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Transnational Corporations Subjectivity Based on the Criteria of the Bernadotte Case and the Traditional International Law Doctrine

*La subjetividad de las empresas transnacionales
basada en los criterios del caso Bernadotte
y la doctrina del derecho internacional tradicional*

*La subjectivité des firmes transnationales sur la base
des critères de l'affaire Bernadotte et de la doctrine
traditionnelle du droit international*

Arno Dal Ri Júnior*

Erika Louise Bastos Calazans**

SUMMARY: I. *Introduction*. II. *International Legal Personality and the Subject-Object Dichotomy*. III. *Transnational Corporations' Capacities and their Participation in International Community*. IV. *Conclusion*. V. *References*.

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RESUMEN: Este artículo trata de discutir el estatus legal de las corporaciones transnacionales (TNC) desde el punto de vista del derecho internacional (DI). El trabajo se centra en dos aspectos del problema propuesto. Primero, se presentan los diferentes vínculos existentes entre la idea de la subjetividad jurídica internacional y la personalidad jurídica internacional, tomando como punto de partida la dicotomía sujeto-objeto. Segundo, se discute si las TNC pueden o no cumplir el criterio del caso Bernadotte y la doctrina tradicional del DI. Este artículo concluye que las TNC son *de facto* sujetos del DI, argumentando que estas entidades son capaces de tener derechos y obligaciones bajo el DI; participar en el proceso legislativo y en la resolución de disputas internacionales.

Palabras clave: corporaciones internacionales, sujetos del derecho internacional, participantes, personalidad jurídica internacional, caso Bernadotte.

ABSTRACT: This article tries to discuss the legal status of transnational corporations (TNC) under international law (IL). The work focuses on two developments of the proposed problem. First, it presents the different links made between the idea of international legal subjectivity and international legal personality, taking as its starting point the subject-object dichotomy. Second, discusses whether the TNC are able or not to meet the criteria of Bernadotte Case and of the traditional doctrine of IL. This article concludes that the TNC are *de facto* subjects of IL, arguing that these entities are able to have rights and obligations under IL; participate in the law-making process and in international dispute resolution.

Key words: transnational corporations, subjects of international law, participants, international legal personality, Bernadotte Case.

RÉSUMÉ: Cet article prétend discuter du status légal des firmes transnationales (FTN) dans le droit international public (DIP). Le travail est centré sur deux volets issus du problème proposé. Premièrement, ce sont présentés les différents liens entre l'idée de la subjectivité juridique internationale et de la personnalité juridique internationale, ayant comme point de départ la dichotomie sujet-objet. Deuxièmement, c'est l'objet de discussion, si les FTN sont capables ou pas de satisfaire aux critères de l'affaire Bernadotte et de la doctrine traditionnelle du DIP. Cet article conclut que les FTN sont des sujets *de facto*, en argumentant que ces entités sont capables d'avoir des droits et des obligations dans le droit international; de participer au processus de création de la norme et à la résolution des différends internationaux.

Mots-clés: firmes transnationales, sujets de droit international, participants, personnalité juridique internationale, affaire Bernadotte.

I. INTRODUCTION

Transnational corporations (TNC) rule the world in terms of business and economic power, some are even more powerful than many states.¹ The increasing participation of TNC as economic and political actors of the “global community”² raised questions regarding their legal status under international law (IL) and their role on the promotion and protection of human rights and the environment. This paper’s primary concern is to discuss if transnational corporations can be classified as “subjects” of international law.

In order to answer this question, two interconnected issues will be addressed. First, present and discuss the different links made between international legal subjectivity and international legal personality using the subject-object dichotomy as a starting point. The main idea of subject-object dichotomy is that an international treaty can create direct rights and obligations for subjects of IL but only indirectly to objects of law. Second, discuss whether or not transnational corporations are capable of fulfilling the criteria of International Court of Justice Reparation for Injuries (Bernadotte Case) Advisory Opinion, and from traditional international law doctrine in order to be

¹ For instance, Apple is more economically powerful than two-thirds of the world’s countries. Francis, David, “These 25 Companies are More Powerful than Many Countries”, available at: <http://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/>.

² According to Professor Onuma “people tend to use the term «international community», consciously or unconsciously assuming that actors on the globe are not only nations or states, but also non-state actors such as international organizations, corporations and non-governmental organizations. They believe that the globe is no longer an arena where states quarrel with each other, but is assuming a character of a community where people share common values and institutions. In this sense, however, the term «global community» may be even more appropriate, because the term «international» still connotes relations between nations or states, often understood as monolithic entities”. Onuma, Yasuaki, “Multi-Civilizational International Law in the Multi-Centric 21st Century World: Transformation of West-Centric to Global International Law as Seen from a Trans-Civilizational Perspective”, in Dupuy, Pierre-Marie and Chetail, Vincent, *The Roots of International Law. Les fondements du droit international: Studies in the History of International Law*, Leiden-Boston, Martinus Nijhoff Publisher, 2014, vol. II, p. 603. Following his approach, in this paper the term “international society” and “international community” are used interchangeably and the term “global community” is used to emphasize the common values shared by various people, actors and agents, as well as their institutions and activities on the globe.

considered as subjects of IL. Reading the Bernadotte Case, two criteria can be found: (a) the capacity of bearing rights and duties under IL and (b) the capacity of bringing international claims. The traditional international law doctrine, based on a state-centric approach, considers two additional criteria: (a) the capacity to make international treaties on international level and (b) the possession of immunities and privileges from national jurisdictions. In this study, only the first three will be addressed, since the last one is clearly not applicable to TCN.

This paper concludes that different subjects may have different sets of rights and obligations under IL and only states can fulfill all capacities associated to international legal personality. Still, this does not mean that there are no other subjects of IL. On the contrary, it only confirms that the traditional IL approach is obsolete and poorly prepared to deal with the changes occurring among international community.

Although transnational corporations fulfill both criteria in Bernadotte Case and some of the traditional IL, they are not recognized as subjects. Therefore, TNC are *de facto* subjects of international law. Another conclusion is that “subject of international law” status is achieved by recognition. It depends on the political will of states and they have no interest in recognizing TNC as subjects. Additionally, transnational corporations have no desire for this recognition as it would officially imply direct international obligations in IL.

In reality, the whole notion of “subjects” and “objects” has no functional purpose and it is more useful and helpful to focus on the fact that transnational corporations are “participants” rather than subjects of the international society. As participants, it is important to establish what kind of rights and duties they may have under international law and how responsibility and/or accountability can be drawn to them.

II. INTERNATIONAL LEGAL PERSONALITY AND THE SUBJECT-OBJECT DICHOTOMY

1. *Sovereign States as Sole Subjects of International Law and the Capacities Associated to the International Legal Personality*

What does it mean to be a subject of international law? For many years now, International scholars have been addressing this question without

successfully giving it a clear answer. It is undeniable that the theme is part of the fundamentals of International legal system, and the discussion is relevant.

The aim of this section is to describe the classical theory and how it relates to the issue of legal subjects. This short presentation intends to provide a background for the next topic, which will try to apply the modern theories of IL to TNC case.

According to Brownlie, “a subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims”.³

Brownlie’s definition was inspired by the Reparation for Injuries Suffered in the Service of the United Nations Case of 1949 (Reparation for Injuries Case or simply Bernadotte Case), an advisory opinion issued by the International Court of Justice (ICJ).⁴ The author considers this definition circular because it depends on the existence of a legal person. In other words, it recognizes the capacity to act of an entity that is already capable of acting at the international level.⁵ Thus, an entity capable of bearing rights and duties and bringing international claims is a legal person under IL.⁶ Logically, if at any point corporations were treated as persons, “we can imply additional rights

³ Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford-New York, Oxford University Press, 2008, p. 57.

⁴ The advisory opinion emerged from killing of Count Folke Bernadotte of Sweden and some of his associates in Jerusalem in September of 1948, while performing their duties as United Nations agents, by Jewish terrorists, members of the Stern gang. The United Nations asked the International Court of Justice if the UN, as an organization, could claim reparations for these injuries from the responsible state. The following questions were asked by the United Nations: “In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him? II. In the event of an affirmative reply on point 1(b) how is action, by the United Nations, reconciled with such rights as may be possessed by the State of which the victim is a national?”. International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949, ICJ Report, pp. 174-175.

⁵ Pentikainen, Merja, “Changing International «Subjectivity» and Rights and Obligations under International Law – Status of Corporations”, *Utrecht Law Review*, vol. 8, issue 1, January 2012, pp. 145-154.

⁶ Brownlie, Ian, *op. cit.*, p. 57.

and obligations because they already have some”,⁷ unfortunately, that is not yet the case of TNC.

The Bernadotte Case links being a subject of international law with the idea of international legal personality.⁸ Legal personality is connected to “the extent to which an entity is recognized by a legal system as having rights and responsibilities”.⁹ Accordingly, in order to have the legal status of subject of International Law an entity must fulfill, if not all, at least some of the four capacities associated with the international legal personality. The four capacities are: (a) the capacity to make claims regarding breaches of International Law; (b) the capacity of bearing rights and obligations under IL; (c) the enjoyment of privileges and immunities from national jurisdictions; and (d) the capacity to make treaties and agreements on the international legal order.¹⁰ The first two criteria are both presented by ICJ in Bernadotte Case and traditional IL doctrine with the other two.

In traditional International Law, only states have international legal personality. The French jurist Henri Bonfils proclaims in his International law manual that states are the sole subjects of international law because they are the only member of international community.¹¹ Oppenheim adopts this classical state-centric approach and asserts:

Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects

⁷ Alvarez, José E., “Are Corporations «Subjects» of International Law?”, *Santa Clara Journal of International Law*, no. 1, 2011, p. 7.

⁸ McCorquodale, Robert, “The Individual and the International Legal System”, in Evans, Malcolm D. (ed.), *International Law*, 2nd ed., Oxford-New York, Oxford University Press, 2006, p. 309.

⁹ Zerk, Jennifer A., *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge, Cambridge University Press, 2006, p. 72.

¹⁰ Brownlie, Ian, *op. cit.*, p. 57.

¹¹ “Les États, considérés comme membres de la communauté internationale, son, par excellence, les personnes internationales, capables d’être ou de devenir les sujets actifs ou passifs de droit primordiaux et naturels, de droits contingents et positifs stipulés dans les traités ou consacrés par la coutume, de posséder un domaine, un patrimoine et d’exercer sur ce patrimoine puissance et domination. Mais sont-ils le seules personnes internationales? Oui, les seules, si l’on prend les termes personnes internationales comme synonymes et équivalents de membres de la communauté internationale. De cette communauté formée par leur volonté implicite les États son ten effect le seuls membres, en leur qualité d’organismes politiques”. Bonfils, Henri, *Manuel de droit international public*, Paris, LNDJ, 1905, p. 77.

of International Law. This means that the Law of Nations is a law for the international conduct of States, and not their citizens... In contradistinction to Sovereign States which are real, there are also apparent, but not real, International persons – namely, Confederation of States, insurgents recognized as belligerent Power in a civil war and the Holy See. All these are not, as will be seen, real subjects of International Law, but in some points, are treated as though they were International Persons, without becoming thereby members of the Family of Nations. It must be especially mentioned that the character of a subject of the Law of the Nations and of an International Person can be attributed neither to monarchs, diplomatic envoys, and private individuals, nor to chartered companies, nations or races after the loss of their state (as for instance the Jews or the Poles), and organized wandering tribes.¹²

Other jurists, such as Hans Kelsen¹³ and Karl Heinrich Triepel¹⁴ also addressed the issue. Although Kelsen and Triepel recognize only states as subjects of IL, they envisage that new legal and political developments may confer legal personality to other actors of the international community.

According to the subject-object dichotomy, especially embraced by the positivist school of international law,¹⁵ from West to East,¹⁶ an entity is subject of law if it can directly participate in the law-making process, if it is

¹² Oppenheim, L., *International Law: A Treatise*, New York, Longmans, Green and Co., 1905, vol. I, pp. 18-19 and 99-100.

¹³ Kelsen, Hans, *Princípios do direito internacional*, trad. of Gilmar Antônio Bedin and Ulrich Dressel, Ijuí, Unijuí, 2010, pp. 161-162.

¹⁴ Triepel, Karl Heinrich, “Les rapports entre le droit interne et le droit international”, *Recueil des Cours*, The Hague, 1923, p. 82.

¹⁵ Anzilotti states: “Il principio che I soli Stati sono I soggetti del diritto internazionale fu affermato con particolare energia dalla recente dottrina positiva, che ne fece la salda premessa di deduzioni dirette ad eliminare una quantità di erronee infiltrazioni giusnaturalistiche e la base per una ricostruzione rigorosamente giuridica di numerosi istituti. Ma il modo in cui il principio fu affermato implicava un duplice errore”. Anzilotti, Dionisio, *Corso di diritto internazionale: introduzione, teorie generali*, Padova, Cedam, 1964, vol. I, p. 113.

¹⁶ The Eurocentric approach of the world and the positivist school of international law was adopted by prominent Japanese scholars, such as Sakutaro Tachi (1874-1943), who divided international law in two: war-time international law and peace-time international law. Tachi's books, *Heiji Kokusaiho Ron* of 1930 (*Treatise on Peace-Time International Law*) and *Senji Kokusaiho Ron* of 1931 (*Treatise on War-Time International Law*) present the clear notion of positivist school recognizing states are the only subjects of international law. Tachi, Sakutaro, *Heiji Kokusaiho Ron*, Tokyo, Nihon Hyoron Sha, 1930; Tachi, Sakutaro, *Senji Kokusaiho Ron*, Tokyo, Nihon Hyoron Sha, 1931.

capable of directly bringing international claims and if it's able of bearing rights and obligations under IL, while objects of law are the beneficiaries of legal rules.

The formalism adopted by positivists ignored the influence of economic and social phenomena in international law,¹⁷ not being able to see that other entities were capable of directly influence and participate in the legal order. Therefore, an international treaty can create direct rights and obligations for subjects of IL but not to objects of law. In other words, a treaty can create legal rules addressing the objects of IL,¹⁸ but the implementation of any right or duty declared in the treaty will depend on the creation of national law by a state, as the treaty law can only affect objects of law indirectly.

The doctrine of international "subjectivity"¹⁹ is based on the binary opposition of subject versus object of law. This binary opposition has become part of the definition of legal personality and is still considered by several authors, such as Julian Ku,²⁰ James Crawford, and Christopher Greenwood.²¹ Clearly, the subject-object dichotomy is based on a state-centric approach, since it presents all the capacities that only states possess. Furthermore, International Law was not, in principle, thought to address transnatio-

¹⁷ Dal Ri Júnior, Arno, *História do direito internacional: comércio e moeda, cidadania e nacionalidade*, Florianópolis, Fundação Boiteux, 2004, p. 113.

¹⁸ McCorquodale, Robert, *op. cit.*, p. 309.

¹⁹ Pentikainen, Merja, *op. cit.*, p. 145.

²⁰ Ku, Julian G., "The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking", *Virginia Journal of International Law*, vol. 51, 2011, pp. 353-396.

²¹ Vázquez, Carlos Manuel, "Direct vs. Indirect Obligations of Corporations under International Law", *Columbia Journal of Transnational Law*, vol. 43, 2005, pp. 927-959. See U. S. District Court for the Southern District of New York, *The Case Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S. D. N.Y. 2003). "Talisman contends that the Court lacks subject matter jurisdiction because corporations are legally incapable of violating the laws of nations. It argues that international law applies to states and in some cases to individuals, but that «the law of nations simply does not encompass principles of corporate liability». Motion Brief, at 4. Talisman relies primarily on affidavits submitted by two renowned international law scholars, James Crawford and Christopher Greenwood. Both scholars, consulting a variety of international sources, conclude that there is no basis in existing international law for the liability of corporations. Nonetheless, a considerable body of United States and international precedent indicates that corporations may be liable for violations of international law, particularly when their actions constitute *jus cogens* violations". Justia US Law, "Presbyterian Church of Sudan vs. Talisman, 244 F. Supp. 2d 289 (S. D. N.Y. 2003)", available at: <http://law.justia.com/cases/federal/district-courts/FSupp2/244/289/2287736/>.

nal corporations as subjects, but solely as objects. This rule approach has at least four important aspects:

The possession of rights, duties and powers is relevant for the question of legal status and for legal personality, and may even be regarded as the same thing as legal personality. States are the only international legal persons that possess the full range of rights, duties and capacities, and are the only entities that are capable of enjoying such possession under international law as we know it today. States can create new, “imperfect”, subjects of international law. All non-state international legal persons derive their legal personality from states.²²

Under this view of international law, it is clear that states can create it and change it as they like. States are also responsible to confer legal status to non-state actors or even create new international legal persons. This is supported by the *Reparation for Injuries Case*.²³ Although transnational corporations are considered objects in this traditional dichotomy, they are not as passive as this model may suggest. Today, their participation in international society is undeniable and greater recognition of their role and contributions are being discussed by the doctrine.²⁴ Plus, the international community evolved to recognize other subjects and actors with different capacities which puts in check this obsolete approach.

2. *New Subjects of International Law in the Twenty-First Century*

Who are the subjects of international law? Until the end of the World War II, international theory had no doubt that sovereign states were the only subjects of IL. Since then, a growing trend occurred including other entities, such as international organizations, individuals, belligerents,²⁵ national

²² Lindblom, Anna-Karin, *Non-Governmental Organisations in International Law*, Cambridge, Cambridge University Press, 2005, p. 90.

²³ *Ibidem*, p. 112.

²⁴ Zerk, Jennifer A., *op. cit.*, p. 73.

²⁵ Insurgents are members of a rebellion; it indicates an armed struggle by dissident forces against an established government in a state. Belligerency is a stage of the civil war in which there are two contenders for power that can be placed on a platform and there is something like a state of war, and not only civil conflicts. Despite conflicting doctrinarian positions as

liberation movements and certain *sui generis*²⁶ or state-like entities,²⁷ as new subjects of international law.

The Reparation for Injuries Case was the breaking point for the recognition of other entities as subjects of IL. The ICJ recognized United Nations, and therefore, international organizations²⁸ in general as subjects of IL, are directly capable of possessing rights and obligations and bringing claims to International Courts.²⁹

According to the Bernadotte Case “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”. Therefore, in order to be considered a subject of international law, it is not mandatory to fulfill all the three capacities, since subjects of law have different nature and participations in any legal system, that is not different under international legal system. For instance, individuals are not capable of signing and ratifying international treaties. Nevertheless, today they are considered subjects of IL because they can make claims in respect of breaches of International Human Rights Law (IHRL) and face trials at International Criminal Courts.

The Court’s approach confirmed that traditional international law system, wrought to regulate sovereign states and their necessities is not yet equipped to properly address transnational corporations and other new ac-

to the exact definition of insurgency there is a consensus that it can become belligerency. Cassese, Antonio, *International Law*, 2nd ed., Oxford-New York, Oxford University Press, 2005, p. 71.

²⁶ Such is the case of Holy See, the Sovereign Order of Malta and the International Committee of the Red Cross.

²⁷ Arno Dal Ri Júnior discusses the international legal personality of federal states based on the classical international law. Dal Ri Júnior, Arno, “As sombras da soberania: a condição jurídica de Estados federados e governos infraestatais no direito internacional”, in Dal Ri Júnior, Arno *et al.*, *Santa Catarina nas relações internacionais: desafios da Assembleia Legislativa do Estado de Santa Catarina no cenário internacional*, Florianópolis, Assembleia Legislativa do Estado de Santa Catarina, 2010, pp. 17-61.

²⁸ According to Ian Brownlie, the legal personality of international organizations is based on the fulfillment of three conditions: “(i) being a permanent association of states, with lawful objects, equipped with organs; (ii) having a distinction, in terms of legal powers and purposes, between the organization and its member states; (iii) the existence of legal powers exercisable on the international plans and not solely within the national systems of one or more states”. Brownlie, Ian, *op. cit.*, p. 677.

²⁹ International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949, ICJ Report.

tors of the international society.³⁰ In other words, the Advisory Opinion exposed how international law is constantly changing. Each new subject of IL has its own characters and means to acquire rights and obligations. To admit the existence of new subjects of international law, so different from each other, is to indirectly admit that the traditional subject-object approach is inadequate to address all the new phenomena in the global community and international legal order.

In order to avoid the stagnation and promote IL development it is necessary to recognize these new subjects. In this regard, Alejandro Rodríguez Carrión asserts:

Regarding the subjects of international law, it could occur the same: two major categories of subjects (States and Organizations) and a broad spectrum of subjects that match poorly with previous ones requires an umbrella which introduce a set of entities that are no more than the expression of the movement of international society and its legal system.³¹

In sum, regardless of accepting TCN as such, they are present in the international community and are actively participating in the promotion or violation of human rights, in the international and national economic development or even in the protection or destruction of the environment.³²

³⁰ Zerk defends that this is an opportunity to develop international regulations. The author believes that is due to two significant developments among scholars: “first, the growing conviction that private entities (traditionally referred to as objects rather than subjects of international law) are themselves subject to «direct obligations» under international human rights law and, second, growing demand of states as regulators of private enterprises”. Zerk, Jennifer A., *op. cit.*, p. 60.

³¹ “En materia de sujetos del Derecho Internacional pudiera ocurrir lo mismo: dos grandes categorías de sujetos (Estados y Organizaciones) y un gran espectro de sujetos que casan mal con los anteriores obliga a un cajón de sastre donde introducir un conjunto de entidades que no son más que la expresión del movimiento de la sociedad internacional y de su ordenamiento jurídico”. Rodríguez Carrión, Alejandro J., *Lecciones de derecho internacional público*, 5th ed., Madrid, Tecnos, 2002, p. 138.

³² Transnational corporations can and do affect the environment and human rights of employees, consumers and communities wherever they operate. For instance, in 2008, Vale S. A. signed an agreement with the Brazilian Federal Government not to sell iron or coal to steel companies involved in slave labor and environmental destruction. Nevertheless, in May 2011, the murder of community leaders revealed that Vale was still selling to such companies. Another example involves the Canadian company, Kinross, which extracts gold from the Paracatu mine, located only 250 meters from the urban area of the city of Paracatu (Minas Gerais State),

III. TRANSNATIONAL CORPORATIONS' CAPACITIES AND THEIR PARTICIPATION IN INTERNATIONAL COMMUNITY

1. *Transnational Corporations as Prominent de facto*

Subjects of International Community

How about transnational corporations? What are their capacities according to Bernadotte Case and traditional international law? In the current and still predominant view, especially among European scholars, such as Crawford and Greenwood,³³ transnational corporations have none. As defended by this doctrinaire view, TNC have some degree of influence and participation in the international community, however, that is not enough to attain subjects of IL status.

Dinh, Daillier and Pellet are cautious in their analysis of TCN under IL. The authors argue that private persons legal personality and capacity, which includes TNC, are established by the national legal order and States are silent on that matter.³⁴ Still, Dinh, Daillier and Pellet consider that international criminal responsibility is a way to consider private persons as subjects of IL.³⁵

Brazil. According to civil society and local Non-Governmental Organizations (NGOs), the gold extraction process adopted in this mine has released gases and other substances into the environment, causing poisoning and even cancer to the city's inhabitants. At the same time, the gold extraction in the Paracatu mine is the main source of labor opportunities for locals. These examples show that corporations are uniquely positioned to affect, positively and negatively, the level of enjoyment of human rights. Aguilar Sánchez, Carlos, "Brasil: Não há milagre fácil. Como aumentar a transparência e responsabilidade das indústrias extrativas", *Economias Emergentes*, Transparency & Accountability-Revenue Watch Institute, 2012, pp. 1-15; Laboissière, Mariana, "Proximidade entre mineradora e população põe moradores de Paracatu em risco: estudos mostram que o arsênio pode ser absorvido pelo corpo", *Correio Braziliense*, 14 March 2015, available at: http://www.correiobraziliense.com.br/app/noticia/cidades/2015/03/14/interna_cidadesdf,475445/proximidade-mineradora-populacao-poe-moradores-de-paracatu-em-risco.shtml.

³³ "Talisman relies primarily on affidavits submitted by two renowned international law scholars, James Crawford and Christopher Greenwood. Both scholars, consulting a variety of international sources, conclude that there is no basis in existing international law for the liability of corporations". U. S. District Court for the Southern District of New York, *The Case Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S. D. N.Y. 2003).

³⁴ Dinh, Nguyen Quoc *et al.*, *Direito internacional público*, 2nd ed., trad. of Víctor Marques Coelho, Lisboa, Calouste Gulbenkian, 2003, p. 664.

³⁵ *Ibidem*, p. 666.

Carrión also shows caution on his reasoning on the subject matter. The Spanish author considers TCN as:

Economic production and marketing units whose scope of activity is not limited by national boundaries. Their discipline and centralized control, along with the possibility of huge amounts of resources, make them real actors of international life. Their legal status, however, is virtually nonexistent internationally. The need to control their activities, policy and unrivaled economic capability for many States has encouraged the claim to regulate and control, resulting in a multiplicity of projects, always abortive, especially in political and economic reality that liberalization aimed more at deregulation. In any case, none of the attempts has contemplated the possibility of granting international subjectivity to transnational corporations.³⁶

Therefore, Carrión recognizes the important role and participation of TCN in international life and the need to control their activities. He also admits that there is no interest among states or even among TCN to officially confirm the subjectivity status under IL.

Touscoz defends transnational enterprises subjectivity:

Anyway, the TNC are not only actors of the utmost importance in international society but also subjects of international law. They relate with other subjects of international law and above all States, resort to all the dispute settlement arrangements that exist in international law, powerfully contributing to their creation and application.³⁷

³⁶ “Unidades económicas de producción y comercialización cuyo ámbito de actividad no se limita por fronteras nacionales. Su disciplina y control centralizados, junto con la posibilidad de disponer de ingentes cantidades de recursos, las hacen auténticos actores de la vida internacional. Su estatuto jurídico, sin embargo, es prácticamente inexistente a nivel internacional. La necesidad de controlar sus actividades, de capacidad política y económica inigualable para muchos Estados ha alentado la pretensión de regularlas y controlarlas, dando lugar a una multiplicidad de proyectos, siempre malogrados, especialmente en una actualidad política y económica en que la liberalización apunta a más a desregulación. En cualquier caso, ninguno de los intentos ha contemplados la posibilidad de otorgar subjetividad internacional a las empresas transnacionales”. Rodríguez Carrión, Alejandro, *op. cit.*, p. 154.

³⁷ “Seja como for, as STN são não só actores da maior importância na sociedade internacional, mas também sujeitos de Direito Internacional. Relacionam-se com outros sujeitos de Direito Internacional e sobretudo com Estados, recorrem a todos as modalidades de resolução de diferendos que existem em Direito Internacional, contribuindo poderosamente para a sua

Indeed, Touscoz presents two compelling arguments regarding TCN, but Alvarez goes further and states:

While the casebook devotes only a few pages to the status of corporations under international law, what it tells its readers is choice, namely that: corporations, at least since the Dutch East India Company, have long been major international law actors and have exerted considerable influence in the making of rules governing trade, investment, antitrust, intellectual property, and telecommunications; are indirect claimants in the World Trade Organization (WTO) dispute settlement system and direct claimants in investor-state arbitration; have long participated in “governmental” teams before international organizations forums; have had direct voting rights in the International Labor Organization; have played standard-setting roles in other organizations like the International Telecommunications Union; have been the de facto subjects of a large number of treaties dealing with everything from labor law to environmental protection; have been the direct subject of Security Council decisions, including its sanctions regimes; and, of course, have been the subject of or participated in fashioning substantial “soft law” regulatory efforts, such as codes of conduct. The intended message is clear: Since corporations make and enforce law, only a formalist blind to reality would deny that they are “persons” or “subjects” of international law.³⁸

We are inclined to agree with Alvarez. There is nothing in IL that wouldn’t allow corporations to be officially considered as subject of international law except for a “formalist blind”. Certainly, it’s possible to consider that TCN would be potentially capable of facing trial for violations of International Criminal Law,³⁹ or could be considered “steering subjects”⁴⁰ of International Economic Law and International Investment Law due to their intense

formação e aplicação”. Touscoz, Jean, *Direito internacional*, Paris, Presses Universitaires, 1993, p. 179.

³⁸ Alvarez, José E., *op. cit.*, pp. 5-6.

³⁹ Gotzmann, Nora, “Legal Personality of the Corporation and International Criminal Law: Globalization, Corporate Human Rights Abuses and the Rome Statute”, *Queensland Law Student Review*, vol. 1, no. 1, 2008, pp. 36-54.

⁴⁰ Nowrot explains that “the term «steering subjects» —in particular to be distinguished from and considerably broader than the generally recognized circle of subjects of international law— comprises all state, substate, intergovernmental, nonstate, and intermediate actors that participate in the creation and development of IEL and in the respective law-realization processes aimed at the enforcement of its rules of behavior”. Nowrot, Karsten, “Transnational

participation on WTO⁴¹ and dispute settlement mechanisms in International Investment Law (IIL).⁴² Considering the roles played by transnational corporations in global community it's imperative to verify whether or not they have any of the capacities associated to international legal personality.

A. *The Capacity to Make Claims Regarding any Violations of International Law*

Do Transnational corporations have *locus standi* to complain on international instances under treaty law? International Human Rights Law (IHRL), the jurisprudence of the European Court of Human Rights and International Investment Law (IIL) may have the answer to this question.

Article 34 of the European Convention on Human Rights (ECHR) states that individual applications will be received by the European Court of Human Rights 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”.⁴³ However, first the Court must analyze if the admissibility criteria of article 35 of the ECHR were fulfilled. Among the criteria, one of the most important is the exhaustion of all domestic remedies in accordance to the general recognized rules of international law.⁴⁴

Transnational Corporations are included among non-governmental organization and, as legal persons, are entitled to make individual applications. In the European Court of Human Rights, when companies are victims, in some circumstances, they are the only ones who can make the application.⁴⁵ In the *Case of Agrotexim and Others v. Greece* of 24 of October 1995 the Court said:

Corporations as Steering Subjects in International Economic Law: Two Competing Visions of The Future?”, *Indiana Journal of Global Legal Studies*, vol. 18, no. 2, Summer, 2011, p. 805.

⁴¹ Although TNC are not member of WTO they have intensely participated in the law-making process through lobbies and *amicus curiae* briefs. Plus, TNC can submit *amicus curiae* briefs to WTO dispute bodies to achieve a variety of procedural/participatory and substantive goals despite procedural barriers.

⁴² Nowrot, Karsten, *op. cit.*, pp. 803-842.

⁴³ Council of Europe, “Convention for The Protection of Human Rights And Fundamental Freedoms”, European Convention on Human Rights of 4 November 1950, Rome, entered into force on September 3, 1953.

⁴⁴ *Idem*.

⁴⁵ Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford-New York, Oxford University Press, 2006, pp. 81-82.

The Court considers that the piercing of the “corporate veil” or the disregarding of a company’s legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or—in the event of liquidation—through its liquidators.⁴⁶

The Court made clear in its jurisprudence⁴⁷ that corporations are included among non-governmental organizations, for the effects of article 34 of the ECHR, and therefore, have capacity to bring actions as victims directly to the Court. This recognition implies another, the Court considers that corporations have acquired rights in international treaties, including the European Convention on Human Rights.⁴⁸

Nevertheless, the Court’s interpretation of article 34 of ECHR accepting corporations as individual applicants and beneficiaries of human rights has not escaped criticism. Muijsenbergh and Rezai point out that:

⁴⁶ European Court of Human Rights, *Agrotexim and Others vs. Greece*, Judgment of 24 October 1995, case number 15/1994/462/543, para. 60.

⁴⁷ European Court of Human Rights, *Sunday Times vs. United Kingdom*, Judgment of 29 March 1979, Application n. 6538/74.

⁴⁸ “An inexhaustive enumeration of Convention rights deemed applicable to corporations includes, first and foremost, the Convention’s procedural rights, which, because of their very nature, do not militate against the inclusion of corporations within their scope. Among the Convention rights always and easily deemed applicable to corporations are the right to a fair trial under Article 6 of the Convention, the right to no punishment without law under Article 7 of the Convention, the right to limitations on the use of restrictions on rights under Article 18 of the Convention, and the right to an effective remedy under Article 13 of the Convention. Furthermore, the right to peaceful enjoyment of one’s possessions laid down in Article 1 of Protocol 1 to the Convention is indisputably applicable to corporations. This is the sole article which according to its own text is applicable to legal persons. Other rights attributable to corporations include the protection against discrimination under Article 14 of the Convention and the freedom of assembly and association under Article 11 of the Convention. Though not applied to profit-seeking corporations, the freedom of religion under Article 9 of the Convention has also been deemed applicable to legal persons (*i.e.* churches) and thus considered capable of conferring rights to non-human entities. In addition to the above-mentioned rights, there are some Convention rights which have been much less easily accepted as capable of conferring protection to corporations, such as the freedom of expression under Article 10 of the Convention, the right to privacy under Article 8 of the Convention and the right to compensation for non-pecuniary damages under Article 41 of the Convention”. Muijsenbergh, Winfried H. A. M. Van Den and Rezai, Sam, “Corporations and the European Convention on Human Rights”, *Global Business & Development Law Journal*, vol. 25, June 2012, pp. 49-50.

The criticism ranges from conceptual incompatibilities (human rights can only be extended to human beings and not to corporations), to practical horror scenarios (the Court will be flooded by a tsunami of corporate applicants), to *quid pro quo* assertions (if companies refuse to accept human rights obligations, they should not be able to benefit from their protection). With a focus on the Convention and its drafting, these points of criticism can be countered with relative ease. For one, as we have seen, the drafters of the Convention never intended to exclude corporations from the conceptual cover of the established human rights. Critics also tend to negate the fact that the Court operates selectively in its inclusion of corporate complaints under the various Convention provisions.⁴⁹

Although, the idea of corporations possessing human rights may cause indignation in some, arguments such as the flood of complaints, may not be a reason to deny corporations the benefit of human rights protection and access to justice.

Another indication of transnational corporations' capacity to make claims and enforce international law, is in the legal regime governing the settlement of international investment disputes.⁵⁰ The most common mechanism is investment arbitration involving the host state and foreign investors,⁵¹ especially, transnational corporations.⁵²

According to Nowrot, normally, an institutionalized form of arbitration is used based on the International Centre for Settlement of Investment Disputes.

⁴⁹ *Ibidem*, p. 52.

⁵⁰ Nowrot, Karsten, *op. cit.*, pp. 824-825.

⁵¹ Article 25 (2) of ICSID Convention refers to the foreign investor as: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention. International Centre for Settlement of Investment Disputes, "Convention on the Settlement of Investment Disputes between States and Nationals of Other States", *ICSID Convention, Regulations and Rules*, ICSID/15, April 2006.

⁵² Alvarez, José E., *op. cit.*, p. 5.

tes (ICSID) Convention, or under the International Chamber of Commerce or even based on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.⁵³ For instance, TNC as one type of foreign investor, can bring a claim against a State at ICSID for the violation of a right declared on an International Investment Agreement.⁵⁴ However, the ICSID only applies when both the country of nationality of the investor and the host State are parties to the Convention.⁵⁵

Another indication is Chapter 11 of North America Free Trade Agreement (NAFTA) which states that in disputes arising from intergovernmental accords involving investors, when acting in the economic capacity, they are in the same level as states.⁵⁶

This direct participation in dispute settlement mechanism “serves as a clear indication of the quite prominent role played by TNCs in the enforcement processes —and thereby also the progressive development— of international investment law”.⁵⁷ Therefore, a preliminary conclusion can be reached: transnational corporations are indeed capable of fulfilling the first criterion of Bernadotte Case.

⁵³ Nowrot, Karsten, *op. cit.*, p. 824.

⁵⁴ According to Mann, International Investment Agreements (IIA) are treaties between states that that can exist in three primary forms: (a) as a Bilateral Investment Treaty; (b) as a Regional Investment Treaty; and (c) as a Chapter of integrated trade and investment agreements that can be signed as a bilateral or regional treaty. The main objective of IIA is provide foreign investors special international law rights and remedies to protect the investment into the host state. The rights can include fair and equitable treatment, known as the minimum international standards of treatment requirement of the host state, and the treatment no less favorable than national investors. Mann, Howard, “International Investment Agreements, Business and Human Rights: Key Issues and Opportunities”, *Report*, International Institute for Sustainable Development, February 2008.

⁵⁵ The ICSID Convention today is an international treaty which has 153 contracting States and only 8 signatory states. International Centre for Settlement of Investment Disputes, “Database of ICSID Member States”, available at: <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>.

⁵⁶ Gal-Or, Noemi, “NAFTA Chapter Eleven and the Implications for the FTAA: The Institutionalization of Investor Status in Public International Law”, *Transnational Corporations*, vol. 14, no. 2, August 2005, p. 121 (UNCTAD/ITE/IIT/2005/5).

⁵⁷ Nowrot completes: “It is controversial whether TNCs are able to acquire the status of partial, derivative subjects of international law on the basis of state contracts concluded with host states, but the above-mentioned structural changes in the scheme of and legal basis for the settlement of investment disputes indicate at least the emergence of an international legal status in this area of IEL”. Nowrot, Karsten, *op. cit.*, pp. 825-826.

B. *The Capacity to Enjoy Direct Rights and Bear Obligations in International Law*

Second, are transnational corporations capable of enjoying direct rights and bear obligations in International Law? According to Zerk, it is possible to conclude that transnational corporations have rights under international investment law, such as the right not to be discriminated against *vis-à-vis* national firms and the right to receive compensation in the event of expropriation.⁵⁸ As mentioned previously, TNC also have rights under IHRL, such as the right to a fair trial, the right to privacy,⁵⁹ the right of freedom of expression⁶⁰ and property rights.

Logically, if several fundamental rights conferred to individuals in constitutional law are also applicable to corporations, why wouldn't they be directly applicable on international level? Additionally, Zerk states that, "although human rights law may traditionally have been devised to protect individuals from abuses by states, International Law must now respond to shifts in power in the international system away from states in favor of large corporations".⁶¹ As mentioned previously, the recognition of the litigation rights of corporations by European Court of Human Rights, also implied on the recognition of human rights.

The European Court of Human Rights case law already concludes that corporations are quite similar to human beings and can express themselves and enjoy access to justice. Muijsenbergh and Rezai hold that "it may not be too far-fetched to assume that the Court's dynamic (snowballing) hu-

⁵⁸ Zerk, Jennifer A., *op. cit.*, pp. 76-78.

⁵⁹ European Court of Human Rights, *Case of Société Colas Est and Others v. France*, Judgment of 16 April 2002, Application n. 37971/97.

⁶⁰ A relatively recent judgment of the European Court of Human Rights regarding the application of article 10 (freedom of expression and information) and of Article of Protocol No. 1 (protection of property) of the ECHR in the Case of *Centro Europa 7 S.r.l. and Di Stefano v. Italy* of 2012. The case concerned an Italian TV company's inability to broadcast, despite having a broadcasting license for such activity. The TV company was unable to do so because no television frequencies were allocated to it. The Court found that the laws enforced in Italy at the time of the occurrence lacked clarity and precision and had not given the means to the TV company, with sufficient certainty, about the point at which it might be allocated frequencies enabling it to broadcast. European Court of Human Rights, Grand Chamber, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, Judgment of 6 July 2012, Application n. 38433/09.

⁶¹ Zerk, Jennifer A., *op. cit.*, p. 78.

manization of corporations, combined with possible future corporate demands, will in due time allow corporations to also enjoy a right to life”.⁶² The dynamic interpretation of the Court is in accordance with the tendency of contemporary international law to discuss corporations’ legal status making an analogy with individuals international capacities as subjects of international law.⁶³

Regarding transnational corporations’ obligations, some authors, including Zerk, Duruigbo⁶⁴ and Clapham, argue that, in theory, they bear duties in IL. However, there are no international mechanisms able to impose sanctions over them when they violate these duties. Yet, the lack of international jurisdiction does not mean a lack of international obligations.⁶⁵

In accordance with the 2011 United Nations Guiding Principles on Business and Human Rights there are three aspects of human rights protections: first, the State obligation to respect, protect and fulfill human rights; second, the corporate responsibility to comply with all applicable laws and to respect human rights in global operations; and third, the need to find appropriate and effective remedies when human rights are violated.⁶⁶ These principles are general rules to be followed by States and corporations to “enhance standards and practices with regard to business and human rights”, and “achieve tangible results for affected individuals and communities, and thereby also contribute to a socially sustainable globalization”.⁶⁷

The second foundational principle states that “business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.⁶⁸ In other words, TNC have the duty to observe their own conduct and the duty to relate the behavior of others, in-

⁶² Muijsenbergh, Winfried H. A. M. Van Den and Rezai, Sam, *op. cit.*, p. 60.

⁶³ Peters, Anne, *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge, Cambridge University Press, 2016.

⁶⁴ Duruigbo, Emeka, “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges”, *Northwestern Journal of International Human Rights*, vol. 6, issue 2, Spring, 2008, pp. 222-261.

⁶⁵ Pentikainen, Merja, *op. cit.*, pp. 145-154.

⁶⁶ Organization of United Nations, Human Rights Office of The High Commissioner, *The Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, New York-Geneva, 2011.

⁶⁷ *Ibidem*, p. 1.

⁶⁸ *Ibidem*, p. 13.

cluding subsidiaries, contractors, suppliers and government agencies.⁶⁹ The commentary of this foundational principle states that the responsibility of business enterprises exists regardless of States ability or willingness to fulfill their own, confirming that “because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights”.⁷⁰ Zerk believes that “the idea that multinationals may be subject to some «direct» obligations under international human rights law is slowly gaining momentum, but is not yet clear where this will lead in relation to CSR”.⁷¹

International treaties have increasingly included corporate liability for international crimes⁷² and, not long ago, the corporate accountability have been discussed by the Special Tribunal for Lebanon (STL) in an emblematic case. The Al-Jadeed Case dealt with charges against a news company accused of contempt and interference of administration of justice.⁷³ The STL had to considered whether liability for violations of international law could be directly attributed to corporations as legal persons. It was the first time in which a legal person was accused of a crime under international criminal justice.

The Tribunal then had to deal with two interconnected questions in the Al-Jadeed Case: first, whether or not the STL had jurisdiction over legal

⁶⁹ Zerk, Jennifer A., *op. cit.*, p. 79.

⁷⁰ Organization of the United Nations, Human Rights Office of the High Commissioner, *The Guiding Principles on Business and Human Rights...*, *cit.*, pp. 13-14.

⁷¹ Zerk, Jennifer A., *op. cit.*, p. 83.

⁷² Such as The *Organization for Economic Cooperation and Development (OECD)*, articles 2, 3 and 4 of The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents of 17 December 1997, Treaty Doc. N. 105-39; and United Nations Convention Against Corruption, articles 26 and 42, 9 December 2003, Treaty Doc. N. 109-06.

⁷³ The Al-Jadeed TV was accused of interfering with justice in two occasions: first, when published information regarding confidential witnesses without STL authorization, and second, failing to remove such information from its website and other platforms, violating a pretrial order of STL. Contempt charges were based on Rule 60 *bis*: “Rule 60 *bis* Contempt and Obstruction of Justice (added 10 November 2010, amended and renumbered 20 February 2013) (A) The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and willfully interfere with its administration of justice, upon assertion of the Tribunal’s jurisdiction according to the Statute. This includes, but is not limited to, the power to hold in contempt any person who...”. Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.6-Corr.1, April 3, 2014.

persons; and second, the material elements of corporate liability and sources of legal authority.⁷⁴ The Appeal Panel decided that STL had jurisdiction over legal person relying on the principle of effectiveness as developed in its previous jurisprudence and based on a teleological reading of Rule 60 *bis* of the Statute.⁷⁵ However, as argued by Kaeb, the Contempt Judge applied a narrow interpretation of the premise and decided that the criminal responsibility of a specific person must be established before a legal person can be responsible for any crime in this case.⁷⁶

Regardless of the outcome of the trial, two important conclusions can be drawn from this case: first, the Appeals Panel's decision on confirming STL jurisdiction over legal persons establishes an important precedent for future cases; second it reaffirms how heavily is the debate on corporate international responsibility before international tribunals.⁷⁷ There are authors discussing the possibility of creating an International Court of Civil Justice⁷⁸ and the corporations' trial before International Criminal Court.⁷⁹

There is actually nothing, except states political will, that prevents the international community from conferring some degree of international legal personality to transnational corporations. In this regard, Genugten declares:

The legal personality of TNCs —corporations in general— in the field of international public law is granted to corporations by the states, and as such can be considered to be more or less a gift. In addition, the number of cases available to illustrate this situation is limited. However, there is an undeniable trend to broaden

⁷⁴ Kaeb, Caroline, "The Shifting Sands of Corporate Liability under International Criminal Law", *The George Washington International Law Review*, vol. 49, no. 2, 2016, pp. 364-365.

⁷⁵ Special Tribunal for Lebanon, *Case Against Al-Jadeed S. A. L. & Al Khayay (The Al-Jadeed Case)*, STL-14-05/T/CJ, Judgment of 31 January 2014. Kaeb, Caroline, *op. cit.*, p. 365.

⁷⁶ Kaeb, Caroline, *op. cit.*, p. 367.

⁷⁷ *Ibidem*, p. 368.

⁷⁸ Steinitz argues that an International Court of Civil Justice would allow "victims of cross-border mass torts de facto (not de jure) have no court to turn to in order to pursue legal action against American multinational corporations when they are responsible for disasters". Steinitz, Maya, "The Case for an International Court of Civil Justice", *Stanford Law Review*, vol. 67, December 2014, p. 74.

⁷⁹ Kelly, Michael J., *Prosecuting Corporations for Genocide*, Oxford, Oxford University Press, 2016.

the scope, and to admit, as well as to urge other actors, including TNCs and other corporations, to enter the playing field of international law.⁸⁰

According to Clapham, the resistance to the recognition of their international legal personality is based mainly in two fears. First, the fear that transnational corporations “would somehow be able to easily interfere in the political and economic affairs of states if they were recognized”⁸¹ as subjects of international law. Second, “is a fear that these foreign corporations would be able to trigger excessive diplomatic protection for national companies of the host state where the foreign nationals are controlling shareholders in those national companies”.⁸²

Another reason, as reported by Hersch Lauterpacht is that “much of the opposition to the predominant doctrine with regard to the subjects of international law is undoubtedly due to such reasons as the reaction against the recognition of sovereign States as the only authors of international law, or to the desire to vindicate the rights of man in the international sphere”.⁸³ Therefore, sovereign States, do not want any other subject directly capable of creating international law, and the financial power and influence of transnational corporations could lead on that direction.

Considering the sovereign states and some academy resistance in legitimate transnational corporations as subjects of international law, scholars concerned about the apparent “legal vacuum”⁸⁴ in which these actors are in, realized that the whole discussion on subjectivity or objectivity is unhelpful and a different approach should be adopted focusing on their participation and not on their legitimacy.⁸⁵

⁸⁰ Genugten, Willem van, “The Status of Transnational Corporations in International Public Law”, in Eide, Asbjørn *et al.* (eds.), *Human Rights and the Oil Industry*, Intersentia, 2000, pp. 81-82.

⁸¹ Clapham, Andrew, *op. cit.*, p. 78.

⁸² *Idem.*

⁸³ Lauterpacht, Hersch, “General Laws of the Law of Peace”, in Lauterpacht, E. (ed.), *Collected Papers*, 1970, vol. I, p. 280.

⁸⁴ Bastos Calazans, Erika L., *Private Military and Security Companies: The Implications under International Law of Doing Business in War*, Cambridge, Cambridge Scholars Press, 2016, p. 79; Singer, Peter Warren, “War, Profits and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Transnational Law*, vol. 42, 2004, pp. 521-550.

⁸⁵ Higgins, Rosalyn, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, p. 49.

C. The Capacity to Make Valid Treaties and International Agreements

Third, we have to confirm if transnational corporations have the capacity to make valid treaties and international agreements. Transnational corporations are not capable of concluding treaties, and obviously, an international contract with a state, even though governed by *pacta sunt servanda*, is not an international legal instrument in that sense. Nevertheless, these non-state actors are capable of intensely contributing to the law-making process. It is well known that transnational corporations are actively working in WTO panels, making lobby and influencing the construction of International Economic Law,⁸⁶ that is even more evident when we observe their participation in the IIL making process.⁸⁷ As pointed by Nowrot:

Although TNCs are neither able to become parties to traditional international agreements nor enjoyed any formal status in deliberation during the Uruguay Round, it is generally recognized that these nonstate actors also subsequently exercised an often decisive influence on the course of the negotiations on TRIPS by way of, *inter alia*, their representatives accompanying state delegations as advisors, providing draft texts of the agreement to negotiators, and lobbying activities at the international and in particular domestic level of the Contracting Parties of GATT 1947.⁸⁸

Although they are not capable of making treaties and international agreements, how about customary international law? The linkage between international legal personality and customary international law is not made by the International Court of Justice in the Bernadotte Case, but this is a relevant secondary question. According to Lindblom:

In general textbooks on international law, personality is often discussed without any reference to the development of customary law. However, since states are both subjects and the creators of international law, the question might be put whether there is a relationship between international law-making and legal personality.⁸⁹

⁸⁶ It's very common states use "advisor" (transnational corporations representatives) from specific segments of industries when concluding bilateral international treaties.

⁸⁷ Nowrot, Karsten, *op. cit.*, p. 823; Alvarez, José E., *op. cit.*, p. 822.

⁸⁸ *Ibidem*, p. 823; *ibidem*, p. 810.

⁸⁹ Lindblom, Anna-Karin, *op. cit.*, p. 77.

Accordingly, it would be more appropriate to verify not if an international actor has the ability to conclude treaties and international agreements, but if it has the capacity to participate in the law-making process, contributing directly or indirectly to it, that would include even the creation of customary international law.

Article 38, item b, of the Statute of International Court of Justice states that customary international law is the “general practice accepted as law”.⁹⁰ It’s presumed that the actors responsible of forming the customary law are states, still, that definition is static and certainly some could link it to international capacity.

Regarding such matter Lindblom proposes four alternative views:

First, it can be held that there is no relationship and that —no matter if IGOs and other entities are or become subjects of international law— states will continue to be the only law-makers. Secondly, one may take the view that some entities (not only states) have personality and some of these participate in law-making, without any connection of one to the other. Thirdly, it might be suggested that there is a relationship in the sense that participation in law-making is a consequence of unlimited international personality, and that full international legal persons are entitled to such participation. Fourthly, it can be held that participation in the creation of international customary law is an indicium of personality.⁹¹

In the contemporary discipline of International relations there is a classical view, defended by Michael Byers,⁹² which asserts that having full legal personality under international law means the prerogative to participate directly in the law-making process, which means he is a supporter of the third view presented by Lindblom.

Still, it is also acceptable to think that transnational corporations’ informal involvement in the law-making process of bilateral investment treaties, is some sort of participation, and in many occasions, is a determinant one. To argue this informal or indirect influence of TNC on law-making process

⁹⁰ Organization of United Nations, Statute of International Court of Justice, article 38, 1945, available at: http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

⁹¹ Lindblom, Anna-Karin, *op. cit.*, p. 77.

⁹² Byers, Michael, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge University Press, 1999, p. 75.

as a determinant point of their legal status as subjects of international law would certainly be problematic.

Another important observation regarding this criterion of Bernadotte case is directly related to individuals. Corporations, just like individuals, do not have the capacity to conclude international treaties and yet are not considered subjects of international law. This only reinforces the argument that it's not necessary to fulfill all three criteria, but how many is enough? Peters suggests that the capacity to bear rights and duties under international law and the ability to make claims to international courts would be sufficient.⁹³ Nevertheless, some authors⁹⁴ have already suggested that state recognition is another necessary element to attain such status. This recognition means some form of community acceptance. That is be a subjective element and identify the general attitude of international community towards Transnational Corporations is actually controversial. Ultimately, recognition, would depend on State's will.

2. *Transnational Corporations as Participants of the International Community*

Transnational corporations are important participants in the international society and international lawyers recognize that their role is too important to be legally ignored. There is no doubt that transnational corporations can affect and be affected by IL. And as previously demonstrated, transnational corporations do have some, even if still controversial and not recognized, capacities of international legal persons.

Some scholars, argues that certain TNC have state-like powers over society and should be treated as "quasi-state entities".⁹⁵ The jurist main argument is that transnational corporations assumed a leading and crucial role in the movement of capital and technology in every country.

These corporations are now major players in the process of determining economic, political and social welfare of nations.⁹⁶ Additionally, since the beginning of the privatization trend in the 1990s private corporations as-

⁹³ Peters, Anne, *op. cit.*

⁹⁴ Shaw, Malcolm N., *International Law*, 4th ed., Cambridge University Press, 1997.

⁹⁵ Slawotsky, Joel, "The Global Corporation as International Law Actor", *Virginia Journal of International Law Digest*, vol. 52, 2012, p. 84.

⁹⁶ *Ibidem*, pp. 84-85.

sumed several public activities, including, security, health and education. The privatization trend of public functions is clearly noticed through the services provided by Private Military and Security Companies.⁹⁷ Although Slawotsky presents compelling arguments, there are some missing crucial elements⁹⁸ in order to give such status to transnational corporations. Historically, the only companies that could possibly be considered for a “quasi-state entities” was the Dutch East India Company and the English East India Company,⁹⁹ still, not without controversy.

The whole traditional notion of subjects and objects of IL is rejected by Rosalyn Higgins and instead she defends that:

It is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing authoritative decision-makers – Foreign Office Legal Advisers, arbitral tribunals, courts.

Now, in this model, there are no “subjects” and “objects”, but only participants. Individuals are participants, along with states, international organizations (such as the United Nations, or the International Monetary Fund (IMF) or the ILO), multinational corporations, and indeed private non-governmental groups.¹⁰⁰

⁹⁷ Private Military Security Companies services include, but are not limited to, transporting weapons to deposit areas or ports; performing scientific research; training personnel or giving military advice; logistic support in conflict areas, such as providing food to the armed forces or construction of military bases. See Calazans, Erika L. B., *op. cit.*

⁹⁸ For instance, the sovereignty implies the capacity to impose its will over society through legal authority.

⁹⁹ “The Government sanctioned these entities through charters. The charter system «stipulated the rules for the governance and constitution of a company and granted a trade monopoly over particular goods and geographical areas of trade». The trading companies were forces unto themselves with sovereign powers of the state: they acted to ensure their own military protection, raising an army or a navy, building forts, making treaties and war, governing nationals, and made their own currency. For instance, the Dutch East India Company’s Charter expressly granted the military power to defend themselves against the Portuguese armed forces. In 1661, the Charter of English East India Company was revised to give the Company criminal and civil jurisdiction over all persons belonging to the Governor or the Company. It also allowed the company to wage war or make peace with non-Christian princes”. Bastos Calazans, Erika L., *op. cit.*, p. 15.

¹⁰⁰ Higgins, Rosalyn, *op. cit.*, p. 50.

Higgins focus on the participation of transnational corporations in the global community rather than on a formalistic approach. Indeed, it is more useful to focus on what are the real contributions and challenges posed by their roles than trying to make them fit in an outdated model. Lindblom argues that the process oriented approach adopted by Higgins has a state-centered view and is helpful in developing contemporary international law:

According to the rule approach, general recognition is thus decisive for an actor to be fully accepted into the system. Although this question is not answered directly by the process orientation—it would not be put that way—it is clear from the discussions referred to above that the process approach has a wider notion of sources, a less state-centred view on international law in general and that it permits greater independence for the lawyer (and legal jurisprudence as a whole) in the development of law. In the case of an actor that already possesses some rights, capacities and other attributes of legal status, it is therefore not unlikely that the process-oriented lawyer or decision-maker will determine that a new actor has been accepted into the legal system in a more general sense.¹⁰¹

International society is changing and the traditional models are not able to follow the new realities. States must recognize the considerable influence transnational companies have today and act on national and international levels.¹⁰²

IV. CONCLUSION

This paper tried to demonstrate the current reality of transnational corporations as key players of international community and as *de facto* subjects of IL, arguing that these entities are capable of participating in law-making process and dispute resolution using international mechanisms; and promote, protect and abuse human rights.

Traditional international law perceives international legal personality only to sovereign states. Yet, developments of international community after the World War II included new subjects in the international legal order.

¹⁰¹ Lindblom, Anna-Karin, *op. cit.*, p. 100.

¹⁰² Alvarez, José E., *op. cit.*, p. 5; Zerk, Jennifer A., *op. cit.*

The Bernadotte Case recognizes that subjects of international law are not necessarily identical in their nature or in the extent of their rights and obligations. Considering their differences, and the lack of political will of states in admitting TCN as subjects of IL law, its more useful and helpful to consider the degree of their participation in international community.

The traditional doctrine agrees that in order to obtain international legal personality certain capacities must be fulfilled, or at least, some of them. As seen, TNC do fulfill some of these capacities, especially the two criteria presented by Bernadotte Case, which are (a) the capacity of bearing rights and duties under IL and (b) the capacity of bringing international claims. Still, it's also important to admit the controversy involving some of them, namely, the capacity to make treaties and agreements on international plane. Although transnational corporations fulfill both criteria in Bernadotte Case and some of the traditional IL, they are not recognized as subjects. Therefore, TNC are *de facto* subjects of international law.

Another conclusion is that "subject of international law" status is achieved by recognition; it depends on the political will of states and they have no interest in recognizing TNC as subjects. Additionally, transnational corporations have no desire for this recognition as it would officially imply direct international obligations in IL and they come a long way to avoid.

Higgins suggests that is more useful and helpful to focus the academic discussion of TNC participation in international community rather than on a formalistic approach presented by the outdated subject-object dichotomy model. Instead, it's more important to discuss whether or not these corporations have any direct international duty to protect human rights and if they can be responsible for human rights violations and abuses under IHRL. The conclusion is that indeed transnational corporations, regardless of been recognized as subjects of international law, are directly owners of human rights and duties. And although there is not yet an international jurisdiction to trial their misconduct, transnational corporations have human rights obligations and rights under IHRL.

This paper concludes that indeed different subjects may have different sets of rights and obligations under IL and only states can fulfill all capacities associated with international legal personality. Still, this does not mean that there are no other subjects of IL. On the contrary, it only confirms that the traditional IL approach is obsolete and poorly prepared to deal with the changes occurring in the international community.

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