

**LEGAL PERSONALITY IN INTERNATIONAL LAW: REVISITING THE IDEAS OF NON STATE ENTITIES AND TRANSNATIONAL CORPORATIONS IN INTERNATIONAL LAW\***

**Abstract**

*In the last decades actors in international law are witnessing the intensive strengthening of normative ties of a series of non state entities like transnational corporations, international non-governmental organizations and international terrorist groups etc 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. 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 in defining a subject of international law. The paper concludes with a recommendation for a new paradigm shift to clothe these transnational corporations and some non state actors with legal personality in International Law.*

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

**1. Introduction**

International legal personality is an important facet of international law that has developed throughout history as a means of international representation. With the acquirement of personality comes privileges and responsibilities. International law is based on rules made by states for states. The capacity of states to enter into such relationships with other states and to create legally binding rules for themselves, is a result of states' international legal personality, a prerogative attributed to all sovereign states. 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 law, 'users' of international law, 'non-state actors' in international law, as well as focusing, instead of on designation, on the research of specific rights and obligations of a particular entity in international law.<sup>2</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. 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>3</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.

---

\* **By Vitus Mazi UDEGBULEM, PhD**, Lecturer, Department of International Law & Jurisprudence, Faculty of Law, Imo State University, Owerri, Imo State. Email: maziudegbulem@rocketmail.com

<sup>1</sup> M. Noortmann, A. Reinisch & C. Ryngaert, *Non-State Actors in International Law*: (Edn, Oxford-Portland, Hart Publishing, 2005) p. 3

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

<sup>3</sup> A. Clapham, *Human Rights Obligations of Non- State Actors*, (Edn, Oxford University Press, Oxford 2006) p. 59

## 2. The Concept of International Legal Personality

It is well accepted in legal doctrine that entities other than states enjoy rights and duties, and international legal personality, to a degree under international law.<sup>4</sup> Certainly these entities are very different from states<sup>5, 6</sup> but it is important to assess the kind of personality they enjoy to understand their variable legal nature in international law.

According to Schwarzenberger:

International practice shows that persons and bodies other than states are often made subjects of international 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 of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from the preconceived notion as to who can be the subjects of international law.<sup>6</sup>

The difficulty is that, aside from states (or perhaps not even including states), there is no clear law on identifying international legal personality. In general, most authorities agree that an international legal person is an entity with a certain capacity for international rights and obligations.<sup>7</sup> Some authorities take a very vague approach to capacity, looking merely for capacity to enjoy international rights and obligations,<sup>8</sup> whereas others are more demanding, looking for specific capacities, *i.e.* the capacity to conclude international agreement, capacity to enter into legal obligation etc.

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. 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. The passive dimension is the capacity to be a holder of legal rights and obligations while its active or dynamic dimension is the capacity to produce legal effects with its own actions. 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. That is the state of one being responsible. 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>9</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<sup>10</sup> 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>11</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>12</sup> The view which is supported in this paper is that the mere possession of international legal rights and obligations by an entity is

<sup>4</sup> Jan Klabbbers, (*I Can't Get No*) *Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, in J. PETMAN & J. KLABBERS, (EDS, 2003) p. 23

<sup>5</sup> . Reparation for Injuries Suffered in the Serv. of the UN, Adv. Op., 1949 I.C.J. Repts. 174, 180 (Apr. 11).<sup>7</sup>

<sup>6</sup> G. Schwarzenberger, *A Manual Of International Law*, (1st ed., 1947) p. 48

<sup>7</sup> A. Clapham, *op. Cit*

<sup>8</sup> A. Clapham, *Op. Cit*

<sup>9</sup> 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>10</sup> See Cheng for example, *Introduction to Subjects of International Law*, *Ibid*

<sup>11</sup> B. Cheng, *Introduction to Subjects of International Law*, *Ibid*

<sup>12</sup> .J.H.W. Verzijl, *International Law in Historical Perspective, Part 2: International Persons*, A.W. Sijthoff, Leiden 1969, pp. 3-4;

sufficient to consider it a subject of international law. This view is consistent with the understanding of legal personality in the general theory of law. 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. Transnational Corporation as Subjects of International Law**

Given the controversies surrounding the very concept of international personality, it is not surprising that the question of transnational or multinational companies as a subject of international law has raised a longstanding and complex debate. That debate first arose during the 1960s in the context of nationalization and permanent sovereignty over resources of newly independent states. In the last decades, the complex issue of the international subjectivity of corporations has resurfaced in the context of their alleged responsibility in respect of human rights. The terms of the debate are mainly polarized around two antagonist schools of thoughts that deserve further elaboration. A significant part of the doctrine considers that multinational corporations are not a subject of international law.<sup>13</sup> This assertion is generally based on two different kinds of arguments. First, from a political and arguably systemic perspective, acknowledging transnational corporations as a subject of international law would substantially reduce the power of states and thus their traditionally dominant position in international law.<sup>14</sup> Second, from a more technical perspective, the denial of personality to transnational corporations is frequently based on the above-mentioned state-analogy conception of personality. Authors particularly stress the fact that corporations lack the power to directly participate in the international law-making process.<sup>15</sup> To this end, Baade explains further explains that:

MNEs [multinational enterprises] are neither states nor public international organizations, and thus neither general ‘natural’ nor ‘artificial’ subjects of international law as presently defined. Even if their procedural role in follow-up proceedings should, in analogy to human-rights complaints mechanisms, suffice to confer upon them ‘partial’ or *ad hoc*, they would still lack at least one of the essential attributes of full international personality. This is the power to participate directly in the international norm-creating process.<sup>16</sup>

However, the two main arguments invoked for denying international personality to multinational corporations are not convincing. They are in contradiction with the sliding-scale conception of international personality as acknowledged by the ICJ in the *Reparation for Injuries* case.<sup>17</sup> In that particular case, the Court clearly rejected any kind of analogy with the state in order to infer the attributes of international personality. The court held thus: ‘This Court has come to the conclusion that the [United Nations] Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State’.<sup>18</sup>

Moreover, while the capacity to participate in the international law-making process may be considered as a potential indicator, it is nevertheless not part of the definition given by the Court. That definition is based on the capacity to have rights and obligations under international law and the capacity to bring international claims. A growing and substantial part of the doctrine considers that multinational corporations have acquired a limited personality derived from international law.<sup>19</sup> Commentators rightly observe that, in some specific circumstances, the capacity to have rights and obligations and the capacity to bring international claims have been directly conferred on them by international law.<sup>20</sup> This is nevertheless a functional personality in the sense that it is attributed to corporations in the strict limits and for the specific purpose required by international law. The question whether they have international personality requires a case-by-case examination of the relevant applicable norms of international law. Following this approach, a limited and derived personality may be

---

<sup>13</sup> K.P. Sauvart & V. Aranda, ‘The International Legal Framework for Transnational Corporation’, in A.A. Fatouros (ed.), *Transnational Corporations: The International Legal Framework*, Vol. 20, New York, Routledge, 1994), p. 84

<sup>14</sup> F. Johns, ‘The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory’, (Melbourne University Law Review, 19, 1994), p. 900

<sup>15</sup> H.W. Baade, ‘The Legal Effects of Codes of Conduct for Multinational Enterprises’, (*German Yearbook of International Law*, 22, 1979), p. 16

<sup>16</sup> Baade, *Ibid*

<sup>17</sup> *Reparation for Injuries Suffered in the Service of the UN*, Adv. Op., 1949 I.C.J. Reps. 174, 180 (Apr. 11).7

<sup>18</sup> . *Reparation for Injuries Suffered in the Service of the UN*, *Ibid*

<sup>19</sup> . J.E. Alvarez, ‘Are Corporations Subjects of International Law’, (*Santa Clara Journal of International Law*, 9, 2011), p. 2

<sup>20</sup> . J. E Alvarez, *Ibid*

conferred by three distinct sources: internationalized contracts, treaties, and customary law, which require further analysis. As for the first source, internationalized contracts are concluded between a host state and a corporation, and are mostly used in the field of oil and mining concessions and development agreements. These contracts not only spell out rights and obligations of the parties, but also frequently contain a clause stating that the contract is governed by international law. Moreover, most of them provide for international arbitration in case of a dispute. Already as far back as 1964, Friedmann affirmed that private corporate parties to such contracts should be regarded as possessing international legal personality.<sup>21</sup> This reasoning was acknowledged by the arbitral award delivered in 1977 in *Texaco Calasiatic v. Libyan Arab Republic*:

In other words, stating that a contract between a State and a private person falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities. But, unlike a State, the private person has only a limited capacity and his quality as a subject of international law does enable him only to invoke, in the field of international law, the rights which he derives from the contract.<sup>22</sup>

However, although this interpretation is shared by many authors, it nevertheless remains controversial.<sup>23</sup> It has been argued that a state alone cannot confer on its private contract partner the status of ‘subject’ of international law, which could be opposed by other states. It is true that such contracts cannot establish an *erga omnes* personality. However, those contracts remain a significant legal tool in order to regulate the conduct of multinational companies at the international level. The second and certainly most established way for conferring international personality on a non-state entity is through the adoption of a treaty. In practice, the capacity to have rights and to bring international claims has been already conferred on corporations by several treaties related to investment.<sup>24</sup> Similar provisions may be found in other fields of international law. For instance, the United Nations Convention on the Law of the Sea provides for a binding arbitration mechanism in case of disputes arising from the interpretation or application of a contract between the parties concerned, including legal versions.<sup>25</sup> UNCLOS also stipulates specific and direct obligations for corporations. For example, Article 137(1) and (3) provides that no juridical person shall appropriate any part of the ocean floor beyond the limits of national jurisdiction nor claim or exercise any rights on its resources. Several authors have deduced from this rather eclectic practice that corporations have been granted an international personality through such treaties, which is however circumscribed to the strict capacities expressly conferred on them by the relevant treaties.

However, treaties directly conferring legal capacities on corporations are not abundant. The most common way of regulating the conduct of corporations follows a more traditional pattern centred on the rights and obligations of states parties rather than those of the corporations *per se*. Although there is no obstacle in international law to adopting treaties directly stipulating rights and obligations for corporations, the majority of existing conventions require states to enact and enforce laws applicable to enterprises. As such, rights and obligations arising from these conventions are indirectly applied to corporations, as demonstrated by the numerous treaties concluded in the context of the protection of environment<sup>26</sup> and the fight against corruption.<sup>27</sup> The third source invoked to justify the international personality of corporations is customary law. According to this approach, the above-

<sup>21</sup> Friedmann, *Changing Structure of International Law*, (1964) 223. See also W. Friedmann, ‘General Course in Public International Law’, (*Recueil des cours de l’Academie de droit international*, 127, 1969), 122.

<sup>22</sup> . *Texaco Calasiatic v. Libyan Arab Republic* (Merits), in *International Legal Materials*, 17, 1978, 1–37, at 17, para. 47.

<sup>23</sup> . Brownlie, *Principles of Public International Law*, 525 and ff.; Malanczuk, ‘Multinational Enterprises and Treaty-Making’, 58–61

<sup>24</sup> See for example, At the multilateral level, the 1965 Convention establishing the International Centre for the Settlement of Investment Disputes and the 1995 Energy Charter Treaty, as well as at the regional level the 1993 North American Free Trade Agreement (NAFTA) and the 1994 Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR are good examples.

<sup>25</sup> . See Articles 187-188 of the United Nations Convention on the Law of the Sea

<sup>26</sup> . Among numerous possible examples, see in particular: Arts. I(3) and III–VII of the International Convention on Civil Liability for Oil Pollution Damage, Brussels (973) adopted in November, 1969 but entered into force effective 19<sup>th</sup> June, 1975. See also Arts. 2–4 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, adopted on 22 Mar. 1989 but entered into force on the 5<sup>th</sup> May 1992.

<sup>27</sup> . See for example: Art. 23 of the United Nations Convention against Corruption (UNGA Res 58/4, 31 Oct. 2003); Arts. 2–3 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997; Art. VIII of the Inter-American Convention Against Corruption, 1996; Art. 18 of the Council of Europe Criminal Law Convention on Corruption (ETS No. 173, 1999).

mentioned treaties on investment and the codes of conduct that have proliferated over the past forty years<sup>28</sup> are part of a broader customary law process acknowledging the international personality of corporations. Although codes of conduct are by definition not binding, some scholars have argued that they contain elements which could serve as an indication of the willingness of states to assume that MNEs possess the principal qualities characteristic of an international legal person.<sup>29</sup> The majority of codes directly address the rules of conduct contained therein to corporations and some of them even contain implementation mechanisms enabling corporate behavior to be scrutinized.

#### **4. 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.

#### **Rights Related to Protection of Foreign Investment**

The contemporary regime of the international protection of foreign investment<sup>30</sup> is for the most part based on international treaty law. It is a series of mostly bilateral investment treaties, 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>31</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. 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. 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 International Centre for Settlement of Investment Disputes or via some other form of arbitration. 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 or the right to access to courts and fair and equitable procedure in event of any legal dispute, and 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, 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.<sup>32</sup> 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>33</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>34</sup>

---

<sup>28</sup> . For an overview of the multiple codes of conduct dealing with multinational corporations, see in particular: S.D. Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level', *Columbia Journal of Transnational Law*, 43, 2004–2005, 389–433;

<sup>29</sup> S.D. Murphy, *Ibid*

<sup>30</sup> . R. Dolzer & C. Schreuer, *Principles of International Investment Law*, (2nd edn., Oxford University Press, Oxford 2012), p. 13.

<sup>31</sup> R. Dolzer & C. Schreuer, *Ibid*

<sup>32</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) accessed on 25 May, 2020.

<sup>33</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>34</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.

### **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, the European Court of Human Rights: 'May receive applications from any person, non-governmental organization 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. The practice of the European Court of Human Rights shows that since 1979<sup>35</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>36</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>37</sup> It is apparent that corporations cannot enjoy all human rights. As pointed out in the literature, 'the 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>38</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. 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.

### **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>39</sup> Such interpretations which were predominantly based on the preamble of the 1948 Universal Declaration of Human Rights have proven to be exaggerated.<sup>40</sup> Positive international law not only addresses States which have an obligation to refrain from violations of human rights of individuals under their jurisdiction, but also entails an obligation to protect those individuals when their human rights are endangered by a third party, including transnational corporations.

### **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>41</sup> had already contained the first attempt of providing a concept of criminal responsibility of groups in international law.<sup>42</sup> 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.<sup>43</sup>

<sup>35</sup> . Sunday Times v. United Kingdom (App. no. 6538/74) ECHR (1979).

<sup>36</sup> M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, (Oxford University Press, Oxford 2006) , pp. 4, 35

<sup>37</sup> . See for example the case of the *British- American Tobacco Company Ltd v. Netherlands* (App. no. 19589/92) ECHR (1995).

<sup>38</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>39</sup> 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>40</sup> C.M. Vázquez, *Direct vs. Indirect Obligations of Corporations under International Law*, *Columbia Journal of Transnational Law*, Vol. 43, No. 3, 2005, p. 942

<sup>41</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.

<sup>42</sup> Article 9 provides that at the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

<sup>43</sup> This was on the basis of the so-called Control Council Law No. 10 for Germany of 20 December 1945.

Especially worth mentioning is the judgement in the case of *I.G. Farben*.<sup>44</sup> From the text of this judgment 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. 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.<sup>45</sup> The draft provision on the relevant competence of the future court had undergone several revisions during the conference.<sup>46</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>47</sup>, but simply because there was not enough available time for the delegations to agree on the specific content of the relevant provision.<sup>48</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, while the other 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. In that way, it has been submitted that:

The 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>49</sup>

### **5. 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>50</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*<sup>51</sup> pointed out the following: '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 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'.

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 a distinguish between full and limited international legal personality. Accordingly, full international legal personality is enjoyed by States only, while the international legal personality of other entities would be limited to certain rights and

---

<sup>44</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>45</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>46</sup> UN Doc. A/CONF.183/2/Add.1, 14 April 1998 and UN Doc. A/CONF.183/C.1/WGGP/L.5/Rev.2, 3 July 1998.

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</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>50</sup> See Cheng, *Op Cit*, p.34

<sup>51</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, 1949 ICJ Rep 174 @ 178

obligations, or certain fields of international law, according to their function in the international community. 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, *Clapham* identified 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>52</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 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.<sup>53</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.

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 kinds 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, 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.

---

<sup>52</sup> Clapham, op. Cit, p. 66

<sup>53</sup> See Article 12 of the Convention.