non-state entities access to international courts and

\textsuperscript{34} Ibid., p. 515.
\textsuperscript{35} Ibid., p. 527.
\textsuperscript{36} Ibid., p. 494.
\textsuperscript{37} Ibid., p. 527.
\textsuperscript{38} Ibid., p. 501.
tribunals. If an entity has no direct authority to take independent steps in its own name to enforce its rights, this does not imply that it is not a subject of the law or that the rights in question are vested in the agency which possessed the right to enforce them. Lauterpacht rightly points out:

The question whether individuals in any given case are subjects of international law and whether that quality extends to the capacity of enforcement must be answered pragmatically, by reference to the given situation and to the relevant international instrument. That instrument may make them subjects of the law without conferring upon them procedural capacity, it may do both the things.

He further says:

The purpose of the State is to safeguard the interests of the individual human being and to render possible the fulfilment, through freedom of his wider duty to man and society. Some of these interests can be effectively safeguarded by the State in the international sphere. But it is inadmissible that the State should claim, in the conditions of the modern world, that it is the best instrument for protecting all these interests and that it is entitled to exclude from this legal sphere individuals and non-governmental bodies which may be created for that purpose.

In the reparation case, the ICJ propounded the functional test for determining as to whether an organization is a legal person or not under international law. The Court observed that if an international organization enjoys and exercises the rights and functions which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane, the organization would be legal person under international law. Hence, we find two essentials in this test:

(a) Rights and duties under international law; and

39 Ibid., p. 501.
40 Ibid., p. 510.
41 Ibid., p. 511.
42 Ibid., p. 532.
43 See ICJ Reports, n. 32, p. 174
(b) Capacity of the international organization to maintain such rights by making international claim.

This test may be applicable to some extent even to individuals which are “ultimate unit”\textsuperscript{44} of NSEs because of the analysis made in the previous paragraphs and because the material point is the capacity to be bearer of rights and duties under international law.\textsuperscript{45} And “there is no rule of international law which precludes individuals and bodies other than States from acquiring directly rights under international law and to that extent, becoming subject of international law.”\textsuperscript{46}

In this context, we can make reference to the role played by NSEs in different fields of human concern, from religion to transport and from science to art. Particularly, the role of NGOs may be mentioned. Obviously, “NGOs do not operate in a vacuum hermetically sealed off from each other or from governmental and intergovernmental organisations.”\textsuperscript{47}

The provision for consultative status of NGOs with the United Nations agencies indicates the interaction between NGOs and IGOs. The most sought-after consultative status is granted by the Economic and Social Council (ECOSOC). Article 71 of the UN Charter authorizes the ECOSOC to “make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.” It also lays down that “such arrangements may be made with international organizations and, where appropriate, with national

\textsuperscript{44} Lauterpacht, n. 18, p. 526.
\textsuperscript{45} ICJ Reports, n. 43.
\textsuperscript{46} Lauterpacht, n. 18, p. 526.
organizations after consultation with the members of the United Nations concerned." These arrangements between the United Nations and hundreds of NGOs demonstrate that the separation of private organizations from the public organizations is not effectively possible. The pattern is one of cooperation, division of labour and common ends rather than a sharp cleavage between public and private sectors.48 But Lauterpacht points out:

The committee which framed the rules governing the attribution of consultative status was careful to emphasize that the non-governmental organizations thus admitted should not be given the same rights as States which are not members of the United Nations or as governmental specialized agencies, but the innovation is significant.49

Hence, from the above discussion it is evident that the sovereign State is no longer the only person involved in organized international intercourse. That is, "administrative convenience and economic efficiency may determine others also as an international person."50 NSEs have international legal personality in restricted sense. This conclusion is consistent with the UN Charter whose Preamble opens with the words "WE THE PEOPLES OF THE UNITED NATIONS". The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (NGOs) also favours this conclusion.51

48 Ibid.
49 See Lauterpacht, n. 18, p. 528.
50 Ibid., p. 53.