Recognition and Responsibility: A Legislative Role for Transnational Corporations in Public International Law — Thoughts from the Perspective of Human Rights

By

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Abstract

Transnational Corporations (TNCs) provide goods, services, jobs and tax income for states and are an essential factor of the globalized economy. At the same time are many TNCs so powerful that it has become impossible for some nation states to regulate them adequately. In particular, in cases of human rights violations, TNCs can be under-regulated perpetrators. For a long time, there have been efforts to ensure that TNCs can be held accountable even if their economic power exceeds the political and regulatory powers of nation-states. So far, international law has had limited success in this regard. Public International Law might be more effective in reaching TNCs if TNCs would have a more open role (as opposed to lobbying states) in creating new rules of international law. It is suggested in this article that TNCs can have a role in the legislative process. The shortcomings of the current legal system will be shown as well. In addition, the text will provide considerations based on human rights and international constitutional law as to why this should not yet happen at this time.

Keywords: Globalization, Transnational Corporations, Public International Law, Law-Making.

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INTRODUCTION

Globalization is often perceived as economic globalization.[469] This view is, of course, too narrow[470] but for the purposes of this paper, I would like to focus on this particular aspect of globalization, specifically, on the role of transnational corporations (TNCs) in Public International Law (PIL)[471]. TNCs are a driving force of globalization[472] and play an increasingly important role not just in economic terms but also for the societies in which they operate as well as for the society at large. TNCs are at times involved in human rights violations.[473] Often

469 S. Kirchner, 'Transnationale Unternehmen als Objekte und Subjekte des Völkerrechts – Zwischen Verantwortung und Teilhabe' in: J. Bäumler / C. Daase/ C. Schliemann / D. Steiger (eds.), *Akteure in Krieg und Frieden* (2010) 219

470 L. Catá Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' [2005] COLUMBIA HUMAN RIGHTS LAW REVIEW7, 37, 101; R. J. B. Jones, *Globalisation and Interdependence in the International Political Economy: Rhetoric and Reality* (1995) 3.

471 *See* S. Kirchner, 'The Subjects of Public International Law in a Globalized World' [2009] 2 BALTIC JOURNAL OF LAW AND POLITICS 83, 85, 91.

472 *Ibid*., at p. 85.

473 G. Teubner, 'Die anonyme Matrix – zu Menschenrechtsverletzungen durch „private" transnationale Akteure' in: W. Brugger and others (eds.), *Rechtsphilosophie im 21.Jahrhundert* (1st edn., Suhrkamp, Frankfurt am Main, 2008) 440 *et seq.* On human rights obligations of TNCs under international law, *see* S. Deva, 'UN's Human Rights Norm: for Transnational Corporations and other Business Enterprises: An imperfect Step in the right direction?' (2004)10 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (, 493 ; G. Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' (2006)69 MODERN LAW REVIEW327; R. Kreide, 'The Obligations of Transnational Corporations in the Global Context

the economic power of a TNC will surpass that of states, which highlights the possibility of state-dependency and correspondingly, the lack of effective protection of human rights as against corporations. TNCs might even evade national rules.[474] Further, transnational economic activities are more difficult to regulate than the purely domestic economic activities of corporations.[475]

TNCs have a legal status as well as a legal personality.[476] Usually, though, this legal personality is based on domestic law. For a sufficiently large global company, no single national market, not even China's, is in itself indispensable. This theoretical dependency on national law and the factual impotency of many nation states make it necessary to ask about the international legal position of TNCs. At the same time, it also becomes imperative to consider whether globalization leads to an entirely new system of international law[477] It will be shown that the globalized international law which has emerged in the last quarter of the century essentially builds on the Post-Westphalian model of international law which has emerged since 1945.

TNCs are an essential element of the global economy, not only as providers and recipients of goods and services, but also as employers and tax payers. The important role of TNCs today though, is not yet adequately reflected in the status that they enjoy under international law. The economic role of TNCs is not reflected in their political or legal role. This comes as no surprise because, globally speaking,

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– Normative Grounds, real policy, and legitimate governance' < http://ssrn.com/abstract=1096102 >; D. Kinley and J. Tadak, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', (2003-04) 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW. 931.; A. Sinden, 'The Power of Rights: Imposing Human Rights Duties on Transnational Corporations for Environmental Harm'(October 10, 2006), TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER SERIES, Research Paper 22/2006, < http://ssrn.com/abstract=925679 >.

474 D. Thurer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State', in Rainer Hofman (ed.), *Non-State Actors as New Subjects of International Law*(1st ed., Duncker & Humblot, Berlin 1999), 37, 49

475 L. Catá Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation's Ob < http://ssrn.com/abstract=1092167 >

476 *Ibid.* 6.

477 *Cf.* 20.

politics is characterized by fragmentation[478] whereas economics is "integrated":[479] It appears easier to break down trade barriers than political barriers. The history of integration in what is today the European Union (EU) is a good example for this. What began as an economical project (*albeit* with a view to securing peace between the partner states) has evolved into a much more ambitious and in many ways, also apolitical project.

The question we have to answer in this context is not the utopian one of whether non-state actors can or should become subjects of public international law on an equal footing with the states. Rather, our question has to be whether we can increase the acceptance of international legal standards applicable to TNCs by allowing TNCs a greater say in their creation.[480]

B. RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS UNDER INTERNATIONAL LAW

TNCs pose a significant challenge for Westphalian-style Public International Law which is still very much centered on the state. Rather than understanding international law in times of globalization as a sudden and complete overthrow of the existing legal order, this development might be described more adequately as a gradual change, *albeit* a fast one.[481] The most notable feature of this change is of course the development of International Human Rights Law. However, while International Human Rights Law gives individuals a certain status under international law, it does not elevate them to the status of full subjects who could decide on the creation of new rules. At the same time, the evolving international legal order today also includes obligations for non-state actors,most notably, but by no means limited to, International Criminal Law.

478 Thurer, *supra* (n7)48.

479 *Ibid.*

480 This approach was first proposed by the author in S. Kirchner, *supra*, (n4), as well as later in S. Kirchner, *supra*, (n2)

481 J. E. Nijman, *The Concept of International Legal Personality - An Inquiry Into the History and Theory of International Law*(1st edn., T.M.C. Asser Press, The Hague 2004)354. *See also* F. Johns, 'The Invisibility of the Transnational Corporations: An Analysis of International Law and Legal Theory', (1994)19 MELBOURNE UNIVERSITY LAW REVIEW 893.

So far, TNCs are mainly the object of non-binding codes of conduct such as those created by the International Labour Organization (ILO) or the Organisation for Economic Co-operation and Development (OECD).[482] Another key example is the "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights".[483] The so called Norms, though, are only soft law[484] and face resistance from states[485], making it unlikely that they will be turned into binding international law anytime soon.[486]

C. CURRENT RIGHTS OF TRANSNATIONAL CORPORATIONS UNDER INTERNATIONAL LAW

Since TNC activities are by their very definition transcending international borders, they are difficult to regulate by national authorities. Not only do states face practical regulatory difficulties[487], but they also face international legal limitations on the regulation of cross-border activities[488] , which makes TNC activities a key challenge for contemporary international legal theory. [489]In particular, the nationality principle[490] limits the regulatory capabilities of states through the sovereignty of

482 *Cf.* S. Kirchner, *supra* (n 2), 228.

483 ECOSOC Commission on Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*(August 26, 2003) UN-Doc. E/CN.4/Sub.2/2003/12/Rev.2, <http://www.unhcr.ch/hurdicoa/huridoca:nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En>. *Cf.* Deva, *supra* (n 6),493 ; O. O. Amao, *Review of the report of the Special Representative of the Secretary-General on the issue of human rights and Transnational corporations and other business enterprises, Prof. John Ruggie to the United Nations Human Rights Council, "Protect, Respect and Remedy: a Framework for Business and Human Rights"* AH/HRC/8/5 (April 2008) <http://ssrn.com/abstract=1131682>; L. Catá Backer *supra*(n 3). 151

484 *Cf*. S. Kirchner, *supra*(n 2), 229.

485 L. Catá.Backer *supra* (n3) 180 .

486 *Ibid*.. 101.; skeptical with regard to more general rules also F. Johns, *supra*(n 14)899

487 L. Catá.Backer, *supra* (n8) 5.

488 D. Kinley andJ. Tadaki *supra* (n6)939 *e*; T. Morimoto, 'Growing industrialization and our damaged planet – The extraterritorial application of developed countries' environmental laws to transnational corporations abroad' [2005] UTRECHT LAW REVIEW 134, 137; *cf.* also A. A. van Hoek, 'Transnational corporate responsibility – some issues with regard to the liability of European corporations for labour law infringements in the countries of establishment of their suppliers' <http://ssrn.com/abstract=1113841>.

489 J. E. Nijman,*supra*(n14)365.

490 T. Morimoto,*supra*(n21) 137.

other states which is affected if TNCs operate abroad through daughter companies that are incorporated in the foreign states in which they operate.[491] Such daughter companies are financially dependent on the mother which is incorporated in the state which seeks to regulate it but are legally independent[492], making it virtually impossible for the regulating state to influence them directly.[493]

Therefore there have been calls for international regulation of TNC activities. It would go far beyond the purposes of this article to go into the details of how international law is used in attempts to regulate TNCs, for example, in the field of international environmental law and workers' rights. Suffice it to say that TNCs *de lege lata* already are burdened with a number of responsibilities under international law, although too many of them only enjoy the status of soft law, like the aforementioned Norms.

On the other hand, corporations do enjoy *locus standi* in several contexts[494], for example as *amici curiae* in the World Trade Organisation's Dispute Settlement system[495] since the *Shrimp/Turtle*[496] and *Lead and Bismuth II*[497] cases, as parties before the International Tribunal for the Law of the Sea but also as *amici curiae* [498]and/or parties before NAFTA tribunals[499], ICSID

491 S. Kirchner, *supra*(n2) 221.

492 *Ibid*.

493 T. Morimoto, *supra* (n21) 147.

494 S. Kirchner, *supra* (n 2) 230; K. Ipsen, *Völkerrecht* (5th edn., C.H. Beck, Munich,2004) 110.

495 *WTO Dispute Settlement Understanding*, Article 13.

496 *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Panel, ET/DS58/R, 15 May 1998, paras7,8 and Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para 108.

497 *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R, 10 May 2000, para 39.

498 2 *Law of the Sea Convention* Annex VI Art. 20 Sec. gives corporations a legal status in cases concerning deep sea mining; *Cf. also* S. Hobe and O. Kimminich, *Einführung in das Völkerrecht*(n8th ed., UTB, Stuttgart, 2004)158.

499 *NAFTA-Treaty*, Chapter 11 < http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=142 >; *Methanex Corp. v. United States*(Decision on Petitions of Third Persons to Intervene as 'Amici Curiae', 15 January 2001); *UPS (United Parcel Service of America, Inc.) v. Government of Canada* (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001); L. Bartholomesusz, 'The Amicus Curiae before International Courts and Tribunals',(2005) 5 NON-STATE ACTORS AND INTERNATIONAL LAW 209,254; A. K. Bjorklund, 'The Participation of Amicus Curiae in NAFTA Chapter Eleven Cases' (22 March 2002)http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/participate-e.pdf >.

tribunals[500], the European Court of Human Rights[501], the International Criminal Court[502], the International Criminal Tribunals for Rwanda[503] and the former Yugoslavia.[504]

The question whether corporations should be heard in the process of creating new rules of international law is a political question which is not the subject of this paper. The question we have to answer is, assuming the political question is answered in the affirmative, how can such an inclusion be facilitated in terms of international legal theory. In this context, it is important to remember that we are not merely referring to codes of conduct which corporations adhere to voluntarily, i.e. the rules they impose on themselves[505], or soft law rules[506]. Rather, we are explicitly referring to the involvement of TNCs, like it is already the case with NGOs, in the creation of new norms of international law which legally bind both them and others.

D. DOES THE *LEX LATA* ALLOW FOR A LAW-MAKING ROLE FOR TRANSNATIONAL CORPORATIONS?

In general, the creation of new rules of international law requires an act by the states, either directly or through intergovernmental international organizations

500 *Aguas Argentinas S.A. and Others v. Argentina* ICSID case no. ARB/03/19 (Order in Response to a Petition for Transparency and Participation as Amicus Curiae 19 May 2005).

501 *European Convention on Human Rights,* Art. 34.

502 *International Criminal Court Rules of Procedure and Evidence,* Rule 103.

503 *ICTR Rules of Procedure and Evidence* , Rule 74.

504 *ICTY Rules of Procedure and Evidence*, Rule 74.

505 For a rather controversial example on such voluntary codes of conduct *cf.* C. Hoppe and O. Quitico, 'Codes of Conduct of PMSCs: The State or Self-Regulation in the Industry'(2009) Academy of European Law Working Papers Collection, PrivWar Working Paper 28/2009, <http://hdl.handle.net/1814/12962>.

506 Like those which have been created by the ILO or the OECD and which are intended to require TNCs to respect the sovereignty of their respective host states, in particular in the developing world. Until today, however, the necessary consensus between industrialized and developing countries regarding such obligations remains missing. Consequently most rules in this field only amount to soft law.

(IOs).[507] But as Public International Law evolves, the question that needs to be raised is what would be necessary to elevate TNCs to the status required to participate in the creation of new rules, in particular to an extent which goes beyond the initiating and consultative functions enjoyed by entities such asNGOs. The case for the role of TNCs is best constructed with reference to NGOs, rather than IOs. As a matter of fact, from a technical perspective, TNCs are a type of NGO: TNCs as well as NGOs are active internationally but incorporated domestically; they both aim to transcend borders, yet find themselves limited by them in so far as they enjoy legal personality as juridical persons in national legal orders.

When it comes to the question of whether TNCs should have a greater role in shaping international law, we have to remember that law reflects on the society to which it applies[508] and a major change in the composition of the society in question can have an effect on the rules which govern it[509]. In general, "[a]n entity is a legal subject of Public International Law, if it is legally able to hold rights and obligations and to claim such rights on an international stage.[510]"[511]

While the sovereign equality of states[512] is a key principle of Public International Law, this does not mean that entities which could be considered subjects of Public International Law in a wider sense enjoy the same degree of subjectivity.[513] We can differentiate between full, partial and particular subjects of international law. While the latter are only able to enter relationships with certain other subjects,[514]

507 On the law-making role of international organizations *cf.* S. Kirchner, 'Effective Law-Making in Times of Global Crisis – A Role for International Organizations' (2010) 2 GÖTTINGEN JOURNAL OF INTERNATIONAL LAW 267, 277\., as well as the overview in K. Zemanek, 'International Organisations, Treaty-Making Power' in: R. Bernhard (ed.), *Encyclopedia of Public International Law*,Volume II (1st edn., North-Holland Publishing Company, Amsterdam, 1995)1343, and the seminal work of J. E. Alvarez, *International Organizations as Law-makers* (1st edn., Oxford University Press,2005).

508 M. Shaw, *International Law* (4th edn., Cambridge University Press1997)36.

509 *Ibid.*

510 I. Brownlie, *Principles of International Law*,(5th edn., Oxford University Press,1998)57.

511 S. Kirchner, *supra* (n 4)86.

512 *Charter of the United Nations* Art. 2 no. 1.

513 Shaw, *supra* (n41)137.

514 *Ibid*.

partial subjects are dependent on the power conferred upon them by full subjects as regards the extent to which they can enter into legal relations.[515]

This already indicates that the view of other actors on the capabilities of an actor is not without importance. An IO for example can only act on the international stage so far as its constitutive document will allow. This constitutive document, of course, is usually an international treaty concluded by states. To this end,, the IO is dependent on the states parties to that treaty. Even if the IO enjoys a legal personality of its own, at the end of the day it is only as capable as the states parties to its constitutive document have allowed it to be.

But it also plays a role in determining whether a potential state actually fulfills the third requirement of statehood (in addition to territory and population), the capability to enter into relations with other states. This capability does not only require an effective government but it also requires that there are other states which are willing to enter into relations with the entity in question. Of course, the statehood of Taiwan will not be put in doubt as long as some states consider Taiwan to be a state and Taiwan therefore is able to enter into relations with them. But the case is already different when one looks at entities which have been hardly recognized by states, such as Abkhazia or South Ossetia which are recognized by only a handful of states (as opposed to Kosova, which is currently recognized by more than 70 states) or the so called Turkish Republic of Northern Cyprus, which is only recognized by Turkey itself, the state which facilitated the creation of the disputed entity. Not only the case of Northern Cyprus but also the case of the four homelands Transkei, Bophutatswana, Venda and Ciskei, which had been granted "independence"[516] by apartheid South Africa show that the collective non-recognition of entities as states by all states except (as is the case with Turkey and South Africa), occasionally, the state which created these entities or only other non-recognized entities (as is the case with the mutual "recognition" of Transnistria and Nagorno-Karabakh) does indeed have consequences for an entity's ability to enter into international relations.[517] Recognition is not a

515 Hobe and Kimminich, *supra* (n 31) 66.

516 These customary requirements for statehood have been codified in Art. 1 lit. l of the *Montevideo Convention on the Rights and Duties of States.*

517 *Cf.* J. Dugard, *International Law –A South African Perspective* (2nd edn., JUTA, Lansdowne,2001), 445.

requirement for statehood *per se,* but collective non-recognition takes away an entity's ability to enter into relations with states, thereby depriving the entity in question of the third element of statehood. In a sense, legal subjectivity therefore has its roots in the ability to play a role in the deliberative process which takes place on the international stage.

But if recognition plays such an important role for states, which are, after all, still the key actors of international law, there is –*a maiore ad minus*–no reason why recognition should not play a role for lesser actors, including transnational corporations. In fact, since TNCs do have a legal status also in national law, they are doubly dependent on states: domestically, since they require incorporation and internationally, since they require acceptance as a partner in the process of creating new rules of international law. The relational-argument brought forward here can be applied to all lesser subjects of international law which are in one way or another dependent on full subjects- be they IOs, NGOs or TNCs. They can play a role on the international stage if other, full, subjects of international law allow them to do so. In a sense, it is this "capability to enter into relations with others that is now becoming the key test for the determination as to whether or not an entity is indeed a subject of PIL."[518]

Contemporary PIL therefore calls for "a fundamentally new type of differentiation: between those subjects which have rights and obligations under international law (subject to the law) and those subjects which are involved in the creation of new law (law makers). This does not mean that the existing differentiations become obsolete, but that we add an additional dimension to it – the differentiation between mere subjects to the law and those subjects which have a chance to actually change the law."[519]

De lege lata the important status of TNCs is not adequately reflected in international law.[520] In particular, the organisational similarities between TNCs and other NGOs call for the inclusion of TNCs in the consultative process of international law-making.Today, NGOs can enjoy consultative status with

518 S. Kirchner, *supra* (n 4)88.

519 *Ibid*.

520 S. Kirchner, *supra* (n2) 231; *cf.* also M. Reisman, 'The View from the New Haven School of International Law' (1992) 86 *ASIL Proceedings* 118, 122.

ECOSOC[521] and can play a role in supervising World Bank projects[522]. From an organizational perspective, there is no reason why TNCs should be not be included when NGOs already are. While it is obvious that TNCs will pursue goals other than, for example what a human rights NGO will pursue, but in the end, both types of organizations pursue goals which are political in the widest sense. Whether the motivation for pursuing the goals in question is mainly commercial or altruistic can vary from case to case and is too vague a criterion so as to allow for a differentiation in the roles of both types of actors.

So far, TNCs play a role in the creation of new rules primarily when they themselves are concerned, that is, in the domain of Private International Law rather than Public International Law.[523] They do not yet play a full role in creating new rules of Public International Law, but they could be engaged more than is currently the case. From the perspective of international legal theory, the question of whether to engage TNCs more in the creative process of making of international law is merely political in nature.

TNCs will have a greater role if they are recognized by other actors to the effect that they ought to be included in the deliberative process which leads to the creation of new norms. As an *argumentum e contrario* from the conclusions drawn on the collective non-recognition of entities as states, I propose that the factual engagement of TNCs by other subjects of international law in the law-making process can constitute a degree of recognition which will elevate TNCs to the same level as other NGOs. As mentioned earlier, some NGOs are already given a consultative status e.g. by the United Nations' ECOSOC and they can act as *amicus curiae* in international litigation. TNCs are non-governmental forms of organization, but they do not enjoy the reputation enjoyed by classical NGOs as stewards of the public interest. TNCs are essentially seen as serving their own interests (or that of their shareholders). But TNCs also matter to many people, such as employees or customers. While both employees and customers can find themselves in a conflict with TNCs, the factual power of large multinational corporations might make it

521 ECOSOC Res. 1296 (XLIV), 23 May 1968, <http://daccess-dds-ny.un.org/RESOLTION/GEN/NR0/007/91/IMG/NR000791.pdf?OpenElement>.

522 J. E. Nijman, *supra* (n 14) 357.

523 S. Kirchner, *supra* (n 2) 233.

just a matter of time until TNCs might be involved in the creation of more binding norms of Public International Law. Their factual importance practically demands some involvement in order to reach effective results and to increase the likelihood of compliance of TNCs with international legal standards-at the risk of watering down standards. Undoubtedly, getting TNCs involved in making international law will bring risks with it.

E. CONCLUSIONS AND OUTLOOK

The potential development proposed here would be part of the evolution of the law to a post-Westphalian stage, but it would by no means herald the advent of a completely new law. Rather, international law evolves towards a completeness which more adequately addresses the power realities of our time – without cutting off the roots which nourish it.

This becomes particularly visible when we remember the continued importance of the states for the international legal system: While non-state actors, NGOs as well as TNCs, today can play a role in international law, both by asserting rights and by influencing the creation of new rules, the responsibility for enforcing international law still rests squarely on the shoulders of states parties to international documents. This will not change in the foreseeable future. At best, states can delegate this task to international intergovernmental organizations, but even when the latter enjoy full international legal personality, at the end of the day it is the states which found and which fund them thatwill have to bear the responsibility to ensure that international law is adhered to by all sides, states as well as non-state actors under their jurisdiction.

Certainly, TNC activities can cause serious problems, but any rule of international law is just as good as its enforcement. Enforcement is a key problem of international law and will remain an important challenge for the future. While it is politically more attractive to be seen involved in the creation of new rules of material law, which sends the signal that things are getting done, the enforcement of international law needs further attention, in particular on the part of states. The increasing involvement of non-state actors does not absolve the States of this responsibility which they bear as the key subjects of contemporary international law.

The reason why states have this ultimate responsibility is that they enjoy an unparalleled degree of legitimacy. Undemocratic states still pose a very serious

problem in this respect, but at least states provide a nexus between the general population and the creation of new rules, as thin or fragile as this connecting band may be. NGOs and TNCs, although they do play important roles, lack this direct connection. Often NGOs are perceived as "good" (when dealing with issues of human rights or with environmental concerns) while TNCs tend to be perceived as "bad" (causing environmental pollution and human rights abuses). This general perception is not without reason, but just as it cannot be ignored, it must not lead to the conclusion that political or other goals may influence the right to participate in the deliberative process which will lead to the creation of new rules. The reality of the impact these actors have on our globalized society cannot be ignored. It is due to their practical importance that they need to be heard. Otherwise we would have to deny a voice also to, say, the People's Republic on China and cut off more than a billion people from the process which shapes international law. Rather than cutting the already existing ties between the population and international decision-making processes which are anywayfragile due to a lack of domestic responsibility, the sovereign equality of nations and the cooperative nature of Public International Law as such demand that those states are engaged by more democratic states with the purpose of drawing them deeper into the deliberative process which leads to the creation of new rules. In the long run, this might also strengthen domestic decision-making cultures by importing stronger deliberative elements, which can put a nation on the track to democracy, just like the Helsinki Final Act helped steer the Warsaw Pact countries towards more freedoms.

In principle, the same benefit of being engaged in deliberative decision-making on an international level applies to non-state actors and in particular, to the compliance with international standards on the part of transnational corporations. TNCs are more likely to adhere to international standards if they have had a say in creating them. Just like with NGOs and states, it has to be clear that TNCs will have their own agendas, nevertheless, this cannot exclude them from having a voice in the creation of new rules. Transnational corporations mustt be included in the creation of new rules of international law as much as other non-state actors. This might even lead to more acceptance of international law by customers, i.e. with the general population, the lives of which it increasingly regulates - directly or indirectly. Such an inclusion, though, will require the creation of solid democratic standards which do not yet exist at this time. In addition, a more solid constitutionalization

of international law[524] - with a clear focus on human rights - is necessary in order to provide a framework within such an increased participation can happen.

Non-state actors are "derivative subjects"[525] of international law. But at the end of the day, all traditional and new subjects are derivatives from the one original subject of man-made law, the human being. *De facto*, non-state subjects might be "second-class"[526]subjects when compared to the state, but that does not mean that they do not play a role in making new rules of international law. While "creating rights and obligations left, right and centre, however useful perhaps in itself, does not add up to sort of paradigm shift that international law might need in order to truly accommodate entities other than states",[527]but these developments indicate that such a change is - while not yet realized - at least possible.

TNCs cannot replace[528] states as the primary makers of international law. While the individual is the core unit of the international society (and families, tribes, nations, municipalities, states, NGOs, religious groups, corporations, international organisations etc. are forms of organisation of multiple individuals on the sub-global level), the state remains the key actor on the international scene. It is, however, no longer the only subject and TNCs should have a role to play as well. This idea is not new:[529]" There is little doubt that [Multi-National Enterprises] have been, and continue to be, actively involved in the generation of legal standards applicable to their respective markets and industries."[530] What is new is the idea that this sector-specific role can be extended towards a more general approach. However, as a prerequisite, international law will also have to provide better safeguards which protect common interests such as human rights and the protection of the natural environment against abuses, regardless of the legal nature of the perpetrator.

524 For a "constitutional" approach *see also* Thurer, *supra* (n 7), 51.

525 J. Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors', in J. Petman and J. Klabbers (eds.), *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi* (1st edn., Martinus Nijhoff, Leiden / Boston, 2003), 351, 361.

526 *Ibid.*

527 *Ibid.* 368.

528 The idea of international law without states has been explored in detail in G. Teubner (ed.), *Global Law without a State* (1st edn., Dartmouth, Aldershot / Brookfield / Singapore / Sidney, 1997).

529 *See* P. T. Muchlinski, 'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community', in: G. Teubner, *supra* (n61) 79.

530 *Ibid*. 86.