INTERNATIONAL LAW AND TRANS NATIONAL CORPORATIONS: TOWARDS A FINAL SUMMATION

Varun Vaish, NALSAR University of Law

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INTERNATIONAL LAW AND TRANSNATIONAL CORPORATIONS: TOWARDS A FINAL SUMMATION

Varun Vaish¹ and Pearl Lim²

INTRODUCTION

The regulation of transnational corporations (TNCs) by an international legal order fundamentally centred on states proves to be difficult when they exercise political influence and have the ability to generate revenue which can eclipse the economies of many countries in comparison.³ According to the World Investment Report 2007, as of 2006 there were 78,411 parent corporations and 777,647 affiliates worldwide.⁴ The scale of the concentration of economic power is illustrated by the statistics: of the world’s hundred largest economic entities, 51 are multinational companies and 49 are nation states.⁵ The Texaco Corporation functioned for years in Ecuador with annual global earnings amounting to four times the size of Ecuador’s GNP.⁶ When corporations, and not governments, are understood to be the one factor that most

1 4th Year student at the National Academy of Legal Studies and Reaseach, Hyderabad, India.
2 4th Year Student at the Faculty of Law, National University of Singapore, Singapore.
6 Id.
influences the international economy\textsuperscript{7} one is hardly surprised with the present day perception that corporations are in fact more powerful than many states.\textsuperscript{8} With corporations exercising greater influence within the international legal system and participating increasingly in international law making, one further realizes that their sphere of control isn’t restricted to the economic sector alone.\textsuperscript{9}

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) was adopted in part, because of the influence exercised by such corporations who desired such an international legislation.\textsuperscript{10} The emergence of “Private-Public partnerships” in the World Trade Organization (WTO) dispute settlement litigations as a matter is being disputed between two nation states, only serves to further the understanding that TNCs are increasingly playing the role of influential political actors on the international scene.\textsuperscript{11} It has also been persuasively argued that TNCs have the capacity to allocate risks in their global operations in a way that limits the capacity of territorial jurisdictions to control their activities.\textsuperscript{12} Tania Voon describes the practical problems that usually occur with TNCs operations as follows:

“They may use workers in countries with low labour costs, locate manufacturing plants in countries with

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\textbf{References:}
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\item \textsuperscript{7} Cox, \textit{Labor and the Multinationals in TNCs And World Order} 414 (G. Modelski, ed.,1979)
\item \textsuperscript{9} Dupuy, \textit{Proliferation of Actors}, in \textit{Developments Of International Law In Treaty Making} 541 (R. Wolfrum and V. Röben, eds.,2005)
\item \textsuperscript{11} G. C. Shaffer, \textit{Defending Interests – Public-Private Partnerships In WTO Litigation} 233 (2003).
\item \textsuperscript{12} Muchlinski, \textit{Multinational Enterprises And The Law} 205 (2007).
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weak environmental regulation, and generally distribute jobs, wealth, people and goods according to factors such as geography, local subsidies, quality of infrastructure, etc.”

In addition, the 2008 global financial crises demonstrate the ripple effect which the regulatory gaps at the international level can lead to. The push for liberalisation of the international market by Western-based multilateral organisations such as the World Bank and the International Monetary Fund (IMF) has ensured that turbulence in one of the major countries due to TNCs’ business strategies can have a global effect. This puts into question the capacity of one domestic market regulator to contain all externalities. With such a wide sphere of influence it is feared that corporations may work to upset the international encouragement of environmental, labour and human rights.

“Shell Global”, for example, is a synonym for Royal Dutch Shell Plc with its headquarters in The Hague, Netherlands, a registered office in London and over 140 affiliates worldwide. While each of the constituent parts are organised and regulated under the laws of the state in which it operates, there is no law governing the global nexus point of these corporations. “Shell Global” is not established, organised or regulated under any law,

15 Ibid.
16 Id.
be it national or international law.\textsuperscript{19} It is hence debated whether these TNCs (because of their impact on the international legal order) should be integrated within the purview of the international legal setup, so as to hold them directly responsible for the protection of environmental, labour and human rights standards.\textsuperscript{20} It is in furtherance of the above line of thought that this paper has been divided into four parts. The first will deal with the position of TNCs in international law and the problems inherent with such a position. The second will look at the nature of the concept of international legal personality and analyse whether there is a need for change. The third part will study the existing international framework for the regulation of TNCs and its inadequacies. Part four will provide recommendations before finally concluding.

\textbf{PART-I}

The position that TNCs have attained in international law wasn’t subject to much debate until very recently. The existing system required that TNCs be governed only through States, which were in turn, were regulated by their international legal obligations. TNCs themselves had no international legal personality analogous to that of States. It was understood that government of states were required to ensure that TNCs within their respective jurisdictions would comply with the environmental, labour and other international obligations assumed by the state, even if such compliance required the passage of domestic legislation.\textsuperscript{21} The problems that are intrinsic to such an approach are that states suffer

\textsuperscript{19} Ibid.
from trans-border limitations, whereas TNCs do not. 22 TNCs have the ability to exercise influence over states internal political actors, thereby negating any chance of an unbiased regulatory framework within the state mechanism. 23 Lastly many a times states, particularly developing ones, simply do not posses the economic and legal competence to regulate TNCs. 24 Even when matters are brought before a domestic court, TNCs plead *forum non conveniens* 25 and shift proceedings to a jurisdiction more amenable to their case. 26 Further there is a possibility of friction between a country where the corporation operates and where it is incorporated, both claiming jurisdiction. 27 Lastly governments of developing countries rarely ever enforce global standards upon TNCs operating within their jurisdiction, fearing an increase in costs of operation and hence reduction in international investment. 28 If the international legal order is to achieve its fundamental objectives in a realistic manner, intrinsic deficiencies in the traditional understandings of international legal personality will have to be understood. 29

22 Matthews, *supra* n. 10 at 463.
23 For example, the case of Union Carbide in India, in reference to the Bhopal Gas Tragedy.
24 Matthews, *supra* n. 10 at 461.
25 Forum non conveniens (Latin for “forum not agreeing”) is a common law legal doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties, see also Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 (1) Columbia Law Review, 1-10 (1929).
29 Karsten Nowrot, *New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of*
PART-II

NATURE OF INTERNATIONAL LEGAL PERSONALITY: NEED FOR CHANGE?

If a case is to be made to recognize the international legal personality of TNCs, one must first attempt to understand what are the attributes an entity must possess in order to achieve such a status. As per Brownlie, the essential attributes of an international legal personality are the ability to make claims in respect of breaches of international law and the ability to enter into international agreements. Cassese, states that such personality is the ability “to be vested with rights, powers and obligations”. Hence international legal personality entails the ability to hold as well as enforce certain rights and obligations.

The question is whether TNCs have the ability to hold and enforce rights and obligations? In the view of Malcom Shaw such can indeed be the case. While examining the U.N Code of Conduct he wrote-“Should such a Code come into effect containing duties directly imposed upon TNCs, as well as rights ascribed to them as against the host state, it would be possible to regard them as international persons.” Hence the only question that remains is whether TNCS can have rights under International

31 IAN BROWNlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 57-60 (1998).
Such a position would be a mere extension of the rights that corporations already possess under domestic law.\textsuperscript{34} We have seen that under multilateral trade agreements such as the NAFTA, corporations can directly bring suits against the Government for infringements of rights.\textsuperscript{35} We have already seen that corporations play a key role in WTO dispute settlement and were instrumental in the creation of international agreements such as TRIPS. Hence granting them International Legal Personality would be merely acknowledging that which is already fact.

However it is important to note that as per traditional legal Scholars ‘international legal personality’ requires something more that just participation in the international legal processes or holding sway over the international society.\textsuperscript{36} It requires a form of community acceptance wherein states grant the body in question certain rights and hence demand in return the observance of certain obligations.\textsuperscript{37} It is for this reason alone that TNCs are not regarded as subjects of international law, even though no real systematic reason for why corporations may not operate in the international legal order as ‘recognized actors’ exists.\textsuperscript{38} Though it has been argued that international human rights treaties are applicable to non state actors such as TNCs as well, the interpretation given to

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these treaties (by looking to their drafting history) has proved that these treaties do not impose direct obligations on any entity other than the states party to them.39

At the level of domestic laws, limitations to separate legal personality of corporations are eroding, with corporations being increasingly held criminally liable for their acts. The legal personality of corporation in the domestic sphere has come a full circle and today corporations are considered at par with ordinary citizens of a state, particularly when it comes to criminal liability. It is perhaps time for the international sphere to take a que from the ongoing developments in the national sphere and grant corporations full international legal personality to shoulder liability equally with other members of the international community. With regards to municipal laws, the socio-ethical philosophy underlying traditional liability i.e. criminal had conventionally resulted in the social control of corporations being problematic as it had ‘no soul to damn or body to kick’.40 The law had struggled to articulate a consistent theory of corporate criminal liability.

Those antagonistic to corporate criminal liability relied upon two principle contentions. First, as per the quasi contractual theory a corporation was authorized by its shareholders to “perform only legal acts”; therefore, “any crimes committed in its name were ultra

vires and non-corporate.” Second, as per the artificial entity theory, a corporation, “as an artificial personality existing only in contemplation of law” could possess no criminal intent. Milton Friedman agreed with this early view of general corporate immunity and argued that in a world of competition and self-interest, there is one and only one social responsibility of business, which is to increase profits. Laski however was quick to perceive that mens rea would merely be a “stumbling block” for the courts, and foretold that the “the reality of corporate crime will pass into legally accepted doctrine.” True to his prophesy, the beginning of the twentieth century witness the promotion of the ‘real entity theory’ and the ushering in of statutes that made corporations criminally liable for certain activities.

The first step in this direction at the national level had its underpinnings in the doctrines of vicarious liability and strict liability in torts. Initially, criminal liability was extended to crimes

42 Frederick N. Judson The Control of Corporations, 18 Green Bag 662 (1906): Ibid.
43 MILTON FRIEDMAN, CAPITALISM AND FREEDOM, 133 (1971).
44 Harold J. Laski The Personality of Associations 29 Harv. L. Rev. 404, 413 (1916): Ibid.
45 Carter asserted that the “narrow interpretation” of a corporation as a mere fiction of the law failed to recognize the existence of “a real corporate entity endowed with an undoubtedly real group will” and that this ‘real entity’ had the moral capacity to commit crimes in JAMES TREAT CARTER THE NATURE OF THE CORPORATION AS A LEGAL ENTITY, 26 (1919); Daniel Lipton, Corporate capacity for crime and politics: defining corporate personhood at the turn of the twentieth century, 96 Va. L. Rev. 1911.
46 See, e.g., An Act to Regulate the Immigration of Aliens into the United States, (1907) (making it illegal for businesses to solicit the immigration of aliens); An Act to Further Regulate Commerce with Foreign Nations and Among the States, as seen in George F. Canfield Corporate Responsibility for Crime, 14 Colum. L. Rev. 469 (1914).
like, misfeasance and non feasance of quasi-public corporations, such as municipalities that resulted in public nuisances. Common law eventually began to impute criminal liability to corporations for strict liability crimes like food adulteration and violation of safety laws. Later, in 1909, the U.S Supreme Court sentenced a corporation for criminal liability under a statute, wherein a nearly unanimous court, concluded that corporations could “be held criminally responsible for and charged with the knowledge and purposes of their agents.” In *People v. Rochester Railway & Light Co.*, the New York Court of Appeals concluded that corporations could possess certain types of criminal intent, and that corporate criminal conduct was not necessarily ultra vires. Corporations were also charged and tried with contempt of Court, which did not require a specific intent to be proved, as was the case in *Regina v. Birmingham and Gloucester Railway*.

The justifications for Corporate over direct liability in municipal laws were twofold. Firstly as opposed to Direct Liability, it served to decrease a company’s net worth. Shareholders faced with the prospect of such a reduction, were

49 Sheyn, *supra* n. 47.
52 *Regina v. Birmingham and Gloucester Railway*, (1842) 3 QB 223: Where a corporation was held liable for disobeying the judge’s order to remove a bridge on the road. This was for the first time that a corporation was held liable for non feasance or an omission to act.
53 As the name suggestions refers to the direct consequences faced my managers or employees of cooperates, on the commission of undesirable acts.
54 J.T. Byam *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 582 (1982).
compelled to ensure that managers do not execute such objectionable acts.\textsuperscript{55} The second and probably the best justification for corporate over direct liability was that individual corporate agents were many a times judgement proof.\textsuperscript{56} However it was argued that because corporate criminal liability relied upon vicarious guilt (a principle of civil liability) rather than the blameworthy morals of an individual, it contradicted the essence of criminal law and served no purpose in the presence of corporate civil liability.\textsuperscript{57} Khanna nevertheless justified the application of criminal law, by asserting that corporate criminal liability originated because only public enforcement through criminal proceedings could ensure optimal deterrence by holding the corporation liable for public wrongs which were unlikely to be enforced by individuals.\textsuperscript{58}

It comes as no surprise then that corporate criminal liability was quick to be adopted in the several other domestic regimes. The 1970’s witnessed its development and expansion throughout Western Europe. Both the Netherlands and Denmark extended their general criminal code to apply to corporations as well.\textsuperscript{59} 2003 saw Switzerland institute ‘subsidiary liability’ wherein only an act ‘in

\textsuperscript{55} They could do so in by amending employment contracts to incentivise non engagement in certain types of activities; See R. H. Kraakman \textit{Corporate Liability Strategies and the Costs of Legal Controls}, 93 YALE L.J. 857, 857-58 (1984).

\textsuperscript{56} A. O. Sykes \textit{The Economics of Vicarious Liability}, 93 YALE L.J. 1244.

\textsuperscript{57} V.S. Khanna \textit{Articles Corporate criminal liability: What purpose does it serve?” 109 HARV. L. REV. 1477 (1996)}.


furtherance of a business activity consistent with the purposes of the enterprise,’ could render a corporation liable and even then only if the fault could not be attributed to a specific individual ‘because of a lack of organization within the enterprise.’

The French weren’t far behind either and in 1992 codified corporate criminal liability in Article 121-2 of the new French penal code.

However as international law norms begin to focus more on the realization of international community interests such as the environment, labour and human rights they become increasingly independent of individual states and path they followed. They no longer mirror developments in the sphere of municipal laws particularly in relation to legal personality. Such a shift has been termed as the ‘Constitutionalization of International Law’.

An essential aspect of international law is that its underlying purpose is the promotion of international stability, the aversion of disputes and the capricious exercise of power. This purpose encompasses the protection of the environment and human rights, as well as the creation of a mechanism for social justice. In order to develop as a pragmatic system, the international legal order has to be in touch with the realities of the international scene. The requirement then is for international law to develop towards being

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60 *Ibid* at p.113.
61 Which stated that ‘Juridical persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives’, *Id.* at 115-22.
62 Reinisch, *supra* n.17.
63 Reinisch, *supra* n.17.
above all ‘a realistic legal system’. Not recognizing the influence of TNCs and withholding legal personality would be undesirable and contrary to the efforts of international law to be recognized as a ‘practical legal system’. It would also be against the inevitable tending of international law towards constitutionalism. Hence it is felt that in order to fulfil the purpose outlined above, the international legal order needs to define on a legal basis the relation of such influential participants with the international legal system. Second, it must legally regiment the conduct of such influential participants in relation to one another in order to ‘effectively’ enforce the objectives and underlying purposes of international law.

The present inadequacy of the approach to international legal personality, is glaring in so far as the responsibility of defacto powerful non state actors, towards community interests in the international legal system is being overlooked, creating an uncalled for menace in an already feeble international legal system. For it is understood that an international legal order, that, for the implementation of its underlying objectives, does not take into account the prevalent realities of the environment in which it operates, will never inspire confidence. This idea is best summed up by James L. Brierly who states that:

“To do that means that we are consenting to a divorce between the law and the ideas of justice prevailing in

67 Nowrot, supra n. 29 at p. 12.
69 Reinisch, supra n.17.
70 Crawford, supra n. 69 at p. 12
71 Id.
72 Reinisch, supra n.17.
the society for which the law exists; and it is certain that as long as that divorce endures, it is the law which will be discredited.”

We know that now international law recognizes crimes that may be committed by an individual such as genocide, war crimes, enslavement (including forced labour) and other crimes against humanity. It also obviously recognizes crimes that have been committed only by States. However when we talk of the application of international law to TNCs and their accountability under it, it is important to understand that such a thought has two aspects. One is that individuals be held accountable for an act undertaken through corporations and the second is that corporations themselves be held liable. The first aspect has definite legal precedent.

The War Crime Trials after the Second World War acknowledged the responsibility of individuals who had committed crimes through corporate entities. The most notable of these were the trial and subsequent conviction (for being accessories to war crimes) of industrialists’ who controlled companies that manufactured Zyklon B Gas for use in the extermination of inmates at concentration camps. Prosecutors also secured the conviction of I.G. Farber executives who were involved in the construction of a slave labour factory at Auschwitz.

74 Cassels, *Supra* at pp. 565-68.
However a less tested and more controversial area of international law has been the accountability of corporations themselves. International criminal prosecution nearly always tended to prosecute individuals and the same was observed by the Nuremberg Tribunal when it stated that-“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Nevertheless it is felt that if the organizational structure of the TNC is such that it is difficult to establish the criminal responsibility of an individual, establishing the liability of the corporation itself may be appropriate.

This approach is not completely unprecedented either, as the Nuremberg Charter itself allowed for the prosecution of ’groups or organizations’ It allowed the Tribunal to declare such organizations as criminal ones. When the U.N. Security Council established the International Criminal Tribunal for The Former Yugoslavia, it included legal persons within the purview of the *ratione personae* jurisdiction of its Statute.

In addition, the traditional arguments stating that corporations are legal and not natural persons, without any physical existence and hence possess no *mens rea* to committee a crime have been

78 Ibid.
79 Jochnick, *Supra* n.3.
80 Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, available at http://www.unhcr.org/refworld/topic,4565c22538,4565c25f443,3ae6b39614,0.html (last visited on 7 November 7 2010 ).
81 Ibid.
over come as simple matters of proof. For example, in the case of New York Cent. & Hudson River R.R. v. United States, it was held that that-“an agent’s culpable mental state can be imputed or directly attributed to the corporation and that the prosecution must prove only that an illegal act was committed by an employee within the scope of employment, with an intent to benefit the corporation.”

It is felt that corporations, just as natural persons, can assume qualified personality and be subject to international law the same way as they are subject to domestic law.

PART III

ANALYSIS OF THE FRAMEWORK GOVERNING TNCs

Existing Framework Governing TNCs

Before any criticism can levied a brief analysis of the existing international framework that governs TNCs is in order. Though various attempts have been made to govern the conduct of TNCs such as by the OECD, the ILO, and United Nations Norms on the Responsibilities Of TNCs and Other Business Enterprises with Regard to Human Rights, corporations haven’t as yet achieved

83 New York Central R. Co. v. United States, 212 U.S. 481 (1909)
84 Jochnick, supra n.3.
85 Ibid.
a special status in international law and any attempt to make their behaviour subject to law has only taken place either in their home jurisdiction or under the local jurisdiction of the place where the crime was committed.  

The international regulatory framework stems from three international organizations namely the Organization for economic corporation and development (OECD), the International Labour Organization (ILO), and the United Nations (U.N.). We begin with the OECD guidelines: The first attempt at an international mechanism to specifically regulate TNCs came in 1976 when ten countries signed the Declaration on International Investment and Multinational Enterprises under the aegis of the OECD. The 1976 OECD Guidelines for Multinational Enterprises are a subset of the above declarations and were revised in the year 2000 after coming into effect in 1976. These reflect the joint recommendations of government to Multinational Enterprises (MNEs) and set standards to be followed by these MNE’s in the field of consumer rights, employment and labour relations, competition environment, anti bribery measures.  

Though an attempt was made in the year 2000 to widen the application of these guidelines and improve the process of implementation they have little or no impact, as they themselves

89 Jochnick, supra n.3.
92 Ibid.
93 Id. at 4-7, 9.
state that ‘the observance of the guidelines by enterprises is voluntary and not legally enforceable’.\textsuperscript{94} The implementation of these guidelines is dependent on the National Contact Points and the Committee on International Investment and Multinational Enterprises,\textsuperscript{95} which perform only advisory and clarification functions without possessing any enforcement powers.

The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Tripartite Declaration) was entered into soon after the OECD guidelines in 1977 under the auspices of the ILO.\textsuperscript{96} This Declaration too was revised in the year 2000 and requires TNCs and other employer organizations to observe labour rights and as per paragraph eight to ‘respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly’.\textsuperscript{97} However these guidelines too are ‘recommended to be observed on a voluntary basis.’\textsuperscript{98} Though a Committee on Multinational Enterprises has been set up under the Tripartite Declaration of 1977 (as per paragraph 3 of its procedure for examination of disputes related to the application of the Tripartite Declaration), its role is limited to interpreting the Tripartite Declaration’s provisions whenever a dispute arises over its meaning.\textsuperscript{99}

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\item[-] \textsuperscript{94} \textit{Id.} at 9.
\item[-] \textsuperscript{96} Tripartite Declaration of 1977, \textit{supra} n. 67.
\item[-] \textsuperscript{97} \textit{Ibid.}
\item[-] \textsuperscript{98} \textit{Id.}
\item[-] \textsuperscript{99} \textit{Id.}
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Next we have the U.N. Framework which has been subdivided into three categories namely the Universal Declaration of Human Rights, 1948 (hereinafter referred to as UDHR), the Global Compact of 1999 and the U.N. Norms of 2004. Though the preamble to the U.N. Declaration on Human Rights extends the Declaration to ‘every individual and every organ of the society’ which could potentially include TNCs, it still remains a state centric instrument with no mechanism for oversight or implementation specifically designed for TNCs. In 1999 another attempt was made to regulate corporate human rights and other violations, through the Global Compact proposed at the World Economic Forum at Davos. Proposed by the U.N. Secretary General Kofi Anan, the Global Compact is essentially a voluntary code of conduct requiring business leaders to abide by the principle of human rights, labour and environment.

It set out nine principles calling for corporations to develop a set of core values in the areas of human rights, labour rights and environmental protection. The Global Compact requires corporations to submit a ‘net report’ to show compliance, as there exists no monitoring or regulatory mechanism to ensure compliance. It is however clearly understood that “the Global
Compact is not a code of conduct; monitoring and verification of corporate practices do not fall within the mandate or the institutional capability of the United Nations.”105 In addition the principles of the Compact are vague, with ample avenues to escape liability. For example principle one requires that corporations “support and respect the protection of international human rights within their sphere of influence.”106 Companies can always claim that the acts of a particular subsidiary or sub-contractor were outside its sphere of influence.107

Lastly we have the U.N. Norms released by the Sub-Commission on the Promotion and Protection of Human Rights.108 They make a specific reference to the U.N. Charter and other international treaties in order to determine the obligations of TNCs.109 These Norms differ from other attempts to make TNCs accountable in so far as they provide specific provisions for the implementations of human rights norms.110 In addition, these norms provide for adequate relief to the victims, in case of a failure by TNCs to live up to their responsibilities under the Norms.111 Lastly the scope of these Norms extends even to “other business

107 Supra n. 106.
109 Id. at Preamble.
110 Id at ¶ 15-19.
111 Id at ¶ 16, 18.
enterprises” connected with TNCs, regardless of their legal form and area of operation. Unfortunately however the Norms are similar to previous attempts in one crucial aspect is so far as they state that “states have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights.”

The inadequacy of the existing framework

The present framework does nothing to establish a uniform human rights standard which can be enforced against TNCs and hence TNCs are in a position to adhere to different standards in different countries. It is felt that the present framework lays too much emphasis on ‘dialogue’ and ‘cooperation’ of TNCs portraying the impression that human rights are subject to the corporation of TNCs. For example Paragraph I.2 of the OECD Guidelines, states that the “governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines.”

The regulatory system is still heavily state-centric, with the primary responsibility of enforcing human rights obligations resting upon States. Lastly there exists a clear lack of sanctions with the existing regulatory mechanism being voluntary with no civil or criminal

112 Id at ¶ 21.
113 Id at ¶ 1.
115 Jack Donnelly, Universal Human Rights: In Theory And Practice (1977)
117 As seen in U.N. Norms on the Responsibilities of TNCs and other Business Enterprises with regard to Human Rights, [hereinafter U.N. Norms]
consequences for lack of compliance. Neither the OECD guidelines, the ILO Declaration nor the Global Compact contain sanctions or even an enforcement mechanism. In addition the OECD does not reveal the identity of a corporation involved in a dispute, thus eliminating the fear of negative publicity for a corporation. In addition any attempt to shift from the status quo is met with failure. For example during the negotiations for the Rome Statue pending the creation of an International Criminal Court the French delegation wished for the Statute to account for the criminal liability of juridical persons, claiming that such an inclusion would make it easier for victims to sue for restitution or compensation. However difference over what form that accountability should take made consensus impossible and hence the language was ultimately dropped by the working group. Nevertheless when the Rome Statute was adopted in 1998 it was felt that accomplice liability provisions could work as those of the Nuremberg Charter and hence “could create international criminal liability for employees, officers and directors of corporations.” Though legally this is true, the exclusion of legal persons from the jurisdiction of the ICC makes the establishment of the liability of its officers difficult.

PART IV

RECOMMENDATIONS

It is argued that the distinctions between the subjects and objects of international law are fading as individuals can be held

119 Ibid at p. 199.
120 Maurice Nyberg, At Risk from Complicity with Crime, FIN. TIMES, July 28. 1998.
accountable for war crimes and crimes against humanity, in addition being able to bring claims against states for violations of human rights.\(^{121}\) With corporations in the United States being found guilty of crimes such as manslaughter and even murder\(^{122}\), it is felt that international criminal obligations that apply to individual can also apply to corporations. Such an approach isn’t novel has been put into practice in the 1993 Security Council Resolution which imposed economic sanctions on UNITA(a rebel group) in Angola which was a non state actor.\(^{123}\) It further asked states to “to bring proceedings against persons and entities violating the measures imposed by this resolution and to impose appropriate penalties”\(^{124}\)

Another approach to afford corporations international legal personality has been to create a new category of international legal personality similar to that given to international organizations.\(^{125}\) Charney asserts that a ‘realistic treatment’ of TNCs would mean according them a status somewhere in between no legal personality and full legal personality.\(^{126}\) In support of the above argument it is proposed that TNCs should be accorded ‘Secondary Limited Personality’.\(^{127}\) Such a status would entail the formal recognition of the rights of TNCs to participate in the negotiations of

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\(^{121}\) Brownlie, supra n 22 at p. 263.

\(^{122}\) Holding that a corporation may be prosecuted for manslaughter due to death of seven construction workers at a plant site in Granite Constr. Co. v. Superior Court, 197 Cal. Rptr. 3.


\(^{124}\) Ibid at p.21.

\(^{125}\) Special status given to the U.N. in the Reparations Case, 1949 I.C.J. 174, 180 (Apr. 11).

\(^{126}\) Charney, supra n.67.

international treaties that affect them. Such participation of TNCs would offer an insight into the corporation’s perspective leading to them being more realistic and hence achieving greater acceptance and hence efficient implementation.\(^{128}\) Such an approach is certainly not unprecedented, the official access of TNCs to the United Nations Conference on Environment and Development (UNCED), which established a framework for partnership between the UN and MNCs, is a case in point.\(^{129}\) As Kenny Bruno and Joshua Karliner note, in the 2000 climate negotiations in the Hague, a forty-three-member team of lobbyists officially representing the interests of Royal Dutch Shell Corporation was far larger than delegations from most other states.\(^{130}\)

It is argued that such participation would be disadvantageous, seeing as how corporations exercise significant clout and would be averse to any piece of international legislation detrimental to their interests. However public advocacy in a recognised forum, as opposed to backdoor lobbying would have to rely to a greater extent on reason and logic, particularly when an obvious negation of interests is present. In addition, the right to negotiate is seen as a trade-off to ensure greater responsibility immediately, which would otherwise be impossible to push through precisely because of the backdoor clout corporations exercise.\(^{131}\)

As far as enforcement of rights is concerned, it is argued that TNCs be allowed to directly bring claims against countries for violations of WTO Rules and in return be subject to the jurisdiction

\(^{128}\) \textit{Ibid.}.

\(^{129}\) KENNY BRUNO & JOSHUA KARLINER, EARTHSUMMIT.BIZ: THE CORPORATE TAKEOVER OF SUSTAINABLE DEVELOPMENT 6 (2002).

\(^{130}\) \textit{Ibid} at 16.

\(^{131}\) Deva, \textit{supra} n.128.
of the International Criminal Court and the International Court of Justice for the violation of human, labour and environmental rights.\textsuperscript{132} However States and not TNCs will continue to shape customary international law through practice. It is argued that the purpose of such limited personality is not to bring TNCs at par with States but rather is meant only for the specific objective of creating a structure of direct international responsibilities.\textsuperscript{133}

Recently the UN Human Rights Council in extending the mandate of the UN Special Representative underscored the need to act at the international level when it observed:

"Weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary."\textsuperscript{134}

The only act remaining for such an objective to be achieved is to create a regulatory framework to facilitate the recognition of international corporate personality for international companies (IC) and to delineate the scope of responsibility and liability attaching to the concept. The framework will define the concept of MNCs

\textsuperscript{132} Deva, \textit{supra} n.128.

\textsuperscript{133} \textit{Id.}

apart from addressing the need to establish a common disclosure regime for TNCs at the international level. Once this has occurred, companies that meet the criteria of TNCs as laid down by the framework, that wish to operate within the domestic jurisdiction of more than one state will be obliged to obtain “International Company (IC)” status before commencing operation. The UN will provide supporting mechanisms by maintaining a global registry for ICs. The registry will issue IC certificates and keep a record of the international network of operations of registered ICs.

CONCLUSION

It has been argued in this paper that TNCs play a significant role in shaping the international legal order and play in increasingly active role not just in the economic sector, but in the social and political sector as well. It is further demonstrated that the position given to TNCs under the present international legal setup is not in proportion to the influence they exercise. The intrinsic drawbacks of this dis-proportionality have been elucidated to supplement the assertion of the fact that the traditional approach towards international legal personality must be done away with in order facilitate a more ‘realistic’ international legal order. In order to further justify this stand the paper has critiqued the existing international framework for regulation of transnational corporation and have attempted to bring out its glaring weaknesses. In doing so the paper has endeavoured to highlight the fact that, there exist very few legal and theoretical barriers to rework the international legal order in order to hold TNCs more accountable.

However, even though several actors—from states to the academia— are involved in working out an efficient regulatory framework for TNCs one must accept the fact that non binding
standards which are voluntary in nature will be more readily accepted by corporations as compared to instruments of compulsory compliance. Though the U.N initiatives are a step in the right direction, more stringent measures are required. The redundancy of the existing mechanism and the growing doubts as to the capacity of international law to fulfil its underlying purpose should be reason enough to bring about a change, which as proved above isn’t too difficult to begin with.