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The Concept of International Personality is neither Static nor Uniform

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Abstract

The concept of "international legal personality" is of prime importance in the discourse of the international law. Initially on the international legal domain states were considered the prime subjects of international law having the status of "international legal personality" with its defined rights and duties and its conduct was regulated by international law. However, many non-states entities have emerged on the international legal framework as a new subject of international law and has acquired the status of "international legal personality" as well. This new development has given rise to the debate that international legal personality is neither static nor uniform but keep on evolving. In the present article this concept is discussed in the light of various judgments which have highlighted the change in the concept of "international legal personality" in several well-known cases of international law.

Keywords: International Legal Personality, States, Non-States entities, United Nations Organization, International Court of Justice

Introduction

Law and Society are interwoven. Basic function of law is to govern society and behavior of all its components. Neither society is static and nor can law be if it has to be applied effectively. This is true for not only law as a whole but for all the concepts of law as well. Law is based on rights and duties of its subjects or "legal persons." The concept of "legal personality" is therefore of prime importance in the fabric of law because every law need "subjects" for its application. All legal systems have their own criteria or tests to determine legal personality of their subjects.

In international law concept of society is replaced by the concept of "community" known as "international community." International law is based on the rights and duties of the participants of this "international community" and the central point of this essay will be these participants and the status of their legal personality under international law.

Initially "states" were the exclusive subjects of international law but with various dynamic changes all around the globe like increase in number of new states because of independence of colonial states, economical changes, political changes, environmental concerns, increasing use of information technology, increasing concerns about protection of intellectual property rights, use of nuclear technology, increasing concerns in the field of human rights, food, energy, natural resources and most important, maintenance of international peace and security especially after two world wars etc. have given rise to expansion of the scope of "international legal personality". The concept of international personality includes not only State entities as subjects of international law but also non-state entities such as International Organizations and Individuals.

What does it mean by international personality, what are the qualifications, attributes or tests for determination of such personality, who are the international personalities other than State entities, how the concept of "international legal personality" has been changed in last century and what are the main reasons and challenges to it etc. will all be discussed in this essay.

As mentioned earlier, neither society is static nor can law be, is true in case of the concept of "international personality" as well. The concept of "international personality" is neither static nor uniform because it has tendency to be changed with changing needs of international community. Various arguments in favor of this proposition will be discussed accordingly in this essay.

Meaning of International Legal Personality:
In its broad sense, legal personality is the personality conferred by law, necessary for being a subject of law and to hold the legal rights and duties. "Legal personality is an acknowledgement that an entity is capable of exercising certain rights and being subject to certain duties on its account under a particular system of law." [1] [Menon, 1992] In municipal legal systems, the individual human beings as well as certain entities such as "limited companies or public corporations" are legal persons.

International legal personality means the rights and the duties held by a legal person under international law. In international law States are primary subjects and to regulate the relations between States, is one of the main objectives of international law. However, it becomes difficult to some extent, to decide international legal personality of entities other than States. But it is equally important to provide at least a limited international personality to such entities, for smooth operation of functions of international law.

State and Non-State both kinds of entities are different in their competence, scope of exercise of their rights and duties etc. and they have to be treated accordingly. It can, therefore, be said that the concept of "international personality" is neither static nor uniform. International Court of Justice has given a relevant advisory opinion in "*Reparations Case*" for injuries suffered in the service of the United Nations. Though the opinion was not sought for interpretation of "concept of international personality." the ICJ has given some very important conclusions related to it. The ICJ says,

> "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international life ...and the progressive increase in the collective activities of States has already given rise to instances upon the international plane by certain entities which are not States." [2] [U.N. I.C.J. Rep, 1949]

It can be said that the concept of "international personality" under international law keeps changing according to the needs of international community having States as its primary subjects. The concept of international personality of States has been explained in following paragraphs.

State Entities:
"State" is the most significant component of international law and perhaps the main reason of development of international law. Only State has a right to be a party in any contentious matter before the ICJ. If an entity wants to be a member of the UN, it has to be a State. The definition of State has been changed to a very limited extent since the beginning, but the concept of statehood is dynamic and not the formal one unlike its definition. "Montevideo Convention on Rights and Duties of States 1934" defines State in most relevant manner. It says,

"The State as a person of international law should possess the following qualifications:

(a) a permanent population, (b) a defined territory, (c) government; and (d) capacity to enter into relations with other States." [3] [Montevideo Convention, 1934]

The entire above mentioned are known as attributes of 'Statehood'. These are parameters for international personality of a State under international law.

(a) Permanent Population:

It is a basic requirement of statehood to have a permanent population. States are aggregates of individuals and thus it is necessary to have permanent population of individuals within the state, however, no minimum limit of population has been set. For example, Tuvalu and Nauru are States having very small populations.

(b) Defined Territory:

Traditional international law acknowledges the "doctrine of Sovereignty" in many instances. For Statehood, defined territory and territorial sovereignty is a prerequisite. States are territorial entities and "territorial sovereignty involves the exclusive right to display the activities of a State." [4] [*Island of Palmas Case,* 1928] As Crawford says that a State requires the exercise of full governmental powers in respect of some area of territory [5] [Crawford 2006]. Here also, no minimum limit of geographical area has been set. It is important to note that undefined or disputed boundaries need not defeat a claim of any entity for statehood. The ICJ has confirmed it in various cases [6]. Montevideo Convention also provides that "the jurisdiction of States within the limits of national territory applies to all the inhabitants of those of nationals." [3]

(c) Government:

Effective and stable government is the most important requirement of all three factual requirements for the claim of statehood. Effective, stable and independent government is necessary for legislative and administrative competence. Once statehood is established it does not cease to exist, in absence of an effective government for some time, due to reasons like civil war, intervention by other powers, chaos or uncertainty etc. Examples are Civil war in Somalia, absence of effective government in Afghanistan, Congo and Sierra Leon etc. Even military occupation or control by non-governmental forces, does not negate the statehood once established [7].

(d) Capacity to Enter into International Relationship:

First three attributes of statehood are factual but this one is purely based on the response, intention, and recognition of other States. The entity may have capacity to enter into international relationship with other States on international plane, but it depends on the response of other States whether they are ready to enter into any legal relationship with it or decline to do so.

It should be noted that membership of any regional organization is not contrary to statehood. The Entity may give some of its powers to regional organization for common interest. For example, member countries of European Union and powers given by San Marino to Italy and Liechtenstein to Switzerland related with foreign relationships. Many African Countries, India etc. are examples of it.

Political Self-determination is the main reason of increasing number of States in International community, especially after World War II, by way of decolonization of colonies and non-independent territories. The right of Self-determination has been accepted at international level [8] and mandate system later replaced by Trusteeship by the UN are systems to protect this right at international level. As Prof. Wallace mentions "self-determination may have an internal as well as an external aspect" [7] and it is held in a Canadian case (Re-Reference by the Governor in Council Concerning Certain Questions relating to the Secession of Quebec from Canada (before the Canadian Supreme Court) that "no right of external self-determination would be recognized when full participation in civil and political life is available" [9]. Self-determination may not be in violation of the principle of territorial integrity.

International community may deny recognition to statehood if an entity has attained attribute of Statehood by illegal use of force.[10] However, it is a highly sensitive issue that whether the use of force was legitimate or not. It depends up to decision of international community therefore recognition by other States is, no doubt, anessential requirement for statehood.

Recognition by other States:

"Recognition is the formal acknowledgement by the State that another exists." [11] Such recognition is accorded in form of an executive or it may be implied recognition. Basically, recognition depends on the willingness of the States recognizing. Recognition can neither be sought as a right nor can it be a duty of other States to accord recognition except in case any State has been obliged to accord such recognition. Recognition is either expressed or implied. Expressed recognition is usually in form of a recognition executive whereas implied recognition can be determined by State practice.

There are two theories on recognition namely, the "constitutive theory" and the "declaratory theory. Constitutive theory is based on proposition of positivist school that any entity can have international legal personality only if it has been recognized by other States. This theory cannot resolve the problems relating to effects of non- recognition and status of entities which are not recognized or recognized by few States and not by all. Declaratory theory is based on practice of recognizing States. It puts more emphasis on State practice and less on act of recognition. As Crawford says, "According to declaratory theory, recognition of a new State as a political act, which is, in principle, independent of the exercise of the new State as a subject of international law." [5] Drawback of the declaratory theory is its simplicity which cannot answer difficulties like problems arising because of retroactive effect of recognition.

Recognition to a State and recognition to a government, both are different. Usually, recognition is accorded on the basis of an effective, stable and independent government but it may happen that an entity may be recognized as a State but its government may not and such recognition does not nullify the statehood of that entity. Recognition to government has two aspects namely, *de facto* and *de jure* recognition. State practice of recognizing State is the indicator that

whether the recognition is *de facto* or *de* jure. "An entity recognized as *de facto* was one which manifested most of the attributes of sovereignty, whereas a *de jure* entity displayed all the characteristics of sovereignty." [7] In initial period Britain adopted practice of *de facto* recognition but nowadays the UK and the USA both accord *de jure* recognition. In legal terms *de jure* recognition differs from *de facto* recognition, as it "implies full diplomatic relations and immunities and privileges for representatives and only *de jure* government can recover a public debt or State asset." [7] Recognition has certain effects on domestic legal system of recognizing State. For example, in the UK, recognized State, 'enjoys *locus standi* and immunity from suits in the Courts of the UK and its legislative and administrative acts will be given effects to within the UK and recognition has retroactive effects.'[7] However, these effects may vary according to different domestic legal systems of different recognizing States.

If an entity do not grant recognition at international level, it cannot have international personality but it still have to be obliged by certain international responsibilities towards international community.

Recognition is, no doubt, very important with reference to international legal personality as "it is an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized." [5]

Non-state Entities:

Non-state Entities include all those entities other than nation-states which have been conferred certain degree of legal personality under international law. These entities are of prime importance as they have evolved the whole concept of international personality. Non-state entities include various entities like International and Regional Organizations, Individuals etc.

International Organizations:

International Organizations are, no doubt, the most important entity amongst all non-state entities. During the 2nd half of 20th century, international organizations has been proliferated in volume because of political problems as a result of two world wars and after that, because of developments and growing concerns on various fronts like economy, environment, human rights, intellectual property rights, trade, resources, energy etc. These organizations operate on international plane and thus play a significant role in international legal system.

As Prof. Wallace defines that "An international organization, for the purposes of international law, is an entity established by agreement and which has States as its principal members" [7] and "Organizations may have the capacity to own, acquire and transfer property and to enter into contractual agreements and international agreements with States and other international organizations." [7] So International Organizations are created by States through multilateral treaties and derive their personality status through their constituent instruments and may have rights and duties under international law. Various international organizations may have different degree of international personality. International Organizations possess most of the features of States but not all because States create them, give them power, and draw their limits for States' common interest through the legal constituent instruments.

United Nations is the most significant international organization with almost universal membership. In fact, United Nations and the League of Nations are the pioneers of international organizations. Both of them were established through their constituent instruments namely the "United Nations Charter" and the "Covenant of the League of the Nations" respectively. Today the UN is the most important international organization, but its legal international personality does not flow from it charter expressly. There are only two articles (Art. 04 & Art. 05) related with legal status of the UN [10] but they do not grant any legal personality. Legal personality of the UN flows from the authority given to it as a distinct entity apart from its member States. Agreements between the UN and every Member State as well as UN/USA Headquarters Agreement show implied legal personality.

International Court of Justice has given an advisory opinion in the '*Reparations Case*' which is very important with regard to implied international personality. It says,

> "In the opinion of the Court, the [UN] Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international

> organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members [as expressed in the U.N. Charter as a whole], by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to conclusion that the Organization is an independent person."[2]

The Court confirmed in this opinion that the Organization can initiate an international claim. The Court says further,

> "The functions of the organization, are of such a character that they could not be effectively discharged if they involve the concurrent action, on the international plane, of 58 or more foreign offices, and the Court concludes that the Members have endowed the organization with capacity to bring international claims when necessitated by the discharge of its functions.'[2]

So it is well adopted fact that international organizations derive their legal personality from their constituent instrument, however, it is a matter of debate that whether such organizations can go beyond the powers expressed or implied in their constituent instruments and act as an independent international entity [12] because all these organizations are created by States and States are free to dissolve them whenever they want. It can be said that even if the international organizations have independent personality, they still have limited personality compared to States.

Specialized Agencies:

Specialized agencies are agencies created under Articles 57 and 63 of the UN Charter. It says;

> "such agencies include the Food and Agricultural Organization (FAO), the General Agreement on Tariffs and Trade (GATT), the International Bank for Reconstruction and Development (IBRD), the International Civil Aviation Organization (ICAO), the International Development Association (IDA), the International Finance Corporation (IFC), the International Fund for Agricultural Development (IFAD), the International Labor Organization (ILO), the International Monetary Fund (IMF), the International Maritime Organization (IMO), the International Telecommunication Union (ITU), the Multilateral Investment Guarantee Agency (MIGA), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Industrial Development Organization (UNIDO), the Universal Postal Union (UPU), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO) and the World Meteorological Organization (WMO)." [10]

These agencies have limited functional competence and direct and special relationship with the General Assembly and the ECOSOC of the UN. These agencies are "brought into relationship with the United Nations and which have wide international responsibilities in economic, social, cultural, educational, health and related fields." [10] Specialized agencies differ from regional organizations because of this "wide international responsibility."

As in case of international organizations, specialized agencies also derive their international personality through their legal instruments, usually under intergovernmental agreements approved by the General Assembly of the UN and Member States' Governments. Under the UN Charter and their respective intergovernmental agreements, specialized agencies possess a *locus standi.* This enables them to seek advisory opinion of the "International Court of Justice" on any legal question arising within the scope of their activities.

Regional Organizations:

Regional international organizations are results of region-specific treaties between States share a common, geographic or policy, interest. These organizations may be established for various purposes. For example, security reasons, political or economic purposes or environmental concerns etc. "Such other regional organizations include the Arab League, the Association of South East Asian Nations (ASEAN), the British Commonwealth, the Commonwealth of Independent States (CIS), the Conference on Security and Cooperation in Europe (CSCE), the Council of Europe, the European Commission (EC), the South American Common Market (MERCOSUR), the North American Free Trade Association (NAFTA), the North Atlantic Treaty Organization (NATO), the organization of African Unity (OAU), the Organization of American Sates (OAS), the defunct South

East Asia Treaty Organization (SEATO) and the Warsaw Pact)."

European Union is the most relevant example of regional organization. In fact, European Union has contributed a lot in expansion and development of various areas of international law like economy, environment, human rights etc.

Regional organizations derive their legal personality through their constituent instruments same as international organizations. The only difference is that regional organizations are created for the purpose of promotion of common interests of a particular region whereas international organizations are created for promotion of common interests at global level.

Transnational Corporations:

Because of rapid developments around the globe in the areas of industrialization, technological developments and increasing economic relationships between various nations, a new entity, whose status is still not clear, has been aroused namely, transnational, or multinational corporations. It is a challenge for international law to describe the personality status of such corporations. "These corporations negotiate with governments and enjoy considerable power which may exceed that of States and the scope of their activities transcends national boundaries." [7] Such corporations derive power from States, and it is a problem for international legal system how to afford protection to individuals as well as environment against the impact of activities of such corporations.

The Holy See:

It is worth mentioning to describe the personality of the Holy See. It does not fulfill some of the basic requirements of international personality. For example, it does not have a permanent population and its function is purely religious. However, it has "Fundamental Law of the State of the Vatican 200, which provides for the various legal and administrative functions and for maintenance of international relationships." [7] It has diplomatic relations with nearly 74 States and observer status at the UN and some of its specialized agencies. It can be said that the Holy See has got limited international personality because other States want so.

Individuals:

As said earlier "states" were exclusive subjects of international law, in fact it can be said that international law was the "law governing the behavior of states" and except nation-states everything was treated as an object of international law including human beings. This is positivist approach of international law which was based on subject-object theory of law. As Higgins observes jurists who favor positivist school of international law admit that only "objects" and "subjects" exist under a legal system and all international law is divided into subjects and objects. Subjects bear rights and responsibilities while objects comprise the rest of the international law. [11] It was believed that only States had rights and duties and capacity to enter into legal relationship under international law. Individuals or group of individuals were subjects under domestic or municipal legal systems only. They had nothing to do with international law because they neither had international personality nor any rights under international law. They had rights and responsibilities and legal capacity to sue or to be sued under municipal law only. No international personality was conferred to individuals under positivist or traditional theory of international law. Individuals were able to ask for their rights only indirectly or by way of representation by their State of nationality on international plan.

Before two World Wars and establishment of the United Nations Organization and its specialized agencies, the situation remained same. States were exclusive subjects of international legal system and acquired sole concern of international legal system. But after that international law has evolved and changed in its scope and contents, popularly known as "the horizontal expansion" of international law, and has conferred, though up to limited extent, international personality to non-state actors including individuals. Increase in international trade, immigration of people from one country to another, various treaties having individuals as their subject matter, technological and cultural development and most important, rising concern for protection of human rights etc. have created a situation where individuals have been conferred international personality in certain cases in international scenario.

After two World Wars and establishment of the United Nations Organizations, the subject matter of international law has been changed to human welfare and international cooperation instead of only national welfare. The preamble of the UN reaffirms the value of individual's rights as a

human. It reaffirms "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)"; it is one of the purposes of the UN. It says to "achieve international co-operation 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." Article 55 of the UN Charter put the UN under obligation to promote universal recognition for human rights and fundamental freedoms and Article 56 put the member States to cooperate with the UN to accomplish this purpose stipulated in Art 55.[1] Human right is a concern which has evolved, to the great extent, the notion of international personality of individuals in international legal system. As Hickey says there are three generations of human rights. "The first generation of human rights is least controversial and comprises civil and political right." [13] "The second generation of human rights is comprised of economic, social and cultural right [14] and third, most controversial generation of human rights addresses collective or solidarity rights which include, among others, claims of human rights to develop, to peace and to a healthy and safe environment." [12] All these have played major role in expansion of scope of individual's international personality.

Procedural Capacity of Individuals:

It is a matter of great concern that whether an individual has procedural capacity to exercise his international personality because it has been seen that there is a lack of such capacity at international level. Article 34 of the Statute of the Permanent Court of International Justice provides that "only States may be parties in cases before the Court." It is true in case of the ICJ as well. But it should be remembered that these are the provisions and not a general principle of international law. States are free to secure individuals' access to international courts and tribunals. In *Danzig Railway Officials* case, the Permanent Court of International Justice held that, treaties could create rights for individuals and in certain circumstances these rights could be enforced in the domestic Courts.[15] The Central American Court of Justice was important in respect of procedural capacity of individuals under international law. This Court was perhaps the first step to recognize the procedural capacity of individual nationals to bring claims against Contracting States. The life of this Court was unfortunately not longer than a decade. Article 297 of the Treaty of Versailles gave rights to individuals to bring actions against governments and nationals of defeated countries.[16] The German-Polish Convention of 1922 popularly known as Upper Silesia Convention is also important to mention because individuals could bring cases not only against foreign countries but also against their own State before the Tribunal established by this Convention. The International Prize Court and The Supreme Restitution Court were also important with regard to procedural capacity of individuals. [1]

As discussed earlier, concern for human rights has given a big rise to procedural capacity of individuals at international level. "European Convention on Human Rights" provides that individuals can initiate claims against their own States, for breach of any rights under the Convention.[17] Various other Conventions and Covenants such as "International Convention on the Elimination of All Forms of Racial Discrimination 1966" [18], "Optional Protocol to the International Covenant on Civil and Political Rights 1966" [19], "The Optional Protocol to the Convention on the Elimination of Discrimination Against Women 2000", "The American Convention on Human Rights" etc. all provide individuals, in one way or other, procedural capacity on international plan.

It shows that individuals have been increasingly recognized as international legal persons. However, 'the procedural capacity to individuals on the international stage, although it has been increased, is only to the extent that States have been willing to afford such an increase.'[7] The reason behind this is simply because in many cases individuals still have very limited or no access to international legal system. As Higgins says, they are dependent upon 'nationality-of-claim' rule[11]. It is up to State whether to claim on behalf of its nationals. This situation may create a lot of problems as States may have their independent political, diplomatic, or economic interests apart from interests of their nationals and if State decides not to bring any action on behalf of its national, he or she have no other alternative except negotiation in few cases.

But still it can be said that contemporary international law confers more procedural capacity to individuals at international level than the traditional customary international law. Individuals have

been recognized to have not only rights in international arena but also have international responsibilities.

International Criminal Responsibility of individuals:

Contemporary international law acknowledges that individuals have some international criminal responsibilities for certain acts. As Prof. Wallace explains "it has been increasingly recognized that individuals may be held responsible for certain conduct because the development of international individual criminal responsibility is a notable feature of international law today." [7] Acts of piracy and slavery are held as crimes against mankind under "customary international law" and individuals who commit it, held liable to punishment by any apprehending State. During the trial of Nazi war criminals after World War II, the Charter of the International Military Tribunal at Nuremberg held individual persons responsible for war crimes, crimes against peace, and crimes against humanity.[20] The Nuremberg Tribunal pointed out that,

> "International law imposes duties and liabilities upon individuals as well as upon states because crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." [21]

Crime against humanity includes one more important aspect of crime of genocide. It is the worst crime against humanity bearing individual responsibility under international law and this fact was affirmed by not only the aforesaid Nuremberg Tribunal but also by UN General Assembly in its Resolution 95 which was reaffirmed in the Genocide Convention of 1948. [22] There are various international instruments acknowledging individual responsibility under international law for various issues. This includes, for example, the "International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973"; the "International Convention for the Protection of Submarine Telegraph Cables 1884"; the "Agreement for the Suppression of the Circulation of Obscene Publications 1990"; "the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications 1924"; the "Agreement Concerning the Suppression of Opium Smoking 1993"; the "Convention for the Suppression of the Illicit Traffic in Dangerous Drugs 1936" and the "International Convention for the Suppression of Counterfeiting Currency 1929." Modern international law now recognizes such acts which can give rise to individual responsibility at international level for example, hijacking and sabotage of aircraft [23], terrorism, offences against persons protected by international law, slave trading, trading in women and children, pollution of seas, pirate broadcasting, illicit traffic in dangerous drugs, theft of national and archaeological treasures etc. [1].

Conclusion:

It can be said that States are though not exclusive subjects of contemporary international law but are and will remain to be primary subjects of international law as they inherently acquire international personality. In fact, international law is a product of customary international relationships between various States. International law developed and has been still developing to meet the needs of this international community, of which States are main persons. States do have certain rights which non-state entities cannot acquire because State is the main source of "international legal personality." All other non-state entities derive their legal status and personality through the legal instruments created by States for their own interest.

However, as said earlier, they are not the exclusive subjects of international law and there is increasing tendency in international law to recognize non-state entities as international legal persons. International organizations, specialized agencies of the UN, regional organizations and individuals have now been recognized to have limited international personality on international plane. It is necessary because in any legal system, including international legal system, all the subjects are not same and do not possess same characteristics. So all subjects of international law need not be States only and not necessarily possess same rights and duties as States do possess under international law. Merely this difference does not mean that non-state actors do not have international personality.

It is argued that if non-state actors are given independent international personality, the present international legal system based on state accountability and the rights and the duties based on it, may get diluted as these non-state actors are proliferating. It can be argued against such caution that it is important to confer international personality to non-state actors because of changing

realities around the globe; international law has to accept certain changes in its concepts to keep pace with them as well as its own smooth application for global integrity. Structure of international legal system may need to change to respond the current situations subject to reasonable adherence to the concept of State sovereignty and accountability.

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