

# Legal Personality as a Theoretical Approach to Non-State Entities in International Law: The Example of Transnational Corporations

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*In the last decades we are witnessing the intensive strengthening of normative ties of a series of non-state entities (e.g. transnational corporations, international non-governmental organizations and international terrorist groups) with international law. Due to the traditional state-centrism of the doctrine of international legal personality in contemporary international law, there is a tendency of using in this context such terms as participants in international law, users of international law, non-state actors in international law or terms focusing on specific international legal rights and obligations of a particular entity. Notwithstanding certain valuable contributions of these theoretical approaches, the author nevertheless advocates the theoretical consideration of this matter within the traditional institution of (international) legal personality. The paper gives an overview of existing and emerging international legal rights and obligations of transnational corporations as an example of prominent non-state entities in international law. On the basis of this overview the author analyzes some of the basic theoretical issues related to international legal personality – the issue of the necessary nature and scope of legal capacity and that of the use of the term "direct" in defining a subject of international law.*

*Keywords: international legal personality, subjects of international law, non-state entities, transnational corporations*

## 1. Introduction

In the last decades we are witnessing the constant strengthening of the normative ties of various non-state entities (often also labeled as non-state actors) with international law.<sup>1</sup> As examples in this context we can mention transnational corporations, international non-governmental organizations and international terrorist groups. Due to the traditional state-centrism of the doctrine of international legal personality, in process of positioning these entities in the international legal system, there are frequent recourses in the contemporary international legal theory to terms such as 'participants' in international

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<sup>1</sup> Of the latest literature see e.g. M. Noortmann, A. Reinisch & C. Ryngaert (Eds.), *Non-State Actors in International Law*, Hart Publishing, Oxford-Portland 2015.

law<sup>2</sup>, 'users' of international law<sup>3</sup>, 'non-state actors' in international law<sup>4</sup>, as well as focusing, instead of on designation, on the research of specific rights and obligations of a particular entity in international law.<sup>5</sup> These approaches to the theoretical inclusion of non-state entities in the international legal system have indeed offered some new viewpoints on the discussions traditionally conducted within the doctrine of international legal personality. But perhaps these approaches should not necessarily be viewed as alternatives to international legal personality but as an integral part of the discourse on this fundamental concept of international law. The appearance of these new approaches could also be viewed as a consequence of the trend of factual expansion of the circle of subjects of international law or/and pretenders to that status.

We are more inclined to the retention and eventual clarification of the institution of international legal personality than to accepting some of the mentioned (alternative) approaches to the theoretical inclusion of non-state entities in the international legal system. Using descriptive terms such as participants, users or actors leads at the very least to decreasing legal precision.<sup>6</sup> Furthermore, the introduction of some of these concepts in international law, which were originally created in the theory of international relations, could entail also the transferal of some other concepts which are alien to international legal thinking.<sup>7</sup> On the other hand, by resorting to a pragmatic approach that avoids the designation problem, and focuses instead on research of specific rights and obligations of a particular entity under international law, one avoids entering into "the mysteries of subjectivity"<sup>8</sup> only in principle. Legal rights and obligations are part of the very foundations of the concept of legal personality and cannot be completely detached from it. After all, it is hard to ignore not only the traditional role of the institution of personality in international law, but also the fact that it is a general legal institution common to all legal systems.<sup>9</sup>

The purpose of this paper is to argue the use of the institution of international legal personality as a valid and legitimate theoretical approach to prominent non-state entities in international law, focusing on the example of transnational corporations. Accordingly, after a short introductory review of the concept of international legal personality, an overview of the existing and some emerging international legal rights and obligations of transnational corporations will be provided. Consequently some of the basic theoretical issues related to the concept of international legal personality shall be analyzed. Finally, the author shall offer some conclusions.

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<sup>2</sup> R. Higgins, *Problems & Process: International Law and How We Use It*, Oxford University Press, Oxford 1994, p. 47 *et seq.*

<sup>3</sup> E. Roucouas, *The Users of International Law*, in M.H. Arsanjani, J. Katz Cogan, R.D. Sloane & S. Wiessner (Eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff Publishers, Leiden 2011, p. 217 *et seq.*

<sup>4</sup> See *e.g.* A. Bianchi, *The Fight for Inclusion: Non-State Actors and International Law*, in U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer & C. Vedder (Eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford 2011, p. 40 *et seq.*

<sup>5</sup> A. Clapham, *Human Rights Obligations of Non- State Actors*, Oxford University Press, Oxford 2006, p. 59 *et seq.*

<sup>6</sup> C. Walter, *Subjects of International Law*, in R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX, Oxford University Press, Oxford 2012, para. 28. See also M. Kreća, *Međunarodno javno pravo*, Pravni fakultet u Beogradu, Beograd 2010, p. 129.

<sup>7</sup> Bianchi 2011, pp. 56-57.

<sup>8</sup> Clapham 2006, p. 69.

<sup>9</sup> Cf. Walter 2012, pp. 28-31, Kreća 2010, pp.128-129 and D. Lapaš, *Nevladini entiteti pred vratima međunarodnog subjektiviteta – put k novom međunarodnom pravu?*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, No. 5-6, 2012, p. 1766.

## 2. The Concept of International Legal Personality

Before presenting the concept of *international* legal personality it is necessary to point out once again that the concept of legal personality is common to all legal systems.<sup>10</sup> To put it simply, legal personality or legal subjectivity is the capacity of a person to be a holder of rights and obligations under a given legal system. However, except for the mere granting of rights and obligations to persons in a particular legal system, social relations require that persons can in principle also produce legal effects with their own actions. That is why legal personality has its passive or static dimension (capacity to be a holder of legal rights and obligations) and its active or dynamic dimension (capacity to produce legal effects with its own actions).<sup>11</sup> The most important features of the latter dimension are the capacity of the person to conclude contracts, to undertake legal actions to protect their own rights and to bear legal responsibility for illegal acts.<sup>12</sup>

The above described general concept of legal personality is in principle accepted also in international law. But in international law this concept has some special features which are the consequences of the different nature of that legal system in relation to internal legal systems. While in internal legal systems the subjects of these systems (legal persons in a broader sense) are natural and non-natural (legal persons in a narrower sense) persons within a particular State, the most typical and the least disputed subjects of international law are States themselves. Unlike in internal legal systems, in international law there is no organized central authority, set above the subjects of this legal system which would grant them this status.<sup>13</sup> Moreover, there is no relevant legal norm of international law which would define its subjects or regulate the means for acquiring this status. The defining of a subject of international law is therefore largely left to legal doctrine.

There is no generally accepted definition of an international legal person or a subject of international law in the legal doctrine. Authors generally agree on the capacity to be a holder of international legal rights and obligations as a necessary precondition for the status of a subject of international law, but they disagree with regard to the necessity of possessing capacity to produce legal effects with their own actions. Thus some authors define a subject of international law merely as a holder of rights and obligations under the rules of international law.<sup>14</sup> On the other hand, the other group of authors deems this passive dimension of legal capacity insufficient and requires some degree of active legal capacity. Yet these latter authors again differ with regard to the necessary content and scope of this active legal capacity necessary to consider an entity a subject of international law.<sup>15</sup>

The view which is supported in this paper is that the mere possession of international legal rights and obligations by an entity is sufficient to consider it a subject of international law.<sup>16</sup> This view is consistent

<sup>10</sup> See generally on legal personality: B. Perić, *Struktura prava*, 12th edn., Informator, Zagreb 1994, p. 55 *et seq.* and D. Vrban, *Država i pravo*, Golden marketing, Zagreb 2003, p. 258 *et seq.*

<sup>11</sup> See Vrban, *ibid.*, p. 259 and Perić, *ibid.*, p. 56.

<sup>12</sup> See Vrban, *ibid.*, p. 268 and Perić, *ibid.*, p. 56.

<sup>13</sup> See B. Cheng, *Introduction to Subjects of International Law*, in M. Bedjaoui (Ed.), *International Law: Achievements and Prospects*, UNESCO – Martinus Nijhoff Publishers, Paris – Dordrecht 1991, p. 33.

<sup>14</sup> See *e.g.* *ibid.*, pp. 23, 25 and Walter 2012, paras. 21-22.

<sup>15</sup> Cf. *e.g.* J.H.W. Verzijl, *International Law in Historical Perspective, Part 2: International Persons*, A.W. Sijthoff, Leiden 1969, pp. 3-4; V. Ibler, *Rječnik međunarodnog javnog prava*, 2nd edn., Informator, Zagreb 1987, p. 302.; J. Andrassy, B. Bakotić, M. Seršić & B. Vukas, *Međunarodno pravo, 1. dio*, 2nd edn., Školska knjiga, Zagreb 2010, p. 65; and J. Crawford: *Brownlie's Principles of Public International Law*, 8th edn., Oxford University Press, Oxford, 2012, p. 115.

<sup>16</sup> Cf. Walter 2012, para. 30.

with the understanding of legal personality in the general theory of law.<sup>17</sup> Of course, we need to admit that this kind of personality without some forms of accompanying active legal capacity is of a fairly reduced significance in the international legal system. But all the same, the evolution of the legal status of the individual in international law (in particular in international human rights law and international criminal law) shows us that the acquiring of international legal rights and obligations can be only one step in the development of a more significant international legal personality of a certain entity.

### 3. An Overview of the Rights and Obligations of Transnational Corporations under International Law

An important feature of the ties of prominent non-state entities with international law is that they are limited only to certain fields of international law. As an example of that it will be shown that the strongest normative ties of transnational (multinational) corporations<sup>18</sup> as prominent non-state entities with international law manifest themselves in several areas: international investment law, international human rights law and international criminal law.

#### 3.1. Rights Related to Protection of Foreign Investment

The contemporary regime of the international protection of foreign investment<sup>19</sup> is for the most part based on international treaty law. It is a series of mostly bilateral investment treaties (BITs), very similar in structure and content, which in general offer mutual guarantees of one State Party's foreign investors' protection in other State Party.<sup>20</sup> These treaties can be characterized as treaties in favor of a third party (*pacta in favorem tertii*) where the third parties who on the basis of these provisions acquire rights are foreign investors, in practice most often transnational corporations. The content of such agreements includes a series of foreign investors' rights, *inter alia*: the right to compensation in case of expropriation, the right to a fair and equitable process and rights based on the standards of fair and equitable treatment, full protection and security, national treatment and most-favoured-nation treatment.<sup>21</sup>

This international legal regime does not only directly address transnational corporations as foreign investors, guaranteeing them aforementioned rights on the international stage, but also generally provides them with the capacity of direct access to international fora for the purpose of protecting their own rights.<sup>22</sup> Most of these treaties contain previously given consent of States Parties to dispute settlement with foreign investors from other States Parties by arbitration under the auspices of the

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<sup>17</sup> See Perić 1994, p. 66 and Vrban 2003, p. 269.

<sup>18</sup> On the term and the definition of the transnational corporation see D. Muhvić, *Transnacionalne korporacije kao subjekti međunarodnog prava*, doctoral thesis, Pravni fakultet Sveučilišta u Zagrebu, Zagreb 2015, p. 26 *et seq.*

<sup>19</sup> On the justification of the study of international investment law under the auspices of public international law see *ibid.*, p. 59 *et seq.*

<sup>20</sup> See R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2nd edn., Oxford University Press, Oxford 2012, p. 13.

<sup>21</sup> See generally *ibid.*, p. 98 *et seq.* and P.T. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn., Oxford University Press, Oxford 2007, pp. 674-698.

<sup>22</sup> See P. Dumberry, *L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements*, *Revue générale de droit international public*, Vol. 108, No. 1, 2004, p. 103 *et seq.*

International Centre for Settlement of Investment Disputes (ICSID) or via some other form of arbitration.<sup>23</sup>

In addition to possessing rights under the provisions of investment treaties, it could reasonably be argued that transnational corporations possess some of those rights, such as the right to compensation in case of expropriation<sup>24</sup> or the right to access to courts and fair and equitable procedure,<sup>25</sup> also under general international customary law. But, since the only way of legal protection of this kind of rights is to seek diplomatic protection of their own State, by which the dispute becomes an inter-State one<sup>26</sup>, in practice rights guaranteed by a treaty to transnational corporations, which are accompanied by the possibility to initiate direct arbitration proceedings against the host State are much more important.

As another argument for the possible recognition of the international legal personality of transnational corporations which was considered already as early as 1960s was the existence of contracts which corporations conclude directly with host States.<sup>27</sup> There is some force in the argument that transnational corporations have some kind of *ius contrahendi* in international law, assuming that these contracts are of a public law character, that they determine sources of public international law as applicable law and that they provide for international arbitration as a means for the settlement of eventual disputes between their parties. International legal practice and theory have still not given a definite answer to the question of the legal nature of these kinds of agreements.<sup>28</sup>

### 3.2. Rights Related to Protection of Human Rights

One of the curiosities of the Council of Europe's system of human rights protection in relation to other international systems for human rights protection is that it guarantees the protection of human rights not only to natural persons, but to some legal persons as well. According to the Article 34 of the 1950 European Convention on Human Rights,<sup>29</sup> the European Court of Human Rights "may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto." Although the term 'non-governmental organization' is commonly associated with non-profit entities, in the context of the European Convention on Human Rights it evidently encompasses companies as well.<sup>30</sup>

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<sup>23</sup> Dolzer & Schreuer 2012, p. 13.

<sup>24</sup> See R. Jennings, A. Watts (Eds.), *Oppenheim's International Law*, Vol. 1, 9th edn., Oxford University Press, Oxford 2008, pp. 919-921.

<sup>25</sup> See *ibid*, pp. 543-545.

<sup>26</sup> The International Law Commission has in the Commentary (5) of the Art. 1 of the Draft Articles on Diplomatic Protection left open the question whether the State which provides diplomatic protection protects its own rights or the rights of its national, or both. For the text of the Draft Articles with commentaries see [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf) (30 March 2017).

<sup>27</sup> See W. Friedmann, *The Changing Structure of International Law*, Stevens & Sons, London 1964, pp. 221-231 and *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Lybia*, Arbitral Award, 19 January 1977, para. 31. *et seq.*, International Legal Materials, Vol. 17, No. 1, 1978, p. 1.

<sup>28</sup> I. Marboe & A. Reinisch, *Contracts between States and Foreign Private Law Persons*, in R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. II, Oxford University Press, Oxford 2012, para. 44.

<sup>29</sup> For the text of the Convention and its Protocols see ETS, Nos. 005, 009, 044, 045, 046, 055, 114, 117, 118, 140, 146, 155, 177, 187 and CETS No. 194.

<sup>30</sup> See *Comingersoll S.A. v. Portugal* (App. no. 35382/97) ECtHR (2000), Concurring Opinion of Judge Rozakis, Joined by Judges Sir Nicolas Bratza, Caflisch and Vajić, and M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford University Press, Oxford 2006, pp. 4, 35.

The practice of the European Court of Human Rights shows that since 1979<sup>31</sup> companies have successfully made claims according to Article 34 of the Convention in a series of cases. The Convention protects the rights of all companies, regardless of their size, or their transnational or national character.<sup>32</sup> In the majority of cases the claimants have been small or middle-sized companies registered in a State Party to the Convention claiming that the state in question had violated their rights guaranteed under the Convention or its Protocols<sup>33</sup>, but there are also cases where the claimants have been transnational corporations.<sup>34</sup>

It is apparent that corporations cannot enjoy all human rights. As pointed out in the literature, “[t]he artificial and essentially inhuman nature of corporations impedes their inclusion within the protective confines of these provisions which seek to protect individuals of flesh and blood.”<sup>35</sup> Examples of these kinds of human rights are: the right to life, the prohibition of torture, the right to liberty and security or the right to marry.<sup>36</sup> On the other hand, the European Court of Human Rights has declared that it has jurisdiction in cases where corporations had claimed that they suffered a violation of the rights such as the right to a fair trial, the prohibition of punishment without law, the right to an effective remedy, the prohibition of discrimination and the protection of property.<sup>37</sup> In some cases the Court has gone so far that it extended the Convention's protection of corporations to some rights which at first glance do not seem to be generally applicable to non-natural persons, such as the freedom of expression<sup>38</sup> or the right to respect for private life.<sup>39</sup>

### 3.3. Obligations Related to the Protection of Human Rights

Due to the very common cases of non-compliance with the international legal obligation of the protection of human rights by developing States that occur in the context of the activities of transnational corporations under their jurisdiction, strong tendencies of imposing adequate direct international legal obligations to such non-state entities have emerged. Some authors have gone as far as to claim that existing international law already imposes such of obligations on these corporations.<sup>40</sup> Such interpretations which were predominantly based on the preamble of the 1948 Universal Declaration of Human Rights<sup>41</sup> have proven to be exaggerated.<sup>42</sup> Positive international law not only addresses States which have an obligation to refrain from violations of human rights of individuals under their

<sup>31</sup> *Sunday Times v. United Kingdom* (App. no. 6538/74) ECtHR (1979).

<sup>32</sup> *Emberland* 2006, p. 12.

<sup>33</sup> *Ibid*, p. 12.

<sup>34</sup> See e.g. *British- American Tobacco Company Ltd v. Netherlands* (App. no. 19589/92) ECtHR (1995).

<sup>35</sup> W.H.A.M. van den Muijsenbergh & S. Rezai, *Corporations and the European Convention on Human Rights*, Pacific McGeorge Global Business & Development Law Journal, Vol. 25, No. 1, 2012, p. 50.

<sup>36</sup> Cf. *Emberland* 2006, pp. 33, 53-54, 63, 110, van den Muijsenbergh & Rezai 2012, pp. 50-51 and Muchlinski 2007, p. 510.

<sup>37</sup> For the relevant examples of the practice of the ECtHR see Muhvić 2015, p. 174.

<sup>38</sup> *Autronic AG v. Switzerland* (App. no. 12726/87) ECtHR (1990), para. 47.

<sup>39</sup> *Société Colas Est and Others v. France* (App. no. 37971/97) ECtHR (2002), para. 49.

<sup>40</sup> See e.g. L. Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, Brooklyn Journal of International Law, Vol. 25, No. 1, 1999, pp. 24-25.

<sup>41</sup> GA Res. 217 (III) A, 10 December 1948.

<sup>42</sup> See C.M. Vázquez, *Direct vs. Indirect Obligations of Corporations under International Law*, Columbia Journal of Transnational Law, Vol. 43, No. 3, 2005, p. 942.

jurisdiction, but also entails an obligation to protect those individuals when their human rights are endangered by a third party, including transnational corporations.<sup>43</sup>

The contemporary tendencies of “disciplining” transnational corporations on the international level with regard to the protection of human rights manifest in the development of relevant international soft law instruments, specific case-law in the United States developed by the implementation of the so-called Alien Tort Statute<sup>44</sup> and also in theoretical contributions of various scholars.<sup>45</sup> Here only the most significant international soft law instruments focusing on the behaviour of transnational corporations with regard to human rights shall be mentioned: the 1976 OECD Guidelines for Multinational Enterprises,<sup>46</sup> the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>47</sup> and Ten Principles of the 2000 United Nations Global Compact.<sup>48</sup>

In addition to the mentioned international soft law instruments, especially important in this context are normative activities that the United Nations has undertaken in the last fifteen years. In 2003 the then Sub-Commission on the Promotion and Protection of Human Rights adopted the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.<sup>49</sup> This document which very ambitiously aimed to impose a wide range of international legal obligations on transnational corporations in the field of human rights proved to be very controversial.<sup>50</sup> The then Commission on Human Rights eventually explicitly declined to give any force and support to that document.<sup>51</sup> But, regardless of that failed initiative the issue of transnational corporations and human rights has remained on the agenda of the United Nations. From 2005 to 2011 there was a Special Representative of the Secretary-General of the United Nations on Human Rights and Transnational Corporations and Other Business Enterprises, whose task was to elaborate existing standards of responsibility and to develop an approach to this issue suitable for gaining general support. The crowning achievements of his work were the 2011 Guiding Principles for Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework.<sup>52</sup> This is a conceptual and political framework that is intended to serve as a basis for further debates and development of this field, but also as a sort of a guide for relevant actors in this process.<sup>53</sup> Finally, the Human Rights Council has

<sup>43</sup> See e.g. Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8, *Velásquez-Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), 29 July 1988, para. 172 and *Costello Roberts v. United Kingdom* (App. no. 13134/87) ECtHR (1993), para. 27.

<sup>44</sup> See B. Stephens, J. Chomsky, J. Green, P. Hoffman, M. Ratner, *International Human Rights Litigation in U.S. Courts*, 2<sup>nd</sup> edn., Martinus Nijhoff Publishers, Leiden 2008, pp. 1-72 i 309-334. and thematic series of articles in *American Journal of International Law*, Vol. 107, No. 4, 2013, pp. 829-863.

<sup>45</sup> See e.g. S.R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, *Yale Law Journal*, Vol. 111, No. 3, 2001, p. 443 *et seq.* and D. Kinley, J. Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, *Virginia Journal of International Law*, Vol. 44, No. 4, 2004, p. 931 *et seq.*

<sup>46</sup> *OECD Guidelines for Multinational Enterprises, 2011 Edition*, OECD Publishing, Paris, 2011.

<sup>47</sup> *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 4<sup>th</sup> edn., International Labour Office, 2006.

<sup>48</sup> The Ten Principles of the UN Global Compact, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (31 March 2017).

<sup>49</sup> UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

<sup>50</sup> See Vázquez 2005, p. 943 *et seq.* and J.H. Knox, *Horizontal Human Rights Law*, *American Journal of International Law*, Vol. 102, No. 1, 2008, p. 40 *et seq.*

<sup>51</sup> Commission on Human Rights Decision 2004/116 of 20 April 2004, UN Doc. E/CN.4/DEC/2004/116.

<sup>52</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, United Nations, New York – Geneva, 2011.

<sup>53</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 7 April 2008, UN Doc. A/HRC/8/5, Summary. See also J.H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in R. Mares (Ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, Martinus Nijhoff Publishers, Leiden – Boston 2012, p. 51 *et seq.*

by its Resolution 26/9 from 25 June 2014 established an open-ended intergovernmental working group on transnational corporations and other business enterprises with regard to human rights with a task to elaborate an internationally binding instrument in this field. The discussion on the question of imposing international legal obligations on transnational corporations with regard to human rights is therefore still in progress.<sup>54</sup>

### 3.4. Obligations Related to International Crimes

From World War II until today it has been demonstrated that transnational corporations can be involved in committing international crimes such as genocide, crimes against humanity or war crimes. Accordingly, it is quite reasonable to consider the question of their responsibility for involvement in committing those crimes under international law. The Charter of the International Military Tribunal in Nuremberg<sup>55</sup> had already contained the first attempt of providing a concept of criminal responsibility of groups in international law (Art. 9). However, the issue of the responsibility of the business sector for participating in the commission of international crimes came to the forefront only in a few cases that took place before the tribunals of the Allied occupation powers in Germany on the basis of the so-called Control Council Law No. 10 for Germany of 20 December 1945.<sup>56</sup> Especially worth mentioning is the judgement in the case of *I.G. Farben*.<sup>57</sup> From the text of this judgement it can be inferred that the court *de facto* held responsible a corporation as such for involvement in committing international crimes, despite formally being authorized only for trying individuals from the management structure of the corporation in question.<sup>58</sup>

At the 1998 Rome diplomatic conference on the establishment of the International Criminal Court there was a very serious discussion about the competence of the future court over legal persons, including transnational corporations. The draft provision on the relevant competence of the future court had undergone several revisions during the conference.<sup>59</sup> The proposal was eventually abandoned, but not because the government delegates had a problem with the conceptual assumption according to which legal persons could have obligations under international law<sup>60</sup>, but simply because there was not enough available time for the delegations to agree on the specific content of the relevant provision.<sup>61</sup>

The main argument in favour of the view according to which there is a development in progress concerning the international legal obligations of transnational corporations with regard to international crimes can be found in the combination of two strong trends in internal criminal law systems. The first one is the trend of an increasing introduction of criminal responsibility of legal persons<sup>62</sup>, while the other

<sup>54</sup> A/HRC/26/L.22/Rev.1

<sup>55</sup> Charter of the International Military Tribunal is an Annex to the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279.

<sup>56</sup> For the text see T. Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials under control Council Law No 10*, Washington, D.C., 15 August 1949, p. 250.

<sup>57</sup> *The I.G. Farben Trial*, Case No. 57, US Military Tribunal, Nuremberg, 14 August – 29 July 1948, Law Reports of Trials of War Criminals, Vol. X, p. 1.

<sup>58</sup> A. Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in M.T. Kamminga & S. Zia-Zarifi (Eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague 2000, pp. 170-171.

<sup>59</sup> See UN Doc. A/CONF.183/2/Add.1, 14 April 1998 and UN Doc. A/CONF.183/C.1/WGPP/L.5/Rev.2, 3 July 1998.

<sup>60</sup> Clapham 2000, p. 191.

<sup>61</sup> *Ibid.*, p. 157.

<sup>62</sup> See A. Ramasastry & R.C. Thompson, *Commerce, Crime and Conflict – Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries – Executive Summary*, Fafo-report 536, 2006, p. 13.

one is a trend of implementation of three international crimes from the Rome Statute of the International Criminal Court in national criminal laws of the states.<sup>63</sup> In that way, “[t]he emerging corporate responsibility for international crimes is grounded in growing national acceptance of international standards for individual responsibility” – “just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today”.<sup>64</sup>

#### 4. The Issue of the Necessary Nature and Scope of Legal Capacity

When authors provide a definition of the subjects of international law, they often in addition state some kinds of indicators of this status. Such indicators very often reflect the content the kind of legal capacity which is enjoyed by States as traditional subjects of international law. Cheng, for example, as indicators of international legal personality lists the right to send and receive diplomatic missions, the right to conclude agreements, the right to engage in legitimate armed conflicts, the right to a maritime flag, the right of diplomatic protection of its nationals, the right to bring an international claim, to sue and be sued on the international plane, the enjoyment of sovereign immunity within the jurisdiction of other States, the right to be directly responsible for any breach of one’s own legal obligations and the right to acknowledged territorial sovereignty over a portion of the surface of earth.<sup>65</sup> It is evident that some of these elements of legal capacity cannot be enjoyed by non-state entities such as transnational corporations or international non-governmental organizations. Thus, the main question here is: does the entity have to meet all or most of the abovementioned characteristics in order to be considered a subject of international law? The International Court of Justice has, way back in 1949, in its advisory opinion regarding the *Reparation for Injuries Suffered in the Service of the United Nations* pointed out the following:

“[t]he 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 law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.” (Emphasis added.)<sup>66</sup>

Judging by the advisory opinion in the *Reparations for Injuries* case, which is still the most authoritative text in respect of international legal personality, the absence of certain elements of legal capacity as those enjoyed by the State as a typical subject of international law does not prevent the extension of this legal status to non-state entities.

The distinction between the State and other eventual subjects of international law prompted some authors to distinguish between full and limited international legal personality. According to this discourse, full international legal personality is enjoyed by States only, while the international legal personality of other entities would be limited to certain rights and obligations, or certain fields of

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<sup>63</sup> Ibid, pp. 15-17.

<sup>64</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 19 February 2007, UN Doc. A/HRC/4/35, para. 33, p. 21.

<sup>65</sup> Cheng 1991, p. 38. See also Crawford 2012, p. 115.

<sup>66</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, 1949 ICJ Rep. 174, at 178.

international law, according to their function in the international community.<sup>67</sup> However, this distinction does not correspond to the reality of contemporary international law. Instead of full and limited subjects of international law it is more correct to speak about the interest of a certain subject or the international community for appropriate rights or obligations of a subject in a particular wider or narrower field of international law.<sup>68</sup> States today clearly do not possess all rights and obligations provided by contemporary international law. As an example of international legal rights which are not enjoyed by the State certain rights which are enjoyed by individuals on the basis of international human rights law, such as the right to life or the right to be free from torture could be mentioned.<sup>69</sup> Contemporary international law has therefore developed from a legal system that regulates exclusively relations between States to a legal system which still largely regulates relations between States, but also takes into account the relevant needs of other entities as well as the international community as a whole by prescribing certain rights and obligations to various entities. As emphasized by O'Connell already in 1970:

“[...] entity A may have capacity to perform acts X and Y, but not act Z, entity B to perform acts Y and Z but not act X, and entity C to perform all three. 'Personality' is not, therefore, a synonym for capacity to perform acts X, Y and Z; it is an index, not of *capacity per se*, but of specific and different capacities.”<sup>70</sup>

Accordingly, the limitation of a non-state entity only to certain international legal rights and obligations, or only to certain fields of international law, does not present a theoretical obstacle to its characterization as a subject of international law.

## 5. The Issue of the Use of Term 'Direct' in Defining a Subject of International Law

When defining a subject of international law, scholars occasionally resort to the use of the term “direct” in their definitions.<sup>71</sup> In these definitions, the term “direct” is used, however, in two different meanings. Accordingly, it is crucial to distinguish between: a) *direct acquisition of rights and obligations* under international law, and b) *possessing direct rights and obligations* under international law.

When some authors argue that for the status of ‘subject of international law’ it is necessary that the entity in question *directly acquires rights and obligations* under international law [meaning a)], they actually claim that for this status it is necessary for that the rights and obligations of this entity should flow from general international law.<sup>72</sup> That would mean that entities which for example acquire rights and obligations exclusively on a basis of some treaty as a third party could not be considered as subjects of international law. This is so because such entities acquire their rights and obligations “indirectly” - by the will of the parties to such a treaty. As a typical example of these kinds of rights on the international plane the right of a foreign national to request of competent authorities of the host State that the consular post of his State be informed in the case of his arrest guaranteed by Article 36 of the 1963 Vienna

<sup>67</sup> Walter 2012, para. 23.

<sup>68</sup> Cf. Higgins 1994, p. 50.

<sup>69</sup> Clapham 2006, pp. 68-69.

<sup>70</sup> D.P. O'Connell, *International Law*, Vol. 1, 2nd edn., Stevens & Sons, London 1970, pp. 81-82.

<sup>71</sup> See e.g. Cheng 1991, pp. 29-31, Andrassy, Bakotić, Seršić & Vukas 2010, p. 65 and Jennings & Watts 2008, pp. 119-120.

<sup>72</sup> See Crawford 2012, p. 115.

Convention on Consular Relations could be mentioned.<sup>73</sup> This kind of approach to defining a subject of international law seems to us too narrow. Even though it does not constitute general, but particular international law, treaty is nevertheless a valid source of international law. It does not seem to be reasonable to leave out those entities which possess rights and obligations exclusively on the basis of a treaty in a sort of a theoretical empty space. We can perhaps make a distinction between subjects of international law in the narrower sense (entities whose rights and obligations flow from general international law) and subjects of international law in the broader sense (entities whose rights and obligations flow from particular international law exclusively).

Apart from the above-described role of the use of the term ‘direct’ in defining a subject of international law, some authors write about *possessing direct rights and obligations* under international law, regardless of whether those rights and obligations flow from general international law or particular international law such as a treaty [meaning b)]. For example, it is not uncommon in international law that certain treaties provide for rights and/or obligations for some private entities ‘indirectly.’ This is common where States Parties of a certain treaty undertake an international legal obligation to envisage certain rights and/or obligations for private entities by means of their own internal legal systems.<sup>74</sup> As an example of such a treaty, the 2003 United Nations Convention against Corruption can be mentioned, which envisages the obligation of private entities to refrain from corruption related activities and their appropriate legal responsibility (Art. 12).<sup>75</sup> But the addressees of *international* legal obligations according to this treaty are not private entities, but only States Parties of the treaty which made the commitment to implement the appropriate obligations and the legal responsibility of such entities through their own legislatures. In formal legal terms, these kinds of obligations of private entities are prescribed by internal laws and therefore do not make them subjects of international law.<sup>76</sup>

Accordingly, when determining a status of a non-state entity in international law it is crucial to take into account two important points. Firstly, it is important to recognize the approach to the regulation of non-state entities in the text of a treaty. It is necessary to determine who the real addressees of the international legal norm are – non-state entity directly, or the State Party of that treaty which is obligated to prescribe certain rights or duties of non-state entities by means of its internal law. Only in the first case could a non-state entity be characterized as a subject of international law. Secondly, although we are of the view that for the characterization of some entity as a subject of international law it is not of a paramount importance that it possesses rights and obligations under general international law (apart from those under particular international law), possessing these kind of international legal rights and duties will certainly give an additional weight to that characterization.

## 6. Conclusions

On the basis of the aforementioned, two important conclusions can be made. First, the basic characteristic of the normative ties of non-state entities with international law is their limitation to certain fields of that legal system only. Second, the example of transnational corporations shows that the international legal sources of the rights and obligations of non-state entities can be quite various, just like the corresponding capacity to produce legal effects with their own actions. For instance,

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<sup>73</sup> 596 UNTS 261.

<sup>74</sup> P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn., Routledge, New York 1997, p. 100.

<sup>75</sup> 2349 UNTS 41.

<sup>76</sup> Cheng 1991, p. 31.

transnational corporations in certain fields of international law enjoy a capacity to directly bring a case before international forums with the purpose of protection of their own international legal rights, but exclusively on the basis of the relevant treaty to which they are a third party. On the other hand, it could be reasonably argued that transnational corporations possess certain rights and obligations also under general international law, but without a legal capacity to act as party to some international proceedings. The given situation leaves room for different answers to the question whether particular non-state entities could be considered subjects of international law or not.

The view taken in this paper is that international legal theory cannot ignore the rights and obligations of certain prominent non-state entities under international law. Their interaction with international law, regardless of the fact that it is limited only to certain fields of that legal system, undoubtedly affects the international legal system as a whole. It can certainly be said that non-state entities such as transnational corporations have a limited status under international law, but it is a status nevertheless. A necessary prerequisite to take a step further and to call them subjects of international law is only a matter of moving away from the excessive insistence on making comparisons with the State as a sort of a prototype of a subject of international law.