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ICLR, 2022, Vol. 22, No. 2.

International Legal Personality of Transnational Corporations – Any Chance for the Theoretical Shift with Respect to a Legally Binding Instrument on Human Rights and TNCs?

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BUREŠ, Pavel. International Legal Personality of Transnational Corporations – Any Chance for the Theoretical Shift with Respect to a Legally Binding Instrument on Human Rights and TNCs? *International and Comparative Law Review*, 2022, vol. 22, no. 2, pp. 139–151. DOI: 10.2478/iclr-2022-0019

Summary: Multinational enterprises or transnational corporations are big and influential actors on international scene. Their economic activities might have unfortunately a negative impact on human rights or environment. Current international law does not have any concrete and satisfactory answer to such situation of lacking direct substantial human rights obligations with respect to transnational corporations and corresponding procedural mechanism. Often, this situation is substantiated by missing or unclear concept of international legal personality of those entities. The present article presents international legal personality of transnational corporations from the perspective of the Legally biding instrument on human rights and TNCs drafted by inter-governmental working group. After portraying general features of international legal personality, the author tends to conciliate basic theoretical concept with the TNCs situation. Then the author presents a deep analysis of the Legally binding instrument and comes to the conclusions of maturing international legal personality of transnational corporations.

Keywords: international legal personality, transnational corporations, human rights abuses, human rights due diligence, legally binding instrument.

1 Introduction

On the 7th September 2021, The French Supreme Court decided to refer to the Paris Court of Appeal the debate on the indictment of cement manufacturer Lafarge for "complicity in crimes against humanity" in the investigation into its activities in Syria until 2014. In this investigation opened in June 2017, Lafarge SA is suspected of having paid in 2013 and 2014, via its subsidiary Lafarge Cement Syria (LCS), nearly 13 million euros to terrorist groups, including the Islamic State (ISIS), and intermediaries, to maintain the activity of its site in Syria as the country sank into war. The group is also suspected of selling cement from

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

the plant to the ISIS and paying intermediaries to source raw materials from jihadist factions. In May 2022, French Court of Appeal Investigative Chamber has confirmed charges against French multinational Lafarge for complicity in crimes against humanity. LCS also remains charged with deliberately endangering the lives of its Syrian employees[1].

This case shows for umpteenth time how different quasi business activities of transnational corporations (hereinafter „TNCs") might have an important impact on human lives, security, environment etc. It is without no doubt that due to diverse municipal legislations, variety of corporate structures of TNCs (problem of lifting corporate veil), different political and procedural approaches in such cases before national courts or on international level, it is very difficult or even impossible to grasp the concept of (international) legal responsibility of TNCs and their international legal personality as such.

The second half of XX. century witnessed a big development of international law rules dealing with human rights protection or fight against impunity for mass violations of human rights. It was the reaction of State deficiency to deal with such a problem. Today, we are witnessing similar situation of business activities causing human rights abuses, where States are lacking corresponding legal measures. "When businesses violate human rights, executives may create wounds that cannot easily be healed by apologies, time or new management."[2] The possibility for individuals to seek redress on international level, which was previously unconceivable, then started to be accepted by international community. The concept of international legal personality has started to be used for individuals[3] – victims as well. A similar development could be seen for TNCs as abusers of human rights in the situation where the redress for victims on national level faces different structural and/or legal deficiencies.

This article aims to draw basic lines of the concept of international legal personality of TNCs with respect to recent development in the area of human rights abuses by multinational corporations[4] and the activity of the Office of the United Nations High Commissioner for Human Rights (OHCHR). The concept of inter-

1 https://www.asso-sherpa.org/charges-confirmed-against-lafarge-complicity-crimes-against-humanity.

2 AARONSON, Susan Ariel. HIGHAM, Jan. Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms. Human Rights Quarterly, Vol. 35, Issue 2 (May 2013), pp. 333–364.

3 KOROWICZ, Marek St. The Problem of the Personality of Individuals. The American Journal of International Law, 1956, vol. 50, pp. 533–562. In: JOHNS, Fleur (eds.) *International Legal Personality.* New York, Routledge, 2016, pp.*vii*–522.

4 In this article, the author does not differentiate between different denominations and uses for the purposes of the topic of international legal personality terms transnational organization, multinational organization, multinational enterprise etc. in the same meanings. He is aware of the fact that these terms are differently employed in various international instruments either on universal (UN) or regional (EU, OECD) level.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

national legal personality will be first portrayed in its general features (2) before being studied with respect to TNCs (3). In order to show the recent development in the subject-matter, I will briefly present the activity of the open-ended intergovernmental group on transnational corporations and other business enterprises with respect to human rights (4). The paper will then protray a critical shift to international legal personality of TNCs under current development (5).

2 Concept of international legal personality

Every concept (definition) brings a certain limitation of perceiving existing social reality. Likewise, it fits for the concept of international legal personality[5]. The concept of international legal personality is something artificial, conventional. It attempts to grasp and describe political and social reality within theoretical definitions. Thus, we usually define "subject of international law [a]s an entity possessing international rights and obligations and having the capacity to maintain its rights by bringing international claims; and be[ing] responsible for its breaches of obligation by being subjected to such claims.[6]". The practical effect of such "circular"[7] definition lies within the real exercise of (capacity to maintain) rights and obligations. "International legal personality is thought to be a *conditio sine qua non* for the possibility of acting within a given legal situation. […] Accordingly, they can neither perform the sort of legal acts that would be recognised by the legal system nor be held responsible under international law."[8] Thus, the close correlation between rights and obligations on the one hand, and capacity to maintain rights and responsibility for breaching obligations on the other hand is crucial. "Norms of international law cannot impose on an entity primary obligations or secondary obligations in case of a breach of one of the primary obligations unless that entity has legal personality under international law. Conversely, an entity has to be regarded as a subject of international law even if only a single obligation is imposed on it under international law ."[9] For States, as primary subjects of international law, and for international (intergovernmental) organizations ("IO"), whose legal personality is far from being questioned for now[10], the concept of legal personality as presented above lies within

5 Every designation of an international legal person as such is an implicit setting-aside of those who don't so qualify, among them animals, the dead and various groupings and institutions that don't conform to the organizational conventions of identity politics.

6 CRAWFORD, James. Bronwnlie´s Principles of Public International law, Oxford University Press, 9th edition, 2019, p. 105.

7 *Ibid.*

8 KLABBERS, Jan., The Concept of Legal Personality, IUS gentium p. 5 (p. 37). In: JOHNS, Fleur (eds.) *International Legal Personality.* New York, Routledge, 2016, pp.*vii*–522.

9 First report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, pt.15. [online] < https://legal.un.org/ilc/documentation/english/a_cn4_532.pdf>. Accessed 15.12.2022.

10 Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, p. 174.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

a confirmation of existence, or recognition. State are subjects from the moment of becoming States[11]. Similarly, the legal existence of international organizations, and thus their international legal personality, lies within their creation (recognizance) by States. The legal personality of the IO is based on the will of States and confirmed by their genuine normative action (treaty establishing particular IO). Thus, it antecedes the existence of social reality which comes to the effect by the creation of the IO. It is, however, different with other subjects of international law. So it is for States, which do exist as political entity (social reality) before being formally or materially accepted as subjects of international law and thus having basic rights and obligations arising from general international law. Similarly, we can refer to other subjects of international law be it general (*e.g.* insurgents, territories under international administration[12]) or special ones (Holy See, International Committee of the Red Cross). And likewise, we could refer to a specific social reality of individuals (in the situation of human rights protection, or criminal responsibility) where the international legal personality has been confirmed and put the effectivity by consequent establishment of procedural capacity to claim for redress or to be prosecuted on international level. However, Crawford has rather critical approach to the international legal personality of individuals caused by the missing element of responsibility in the area of human rights protection. "While international human rights law recognizes a variety of rights for individuals (and even corporations), the norms of human rights law are not yet regarded as applying horizontally between individuals, in parallel to or (still less) in substitution for the applicable national law. To the extent that some human rights instruments include provisions dealing with individual responsibilities as well as rights, international law provides no regular means for their enforcement. In practical terms, human rights (and other obligations assumed for the benefit of individuals and corporations) arise against the State, which so far has a virtual monopoly of responsibility."[13] Other authors reject totally the concept of international legal personality of individuals. They suggest leaving the subject-object dichotomy and to speak rather about "participants in international system"[14], "constitutional subjects". In order to reconcile contradicting approaches, Nowrot presents subject doctrine theory based on rebuttable presumption. He views the legal personality of individuals in the perspective of weaker "influential position in the international legal system"[15].

11 The ´acceptance´ of international community, or the so called „capacity to enter into relations with the other States".

12 CRAWFORD, James. *Op. cit.* p. *107*

13 *Ibid.* p. 111.

14 HIGGINS, Rosalyn. Problems and Process: International Law and How we use it. Claredon Press, 1994, p. 49. „International law is a dynamic decision-making process in which no subjects and object exist, but only a variety of participants, including MNCs". (p. 50)

15 NOWROT, Karsten. Reconceptualizing International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities, Philipine Law Journal, 2006, Vol.80, pp. 563–586. In: JOHNS, Fleur (eds.) *International Legal Personality.* New York, Routledge, 2016, pp.*vii*–522. Nowrot precises: „Only with regard to

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

This presumption can be rebutted by an expression of international community in a legally binding form[16]. However, the category of influential non-state actors might be seen as "subject only to relative international legal obligations towards State that have not rebutted the presumption"[17]. It is then the question, whether and to what extent these theoretical approaches are easily transferable for the concept of international legal personality of transnational corporations.

3 TNCs as "subjects" of international law

Different conceptual approaches have been presented above to grasp international legal personality. Diversions occur primarily for "non-classical" subjects (sometimes referred to non-States actors/subjects). Thus, for States and IO, classical concept of legal personality is still valid. Hence, the concept of legal personality of other non-State actors, entities, individuals, etc. is somehow problematic. Wouters and Chané, referring to positivists´ perspective, remind that states "can up-grade non-state actors to subjects of international law by endowing them rights and obligation. Non-states actors thus derive their subjectivity from States and are dependent on their recognition."[18] Should we apply the classical theory on international legal personality to the TNCs, it would be difficult to determine rights and or obligations arising directly from the system of international law and similarly the capacity of making claims or to be responsible. In this regard, Clapham concludes on limited international personality of MNCs.[19] Klabbers puts this in different words. He claims that "personality is by no means a threshold which must be crossed before an entity can participate in international legal relations; instead, once an entity does participate, it may be usefully described as having a degree of international legal personality."[20] From the analytical point of view we can outline three different perspectives to the international legal personality of TNCs. First, – strictly positivist-one – ascertains TNCs cannot be subjects of international law as they are not recognized as such by primary members of international community – States. Second, – formalist-one, claims TNCs can-

those actors whose limited participation in the interactions within the international system does not qualify them as being sufficiently influential, the existence of international legal obligations is still dependent upon an explicit imposition by states through treaty or customary or international law. This last mentioned categorization currently applies especially to individuals ". *Op. cit.* p. 380

16 *Ibid.*

17 NOWROT, Karsten. *Op. cit.* p. 381.

18 WOUTERS, Jan, CHANÉ, Anne-Louise, Multinational Corporations in International Law. *SSRN Electronic Journal.* January 2013. [online]. Available at: https://www.researchgate.net/publication/272241501_Multinational_Corporations_in_International_Law. Accessed: 09.01.2023.

19 CLAMHAM, Andrew. *Human rights Obligations of Non-State Actors*, Oxford University Press 2006, p.199, quoted in WOUTERS, Jan, CHANÉ Anne-Louise, *op.cit.* p. 7.

20 KLABBERS, Jan. *An Introduction to International Institutional Law*. 2nd ed. Cambridge University Press 2009. p. 52

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

not be subjects because their do not possess nor direct rights neither obligations. Third, – realist one – acknowledges legal personality to TNCs on the basis on their real participation, role and activities impacting on international legal system. The plenitude of activities by multinational corporations and their harmful consequences on human rights and environment is so important, it would be illogic and unfair to overview it by a simple conclusion on lacking international personality.[21] From conceptual and systemic[22] point of view, it is difficult for now to grasp international legal personality of TNCs and even more complicated to determine and assess substantial and procedural implications of *such* international legal personality. The current system does not make it possible to hold TNCs accountable for human rights abuses at the level of international law and to take concrete procedural steps against them. Therefore, members of international community (States, IO) being aware of such deficiencies tend to negotiate a binding instrument on human rights and TNCs to challenge the aforementioned situation. Nevertheless, can this document change the future concept of TNCs international legal personality?

4 TNCs international legal personality from the perspective of the LBI

The Legally binding instrument on Human rights and TNCs ("LBI") is not a first attempt of the international community to come up with a regulation of TNCs activities and their impacts on human rights[23]. Different non-binding texts have been already adopted on international or regional level (OECD)[24]. Those soft-law documents make a stress on preventive measures and voluntarily compliance in order to achieve the general aim which is the protection of human rights. Preventive measures adopted by States and voluntarily compliance by TNCs is framed basically by two general concepts: due diligence and responsible business conduct[25]. The concept of due diligence (of States) relates to the obligation of conduct and requires that State protects other sovereign States, their representatives and nationals from illegal acts perpetrated on its own territory. Due diligence principle comprises preventive and repressive facets. "The customary law obligation of due diligence in performing international obligations

21 The development of legal personality of TNCs might be compared to the international legal personality of individuals (in human rights law matters or in criminal law matters). However, it is far more complicated to grasp transnational corporations in one-entity person due to complicated, unclear and unstable of corporate net.

22 Despite their real activities in international area, TNCs seem to be out of the system of subjects of international law.

23 For a general over-view see for example GEALFOW, Amal Azem; MACHONOVA SCHELLONGOVA, Ivana. Draft Legally Binding Instrument on Business and Human Rights – Is UN Stepping Twice into the Same River?. International and Comparative Law Review, 2022, vol. 22, no. 1, pp. 149–164. DOI: 10.2478/iclr-2022-0010

24 OECD Guidelines on Multinational Enterprises.

25 Those two concepts might be seen as totally separated. Nevertheless, they can be perceived as double-facet of one principle.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

is viewed as criteria for attributing State responsibility in cases of violation of international law resulting from an omission, rather than an action, of a state."[26] If due diligence principle stands for States[27], the concept of responsible business conduct lies within corporations. It relates to a broader concept of corporate social responsibility and with respect to human rights a notion of human rights due diligence[28] is employed. Both principles are mirrored in the third draft of Legally binding instrument on Human rights and TNCs presented by the Intergovernmental group in 2021[29]. Even though the creation itself of the Intergovernmental group as well as its activity is not very much supported by a large number of States[30], the document reflects certain conceptual tendency supported mainly by less developed countries and countries of foreign direct investment by TNCs. However, it is not the purpose of this text to assess whether such approach of western countries reflects elements of the ideology of neo-colonialism[31]. In the following text, we will introduce gradually the general presentation of the LBI from international legal personality perspective (4.1.), examine then the role and obligations of States (4.2.) and end up with portraying role and obligations of business enterprises (4.3.)

4.1 General presentation

Examining the Legally binding instrument from the international legal personality pattern, we can observe the conceptual tendency giving a concrete status to the TNCs. The whole prevention-protection system is based on three pillars reflected as well in different principles[32] of the LBI Preamble and then developed throughout the document. Namely: first, States´ primarily obligation for human

26 KULESZA, Joanna, *Due Diligence in International law*. Brill, 2016. [online] <https://doi.org/10.1163/9789004325197_002>, p. 2. Accessed: 14.12.2022.

27 As it will be shown later, the LBI and other doctrinal approaches refer to the due diligence of business enterprises which is concept similar or same to the concept of responsible business conduct.

28 Human rights due diligence is a concept used by the UN Guiding principles on Business and Human Rights prepared by the UN Special Representative John Ruggie and adopted by the Human Rights Council in its resolution 17/4 in June 2011.

29 Human rights Council adopted in July 2014 a Resolution A/HRC/RES/26/9 by which it „decides to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights".

30 It is interesting to note the voting of the resolution, where 20 States voted for, 14 against and 13 abstained in voting. States voting against were States – members of the EU or politically related to it (Montenegro, Macedonia), USA and Japan.

31 STORGAARD, Marianne. TIENARI, Janne. PIEKARI, Rebecca. MICHAILOVA, Snejina. Holding On While Letting Go: NeoNeocolonialism as Organizational Identity Work in a Multinational Corporation, January 2020, Organization Studies 41 (11), pp. 1–21.

32 Some of those principles have already been mentioned in the preamble of Human Rights Council Resolution A/HRC/RES/26/9 establishing the intergovernmental open-ended group on business and human rights.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

rights protection and promotion[33]; second, victims´ access to remedy[34]; third, business enterprises obligation for respect internationally recognized human rights[35]. The figure of three pillars can also be seen as an inverted triangle (State sovereignty – business enterprises – victims access to remedy) positioned at the top of the sovereignty of the States. It is the State, as a sovereign and primary actor and subject of international legal relations, which has first the obligation vis-à-vis individuals and human rights protection and promotion including the access of victims to remedies. And then an obligation to articulate former obligation through the business relationships. The well-known State-to-persons pattern already establish by international human rights law norms is now complemented and modified by the element of "business enterprise". In the situation of human rights abuses committed during business activities by multinational enterprises, States cannot stand alone. They are not, and cannot be unique bearer of obligation towards individuals, victims. In that sense, we can speak of a general commitment which is and has to be shared between States and TNCs with respect to individuals. However, the position of States and TNCs is not the same, so that the specific content or parts of the elements constituting this general commitment are not the same and, in fact, not interchangeable. This situation is well mirrored in the text of the LBI mentioning different obligations and task of States on the one hand, and of TNCs on the other hand.

4.2 Role and obligations of States

The LBI is not a typical human rights law instrument, so State´s obligations[36] are to some extent different[37], and they follow from the general figure of inverted triangle presented above. From this perspective, there are some typi-

33 LBI Principle 7 reads: Stressing that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that State must protect against human right abuse by third parties, including business enterprises, within their territory, jurisdiction, or otherwise under their control, and ensure respect for and implementation of international human rights law.

34 LBI Principle 6 reads: Upholding the right of every person to have effective and equal access to justice and remedy in case of violations of international human rights law or international humanitarian law, including their rights to non-discrimination, participation and inclusion.

35 LBI Principle 11 reads: Underlining that business enterprises, regardless their size, sector, location, operational context, ownership and structure have obligation to respect internationally recognized human rights, including by avoiding causing contributing to human rights abuses through their activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships.

36 In this regard, compare for example the European Convention on Human rights, Art. 1 which reads : „The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

37 One of the purpose of this instrument is "to clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfil and promote human rights in the context of business activities, particularly those of transnational character". *Cf.* The LBI Art. 2.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

cal commitments vis-à-vis individuals taking form of States´ obligations ("States Parties shall protect victims, their representatives, families and witnesses from any unlawful interference with their human rights and fundamental freedoms, including prior, during and after they have instituted any proceedings […][38]) or the form of rights of victims[39], being supported by procedural facilitations[40]. Then, there are obligations vis-à-vis business enterprises aiming at changing their conduct and position with respect to individuals. In that sense, "States Parties shall regulate effectively the activities of all business enterprises "[41] and „shall take appropriate legal and policy measures to ensure that business enterprises […] respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships"[42]. Those obligations of conduct are mainly oriented to the prevention and represent elements of the State due diligence principle. However in terms of content and purpose, State due diligence principle differs from responsible business conduct or business due diligence, or in other words human rights obligations of business enterprises.

4.3 Role and obligations of business enterprises

As presented above, in the situation of possible human rights abuses committed during business activities the general commitment vis-à-vis individuals is somehow split between States and business enterprises. In this sense, States have a primarily responsibility for human rights protection. However, in this specific situation, such responsibility is particularly articulated towards business enterprise what creates a new specific obligation on them. It is confirmed directly in the LBI which mentions in the Art. 2 one of its purposes that is "to clarify and ensure respect and fulfilment of the human rights obligations of business enterprises"[43]. This provision should be read simultaneously with the provision

38 The LBI Art. 5, Protection of Victims]

39 The LBI Art. 4, Rights of Victims – e.g. – be treated with humanity, be guaranteed the right of access to justice and effective remedy, be guaranteed the right to submit clais including class actions, be guaranteed the access to information.

40 The LBI Art. 7.1., Access to Remedy, reads „State parties shall provide their courts and State-based non-judicial mechanisms, with the necessary competence […]to enable victims´ access to adequate, timely and effective remedy and access to justice […]." Similarly, „States Parties shall provide adequate and effective legal assistance to victims" (Art. 7.2.), they „ shall enact or amend laws allowing judges to reverse the burden of proof in appropriate cases to fulfil the victims´ right to access to remedy" (Art. 7.4.), or they „shall provide effective mechanisms for the enforcement of remedies for human rights abuses, including through prompt execution of national or foreign judgments or awards" (Art. 7.5.).

41 The LBI Art. 6.1.

42 The LBI Art. 6.2.

43 It is interesting to note, that modifications proposed by the European Union speaks about *responsibilities* instead of obligations. *Cf.* The third revised draft legally binding instrument with the textual proposals submitted by States, A/HRC/49/65/Add.1, 28 February 2022.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

of the Art. 3.3. refereeing to the substantial scope of the LBI. The substantial scope of the LBI covers "all core international human rights treaties and fundamental ILO Conventions to which a State is a Party, and customary international law". It does not mean *per se* that States´ obligations are the same as that of business enterprises. Nevertheless, the letter ones are derived in substance from the former ones. Thus, those obligations of business enterprises form the general framework and content of the concept of human rights due diligence which is expressly mentioned in the LBI[44]. Different and concrete obligations for business enterprises are then specified and developed within Art. 6.3. and Art. 6.4. What is decisive from the point of view of international legal personality is the phrasing of the Art. 6.6. which refers to sort of *dual obligation* – that of States and that of business enterprises. This article reads: "States Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article taking into consideration the potential human rights abuses resulting from [activities of] the business enterprises […] including those of transnational character." Substantial human rights due diligence provisions are then supported by procedural elements based on the concept of liability for human rights abuses arising from business activities.[45] They involve liability of legal persons without prejudice to the liability of natural persons; civil liability not contingent on criminal liability findings; effective dissuasive criminal, civil and/or administrative sanctions in situations where business activities have caused or contributed to human rights abuses[46]. This demonstrates that a general set of obligations come through the concept of human rights due diligence of business enterprise directly to TNCs. Yet, it would be premature to contend those obligations have been already well anchored within the system of international law. Nevertheless, not formally existing yet, they start to be more and more apparent.

5 Possible and wanted shift of international legal personality of TNCs?

It has been demonstrated the LBI provides for specific substantial obligations of TNCs accompanied by procedural mechanisms. They cannot be yet assessed as *hard law* obligations arising directly to TNCs from international law. Far from being derived, those obligations are somehow vehiculated from States´ obligations, using especially the concept of business due diligence. For the time being, they rather leak out from States´ obligations and trickle only smoothly more in domestic area. This can be somehow compared to the development of international legal personality both in the branch of international human rights law and international criminal law. Should we study the historical development of these branches of

44 The LBI Art. 6. 3 reads: „States Parties shall require business enterprises to undertake human rights due diligence, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships […]".

45 The LBI Art. 8.

46 The LBI Art 8.2. and Art. 8.3.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

international law in general and the position of individuals and the concept of international legal personality more specifically, we would come up to a variety of similarities comparing to current situation of multinational enterprises. In the germ, both in international human rights law[47] and in international criminal law[48], the international legal personality of individual was everything that acquired. Similar development might be seen with TNCs. TNCs fulfils different elements or criteria of "unformal" international legal personality. They are influential actors on international level[49], big business and commercial actors[50]. And to a big extent, they are holders of new (specific) obligations stemming from international law and being vehiculated by the concept of business due diligence principle. However, the issue of international legal personality of TNCs is also related to the definition of transnational corporations[51]. To the comparison with international human rights law and international criminal law, for TNCs there is no subject unity. Different subject elements build up the totality of TNCs – mother society, its subsidiaries, their suppliers. To by-pass the problematic approach to the definition of TNCs, the LBI speaks in the definition Article 1 about business activities, business activities with transnational character and business relationship[52]. However, when referring to obligations, human rights due diligence, the LBI uses the term of <business enterprise> and/or <business enterprise that undertake activities of transnational character>[53]. In that sense, obligations which take source from international legal system and are vehiculated by States to business enterprises do not specifically differentiate between *national* and *transnational* corporations. The transnational character of the corporation is not created only and exclusively by the net between *national* mother society and its foreign subsidiaries. It is the transnational character of business activities which is taken into consideration. In this regard, the concept of international legal personality of TNCs based on *transnational activities* mirrors the fluidity of the concept of TNCs itself. To some extent it might be difficult to determine who in fact is the holder of obligations enumerated for example in the LBI, who should then be held responsible for human rights abuses, and who should be procedurally sued and in the position of defendant. In this sense, the LBI is rather open in terms of adjudicative jurisdiction and precises that "courts vested with jurisdiction […] shall avoid imposing any legal obstacles, including the doc-

47 CANCADO TRINDADE, Antônio Augusto. *Le droit international pour la personne humaine*. Pédone, 2012. pp. 2–368.

48 CASSESE, Antonio. GAETA, Paolo. *Cassese's International Criminal Law*, 3rd ed. Oxford University Press, 2013. pp. xx–472.

49 *Cf.* NOWROT, Karsten. *Op.cit.*

50 *Cf.* HIGGINS, Rosalyn. *Op.cit.*

51 For the different approaches to the definition of multinational corporations: *cf.* SUPPA, Alessandro; BUREŠ, Pavel. Can Multinational Corporations be responsible for human rights violation of its outsourcee company? Response of national or international law? International and Comparative Law Review, 2020, vol. 20, no. 1, pp. 153–179. DOI: 10.2478/iclr-2020-0007

52 The LBI Art. 1.4., Art. 1.5.

53 The LBI Art. 6.2. and others.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

trine of *forum non conveniens.* […]"[54]. The lack of subject unity and as a corollary the procedural deficiencies are to some extent overcome by the concept of business enterprise with transnational activities and broad adjudicative jurisdiction.

6 Conclusion

It has been shown that for the time being the international legal personality of TNCs cannot be grasped by theoretical approaches of existing concepts. TNCs do not fulfil classical criteria of subjects possessing rights and obligations arising from the system of international law and having the capacity to maintain those rights by bringing international claims. The question is whether such theoretical concept is still sustainable in the situation of big influential non-State actors. Economic (and political) position of TNCs and the impact of business activities they have on human rights and environment urges a certain change of this classical approach. One example of such a change is a third revised draft of Legally binding instrument on human rights and TNCs. The analysis of this instrument has shown that special "new" obligations of human rights due diligence are vehiculated from States to business enterprises. This concept of *dual obligations* vis-à-vis individuals is a pillar within the LBI. In this regard, we may conclude that those *soft* obligations are first hallmarks in the construction of international legal personality of TNCs. The missing subject unity of TNCs is overcome by the concept of business enterprise´s activities which is then supported as well by broad adjudicative jurisdiction where municipal courts are invited not to hinder victims´ right to access to the court by different legal obstacles. Current situation of international legal personality of TNCs might be compared to the development of international personality of individuals in international human rights law and international criminal law. The wording of the LBI gives a clear standing that the international legal personality of TNCs is being shaped step by step.

Acknowledgments:

The paper has been prepared on behalf of the project: IGA_PF_2020_001 "Transnational corporations – current challenges for international law "

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Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601