Non-State Actors for Profit: Revisiting Transnational Corporate's Personhood and Responsibility under International Law

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Cover Page Footnote
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Non-State Actors for Profit: Revisiting Transnational Corporations’ Personhood and Responsibility under International Law

Katayoon Beshkardana* and Faraz Shahlaei**

Abstract:

The growing impact of Transnational Corporations (TCs) on international trade, investment, and human rights raises the question of international corporate responsibility. For international responsibility, TCs must be recognized as subjects of international law with legal personality. Apart from states as the primary subjects of international law, such status has been granted to intergovernmental organizations (IGOs). The factors that contributed to the IGOs’ recognition as international law subjects seem to be present for TCs today. While the International Court of Justice granted such legal status to IGOs, for TCs, the best path to recognition would be to establish a global authority with a public-private partnership structure and a self-contained regime to regulate and hold TCs responsible for their internationally wrongful acts.

Keywords: Transnational corporations, international subjects, international legal personality, international corporate responsibility, self-contained regimes, internationally wrongful acts.

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TABLE OF CONTENTS

Introduction.................................................................................................................. 251
I. Evolution of International Legal Personality Beyond states: Case of Inter-Governmental Organizations .............................................. 258
II. TCs and International Law in Theory and Practice.............................. 264
   A. TCs’ International Legal Personality in Theory ...................... 265
   B. TCs’ International Legal Personality in Practice......... 268
III. Path Forward: The Good, the Bad, the Ugly......................... 277
   A. The Good Option: Active Rule Making......................... 278
   B. The Bad Option: Advocacy and Soft Law Development.. 283
   C. The Ugly Option: Laissez Faire Doctrine ...................... 283
Conclusion .................................................................................................................. 284
INTRODUCTION

Transnational corporations (TCs) are private entities that own and control production and distribution of goods, services, and intellectual properties in at least one country other than their home country.\(^1\) They have decentralized operations across borders and facilitate international trade through global value chains.\(^2\) TCs are known as non-state actors in international law, an umbrella phrase that is used to identify entities beyond states that impact international law and particularly, international human rights law.\(^3\)

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\(^1\) The United Nations (UN) has defined transnational corporations (TCs) as “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.” Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted 13 Aug. 2002, Sub-Comm’n on the Promotion & Protect. of Hum. Rts. Res. 2003/12, U.N. ESCOR, Comm’n on Hum Rts., Sub-Comm’n on the Promotion & Prot. of Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, para. 20 (2003). The Organization of Economic Cooperation and Development (“OECD”) guidelines defines TCs as companies established in more than one country that coordinate their operations in various ways, with one or more entity’s significant influence over others and widely varying degrees of autonomy, with ownership structures that may be private, state, or mixed. See OECD Guidelines for Multinational Enterprises, OECD (Sept. 29, 2011), www.oecd.org/daf/inv/mne/48004323.pdf. The terms multinational enterprise, transnational corporation and multinational corporation are used in the literature interchangeably. While multinational corporation and transnational corporation indicate to their existence as an incorporated legal entity, multinational enterprise is a political or economic reality that can take different legal forms and devices. The word ‘transnational’ emphasizes the operation of such corporations across national borders. See Alexandra Gatto, MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS: OBLIGATIONS UNDER EU LAW AND INTERNATIONAL LAW 38 (2011).

\(^2\) TCs are heavily involved with cross-border free flow of labor, capital, goods, services, and data. They are the major providers of services that were traditionally assumed by the governments, to the extent that, for some commentators, TCs appear to “rule the world.” See Song Kim & Helen V. Milner, Multinational Corporations and their Influence Through Lobbying on Foreign Policy, in GLOBAL GOLIATHS: MULTINATIONAL CORPORATIONS IN THE 21ST CENTURY ECONOMY 2, 25 (C. Fritz Foley, James R. Hines Jr., & David Wessel eds. 2021).

\(^3\) See Philip Alston, The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, in NON-STATE ACTORS AND HUMAN RIGHTS 3–7 (Philip Alston ed., 2005). See also, Eisuke Suzuki, Non-State Actors in International Law in Policy Perspective, in NON-STATE ACTORS IN INTERNATIONAL LAW 33 (Math Noortmann et al. eds., 2015). Regarding the impact of non-state actors on international adjudication, see Yael Ronen, Participation of Non-State Actors in ICJ Proceedings, 11 L. & PRAC. INT’L. CTS. & TRIBUNALS 77 (2012). There are several non-state actors that influence international law and enjoy some level of recognition and legal status. For example, the legal personality of individuals and natural persons has been developed over past decades within the context of international human rights and humanitarian law and manifested itself in international criminal law to some extent. Some cases on recognition of international personality for individuals in international law are LaGrand Case (Ger. v. U.S.) 2001 I.C.J. 104 (June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31); Sanchez-Llamas v. Oregon, 584
TCs have broad economic powers due to their large presence in all sorts of economies, and benefit, extensively, from exports and market liberalization. Their turnovers are at times greater than the national budgets of some states indicating their significant role in the global economy.

With such broad powers, TCs have the potential to be the cause of good or evil. The explicit role of TCs as part of a global response to the Ukraine crisis in 2022, was undoubtedly a remarkable good deed on behalf of TCs. Since the beginning of the Russian invasion, major companies in critical sectors of the economy started to withdraw, suspend, or limit their operations

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in Russia, at a speed that outpaced the official responses by states. For example, Shell, one of the largest oil companies in the world, announced withdrawal from the Russian oil and gas sector, PayPal, a financial technology company shut down its services in Russia, McDonald’s, the fast food industry giant, left Russia after about thirty-two years of having that market, Delta Air Lines, one of the major United States airlines, suspended its alliance with Aeroflot, the largest Russian airline, and sportswear companies such as Reebok, Adidas, and Nike either paused their sales in Russia or closed down their stores.

Another example, in the context of the Ukraine war, is the actions taken by Sports Governing Bodies (SGBs), private entities with a high volume of business activities that provide international sports platforms of high importance to governments. SGBs’ implied powers help, in some

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8 Bill Chappell, *McDonald’s Is Leaving Russia, After More Than 30 Years*, NPR (Mar. 16, 2022, 8:43 AM), https://www.npr.org/2022/05/16/1099079032/mcdonalds-leaving-russia.


circumstances, enforce international rules and regulations including international human rights law. When the Ukraine war started, SGBs took relatively harsh and tremendously fast actions against Russian sports. Just one day after the invasion of Ukraine, the Union of European Football Association (UEFA), the governing body of football in Europe, moved the Champions League’s final match of the season from Saint Petersburg to Paris. Within the next couple of days, the International Olympic Committee (IOC) recommended that all international sports federations not invite or allow participation of Russian athletes due to violation of the Olympic truce tradition, and the International Judo Federation suspended the Russian President’s honorary status. Russia was suddenly out of the race to qualify for the 2022 Qatar World Cup, halfway towards the end of the qualification round.

TCs can equally be evil and do harm. A famous example is the Shell Oil Company consortium that partnered with a state-owned Nigerian oil company and exploited oil reserves in Ogoniland disposing toxic wastes into local waterways causing human health and environmental disaster for local communities. A further example is the case of Enron, which included wire


For example, when FIFA demanded Iran must allow women in the stadiums, the government complied with such request in less than 4 months. See Maziar Motamedi, Iranian Women Allowed to Watch Football Match after FIFA Pressure, ALJAZEERA (Aug. 22, 2022), https://www.aljazeera.com/news/2022/8/25/iranian-women-allowed-to-watch-football-match-after-fifa-pressure. The IOC has the power to unilaterally impose international obligations on states. For example, if a state wants to become a host for Olympics, it must ratify the UNESCO Convention Against Doping in Sports. See Michael Straubel, The International Convention Against Doping in Sport: Is It the Missing Link to USADA Being a State Actor and WADC Coverage of U.S. Pro Athletes?, 19 MARQ. SPORTS L. REV., 63, 64 (2008).


Alston, supra note 3 at 11.
Revisiting Transnational Corporations’ Personhood and Responsibility

and securities fraud, falsifying financial reports, and obstruction of justice that led Congress to pass the Sarbanes-Oxley Act intensifying responsibilities of managers of public companies. In the recent corporate fiasco of investment fraud in crypto assets by FTX the company’s bankruptcy CEO call it worse than Enron. FTX Trading Ltd., was a global cryptocurrency trading platform that provided service to customers worldwide while the majority of its investors were U.S. based. The company went bankrupt in November 2022, and soon after, the U.S. Securities and Exchange Commission (SEC) filed charges against FTX Chief Executive Officer (CEO) for violation of the anti-fraud provisions of the Securities Act.

Despite the great impact on international trade, investment, and human rights, TCs are not recognized as subjects of international law with legal personality, and there exists no uniform law governing their international behavior. Subjects of international law are persons, natural and juridical,

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20 John Ray, FTX Bankruptcy CEO testified before the House Committee that “in his career as chief executive officer and chief restructuring officer in several corporate failures involving allegations of criminal activity and malfeasance, including the Enron bankruptcy he has never seen such an utter failure of corporate controls at every level of an organization, from the lack of financial statements to a complete failure of any internal controls or governance whatsoever.” Testimony of John J. Ray III, CEO, FTX Debtor Before the Committee on Financial Services House of Representatives (Dec. 13, 2022).

21 FTX was incorporated in Antigua and Barbuda, headquartered in the Bahamas, and operated through two branches: FTX.com for international users’ access to invest in different cryptos with low trading fees and the FTX.US, available to U.S. residents to invest in about twenty cryptos with low trading fees. The major FTX shareholders were Sequoia Capital, a Silicon Valley venture capital fund, Temasek, an investment company owned by the government of Singapore, Paradigm, Ontario Teachers’ Pension Plan, Tiger Global Management, and SoftBank. For the value of their investment and the estimates of their loss see Chase Peterson-Whitorn, Exclusive: These FTX Investors Stand to Lose the Most from the Crypto Exchange’s Implosion, FORBES (Nov. 10, 2022, 7:35 PM), https://www.forbes.com/sites/chasewithorn/2022/11/10/exclusive-these-investors-stand-to-lose-the-most-from-ftxss-implosion/?sh=6af5e1e02670.

22 According to the Securities and Exchange Commission (SEC), FTX raised more than $1.8 billion from equity investors while actively and purposefully concealing from FTX’s investors ‘(1) the diversion of FTX customers’ funds to Alameda Research LLC, FTX CEO’s privately-held crypto hedge fund; (2) the special treatment afforded to Alameda on the FTX platform, including providing Alameda with a virtually unlimited “line of credit” funded by the platform’s customers and exempting Alameda from certain key FTX risk mitigation measures; and (3) undisclosed risk stemming from FTX’s exposure to Alameda’s significant holdings of overvalued, illiquid assets such as FTX-affiliated tokens. The complaint further alleges that Bankman-Fried used commingled FTX customers’ funds at Alameda to make undisclosed venture investments, lavish real estate purchases, and large political donations.” See Press Release, SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX, SEC (Dec. 13, 2022), https://www.sec.gov/news/press-release/2022-219. For FTX Bankruptcy case see FTX Trading Ltd., KROLL, https://restructuring.ra.kroll.com/FTX/.
upon whom the law confers rights and imposes duties. They enjoy the right to enter international treaties, to bring an international claim, and to be directly accountable for any breach of one’s own obligations. International legal personality is also about law-making capacities. For example, the United Nations (UN) and the World Trade Organization (WTO) are international entities with legal personality, i.e., they have the authority to regulate, administer, and adjudicate the rights and obligations of their members within the framework of their organizational mandate. International legal personality, in this sense, requires recognition of an actor as a subject of international law.

In this paper, we look into the question of TCs’ subjectivity, personality, and responsibility under international law. The paper is divided into three parts. Part I investigates the conditions under which an international actor becomes the subject of international law and gains legal personality. It studies the factors that contributed to the recognition of intergovernmental

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26 For some scholars, legal personality is not necessarily linked to subjectivity in international law, and it merely refers to capacity to enjoy rights and privileges, and to bear duties. Corporations seem to have sufficient rights and privileges to conclude that they are legal persons. See Andrew Clapham, *Human Rights Obligations of Non-State Actors* 68–69 (2006). Others further argue that international legal personality should not be confused with international corporate liability even though it seems corporations have both. See Alvarez, supra note 24, 24 at 31. International rights and obligations don’t necessarily provide legal personality to their holders. For example, under the Common Article 3 of the Geneva Conventions (1949) and 1977 Additional Protocol, non-state actors armed forces and organized groups must comply with international humanitarian law without holding any legal status. See Gentian Zyberi, *Non-State Actors from the Perspective of the International Law Commission, in Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* 165, 169 (Jean D’Aspremont ed., 2011). For the authors of this paper, however, there is a connection between international subjects, legal personality, and responsibility. This does not deny the fact that international law, on occasion, has treated some non-state actors as its objects and have imposed upon them some obligations or provided them with rights without formally accepting them as subjects of international law. Subjects, however, not only have rights and obligations, but are also able to actively participate in international law-making processes and impact international law development.

27 There are five schools of thought regarding legal personality in international law: state only conception, recognition conception, individualistic conception, formal conception, and actor conception. Our analysis mainly relates to the actor conception of international personality. See Portmann, supra note 2525 at 208–42.
organizations (IGOs) as subjects of international law with legal personality.\textsuperscript{28}

Part II reviews TCs’ active role in and impact on international law in the past few decades as entities that are effective participants of the international order and function like international persons. This analysis mainly focuses on the effective powers that TCs display on the international stage and the similarities that can be identified between TCs and IGOs. This part further reviews the international guiding principles for business enterprises and private entities, and their shortcomings in addressing TCs’ internationally wrongful acts.

Part III discusses the future paths that the international community might take towards TCs. The ‘good’ option would be an active engagement in recognizing TCs as subjects of international law with legal personality, codifying and setting minimum international standards governing their behavior. While this may be achieved by means of a treaty, ICJ advisory opinion, and development of customary international law (state practice and \textit{opinion juris}), the best path would be to create a global authority, a self-contained subsystem of international law empowered to administer, implement, and enforce TCs’ international legal regime. Rather than creating a treaty with states in its core with the primary responsibility of implementation and enforcement of treaty obligations, we can create a subsystem of international law that is self-contained with permanent mechanisms in place and an inclusive membership structure composed of all the stakeholders, public and private, to govern the TCs’ international behavior. The ‘bad’ option for the international community would be to continue advocating corporations’ voluntary self-regulation based on their corporate structure and governance, scope of their business activity, and value systems. Given that corporations are private entities driven by profit and cost-benefit analysis, often with lack of effective monitoring, assessment, and evaluation mechanisms such voluntary self-enforcing codes of conduct will create a fragmented system that vary from one structure to the other, failing to create a comprehensive, uniform, and consistent accountability framework for TCs. Finally, the ‘ugly’ option would be to remain passive and to refuse building consensus while TCs continue to impact multiple aspects of our international legal system. This historical approach has reached its expiration date and has no further theoretical or practical value.

\textsuperscript{28} See discussion \textit{infra} Part I, pp. 6–11.
I. EVOLUTION OF INTERNATIONAL LEGAL PERSONALITY
BEYOND STATES: CASE OF INTER-GOVERNMENTAL
ORGANIZATIONS

International personality is barely regulated and is largely dependent upon case law and practice.29 Thus, its meaning and connotation are elastic, providing different subjects with different levels of legal status recognition based on differing contexts.30 The realm of international law has traditionally been the scene of state action since the formation of the concept of sovereignty and emergence of modern territorial states.31 The state-centric international law theory has persistently continued for centuries since Jean Bodin first established the sovereignty paradigm in 1586.32 International law has originally been made by the states for the states with a strong emphasis on the public nature of international rule-makers.33 This has been reflected in the definition of international law as a body of legally binding customary and treaty rules made by state consent with the aim of preserving order and peace and fostering trade among civilized nations.34 A quick look at the orthodox positivist doctrine clearly pinpoints the centrality of sovereign states in making and enforcing international law.35 Thus, in classic international law doctrine, states are the quintessential persons and those who primarily have created and are developing international law.36

29 See Portmann, supra note 2525, at 9–10.
30 Id. at 8–12. For examples of the legal status of non-state actors in international law, see supra note 3.
36 Historically, however, not all states had international legal personality. International law was not inclusive of all sovereign states and did not treat them as equal subjects. The law, as was shaped during the era of European colonialism of the eighteenth and nineteenth centuries, excluded the so-called uncivilized nations by definition and practice. At this time,
IGOs are essentially an extension of the state apparatus and facilitate state participation in formal arenas of international lawmaking. IGOs became subjects of international law through a top-down formal judicial recognition. The law governing IGOs developed in other areas of international law including customary international law later.

As states were evolving in a rapidly changing world, new entities in the form of international organizations began to emerge. The peak came in the 1860s with the birth of several international organizations. The emergence of IGOs after World War I was a response to the need for increased international cooperation and a desire to prevent future wars. The massive destruction and loss of life brought by the war caused many people to believe that the international community needed to work together more closely to prevent future conflicts. While some of these organizations have been more successful than others, they represent an important development in the history of international relations and continue to play an important role in global governance today.

With the rise and proliferation of international organizations at the end of the nineteenth century and the beginning of the twentieth century, their relationship with international law became central in the literature. The Permanent Court of International Justice (PCIJ) prepared the grounds for recognition of IGOs’ international personality in a series of advisory opinions requested on the status of the International Labor Organization (ILO) in the

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37 Suzuki, supra note 33, at 33.
39 The League of Nations was the first IGO established after WWI. It was created in 1919, with the goal of promoting international cooperation and preventing future wars. The International Labor Organization (ILO) was established in 1919 as another significant IGO. Another example was the Health Organization, the predecessor of The World Health Organization, created under the premises of the League of Nations in 1920. See id.

The international river commissions, which covered areas like the Rhine, Elbe, Po, and Danube, were one of the first international organizations, having initially only territorial jurisdiction.\footnote{Kirsten Schmalenbach, \textit{International Organizations or Institutions, General Aspects}, in THE MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW \textnumero{} 2 (2020).} Among these commissions, the European Commission for the Danube was the first to be recognized and granted limited international legal personality by the PCIJ under the theory of implied powers.\footnote{See Christian Walter, \textit{Subjects of International Law}, in THE MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW \textnumero{} 3 (2007).} The PCIJ stated that the European Commission of the Danube exercises its functions “in complete independence of the territorial authorities.”\footnote{\textquote{The PCIJ indicated in this advisory opinion that personality in international law was not necessarily confined to states and the European Commission as an international institution “has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.” Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14, at 64 (Dec. 8).}
Revisiting Transnational Corporations' Personhood and Responsibility
44:249 (2024)

Trade (GATT 1947), soon raised questions with regards to their legal status in international law. The issue of the international legal personality of these newborn entities was brought before the ICJ and shaped one of the early advisory opinions of the court. Count Bernadotte, the UN mediator in Palestine, was assassinated during the course of his duty in 1948. The UN General Assembly requested an advisory opinion from the ICJ, posing the question of whether the UN, as an Organization, has the capacity to bring an international claim against the responsible ‘de jure’ or ‘de facto’ government to obtain reparations due in respect of the damage caused to the UN as well as to the victim or to persons entitled through him. Despite the fact that the UN Charter had not expressly answered the question posed, the court argued that it was a necessary implication for the UN to have legal capacity for carrying out its functions. Consequently, the court unanimously and without any dissent held:

> [w]hen the Organization has sustained damage resulting from a breach by a member of its international obligations, it is impossible to see how it can obtain reparation unless it possesses capacity to bring an international claim. It cannot be supposed that in such an event all the members of the organization, save the defendant state, must combine to bring a claim against the defendant for the damages suffered by the organization.

In the opinion of the court, the UN was intended to exercise and enjoy functions and rights, and the capacity to operate on an international plane by possession of international personality. The UN could not plausibly carry out the intentions of its founders if it was devoid of international personality. The UN members, “by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.”

As the court remarkably stated, “the nature of subjects of legal systems, their rights and liabilities depend upon the needs of a given community. The

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50 “The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers, which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.” Id. at 182.
51 Id. at 180–81.
52 Id. at 179.
development of international law has been influenced by the requirements of international life and the progressive increase in the collective activities of non-state actors.”

Despite the recognition of legal personality for IGOs in the early years of the ICJ and its reaffirmation in multiple following cases, it was not until 2011 that the Draft Articles on Responsibility of International Organizations was adopted by the International Law Commission (ILC) and submitted as part of the Commission’s report to the UN General Assembly. The legal personality of IGOs was first established in the ICJ’s advisory opinion, consolidated in subsequent contentious disputes in the course of a noticeable period of time, and finally codified in the ILC Draft Articles reflecting the customary laws governing IGOs’ behavior in international law.

The development of the IGOs’ responsibility doctrine can be seen in the jurisprudence of the domestic courts as well. One of the recent examples is Jam v. International Finance Corporation where the Supreme Court of the United States denied absolute immunity of the International Finance Corporation (IFC). In this case, the IFC financed construction of a coal-fired power plant in a coastal region of Gujarat in India. The Indian company, while operating the project, polluted the air, land, and water in the area and caused serious environmental and social harm to the local community. Inhabitants of the region sued the IFC for failure to supervise the client’s company for social and environmental risks in the construction and operation of the power plant. The Supreme Court concluded in a 7-1 majority, that international organizations are not absolutely immune from suit according to International Organizations Immunities Act (IOIA).

53 Id. at 178.

54 The ICJ in “Cumuraswamy” advisory opinion of 1999 reaffirmed that the UN may have responsibility to provide compensation for the acts of its agents. See Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29). See also, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (WHO and Egypt), Advisory Opinion, 1980 I.C.J. para. 37 (Dec. 20). (The court held that “international organizations are subjects of international law and ‘as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”). Id.


immunity of foreign governments, and since foreign governments are no longer absolutely immune under the Foreign Sovereign Immunities Act (FSIA), such absolute immunity cannot be extended to international organizations anymore.\(^5^9\) Despite being a national decision by the U.S. Supreme Court, the ruling indicates development of IGOs’ legal responsibility that corresponds to the current needs of the international community.

A quick look at the founding instruments of international organizations demonstrates a mainstream trend to explicitly recognize their legal status as persons under international law, to benefit from rights and privileges, and to be enabled to institute legal proceedings.\(^6^0\) In the meantime, the law of responsibility of international organizations is expanding, as seen in the \textit{Jam} case, signaling that the law is not static, it develops over time, and there is no room for ‘affections’ to keep the status quo.

Modern international law has developed both substantively as well as in its form. While states continue to be the primary members of the international community, the notion of ‘subjects’ of international law and their legal personality has been expanded beyond states, in theory and practice. Once such recognition expanded to IGOs, TCs seem to be next.

\(^5^9\) The U.S. enacted the 1976 Foreign Sovereign Immunities Act (FSIA) that restricted the absolute immunity of foreign states from suit in U.S. courts for commercial activities. 28 U.S.C. § 1605(a)(2).
\(^6^0\) Article VII Sec. 2 of the International Bank for Reconstruction and Development (IBRD) Articles of Agreement: “The Bank shall possess full juridical personality, and, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.”; Article VIII of the Marrakesh Agreement Establishing the WTO: “1. The WTO shall have legal personality and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions. 2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions. 3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO. 4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947. 5. WTO may conclude a headquarters agreement.; Article 4 of the Rome Statute establishing the International Criminal Court: 1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. 2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.” See IBRD Articles of Agreement art. 1, opened for signature Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 (as amended Feb. 18, 1989); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.; Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9 (1998), 37 I.L.M. 999, art. 25 [hereinafter “Rome Statute”].
II. TCs and International Law in Theory and Practice

TCs are private subjects driven by profit which function on private corporate powers. They take interest in shaping international law and influencing international decision-making processes by incorporating their preferred policies and engaging in transnational relations affecting political outcomes, either within one or more states, or within international institutions. TCs favor free trade, capital mobility, open market access and harmonized norm setting and dispute settlement. Lowering tariffs and trade barriers, preferential regimes, opening of capital markets, and investment protections are all policies that TCs have championed and pursued across borders. The rise of new generation cross-border corporate activities empowered with digital technologies increases TCs’ implied powers, authority and influence, and provides them with an increased opportunity to reshape the dynamics of the international legal landscape.

With such broad powers, TCs have the capacity to violate laws, commit crimes, and be harmful to humans and the environment. They can indirectly create incentives for the government to violate human rights for business purposes, such as providing international credibility to authoritarian regimes by means of investment and financing. Moreover, due to their easy access to global markets and the need and dependence of less developed economies on their investment, the national regulatory landscape has traditionally been designed to be appealing to TCs’ foreign direct investments by the provision of incentives, tax release, and less restrictive measures. Due to their

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61 Alston, supra note 33, at 15–16. Some scholars argue that TCs do not enter the rule-making process in an unmediated fashion. In other words, their interactions with states and other actors do not produce customary international law. Accordingly, they do not own law making capacities. See Anthony Clark Arend, LEGAL RULES AND INTERNATIONAL SOCIETY 176 (1999); Antonio Cassese, INTERNATIONAL LAW IN A DIVIDED WORLD 103 (1986).
62 See Kim & Milner, supra note 22, at 6.
63 Id. at 25.
65 TCs can breach human rights through the use of child labor, discrimination against certain employees such as women and union members, attempts to suppress independent trade unions and discourage collective bargaining, failing to provide safe working conditions, and restricting the spread of technology and intellectual property. See David Weissbrodt, Roles and Responsibilities of Non-State Actors, in OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 726 (Dinah Shelton ed., 2013).
66 The prevalent approach to TCs has been largely focused on protection of investment and capital by granting rights. This has been reflected in the laws of expropriation, contractual remedies, adequate, prompt, and effective compensation for lost profit due to state actions, fair and equitable treatment, national treatment, most favored nations clause (MFN), full protection and security, non-discrimination, and arbitration as an alternative dispute resolution.
decentralized structures, states cannot properly police every aspect of TCs’ operation. Recognition of TCs as subjects of international law enables the international legal system to regulate their behavior and to hold TCs responsible in a consistent, transparent, and predictable manner when they break the law.

An evaluation of the current position of TCs in the international legal order demonstrates that they are potentially *de facto* subjects of international law. The role and powers that TCs have acquired in contemporary international law has elevated them to a status that resembles that of the traditional international law subjects. What enhances this observation is the similarities that can be detected in the evolution of the concept of international personality for IGOs, as described above, for TCs.

Nevertheless, neither states nor TCs are willing to commit to a binding international responsibility framework.67 There is no consensus among international actors to recognize TCs as new subjects and to agree upon a binding instrument that defines their international responsibility. States enjoy a broader discretion in treating TCs in the absence of an internationally defined and framed legal responsibility. In addition, states are unwilling to intervene because of the revenues from tax paid by these companies or the overall economic impact on financial wellbeing of their citizens.68 On the other hand, TCs claim they perform better under less restrictive regulatory regimes. This is due to concerns that extra constraints on operations of these profit-based companies will take away their economic efficiency. TCs normally prefer to hide behind the corporate veil and advocate voluntary mechanisms, and non-binding documents.69

Below, we review the theoretical foundations for recognition of TCs as subjects of international law and illustrate the practical efforts done so far to regulate TCs in international law.

A. TCs’ International Legal Personality in Theory

As early as the 1960s, international law literature has made reference to TCs’ personhood.70 Yet, the idea of corporate self-regulation and *laissez-faire* doctrine has governed TCs’ international behavior for decades. TCs were predominantly considered to have no established moral obligations beyond their duties to uphold the interests of their shareholders and maximize profit.71 The efforts they made to improve their public image in relation to

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67 Gatto, supra note 11, at 13–16.
68 Id. at 25.
69 Id. at 13–16.
human rights were a matter of self-interest that did not reflect the existence or acceptance of a moral obligation. In fact, in the corporate world, voluntary adoptions of codes of conduct were traditionally seen to reduce competitiveness and profit and increase costs.\footnote{Richard Falk, Human Rights, 141 FOREIGN POL’Y 18, Mar.–Apr. 2004, at 20–22. See also Alston, supra note 3, at 22–23.}

International law doctrines describe the role and status of TCs based on certain normative preconceptions and community expectations they try to target.\footnote{Jean D’Aspremont, Non-State Actors and the Social Practice of International Law, in NON-STATE ACTORS IN INTERNATIONAL LAW 11 (Math Noortmann, August Reinisch, & Cedric Ryngaert ed., 2015).} Below is a brief introduction to two major doctrinal perspectives regarding ‘subjects’ of international law and their legal personality.

The orthodox positivist doctrine considers international law as a normative framework governing states’ relations. It argues that non-state actors do not formally participate in the collective will of the international community and law-making processes, and when addressed are merely objects of regulations.\footnote{Cedric Ryngaert, Math Noortmann, & August Reinisch, Concluding Observations in Non-State Actors and Globalization: A Paradigm for Decentered World, in NON-STATE ACTORS IN INTERNATIONAL LAW 369 (Math Noortmann, August Reinisch, & Cedric Ryngaert ed., 2015).} Any entity can be treated as objects of international regulations so long as states treat it as such.\footnote{Alston, supra note 3, at 19–20.} The issue of “subject,” however, is intertwined with legal personality and is the corollary of authority i.e., power in decision making. That explains why apart from states, known as members, and IGOs which are the apparatus of states, the rest are called non-state ‘actors’, a political science term which has absolutely no significance in terms of legal capacity and personality.\footnote{Id. at 20.} For a positivist, international personhood is a status that is granted to non-state actors by states and unless states recognize such status, they lack legal personality.\footnote{Cassese, supra note 61, at 103.} Moreover, being a subject of any legal system (domestic or international) requires both rights and responsibilities. The law of responsibility determines the consequences of a breach and regulates the permissible responses to such violations.\footnote{James Crawford & Simon Olleson, The Nature and Forms of International Responsibility, in INTERNATIONAL LAW 445 (2003).} Under international law, responsibility “is the necessary corollary of international obligations.”\footnote{Id.} As long as no international obligation is clearly defined for non-state actors through sources of international law listed in Article 38 of the ICJ Statute, their personhood under international law is not complete, and therefore, holding them internationally responsible will be implausible. When responsibilities are not defined, the legal personhood is impaired. In this sense, state responsibility

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\item 72 Richard Falk, Human Rights, 141 FOREIGN POL’Y 18, Mar.–Apr. 2004, at 20–22. See also Alston, supra note 3, at 22–23.
\item 75 Id. at 20.
\item 76 Id. at 20.
\item 77 Cassese, supra note 61, at 103.
\end{itemize}
is a well-developed branch of international law while the responsibility for non-state actors is the least developed.

The New Haven doctrine, on the other hand, suggests that the dichotomy between subjects and objects of international law is inoperable and must be substituted with “participants” in international decision-making processes.80 When entities participate in lawmaking it is implied that they have a degree of recognition and legal personality.81 The New Haven School uses “participants” instead of “subjects” to describe forms of interactions within the international legal system. To determine legal personality, one must investigate “participation” in law-making as a dynamic criterion rather than “subject” as a static concept. The complexity of processes of making and enforcing international law is such that it requires a broader investigation and a closer observation of activities of international actors to determine the normative impact of their actions and their maturity in meeting elements of personhood. When we are focused on “subject,” it constrains us into a set of framed criteria that whoever doesn’t match those criteria would not be defined as subjects and consecutively would not have rights and obligations under international law. However, if we look at actors from the participation perspective then many may count as international persons for the sake of law.

For New Haven scholars, participation in international decision-making process is a key factor for the establishment of legal personality. Law as a process is assessed based on group and individual action given their situation, expectations and demands, resources, and effects.82 States, as well as a range of non-state actors, have different objectives such as economic development, health, environment, trade, and energy, and they all participate in international decision-making.83 In fact, non-state actors have become strong influencers of international law given that they are quicker in reacting to global events compared to states, due to their access to efficient communication systems and resources.84 This is especially true regarding TCs’ access to capital, technology, fewer hierarchical and bureaucratic structures, and efficient governing bodies. It is undeniable that states have a reinforced and intensive dominance in lawmaking through conventions and

82 Suzuki, supra note 3, at 36–37.
83 Id. at 36.
84 For example, sports’ governing bodies (SGBs) actively participate in shaping sport policies in cooperation with UNESCO. The International Olympic Committee (IOC), the International Paralympic Committee, and a few other SGBs hold permanent consultative membership within the structure of UNESCO’s Intergovernmental Committee for Physical Education and Sport, while several other SGBs serve as designated consultative members. See Intergovernmental Committee for Physical Education and Sport (CIGEPS), UNESCO, https://www.unesco.org/en/sport-and-anti-doping/cigeps; see also, Mahmoush H. Arsanjani, The Use and Abuses of Illusion in International Politics, in Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 52 (2011).
within the context of IGOs. In fact, the concept of non-state actors was primarily invented by the states to keep non-state entities away from formal law-making forums.\textsuperscript{85} In present days, however, states are allowing norms and standard making outside classical channels to provide grounds for less rigidity of the law and broader accountability.\textsuperscript{86} The legal personhood of non-state actors is directly linked to their engagement in international lawmaking as well as their relationship with traditional international actors \textit{i.e.} states and IGOs.\textsuperscript{87}

Beyond the doctrinal debate, identifying the subjects of international law has practical implications.\textsuperscript{88} The law is ultimately about those bound by the rules and those who have the power to make and enforce it. The recognition of international subjects and their legal personality must go through formal channels of the law to become part of the enforcement mechanism. The law requires both theory and form.

\textbf{B. TCs’ International Legal Personality in Practice}

A historical analysis of the evolution and advancement of international law is an essential element to understand the causes of its success or failure, and it helps us find functional solutions and adapt our institutions to emerging realities.\textsuperscript{89} Pragmatism requires us to think instrumentally about the best rules for the future since consistency with any past legislative or judicial decision does not necessarily contribute to justice.\textsuperscript{90} Doing so may require interpretation beyond the black letter law to find a balance and make the legal practice the best it can be from the point of view of political morality.\textsuperscript{91} In international law, states occasionally commit to ‘pragmatism.’\textsuperscript{92} Below provides examples where states treated TCs differently in different historical contexts and due to changes in circumstances.

The “New International Economic Order” orchestrated with the formation of the UN Conference on Trade and Development (UNCTAD) and Group 77 during the 1960s and the development of international human rights law had an impact on the relationship between the host state and TCs

\textsuperscript{86} D’Aspremont, \textit{supra} note 33, at 5.
\textsuperscript{87} MATH NOORTMANN, AUGUST REINSCH, & CEDRIC RYNGAERT, \textit{NON-STATE ACTORS IN INTERNATIONAL LAW} 369 (2015).
\textsuperscript{88} Lauterpacht, \textit{supra} note 23, at 14–15.
\textsuperscript{89} Henry R. Spencer, \textit{International Politics and History}, 17 AM. POL. SCI. REV. 392, 400–401 (1923).
\textsuperscript{90} RONALD DWORKIN, \textit{LAW’S EMPIRE} 151 (1986).
\textsuperscript{91} Id.
in terms of rights and duties. The host states demanded compliance with domestic laws and policies and reserved the right to expropriation, more favorable investment agreements, and broader authority over the activities of TCs within their territories. This dynamic between the host state and TCs changed with the collapse of the Soviet Union and the dominance of a neoliberal economy that created a far more friendly environment for transnational business to become the drive for economic development by actively engaging in setting standards of trade and investment.

The promotion of free trade and investment and the new age of Bilateral Investment Treaties (BITs) re-emphasized the protection of foreign investment in forms of fair and equitable treatment, Most Favored Nation clauses (MFN), national treatment, free repatriation of profit, and effective, prompt and adequate compensation in case of expropriation. This increasing activity was accompanied by numerous corporate scandals that raised concerns anew among international legal scholars and demanded international responsibility for TCs.

Acknowledging TCs as subjects of international law enables international authorities to address the corporate misconduct and hold private entities responsible for breach of international law such as human rights law when the states fail to do so. To this date, International Human Rights Law (IHRL) only recognizes states’ civil liability for violations of human rights.

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94 Ratner, supra note 36, at 457.

95 Suzuki, supra note 3, at 42; see also Ratner, supra note 36, at 458.

96 Ratner, supra note 36, at 458–59.

97 For examples see discussions above at 3–4; see also supra note 18; see also Alston, supra note 3 at 11.

98 Ratner, supra note 36, at 465.

99 Ratner, supra note 36, at 461. It is worth mentioning that when it comes to rights, the European Court of Human Rights (ECtHR) have previously acknowledged TCs’ rights under the European Convention on Human Rights. For example, Article 34 of the European Convention on Human Rights (ECHR) recognizes the right to claim a violation of any person, non-governmental organization, or group of individuals of its rights before the court including corporations. The ECtHR has granted corporations protection regarding due process guarantees of article 6 (1), right to freedom of expression (for media companies) under article 10 (1), Autronic AG v. Switzerland, App. No. 12726/87 178 Eur. Ct. H.R. (ser. A) (1990), protection of business premise, protection of purely commercial speech, applicability of article 8 (1) to corporations, award of monetary compensation for non-pecuniary damages for monetary damages under article 41, Comingersoll S.A. v. Portugal, App. No. 35382/97, 2000-IV Eur. Ct. H.R. 355, and Société Colas Est SA and Others v. France, App. No. 37971/97, 2002-III Eur. Ct. H.R 2002. The court has established that companies can suffer non-pecuniary damages such as the loss of reputation, uncertainty in decision planning, anxiety to the management team, disruption in the management of the company. Distinction between natural and legal persons are irrelevant. This is contrary to the personal jurisdiction of the International Covenant on Civil and Political Rights (ICCPR) Optional Protocol that only
States are the only parties to the international human rights treaties and bear obligations for violations. States own the ultimate obligation to respect, protect, and fulfill IHRL within their territories and jurisdiction. Furthermore, the international law of state responsibility holds accountable states who would violate human rights, or otherwise authorize, instruct, control, or direct corporate activities that violate human rights. This is known as positive human rights obligations of states or the horizontal effect of human rights. This obligation is reinforced by the jurisprudence of international courts. For example, the European Court of Human Rights (ECtHR) has consistently emphasized that the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals. For the ECtHR, the “acquiescence or connivance of the authorities of a contracting state in the acts of private individuals which violate the Convention and the rights of other individuals within its jurisdiction may engage the state’s responsibility.”

While state responsibility for acts of private entities within its territory remains, it is not clear for what actions and to what extent the duty of the state is stretched, as well as what sort of remedies can be provided by states to compensate for the negative impact of the TCs on human rights abuse. TCs at times are as powerful as independent states. States, on the other hand, might either lack the resources or political will to hold TCs liable for human rights violations domestically. Other states might even partner with TCs to violate the rights of their own people. As their role expands, TCs have become more independent of governmental control. They are headquartered in one state, have shareholders in other states, and operate worldwide. They allow individuals to bring a claim for the violation of their rights before the ICCPR Human Rights Committee.


104 Ratner, supra note 36, at 471.

105 Id. at 461. See also S.C. Res. 1306 (July 5, 2000) (condemning the role of diamond companies in Sierra Leone’s civil war).
can easily move their capital to jurisdictions with less regulatory burdens. The breadth of TCs’ impact on human rights makes it a necessity to develop an international responsibility regime for TCs independent of states’ vicarious liability for their actions.

The jurisdiction of international courts is also historically limited to states. Yet, with the adoption of the Rome Statute in 1998 and establishment of the International Criminal Court (ICC) in 2002, this jurisdiction has extended to individuals. International criminal law recognizes individuals’ criminal liability for international crimes against humanity, genocide, and war crimes. According to the travaux préparatoires, the Rome Statute contained prosecution of corporations as well as individuals. Nevertheless, the wording was dropped in the final draft as delegations to the Rome Conference raised concerns that their local legal systems do not recognize a criminal liability for legal persons and this creates difficulties for the implementation of the complementarity principle of the ICC jurisdiction.

106 Accordingly, the ICC can investigate and prosecute “natural persons” for the gravest crimes of concern to the international community including genocide, war crimes, crimes against humanity and the crime of aggression. See Rome Statute, supra note 60, art. 25.


As a result, ICC does not have personal jurisdiction for investigating corporations.\textsuperscript{109}

There are international instruments that mandate states establish liability of legal persons for commission of internationally recognized crimes such as the UN Convention Against Corruption, the UN Convention on the Suppression of the Financing of Terrorism, and the UN Convention Against Transnational Organized Crime.\textsuperscript{110} In the context of environmental law, states have adopted a series of treaties that place direct liability on private entities responsible for pollution. These include the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1984 Protocol thereto, the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, and the 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources.\textsuperscript{111} The civil liability of private actors, however, relies on domestic mechanisms for enforcement. Again, these instruments do not establish an international authority to investigate liability of private entities for breach of internationally recognized norms.

The UN started its efforts in drafting a code of conduct for TCs in the 1970s and 1980s.\textsuperscript{112} Back then, the role of TCs was defined in relation to their

\textsuperscript{109} Rome Statute, \textit{supra} note 60, art. 25 & 26.
\textsuperscript{111} For instance, the 1969 Brussels Convention states “[T]he owner of a ship at the time of an accident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.” International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, \textit{reprinted} in 9 I.L.M. 45 (1970). These treaties thus impose an international standard of liability on the corporation.
\textsuperscript{112} Draft United Nations Code of Conduct on Transnational Corporations, UN Doc.
impact on the new international economic order, the sovereignty of the host states, and securing foreign investment in developing contexts rather than human rights, and social and environmental responsibilities.\textsuperscript{113} The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy as well, was adopted as a non-binding instrument in 1977.\textsuperscript{114} It contained principles on employment, training, conditions of work and life, and recommended workers, employers, and governments to observe these principles on a voluntary basis. The declaration didn’t have a compliance mechanism.

In 2005, the UN’s work on business enterprises and human rights took a significant step forward when the then UN Commission on Human Rights approved the appointment of a special representative on the issue of human rights and TCs and other business enterprises.\textsuperscript{115} This marked the beginning of a more concerted effort to regulate the activities of transnational business enterprises in relation to human rights. The work of the Special Representative resulted in the adoption of the UN’s Guiding Principles on Business and Human Rights in 2011 (UNGP), by the UN Human Rights Council (HRC).\textsuperscript{116} The UNGP recognizes 1) the primary liability of states to respect, protect and fulfill, 2) the responsibility of business to avoid causing or contributing to adverse human rights impacts, and 3) effective access to remedy for the victims of abuse.\textsuperscript{117} In 2014, the Council established an open-ended intergovernmental working group with the mandate “to elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of TCs and other business enterprises.”\textsuperscript{118} The Working Group set the goal to promote and implement the guiding principles and launched an annual forum on business and human rights to strengthen dialogue and cooperation. In a 2021 resolution, the HRC confirmed that the UNGP has turned into a “globally agreed-upon authoritative standard” for ensuring the respect for human rights in the business sector.\textsuperscript{119} Despite the HRC statement, these standards lack legal enforceability, independent third-party monitoring and evaluation, and are vague in language rather than

\begin{thebibliography}{9}
\bibitem{Alston} Alston, supra note 3, at 7.
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creating a precise, clear, and unequivocal commitment. Implementation of these guidelines is voluntary and dependent on internal corporate policy and procedures in handling inquiries, making an initial assessment, solving disputes, and offering good offices. The effects of these guidelines are said to be “commercial rather than legal.”

Apart from the UN efforts, international arbitral tribunals have, on a number of occasions, recognized TCs as subjects of international law. In *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, the arbitral tribunal found that since the contract between a state and private person is subject to public international law, then for the purpose of that contract the private company has a limited and specific international capacity and finds a status as a subject of international law. The tribunal further elaborated on implied powers of private companies in their contractual relationships with states stemming from the scope of contractual services, the length of contracts, and the degree of state involvement.

The International Center for Settlement of Investment Disputes (ICSID) found, in *Amco Asia Corporation v. Republic of Indonesia*, that international law applies to the contract between a state and a private investor and stated:

> [t]his Tribunal notes that Article 42 (1) of the ICSID Convention refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search much be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus, international law is fully applicable and to classify its role as “only” “supplemental and corrective” seems a distinction without a difference. In any event, the tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law.

At the regional level, the broad corporate access to personal data of individuals empowered by new technologies, have initiated efforts and urged countries to act against personal data breach. The European Union enacted the General Data Protection Regulation (GDPR) in 2018. GDPR considers

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122 Id. at para. 45.
data protection to be a fundamental right of individuals and holds accountable companies that breach personal data protection and privacy rights. GDPR applies to all businesses and organizations established in the EU or outside the EU that offer goods or services, process personal data, or monitor the behavior of individuals in the EU regardless of where the actual processing of the data takes place. While GDPR is a regional regulatory initiative, it has become a model law based on which new laws are being developed.

As seen above, arbitral tribunals have been more open to recognition of TCs as subjects of international law and have directly imposed international obligations on TCs in their rulings. GDPR, on the other hand, stands as the sole legally binding and enforceable regional treaty that imposes sanctions directly on private entities across the world. GDPR, however, has a limited

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125 GDPR. Recital 1. Article 8 of the Charter of Fundamental Rights of the European Union (EU) provides that “everyone has the right to the protection of personal data. Such data must be processed fairly for specified purposes and based on the consent of the person concerned or some other legitimate basis laid down by the law. Everyone has the right of access to data which has been collected on them, and the right to have it rectified or removed based on legitimate grounds.” See Charter of Fundamental Rights of the European Union, art. 8, 2000 O.J. (C 364) 1.

126 Article 3 of the GDPR provides that the GDPR applies to the processing of personal data where personal data processing occurs in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. This implies that where a natural or legal person that qualifies as the data controller or data processor under the GDPR is established in the EU and processes personal data through blockchains or other means, the European data protection framework applies to such processing. The Regulation also applies where the personal data relates to data subjects that are based in the EU even where the data controller and data processor are not established in the Union, but they offer goods or services to data subjects based in the EU with or without payment. This could, for instance, be the case where operators of a blockchain make available their service to individuals in the Union. Where someone based outside of the EU uses blockchain to process personal data in the context of monitoring the behavior of EU-based individuals the Regulation equally applies. In sum, blockchains that are used to process personal data and have some link to the EU are subject to GDPR requirements. See Rachel F. Fiefer & Kristin Archick, CONG. Rsch. SERV., LSB10896, EU DATA PROTECTION RULES AND U.S. IMPLICATIONS (2020).

127 Several federal bills have been introduced to both the House and the Senate and are currently reviewed at the committees. One of the most prominent proposals that has gained bipartisan support is the American Data Privacy and Protection Act (ADPPA), H.R. 8152, 118th Cong. (2022). The House Energy and Commerce Committee has voted for the bill to advance to the full House of Representatives. The bill introduces right to private action, preempts state laws with some exceptions and delegates the Federal Trade Commission (FTC) and state attorneys general for the enforcement of the Act. For the summary of the bill, see Jonathan M. Gaffney et al., CONG. Rsch. SERV., LSB10776, OVERVIEW OF THE AMERICAN DATA PRIVACY AND PROTECTION ACT (2022). Another bill, Data Protection Act, introduced in February 2020 (renewed in 2021) by Senator Kristen E. Gillibrand and is now being considered in the Senate Committee on Commerce, Science, and Transportation. This bill, if passed, establishes an independent federal Data Protection Agency (DPA) to regulate the collection, disclosure, processing, and misuse of individuals’ personal data by a covered entity. For a summary of the Act and related actions in the Senate, see Data Protection Act of 2021, S. 2134, 117th Cong. (2021). These bills are modeled after the GDPR.
International law can be developed through different channels. When there is no consensus among states and a firm political will to manifest itself in international agreements, or customary law, soft law instruments help build the foundations and reflect the aspirations of the community of international actors. The growing number of guidelines and soft law instruments is an indicator of the ever-expanding public awareness of and a strong public opinion surrounding international legal status of TCs. Such aspirations are slowly moving their way up to the centers of authority, and decision making, and being translated into binding jurisprudence of domestic courts. In a recent case concerning a claim for damages against a Canadian mining company by three Eritreans, the Canadian Supreme Court held that “it is not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of obligatory, definable, and universal norms of international law.”\footnote{Nevsun Res. Ltd. v. Araya, 2020 SCC 5, [2020] 443 D.L.R. 4th 183 (Can.).} The Canadian court system has offered plaintiffs a forum of necessity in this case and preserved a right to trial in Canadian courts where it is impossible to bring proceedings in the host state, and access to remedies for human rights violations by TCs.\footnote{Angie Redecopp, With Power Comes Responsibility: Incremental Progress in Canada on Parent Company Human Rights Liability, 17 J. Leadership, Accountability & Ethics Vol. 1, 32–34 (2020).} An older example is the Presbyterian Church of Sudan v. Talisman Energy, where the U.S. District Court for Southern District of New York found jurisdiction, according to the Alien Tort Claims Act, over non-resident, non-American parties to the dispute based on a defendant’s conduct that violated well-established, universally recognized norms of international law.\footnote{Presbyterian Church of Sudan v. Talisman Energy Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006).} Talisman Energy Inc. was a Canadian multinational oil and gas company. In the late 90s, while the second Sudanese Civil War was underway, Presbyterian Church sued the company in an American court for genocide, alleging that Talisman assisted Sudanese government to bomb churches, attack villages and kill church leaders to clear way for access to oil. In an unprecedented decision, the U.S. District Court for Southern District of New York accepted to hear the case but later dismissed it due to lack of admissible evidence to support claims against Talisman Energy. The court found jurisdiction according to the Alien Tort Claims Act, 28 U.S.C. § 1350 (“ATCA”). The Act states that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” To be actionable under the ATCA, a defendant’s conduct must violate “well-established, universally recognized norms of international law.” The court further reasoned that the jurisdiction is definitive since the allegations of genocide, war crimes, torture, and enslavement violate universally recognized norms of international law. Although Talisman contended that corporations are not legally capable of violating international law, the court disagreed and affirmed that corporations, like any other private actor, are subject to \textit{jus cogens} and they can be positively found liable for violations of human rights normally requiring state actions. \textit{See Presbyterian Church of Sudan v. Talisman Energy, Inc.}, 244 F. Supp. 2d 289 (S.D.N.Y. 2006).
While individual states might engage in recognition of international obligations for TCs within their jurisdictions, the value of a global regulatory framework lies in the uniformity, flexibility, predictability, and security it provides to our multilateral system of trade, investment, and human rights. The rapid development and ever-changing landscape of international affairs combined with the power of the public and demands for responsible business eventually requires international legal codification.\textsuperscript{131}


Today, international legalism is challenged as a worldview and is not a dominant discourse. We are departing from multilateralism and global standard setting and moving towards clustered rulemaking.\textsuperscript{132} This is partly due to changes of dynamics in international relations and new emerging economies with different power and authority structures, non-transparent, and hostile to democratic values. Due to threats of security imposed by emerging powers that do not represent liberal values, western liberal democracies are turning inwards and trying to find local solutions instead of multilateral rule making. In the past couple of years, we have witnessed tighter national and regional regulations among political allies. The role of IGOs is diminishing as a new sense of insecurity and unreliability on global markets increases, considering the recent pandemic, war, and the issue of energy in Europe. These realities have raised demands for self-reliance and less emphasis on the interdependence of the global economy and have urged corporate leaders to bring operations closer to home despite higher costs. Policy makers are equally re-evaluating the value and benefits of the international rule-based system. International law suffers from norm setting and building consensus over many matters including TCs. The solidarity that existed after the Cold War is no longer present. IGOs are being undermined in rendering their mandate and performing their duties.\textsuperscript{133} Against this

\textsuperscript{131} Alston, supra note 3, at 32. International Law Commission (ILC) has a primary mandate in codifying international law. According to the Statute of the ILC “the Commission shall have for its object the promotion of the progressive development of international law and its codification. See United Nations, The Work of the International Law Commission, Vol. I, art. 1(1), 245 (2007). While ILC has entered fields of IGO’s responsibility and individual criminal responsibility, it has avoided discussing international responsibility for TCs. Articles 8, 9, 10, 11 of the Draft Articles on State Responsibility, codified by ILC, identifies responsibility of states for non-state actors whose conduct can be attributed to a state. While as a general principle, states are not liable for the conduct of private persons or entities that are not attributed to state, if such activity is authorized by state or carried out under its instruction, control, or direction, that state assumes responsibility for such acts. Also, ILC have acknowledged individual responsibility for non-state actors. Nevertheless, ILC has continuously avoided to address direct liability of TCs as holders of rights and obligations under international law. See Zyberi supra note 26, at 169.

\textsuperscript{132} The proliferation of regional trade agreements is an indicator of such trends.

\textsuperscript{133} The WTO is a perfect example where power dynamics have paralyzed the organization. On November 30, 2020, the WTO Appellate Body (AB) was left defunct as the last of the AB
backdrop and regardless of where power politics will lead us, from a legal perspective, there is a value in multilateralism and an international rule-based system that provides predictability, flexibility, and security. Moving forward, the international community seems to have three paths to take in addressing TCs’ legal status: The good, the bad, the ugly.

A. The Good Option: Active Rule Making

There are several good options that the international community may take in formulating a legal regime to govern TCs. One would be direct involvement of states in their traditional form to set such norms and standards by means of a treaty or a multilateral agreement. Efforts in this regard are already underway. As mentioned above, the UN Human Rights Council has established an intergovernmental working group on transnational corporations and other business enterprises with respect to human rights with the aim of effectively implementing the UNGP. The Working Group has been actively engaged in drafting a legally binding instrument to regulate TCs and other business enterprises with the goal of facilitating access to remedy for victims of human rights violations.

While the outcome of the Working Group has been seen as a positive development, it continues to face challenges, including the question of whether direct international obligations should be imposed on companies.

members provided her farewell remarks. See Hong Zhao, Farewell Speech at the Graduate Institute, Geneva (Nov. 30, 2020), https://www.wto.org/english/tratop_e/dispu_e/farwellspeechhzhao_e.htm. The United States had blocked appointment and reappointment of the AB members until the AB lost the quorum required for the body to function. See BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10385, THE WTO’S APPELLATE BODY LOSES ITS QUORUM: IS THIS THE BEGINNING OF THE END FOR THE “RULES-BASED TRADING SYSTEM”? (2019). The AB had in effect met its demise only after twenty-five years of existence. It is not clear at this time if it will resume functioning. The AB had been called the “Jewel in the Crown” of the multilateral trading system frequently by trade practitioners and scholars in the field of international trade. See Press Release, Pascal Lamy, Dir. Gen. of WTO, WTO Disputes Reach 400 Mark (Nov. 6, 2009), https://www.wto.org/english/news_e/pr09_e/pr578_e.htm. See also Mike Moore, The Post-Doha Multilateral Trading System, http://trilateral.org/download/files/trade.pdf. The non-functioning adjudicative body of the WTO, accompanied with the failure of the organization in negotiating trade agreements after the Doha round, has left the organization paralyzed in regulating and enforcing international trade law and administering multilateral trading system effectively. For Doha Round negotiation failure see Pascal Lamy, Time Out Needed to Review Options and Positions, TRADE NEGOTIATIONS COMMITTEE (2006), https://www.wto.org/english/news_e/news06_e/tmc_dg_stat_24july06_e.htm.

See discussions above at 19 and supra note 118.


Although private actors may contribute to the treaty-drafting process, it is essential to recognize that a treaty of international law must be adopted by states, and its primary obligations will pertain to states. In their submission, non-state stakeholders have brought up this matter to the attention of the Working Group.\textsuperscript{137} The practice of international human rights bodies demonstrates states’ responsibility for violations of human rights within their territories, even when infringed upon by private entities such as TCs. The challenge continues to remain for the Working Group with regard to the recognition of an independent and direct responsibility for TCs for violations of international human rights law. It seems the only way to overcome this challenge and to hold TCs internationally accountable is to recognize TCs as subjects of international law.

The ILC might be the most relevant and appropriate international body that can help identify and collect general principles of international law with regard to TCs. Nevertheless, it continues to remain silent with no explicit agenda for clarification of the legal status of TCs under international law.\textsuperscript{138} As an international authority that collects and codifies customary rules and general principles of international law, ILC has the potential to fill the gap and inform the international community on such uncertain matters. In the view of the authors, ILC’s non-intervention in this pressing matter undermines the role international law must play with regard to vital and urgent matters.

Another good option would be an ICJ advisory opinion that elaborates on the status of TCs in international law. This can be similar to what was done for recognition of IGO’s international legal status. However, the viability of this option is somewhat under question since according to the UN Charter and the ICJ Statute, it is only the UN General Assembly and the Security Council that may request an advisory opinion in respect of “any legal question” while other UN organs and agencies may request an advisory opinion on “legal questions arising within their scope of activities.”\textsuperscript{139} States cannot request an advisory opinion from the ICJ directly. It is very unlikely that the UN General Assembly would request an ICJ advisory opinion on the legal status of TCs and their responsibility under international law in the near future.


\textsuperscript{138} There are rules for ILC intervention. The topic must relate to public international law, reflects a need of states, it must be sufficiently advanced in terms of state practice, it must be concrete, and feasible for progressive development. ILC has always avoided parallel work with the UN Commission on International Trade Law (UNCITRAL) or the Hague Conference on International Private Law. ILC also justifies its non-intervention in the field of TCs by arguing that there is a lack of enforcement mechanism as well as inflation of rules. See Zyberi, supra note 26, at 165–66.

\textsuperscript{139} U.N. Charter art. 96 and ICJ Statute, art. 65 ¶ 1.
Other than a multilateral treaty, customary law, and ICJ advisory opinion, the best of good options is to create a global authority, a self-contained subsystem of international law that regulates, administers, and adjudicates legal matters related to TCs. Self-contained regimes are based on *lex specialis* rules that accommodate the unique nature and characteristics of their legal subjects, and consider the circumstances with greater precision, clarity, and definiteness. These regimes combine specific primary rules (rules laying down substantive rights, obligations, and powers) with specific secondary rules (rules about rule-creation and change, responsibility, and dispute settlement) that are independent from the principles of general international law. The Draft Articles on State Responsibility acknowledges the priority of special rules over general law and does not extend the applicability of its general rules to those internationally wrongful acts that are governed by special rules and legal regimes of international law. Therefore, the general rules governing the breach of international law are secondary to special rules governing particular regimes.

Modern international law doctrine looks positively at normative and institutional proliferation in the form of self-contained subsystems of international law. It seems less concerned with global legal pluralism as a

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140 *Lex specialis* forms clusters of rules that are institutionalized and claim to exist under subsystems known as self-contained regimes. Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L L. 265, 275 (2009). A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches. When such a regime seeks precedence in regard to the general law, we have a self-contained regime. Imagine an international trade dispute between two countries is taken to the dispute settlement body of the WTO and not to the ICJ. WTO is a self-contained regime of international law with particular primary and secondary rules (*lex specialis*). Examples of self-contained regimes include but are not limited to international human rights law, international trade law and international environmental law. Diplomatic law is another example of a self-contained regime, where the rules are designed to deviate from the law of state responsibility. In the *Hostages Case*, the ICJ stated: “The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving state’s obligations regarding the facilities, privileges, and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.” *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 86 (May 24).


phenomenon that can put international law at risk. Rather, such pluralism is seen as a response of legal imagination to social change in a rapidly transforming world. Modern international law does not consider new international legal regimes as a challenge to its consistency and coherence. What threatens the integrity of international law, however, is a fragmented system with unaccountable governance networks, such as the one we are currently witnessing regarding TCs and their international behavior.

There is a potential to create an international subdiscipline, a self-contained regime, to govern TCs' and hold them accountable for their internationally wrongful acts. Defining norms and administering their implementation, as well as adjudicating corporate wrongdoings at the international level, however, requires a strong political will on behalf of sovereign states. In the meantime, we will not be able to tackle the most pressing problems of our time, from data protection and security to climate change, pollution, food insecurity, poverty, and inequity unless we can bring nations together to agree upon minimum standards governing the behavior of TCs as one of the most influential actors on the international plane. TCs as active members of the international community require a legal regime institutionalized through substantive rights and obligations accompanied by procedural rules that administer their implementation, and an adjudicative body that settles their disputes, i.e., a self-contained regime of international law. For those of us who believe in a rule-based international system, such path is the exact opposite of an internationally fragmented system.

The first step to create a self-contained regime for TCs is to formally recognize their legal status as subjects of international law. This can be achieved by accepting TCs to the membership of an international public-private partnership. An excellent example of such structure can be observed in the field of sports, where states and SGBs have joined forces in


146 Broude, supra note 144, at 286–87. As Bruno Simma once said, regardless of the traditional theory of international law, the “conscience of mankind and elementary considerations of humanity is imperative for international law irrespective of whether these phenomena are cast in the language of natural law or not.” Simma, supra note 35, at 34.

the battle against doping. The World Anti-Doping Agency (WADA), created under Swiss law and headquartered in Montreal Canada, serves as the organization created through collaboration between SGBs as private entities and states, with both parties holding equal representation and authority in decision-making processes and contributing to the organization’s budget.\textsuperscript{148} The highest governing body of WADA is the Foundation Board consisting of 20 members from the SGBs and 20 members appointed by governments plus a president and vice president.\textsuperscript{149} To ensure an equitable partnership between the two factions, the position of the presidency and vice presidency will alternate between a member representing the SGBs and a member appointed by governments during each working period meaning that whenever the President is from the sport movement the vice president will be appointed from the governmental pool and vice versa.\textsuperscript{150}

This successful collaboration between states and SGBs was made possible by the adoption of two foundational documents. The World Anti-Doping Code was adopted by WADA.\textsuperscript{151} Being a private law document, however, the WADA Code \textit{per se} did not create obligations for states. Therefore, to provide this private document with the force of public international law, UNESCO adopted the International Convention against Doping in Sport in 2005.\textsuperscript{152} States who become parties to the UNESCO convention, assume their obligations under a treaty by incorporating the responsibilities outlined in the WADA Code and other essential WADA documents into their domestic legal system as part of their international effort to combat doping.\textsuperscript{153}

While the anti-doping system described above has deficiencies such as not having a dispute settlement mechanism to effectively address violations committed by both sides, and provide reparations to the victims, TCs and states public-private partnership can envision an international adjudicate or arbitral tribunal equipped with necessary powers to hold both TCs and states responsible for their wrongful conducts. Such adjudicative body can directly hold either states or TCs accountable for any violations that are attributable to them.\textsuperscript{154}

\textsuperscript{149} \textit{Id}.
\textsuperscript{150} \textit{Id}.
\textsuperscript{153} \textit{Id.} art. 4. According to the UNESCO Convention, WADA’s Prohibited List and the Standards for Granting Therapeutic Use Exemptions are integral parts of the Convention.
\textsuperscript{154} International adjudication is always a trial-and-error process \textit{See} Cesare PR Romano, \textit{Trial and Error in International Judicialization}, in \textit{The Oxford Handbook of International Adjudication}, 111–133 (Cesare PR Romano et. al. eds., 2014).
B. The Bad Option: Advocacy and Soft Law Development

The ‘bad’ option is to continue adopting soft law and advocate TCs’ self-regulation through voluntary codes of conduct and corporate governance. TCs are profit driven, subject to change as the situation changes. There exists no consistency in their behavior as they differ depending on the corporate structure, the type of business, and the management vision. They often lack independent monitoring and evaluation, assessment, and enforcement mechanisms. A quick look at the example of the FTX collapse indicates that TCs’ self-regulation can create disasters by failing to implement any internal governance and control that is necessary for a large company entrusted with people’s money and asset from across the globe. As a result, voluntary compliance and self-regulation do not seem to be an efficient way to address TCs’ violations of international trade, investment, and human rights in a consistent, coherent, and comprehensive manner. This is particularly important in light of the previous failed efforts in regulating the conduct of TCs with respect to their human rights obligations through adoption of voluntary code of conducts.155 Some commentators have criticized such efforts as an approach that undermines the international human rights law regime.156

C. The Ugly Option: Laissez Faire Doctrine

The laissez faire doctrine and a ‘watch and see’ policy towards TCs is an ‘ugly’ option. This is a safe option for those who tend to believe that international law only has two residents with full legal capacity i.e., states, and IGOs. But the realities of the new world order will not tolerate inaction. International law will be severely undermined if it decides to remain silent regarding the accountability of TCs for their international wrongdoings and violations of human rights law. Delay in recognition of TCs as subjects of international law, their personhood, and above all a lack of willingness to regulate their behavior internationally creates ground for them to evade accountability. Given the volume and depth of their impact internationally as autonomous, self-governed enforcement arms of international law, the more delay in their recognition, the more harm is caused since their international behavior continues to be ad hoc, arbitrary, and inconsistent. The time has arrived to bridge this gap. The international legal regime will lose credibility and become totally irrelevant if it fails to create a comprehensive legal framework for the international liability of TCs, private subjects that are driven by profit and function on corporate power.

CONCLUSION

We are living in a poly-centric world today where new technologies are tremendously changing the public dynamics. Such modern processes developed by private entities change the dominant state-centric paradigm and empower more direct forms of public decision making.\(^{157}\) The private executives feel empowered to make global decisions as arbiters of right and wrong.\(^{158}\) TCs seek to achieve political and economic ends and to exert power without formally holding it.\(^{159}\) They supplement and enhance the actions of states and influence international law through their implied powers.\(^{160}\) Trusting business to do good all by itself free from liability, and a monitoring, evaluation, and enforcement mechanism would be too simplistic and unrealistic.\(^{161}\)

This paper discussed the legal status of TCs in international law and the necessity for their recognition as international law subjects with direct responsibility for internationally wrongful acts. It found that at least some factors that contributed to the recognition of IGOs’ legal status are present today for TCs. Failure to recognize TCs as international law subjects provides them with a ground to evade accountability for their internationally wrongful acts. Finally, the paper recommended few options and potential course of actions that the international community might take vis-à-vis TCs and highlighted their consequences.

The international community has taken steps towards regulating TCs and has launched efforts to codify their international rights and obligations in the context of a state-centric treaty regime. The challenge, however, is the lack of an enforcing mechanism. The authors are of the view that creating a global authority—a self-contained legal regime—in the form of a public-private partnership—a hybrid organization—with states as well as TCs as its members, is the most progressive solution that can finally complete the puzzle of TCs in international law and provide them with full legal status as international law subjects with legal personality, and responsibility for their internationally wrongful acts.

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\(^{159}\) Suzuki, supra note 3, at 40.


\(^{161}\) While business ethics shape part of the reason why corporations withdrew from Russia, a pragmatic motive was determinative, the very fact that Russian market was not a major source of revenue for most firms. See War & Wokery: Is Cancel Culture Coming to Free Trade?, THE ECONOMIST (April 2nd, 2022), https://www.economist.com/business/2022/04/02/is-cancel-culture-coming-to-free-trade (last visited Mar. 11, 2024).