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THE LEGAL POSITION OF MULTINATIONAL CORPORATION IN INTERNATIONAL LAW

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Abstract

It has been recognised that Multinational Corporation has played important role in international law particularly on economic matters and recently on human rights. Hence, the question is how international law views this entity: is it a subject or object of international law? What kind of modalities and limitations for MNC to operate in international law? Do they have some capacities for law making treaty? This article attempts to answer those questions critically by Public International Law as a point of departure. It is argued here that different theories used lead to different conclusion on the position of multinational corporation in International Law. Nevertheless, such differences will not delete the fact that this entity has certain rights and obligations in International Law.

Keywords: Public International Law, Multinational Corporations, Human Rights, Subject, Object.

Abstrak


Kata Kunci: Hukum Internasional Publik, Korporasi Multinasional, Hak Asasi Manusia, Subjek, dan Objek.
1. INTRODUCTION

Business and Human Rights has been the issue in the last decade. There have been initiatives taken by various actors including lawyers, practitioners, economist and civil society to integrate human rights into business process of a corporation. The current trend refers to the adoption of the United Nations Guiding Principle (UNGP) which provide a voluntary based norm which can be used by all actors – States and non-state actors as a guidance. Despite its important role in providing a common agreement on the content of corporate human rights responsibility, the UNGP suffers from various weaknesses. Due its voluntary nature, its effectiveness depends on the will of corporation.

At the same time, there has been a parallel process on the possibility of developing a legally binding instruments binding States and a corporation particularly multination corporation. 1 Hence, the issue is whether a Multinational Corporation is a subject of international law: Is a MNC a legal entity under international law? Can it bound by international law directly? Can it conclude a treaty? This article attempt to answer those questions by analyzing the position of MNC under international law.

2. LIMITATIONS

This article applies several limitations: First, it is important to note that this paper is written at a time when several issues concerning business and human rights are being addressed. The paper attempts to cover a wide range of materials and considers only those that are publicly available at the time of its completion.

Second, concerning terminology, the term ‘transnational corporation’ and/or ‘multinational corporations’ are used interchangeably in this article. It is defined 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.2

Third, it has been accepted generally at the national level that a corporation is considered as a legal entity having legal rights and duties granted by a State 3 Nevertheless, International law is very different from national law. International law consists of rules governing the relationship between states. States are seen as the only lawmakers. Therefore, the discussion of the legal position of non-state actor particularly Multinational Corporation (MNC) will be viewed in this context.

The intention of this article is to observe the development of legal theories regarding the status of non-state actors in International law and to find out/set up some characteristics, which will be suitable for this work. It is also to find terms with defined meaning and can serve as tools for the following investigation. Finally, examining whether it is possible to use that patterns and make analogies with the international legal position of MNC will be the ultimate goal.

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3. THE HISTORICAL VIEW ON THE SUBJECT OF INTERNATIONAL LAW

International law has been developed through long period process as a result of interrelation between States. The centre has been State – sovereign State. It is interesting to know how the concept has been switching to new direction from State system to ‘state & non-state’ system in the last decade.

The State system was developed mainly after the Peace Treaty of Westphalia of 1648. In this system, international law only governed the relationship between States. On the contrary, the relationship between States and individuals and/or between individuals was mainly a matter of national law. The argument behind this division is that international law only created direct rights and duties to state, therefore, only State can be a subject of international law. Individuals – non-state actors – had no direct international rights and obligation and they were, therefore, seen as an object of law.

In the 20th century, this notion of “subject and object” was challenged by several practical developments, that is, the interaction between entities other than states under the auspice of international law. The important development was the present of international organisations, which have existed since 1815 but only after the First World War I, their political and legal roles became very important. In the case of Reparations for Injuries Suffered in the Service of the United Nations decided by International Court of Justice (1949), the issue of subject of international law has remarkable developed. The judgement granted the United Nations as International Organisation autonomous powers with rights and duties distinct from those belonging to each member States. It means that the United Nation is acknowledged to operate in international plane as a subject of law and to have a legal personality. This development has brought to the effect the possibility of non-state actor to be subject of international law and altered the concept of state system.

Moreover, the case of Danzig Railway Officials decided by the International Court of Justice laid down a foundation to give certain rights and obligation for non-state actors. This case allows State to create individual rights and obligation and enforceable by national courts providing States agree do provide them. This famous case has been preceded by an older case: the treaty between the Five Central American States establishing the Central American Court of Justice providing for individuals to bring cases directly before the court. Both cases clarified the possibility of conferring individuals with international rights and obligations and making them legal subjects if states are willing to.

In early 1946–48 as a result of the Holocaust of German’s Nazi regime in the Nuremberg Trial followed later by Tokyo International Tribunal, the position of individuals became stronger in International law. Judgements of these two tribunals established guilt of the defendants in respect of war crimes and crimes against humanity.

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6 Ibid., pp. 92-96.
9 Lassa Oppenheim and Lauterpacht, *International law: A Treatise*, eighth edition. (London: Longman, 1955), p. 491, he mentioned that the concept of individual as subject of international law has been introduced in between 1947 – 1948,
humanity. They also concluded that individuals have responsibilities under International law as ‘international law imposes duties and liabilities upon individuals as well as upon states have long been recognised...’ This principle is also reflected in article 7 of Statute of the International Criminal Tribunal for the Former Yugoslavia and article 6 of the Statute of the International Criminal Tribunal for Rwanda. Furthermore, in Rome Statute on the International Criminal Court (1999) and the Sierra Leone Special Court (2002) requiring the individuals responsibility in order to file a case before the Court. It demonstrates that there are some actions of individuals that lead to direct international responsibility. The individual is responsible without any need to link with a State. Although one can argue that State’s consent to the treaties of decisions is still necessary, in certain cases such genocide, crimes against humanity, and war crimes, the responsibility arose through customary international law.

The role of non-state actors in the international plane is reaffirmed in human rights regime where individuals are the centre of protection. Most of human rights treaties confer right to individuals and impose duties to State to respect and protect them. Additionally, human rights treaties have granted individuals rights and capacity to bring a case against state before international or regional bodies. Nevertheless, State is still an intermediary or directly involved in international claim by individuals. The claim cannot be brought before international court or bodies unless the concerned state has ratified the relevant treaty and accepted the capacity of individual to bring the claim.

In the field of law of war or humanitarian law, International law has also granted limited international rights and duties to insurgent as well as capacity to conclude international agreement with other States. This law does not specify when the groups of people start having rights nor affect their ‘legal status’ but it gives indicia that this group of people is a subject of law in certain way.

Another possible candidate for international personality is the transnational or multinational enterprises (MNC). This recent phenomenon appears as the result of interrelation between International law and international business relation. However its present remains uncertain due to many doctrinal problems. Therefore, it is the aim of this part to deal with them.

From this description, it is obvious that the number of entities such individuals, international organisation, and rebel groups other than states are emerging and have relations and influences to the development of International law. Although their legal positions are subjected to debates, their presence as ‘subject’ of International law can not be denied.

4. LEGAL STATUS OF MNC IN INTERNATIONAL LAW: SOME CONSTRUCTIONS

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12 Geneva Conventions I to IV, Protocol Additional to the Geneva Conventions.

13 Article 2 paragraph 2, Common to the Geneva Conventions I to IV.

14 Ibid. What it means by legal status in article 2 paragraph 2 that any agreements between insurgent and state could not change the position from insurgent to be state or viva versa unless state recognise them.
4.1. MNC as an object of International Law

The first position recognises MNC as an object of international law, not a subject. This distinction is based on the traditional notion of how international law is created, from where it derives its binding force, and what its structure is, which has posited the state as the main focus of this law. Therefore, ‘[individual] has no inherent capacity under international law.’ In this case, the subject of law or personality refers to the concept of statehood; hence, a non-state actor is not a subject, but an object.

What do we mean by object? According to Manner, in the case of an individual, being an object means:

…he has no rights and duties whatsoever under it or that he cannot invoke it for his protection nor violate its rules. […] The individual is but a thing from the point of view of this law or that he is benefited or restrained by this law only insofar and to the extent that it makes it the right or the duty of states to protect his interests or to regulate his conduct within their respective jurisdiction through their domestic law. […] He individual as such, or as object, has not international rights or claim against states to be made by them as an object of their international rights and duties or to be treated by them according to the international law once they have in fact made him an object thereof. Rather, it holds, the individual must look to states also in these respects.

Similarly, McCrorquodale defines ‘objects’ as entities ruled by states or beneficiaries under a system in which a treaty or treaties benefit individuals, as in diplomacy or commerce. Oppenheim’s definition of an ‘object’ of international law also stipulates that International law does not impose duties or confer rights directly upon an individual human being. Rights or duties which might necessarily have to be granted to an individual [including corporations] are not, as a rule, international rights or duties, but rights/duties granted/imposed by national law in accordance with a duty/right imposed upon the state in question by international law. In short, the semantic of object or subject refers to strict jurisdictional distinction between national and international law, whereby non-state actors fall under national law, and states, under international law. The two levels operate differently, and their applicability should not overlap.

18 Oppenheim writes that the state is the normal subject of international law, while also arguing that individual or entities other than states can become individuals through a different process; as such, they can be assumed to be ‘not normal’ subjects of international law. Unlike his first edition which focused on the state system, the eighth edition, relating to the position of individual in international law and published almost thirty years later, affirmed that states did occasionally confer international “rights” strictior sensu; that is, rights which they acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals on individuals. It is obvious that Oppenheim has acknowledged the role of the individual as a subject of international law by conferring it international rights and obligations. See: Sir Robert Jennings and Sir Arthur Watts, Oppenheim’s International law, 9th ed. (Essex: Longman, 1992), at 16.
19 Ibid.
20 Ibid.
This approach was established at a time when ‘the very nature of international law necessi[ed] this view’ meaning that International law was seen as a set of rules governing states. This significantly eroded the grounds for the object theory of the individual; it rested only on the circular argument that non-state actors are objects under International law because the latter treats them so. Moreover, the approach is unrealistic today, in light of current developments in the field. International humanitarian law, international human rights, and international criminal law are examples of how non state actors like individuals and corporations are not treated merely as ‘things’, but have rights and obligations imposed. The question is no longer what constitutes a sovereign State or not, but what the subject of law is.

4.2. MNC as a Partial Subject of International law

This means that MNCs have certain rights and duties as well as capacities, and enjoy a partial international legal subjectivity in specific circumstances. According to some authors, unlike states, which are ‘full’ subjects of international law, corporations have only a ‘partial international legal personality’, provided that states allow it. The partiality implies three points. First, the existence of the entity in question is subject to states’ consent. State confers legal status to non-state actors through various means, including treaty and customary international law.

Second, a corporation can have either direct or indirect rights, obligations, capacities and/or personalities determined by States. This state exclusivity has been contested by scholars. Some propose that the particular subject of law and personality should be determined by the entity in question (self-identification) while others hold that states, as primary subjects of International law, should decide who can be included in its ‘society’. The ICJ itself, in the reference case Reparations for Injuries Opinion, is unclear in this regard, merely stating that the concept of subject of law can be broadened depending on the need of the ‘international community’ and ‘the requirement of internal life’. However, it is not explicitly stated whether that need and requirement are solely determined by states or by other actors.

Third, partiality implies that the rights, obligations, and responsibilities of non-state actors are not identical to those of states. The former may carry different rights, obligations and capacities. This uneven construction of personality signifies that non-state actors will not and cannot become the ‘full’ subjects of law. The unavailability of international mechanisms for corporation, for example, speaks to the corporations’

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22 Ibid.
‘partial’ relationship to Public International law. This is underscored by the fact that non-state actors are excluded from the international law-making process, which emphasizes the handicap of accepting the corporation as a ‘full subject’ of international law. In this case, personality or subjectivity is perceived as a jigsaw puzzle of different entities, where unlike states, non-state actors cannot contain all the pieces:

Only independent states possessing sovereign equality in their mutual relations enjoy all-round legal capacity comprising any legal position provided by the international legal order. All other subjects of international law possess only a capacity which is limited to the function they are to fulfil in that legal order.29

Thus, other (non-state) actors may have only relative (or limited) legal personality, which depends on and is circumscribed by certain rights and duties granted to them under international law.

Regarding MNC as the partial subject of international law may provide an easy escape from the dilemma, but leaves many problems to be addressed such as the absence of clear criteria, as well as the limitations and consequences if such criteria is not met. An excessive reliance on states as a mirror for determining the personality of entities risks overlooking other powerful actors on the international stage.30

4.3. MNC is the Participant of International law

The third school of thought objects to the use of these concepts of personality or subjectivity in the international context, choosing instead to pursue other approaches, including the Higgins (participant) and Clapham (capacity) models and other scholars. This concept is a ‘new’ legal approach which relies on the notion that international law as ‘a continuing process of authoritative decisions,’ as opposed to rules approach. 31 It is more concern with question of how international legal rules were made and used by the sharper of foreign policy as well as how the law could benefit the community as a whole,32 than of the content of actual legal rules. This theory has also been influenced by the pluralistic approach with a thought of globalisation as centre issue.33 Globalisation in the context of law creates a multitude of decentralised law making process in various sectors of civil society independently

31 Higgins argues:
When decisions are made by authorised persons or organs, in appropriate forums, within the framework of certain established practices norms, then what occurs is legal decisions-making. In other words, international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process and not just the reference to the trend of past decisions which are termed ‘rule’. There inevitably flows from this definition a concern, especially where the trend of past decision is not overwhelmingly clear, with policy alternatives for the future.
of nation-states. All actors in this process are considered to be equal, not only between states but also non-state actors. Therefore, these theories give more roles to non-state actor and sovereign States are no longer seen as the sole actor:

Besides the traditional nation-state, whether independent or associated with another actor, the world social and decision processes include intergovernmental organisation, non self governing territories, autonomous regions, and indigenous and other peoples, as well ass private entities such multinational corporations, media, non governmental organisation, private armies, gangs, and individuals.

Under this view there are many participants in the international legal system, in the sense that there are many different entities from states and international organisation to Multinational Enterprise and natural persons who engage in international activity. All entities (state or non-state actors) can be part of legal system if they have actual or potential influence in the decision processes. This means that such entity should be able to give ‘certain contribution or participation’ to the formation of treaty or customary international law depending on their influence and to be bound by it. It also means that entity can have direct right and obligation as well as capacity in international law. Rosalyn Higgins who supports this theory indicates that the question of rights and obligations as relevant for exploring the notion of participations.

These models place more weight on the sociological role of entities, rather than self-imposed theoretical questions. Clapham goes even further by arguing that acknowledging the role of non-entities in international law is a precondition for effective international human rights law. While it is true that certain limiting issues such as treaty formation, diplomatic relations and immunity before the Court require parties to have full personalities in order to perform such functions, he argues that in many cases, these state-like qualities and privileges are not necessary. The discussion is reaffirmed by Koh and Teubners’ proposals for even looser criteria to include non-state actors in the lawmaking process.

This brief overview suggests that the notions of subjectivity, personality, participant, and capacity are not mutually exclusive. While the use of concepts like subjectivity and personality to clarify the position of multinational corporations is in keeping with the semantic framework of international law, the new terms ‘participants’ and ‘capacities’ may be helpful, since they are more pragmatic and do not view emerging actors through a ‘state-lens’ although it is also controversial and suffers from various weaknesses.

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35 Ibid.
37 emphasised made by writer
38 Clapham states: “If international law is to be effective in protecting human rights, everyone should be prohibited from assisting governments in violating those principles, or indeed prohibited from violating such principle themselves.” See: Ibid.
39 Ibid.
40 Waagstein, Corporate Human Rights Responsibility: Continuous Search for A Regulatory Framework.
5. MODALITIES OF MNC IN INTERNATIONAL LAW

5.1. Defining the Approach

In order to investigate the modalities of MNC, identification of the existence of rights, obligations, and capacities to enter international relation is selected as the basic elements derived from the concept that international law is the law binding upon self-governing communities. It means that an entity will decide whether it will be part of the international community or not. Therefore, the method appears to be the other way around. Instead of determining whether MNC is a subject of International law or legal person, it will examine whether such entities independently become part of self-governing communities by having certain elements to be recognised as part of international community. The existence of those elements [certain rights and/or obligation and/or capacities to enter international relation] is not decisive but it is an indicator which may show the quality or role of each entity. One entity might have a big role and other might have small one. There are some roles which might be dependent each other; however, there are also some roles which are independent.

This approach is considered to be a bridge over the other two approaches (the participants and the subject-object/personality approaches). It tries to fill the gap resulting from the rigid application of the concept of subject-object/personality and it also gives more clarifications to the concept of participants. The elements might lead to the conclusion that the entity concerned may be classified as an international legal person, as Klabbers said:

Personality is emphatically not a prerequisite for the ability to act under international law, nor do …rights, privileges, powers, or immunities, follow automatically from it. Indeed, if anything, it appears to be the other way around: the existence of certain rights, privileges, powers or immunities may lead to the conclusion that the entity concerned may be classified as an international legal person.

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At the same time, this model is also relevant to the concept of participation where the quality to enter international relation depends on the participation of entities which is reflected in the presence of rights, obligations and other capacities. In this approach, the term ‘actor’ (state actor and non-state actors) is utilised to express the present entities in international law. It appears to be neutral to accommodate both concepts (concept of participants and subject/object-personality). The ‘state actor’ refers to the traditional legal actor and the ‘non-state actor’ affirms the other entities.

The conceptual analysis undertaken by Carl Aage Nørgaard appears to be the most comprehensive and sufficient to describe the elements of some entities in order to be part of international relations. The Nørgaard argument is basically adopting the concept of Prof. Alf Ross providing that:

The concept of subject of law ought to be disintegrated into the constituent elements, subject of [rights and proceedings] and subject of [duties and responsibility], because a subject of law is not necessarily both a subject of [rights and proceedings] and of [duties and responsibility] 43.

Shortly, Nørgaard’s opinion can be structured into:

The subject of rights and proceedings [power]:

43 Nørgaard, The Individual in International Law, pp.26-33.
- the subject of rights
- the subject of proceeding [power]

The subject of duties and responsibility [liability]:
- the subject of duties
- the subject of responsibility [liability]

Furthermore, he describes rights as:
“Rights. A rights for a person A means that a legal rule is to his benefit – irrespective of whether A himself or only another person for instance his state can bring an action against the person who violates the rule in question. In other words, the term, rights, regards only the substantive rights in contradistinction to the procedural capacity.”

And the subject of rights as:
“A subject of [rights] under a legal rule is a person for whose benefit the rule exists; in other words, a person who has a substantive right under the legal rule notwithstanding the problem whether the person himself has any legal capacity to take any action by which to enforce his substantive right or whether such action can only be taken by another, in international law normally his state. A subject of proceeding [power] is a person who can bring a claim as a case before a tribunal. A subject of right and proceeding [power] is a person who is both a subject of interest [rights] and of proceedings.”

Moreover, he also describes duties as:
“Duty. A duty for a person A means that a legal rule requests a certain conduct from him – irrespectively of whether he himself can be held responsible before the court if he violates the rule in question or only another person for instance his state can be held responsible for his act or omission. The term duty regards only the substantive duty in contradiction to the procedural problem of responsibility.”

Then, the subject of duties and responsibilities is defined as:
“A person who has a material duty under the legal rule irrespective of the problem whether he personally can be held responsible for violating it or whether only another, in international law normally his state, can be held responsible. A subject of responsibility [liability] is a person who can be sued and held responsible before a tribunal. A subject of duties and responsibility [liability] is a person who is both a subject of conduct [duties] and responsibility [liability].”

It is obvious that Nørgaard has distinguished the position of rights and proceeding as well as duties and responsibility. He further mentions that rights /substantive rights are in contradistinction to the procedural capacity. Correspondently, the term duties /regard only the substantive duty in the opposite to procedural problems of

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44 Ibid
45 Ibid.
46 Ibid.
47 Ibid.
responsibility [liability]. He gave example of the different concept applies in practice relating the position of individual:

“In many cases, individual may be a subject of interest and conduct under certain rule; whereas, under the same rule the state is the subject of proceedings or of responsibility.”48

In this case, it is possible for an entity to be merely the subject of rights without having capacity to bring an action before the court or visa versa. Likewise, the subject of duties might not always be held responsible for the failure of his duty. Furthermore, it is not impossible either that an entity can carry all elements at the same time.

Based on this approach, there will be no longer situation consisting of an inevitable choice of one or the other of the two extremes, whether subject or object of law since numerous varieties can easily be found in the practice. Additionally, this model will clarify and reform the concept of participation. Each element will show the quality of each entity in international law. Hence, this method will be the point of departure to investigate the position of Multinational Enterprise in International law.

5.2. International Legal Rights and Duties/Obligations

Before applying Nørgaard’s concept to the right and obligation of Multinationals, we are observing how the International law accepts the presence of non-state actor’s right in many ways as discussed by many scholars. Malanzuk mentioned that:

“… very many rules of international law exist for the benefit of individuals and companies, but that does not necessarily mean that the rules create rights for individual and companies, any more than municipal rules prohibiting cruelty to animals confer rights on animals. Even when a treaty expressly says that individuals and companies shall enjoy certain rights, one has to read the treaty very carefully to ascertain whether the rights exist directly under international law, or whether the states party to the treaty are merely under an obligation to grant municipal law rights to the individual or companies concerned…”49

Relating to the right of non-state actor, for instance individual, which can be derived from treaty, Oppenheim stated:

“… Although treaties may speak of the rights of individuals as if they were derived from the treaties themselves, this, as a rule, is not normally the position. Such treaties, rather than creating the rights, impose the duty upon the contracting states to establish them in their national law…”50

Similar opinions are discussed by Fried Van Hoof as well as D.J. Harris claiming that right should be defined broadly covering substantive and procedural rights. They further stated that the access to international legal remedy for assessing whether international law creates a right to an individual.51

Despite these objections, there are also some scholars who acknowledged that non-state actors do have international rights in the strict sense (separated from legal power to enforce the rights). This concept of separation between right and power/capacity has been legitimized by the Permanent Court of International Justice in the dictum:

48 Ibid
50 Oppenheim’s International law, Volume I, p. 847 supra note: 19
51 D.J. Harris, Cases and Materials, p. 142.
The varieties of opinions by many scholars show that there is no common acceptance of the right of non-state actor in International law.

Applying the concept of Nørgaard, there are three possible assumptions:

1. A particular entity has rights in the broad sense: substantive rights and proceedings
2. An entity has substantive rights but not able to enforce the rights (lack of proceedings).
3. Entity is not a holder of substantive rights but have capacity to enforce the rights (lack of substantive rights)

Observing the existence of international obligation of non-state actor can be conducted by examining whether States through treaty create obligation to non-state actor directly. In this case, the obligation of non-state actor will imply the right of State. One example of the treaty imposing direct obligation to non-state actor is the 1969 International Convention on Civil Liability for Oil Pollution Damage. Article III of the Convention provides that the owner of a ship shall be liable for any pollution damage caused by oil, which has escaped from the ship. The term ‘owner’ is to be understood as the ‘person or persons registered as the owner of the ship’, and a ‘person’ means ‘any individual or partnership or any public or private body’.

Applying the concept of Nørgaard, the duty or obligation in international conventions can be concluded into three assumptions:

1. An entity is required to have substantive obligation and be able to take responsibility to their action.
2. An entity has substantive duty but lack of responsibility - In the absence of element of subject of responsibility, other entity such state might be the subject of responsibility.
3. An entity is not a duty holder but has capacity to take responsibility.

6. MNC IN INTERNATIONAL LAW

6.1. Are MNC Incumbent of Rights under International law?

6.1.1 Substantive Rights

The sources of the rights of MNC are identified in many ways. The most common ones are in treaties and international agreement between state and MNE as well as declaration or code of conduct. However, the latter is not considered binding legally.

Historically, International law tends to emphasise the rights rather than duties of MNC. Before the Second World War and in the decade after the War, international organisations focused their attention to protect investors including their national investors by providing them with privileges. The other dominant issues in the post war were expropriation and compensation protecting the assets from post war era. In
1970s the focus shifted due to the era of decolonisation and several cases of abuse of corporate power. During that decade, corporations were regarded as ‘agents’ of new colonisation by developed countries. Therefore, the trend was to have a regulation providing States particularly developing countries with protection that would move them towards economic self-determination and limit the power of TNC. Various codes of conduct of MNC such the OECD Declaration on International Investments and Multinational Enterprises (1976), and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) and others were developed and adopted. In the 1980s and 1990s, the focus protect MNC has re-arisen. This is due to the efforts to promote free trade. Any restrictions which may hinder foreign direct investment were revoked.

During that time, the rights provided in the Multilateral Agreement on Investment (MAI) are considered to be the basic rights of foreign investor. Moreover, the position of corporation as part of investor has been acknowledged to be legal person under this treaty. In this treaty the strong emphasis is to put on the rights of MNC at the expense of the rights of States. The agreement would stipulate that foreign investors should be treated no less favourably than domestic companies. Government would make a broad promise not to impair the use of any investment by unreasonable or discriminatory measures. For example, Countries that sign the MAI would have to eliminate all ‘performance requirements’ for investors – such targets for sales, obligation of local employment, priority to local investor or research in a given country and lift all restrictions on the movement of capita, such as preferences for long-term investments over short term stock speculations. Government would also have to compensate investors when their property is expropriated from a public use, like building a road. But they would also have to pay for ‘partial’ expropriation or the ‘equivalent effect’ of expropriation, which could force government to pay corporations if regulations delay or reduce potential profits. In the environmental matters, MAI gives MNC a right to non-renewable natural resource, to the exploitation of minerals, including hydrocarbons, and any other natural resources. Despite of the objections by many countries which made the MAI failed to come into force, it can clearly be an

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56 A well know case is the involvement of International Telephone and Telegraph Corporation (ITT) in the coup against president Salvador Allende in Chile in 1973. Ibid.

57 Nicola Jägers, supra note: 15


59 Article 1 of the draft of MAI. There was no state made any rejection or reservation to sub paragraph 2 article 1.

60 Chapter III of the draft of MAI: Treatment of Investors and Investments.

61 In the privatisation, it does not impose an obligation to privatise only on how to do it. When government privatise public enterprises or services provisions there will be no restrictions on foreign ownership. When a government puts to tender the handling of social security data, assessment of tax returns, public bus services, management of public hospitals, educations programme, it cannot discriminate in favour of domestic or in house bids from within public sector. Chapter IV Privatisation, the draft of MAI


63 Chapter IV : Investment Protection, the draft of MAI.

64 Chapter X: Other Provisions, the draft of MAI.
evident that international communities are willing to bestow MNE with rights in International law.

In the human rights field, there is a big question whether MNC have ‘human corporation’ rights since human rights instruments are originally not denoted for a corporation. The argument which is commonly used to support human rights for corporation is that corporation are organised, operated by and for the benefit of human beings. Therefore, there is a sense in which policies and activities directed at corporations can actually affect the human beings behind the corporation. This argument has been supported by the United Nations Human Rights Committee established under Article 28 of the International Covenant on Civil and Political Rights (ICCPR) which has endorsed this principle of derivative entitlement after the case of Allan Singer v. Canada. In this case, Canada objected to the admissibility of the communication which alleged a violation of article 19 (freedom of expression) of the Covenant. The Committee stated that:

“The State party has contended that the author is claiming violations of rights of his company, and that a company has no standing under article 1 of the Optional Protocol. The Committee notes that the Covenant rights which are at issue in the present communication, and in particular the right of freedom of expression, are by their nature inalienably linked to the person. The author has the freedom to impart the information concerning his business in the language of his choice. The Committee therefore considers that the author himself, and not only his company, has been personally affected by the contested provisions of Bills Nos. 101 and 178.\(^65\)

From this explanation, it is clear that human rights standard has been extended to legal creation body although the quality may not necessarily be as widely as rights of human beings but the law does confer human rights to corporation such the entitlement of corporations to rights of property,\(^66\) to a fair trial,\(^67\) to privacy,\(^68\) or to some form of freedom of expression.\(^69\) At the same time, there is no recognition of the entitlement of the right to life\(^70\) or protection against torture or slavery. These are rights which are personal to the human being and cannot be conferred on juristic persons.

In law making process, there is still discussion on whether MNC can also conclude treaties. This question derived from the fact that there are a lot of contracts between MNC and a State (host country) which provide rights and duties of each party to the contracts, dispute settlement, and law applicable. Most of the contracts refers to international arbitration as a way to settle dispute and refers to the general principles of International law when there is a law vacuum. Then, the question whether that contract can be considered to be a treaty or just an ‘internationalised contract’.


\(^{66}\) Article 1 of Protocol No. 1 of the ECHR

\(^{67}\) Article 6 of the ECHR (see case law in section III infra).

\(^{68}\) Article 8 of the ECHR (see section III infra).

\(^{69}\) Article 10 of the ECHR (see Sunday Times v. United Kingdom no. 2 European Court of Human Rights Series A. 217)

\(^{70}\) Quebec v. Irwin Toy Ltd (1989) 1 S.C.R. 927 at 1001 et seq.
In the case of Anglo-Iranian Oil Company, which concerned a contract regarding the exploitation of oil concluded in 1933 between Iran and a company incorporated in the United Kingdom, the Anglo-Iranian Oil Company, the International Court of Justice concluded:

the contract was nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom is not a party to the contract.\(^{71}\)

It does not mean that a private corporation can never enter into an international agreement with a State, it only concludes that such agreement does not fall within the Court’s jurisdiction.\(^{72}\) The Restatement clearly does not regard such contracts as treaties.\(^{73}\) Furthermore, Christopher Greenwood tries to intermediate views by concluding that a contract between state and foreign company may be delocalised and that the legal system by which the contract is to be governed may be public international law.\(^{74}\) This refers to the choice of law applicable in agreement - the ‘applicable law clause’ – where the parties have the discretion to choose any law or rules, they wish but they may also exclude the application of any national law by referring to ‘common to the principles of international law and in the absence of such common principle then by and in accordance with the general principles of law.’\(^{75}\)

This elaboration implies that one should leave the discussion whether the MNC’s contract with a government or a international organisation can be considered to be treaty or internationalised contract. The fundamental point is that MNC has a specific right under International law\(^{76}\) including right to conclude a contract with a State and right to choose to be bound by International law. In sum, it is clear that MNE have substantive rights in various degree under International law, therefore, they can be a subject of rights.

6.1.2. Proceedings

Most of international tribunals are not open to the companies for instance the International Court of Justice which requires States to be the parties to the contentious cases before the Court.\(^{77}\) However, corporations are frequently the subject of proceeding meaning that corporations are provided with the possibility of enforcing their substantive rights especially in the area of arbitration as well as other international institutions.

In 1991, the Iran-United States Claim Tribunal, for example, gave individuals and companies, which are nationals of one of the two parties, legal standing in Tribunal under certain conditions.\(^{78}\) At the same year, the United Nations

\(^{71}\) International Court of Justice Report on the case of Anglo-Iranian Oil Company, 1952, pp 93 and 112.

\(^{72}\) Anna-Karin, *Non-Governmental Organisation in International law*.

\(^{73}\) Restatement (Third) volume 2, p. 214


\(^{78}\) Ibid. see also chapter 22. See also Article VII of Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United State of America and the Government of the Islamic Republic of Iran (Claims settlement
Compensation Commission (UNCC) was set up after the defeat of Iraq which authorized corporations to bring claims for compensation against Iraq through their respected government. Another example is the 1988 Canada-United States Free Trade Agreement (FTA) which provide private parties access to binotional panels. Their decisions can be binding in certain cases. The procedure has also been made part of the North American Trade Agreement (NAFTA).

Another example is found in the United Nations Conventions on the Law of the Sea (UNCLOS), the ‘Seabed Disputes Chamber’ was set up. This Chamber has jurisdiction relation to disputes between parties to a contract including corporations. Reference should also be made to the 1995 Energy Charter Treaty. This treaty provides the access of private investors to international arbitration against States for breaches of obligations in the treaty. Furthermore, the International Centre for the Settlement of Investment Disputes (ICSIC) which was established by the convention concluded that the jurisdiction of the Centre shall extend to any legal disputes arising directly out of an investment between a contracting party and a national either a natural or a legal person, which has the nationality of a contracting State other than the state to the dispute.

The convention on the settlement of investment disputes between states and nationals of other states established the International Centre for the Settlement of Investment Disputes (ICSC) within the World Bank Group. The purpose of the Centre is to resolve through conciliation and arbitration, disputes arising between Contracting Parties and foreign investors. ICSID arbitration and conciliation allows States and foreign investors to settle their disputes on an equal footing within an international institutional framework. The forum materialises the possibility for investors to assert that their investment contracts have been breached. This internationalised dispute settlement mechanism, supported by developed states was intended to protect the investments of their MNE rather than prosecute them. This convention shows the tendency of the international legal order to give more privileges (real international rights) to MNE without imposing on them new responsibilities. Their international subjectivity stems from the fact that they enjoy asserted and protected under international law.

Finally, in the field of human rights, the European Convention on Human Rights provides the possibility for corporation to bring a claim against a state party for a violation of human rights. It this case, corporation is considered to be a victim of human rights violation:

“…any person, non-governmental organisation or groups of individuals claiming to be the victim of a violation by one of the High Contracting parties of the rights set fort in the Convention… to file a complaint before the court.

From this explanation, it can be concluded that MNC is not only a holder of substantive rights but also a subject of proceeding since there are some treaties confer...
both elements in the same treaty as Malanczuk mentioned that “On way of proving that companies are the bearers of rights is to show that the treaty conferring the rights also provides a possibility of enforcement”.  

6.2. Are Multinational Enterprises Incumbent of Duties under International law?
6.2.1. Substantive Duties/Obligations

International treaties do not directly bind MNE in the sense that only on the states can be parties to the treaties. However, this does not mean that international treaties does not confer direct obligation to non state actor especially multinational. In fact, there are several obligations which are imposed directly by treaties in different field of international law.

Like individual, in the Rome Statute on the International Criminal Court, only states are the parties to the convention, however, the statute imposes obligation to individual that anyone who commits crimes against humanity, war crimes, and genocide can be brought before the court. In the field of international criminal law, the obligation of non-state actors becomes very clear. Some treaties create crimes for ‘legal person’. Those legal persons are not parties to the treaty, yet they have obligation once it enters into force. Another example can be found in the International Convention on the Suppression and Punishment of the Crime of Apartheid. This Convention declared that apartheid is an international crime and will punish any organization, institutions, and individuals who commit the crime of apartheid.

Although the convention does not explicitly mention corporation, it is included into this context.

The Council of European Criminal Law Convention on Corruption imposes obligation to States to criminalize a large range of corruption offices conducted by anybody including legal person. The Convention does not provide an autonomous definition of ‘legal person’ since the convention permits states to use their own definition in their company law or criminal law. However, by referring to Article 18 on corporate responsibility, it implies that legal person includes corporation is also subjected to this Convention. Nevertheless, the Convention does not impose any obligation to hold legal persons liable for corruption. Instead, State can undertake to establish some form of liability of legal persons engaging in corruption.  

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83 Malanczuk, Akehurst’s Modern Introduction to International Law, 101.
85 The international trend at present seems to support the general recognition of corporate liability, even in countries, which only a few years ago, were still applying the principle according to which corporations cannot commit criminal offences. Therefore, the present provision of the Convention is in harmony with these recent tendencies, e.g. in the area of international anti-corruption instruments, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Article 2), European Criminal Law Convention on Corruption (ETS No. 173).
86 Corporation can be asked for its responsibility if it fulfilled one of three conditions set up in the Convention. The first condition is that an active bribery offence, an offence of trading in influence or a money laundering offence must have been committed, as defined in Articles 2, 4, 5, 6, 7, 9, 10, 11, 12 and 13. The second condition is that the offence must have been committed for the benefit or on behalf of the legal person. The third condition, which serves to limit the scope of this form of liability, requires the involvement of “any person who has a leading position”. Company, who commits, participates, or to be involved in corruption can be asked for its responsibility. Ibid.
arrangement is applicable in the Convention on Combating bribery of Foreign Public Officials in International Business Transactions which impose criminal liability of legal persons in the case of non-compliance.88

In the field of environment law, the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Bawel, 1989 defines illegal traffic of transboundary hazardous wastes without the relevant authorization as crime89 and demands that each State Party to ‘introduce appropriate national/domestic legislation to prevent and punish any person who carries out the transport of hazardous wastes or other wastes. Most importantly the Convention defines person as any natural or legal person90 including company. Additionally, The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Wastes within Africa goes further than most treaties and explicitly demands national legislation ‘for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties shall be sufficiently high to both punish and deter such conduct.91 The convention defines ‘person’ as ‘any natural or legal person’ too.

These are the examples in which that corporations may be imposed by treaties directly or indirectly. There are more other instruments directly address Multinational Corporation such the United Nation Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, Organization for Economic Co-operation and Development (OECD) Declaration for Multinational Enterprises92, and ILO (1977) Tripartite of Principles concerning Multinational Enterprises and Social Policy.93

6.2.2. Responsibility

Nørgaard has integrated the element of ‘responsibility’ into ‘responsibility and examination’ based on the limited availability access for non-state actor. To be a subject of responsibility refers to the possibility to sue the duty holder before a tribunal. In this case, even though corporations have obligations at the international level, the subject of responsibility remains predominantly to States since state is the party to the treaties. For example, the Council of Europe Criminal Law Convention on Corruption imposes obligations to States to criminalize a large range of corruption offices conducted by anybody including legal person. The liability of a corporation will be held at the national rather than international level.

88 Person means any individual or partnership or any body governed by public or private law, whether corporation or not, including a state or any of its constituent subdivisions.

89 Article 2 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD

90 Article 4 (3) of The Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Bawel, 1989


93 A non-binding declaration addressed to governments, business, and labour in the ILO’s 159 member States. It set out principles in the fields of employment, training, working conditions, and industrial relations.
Furthermore, obligations can also be enforced through examination. It means that the subject is examined by an international organ not being a tribunal. MNCs are subject to examinations by international bodies for instance, ILO\textsuperscript{94} and the OECD supervision.\textsuperscript{95}

In sum, it is necessary to underscore the precarious position of MNCs in international law. Their status very much depends on the normative approach used. Nevertheless, one cannot disregard the fact that international law acknowledges the presence of corporations. This law, while still mostly created by states, ultimately deals not only with the conduct and relations of states and international organizations, but increasingly with juridical and natural subjects, including those in the state’s own territory. At the same time, the participation of non-state actors in lawmaking, either through implementation or drafting, is more evident. In other words, the fact that MNC’s position in international law is uncertain does not preclude MNC’s holding rights as well as obligation to take part in creating international law. This will be discussed at length in the Section that follows.

The position of Multinational Enterprises (MNE) is very unique. In one hand, the MNE carries international characters due to its special operations. On the other hand, the separated entity of the component units that together formed the economic entity named MNE carries national element, which could only be recognized and dealt with domestic legal orders. They are established under state law of one country as ‘artificial legal person’ but their operations including their affiliation can be subject to the law of other country. Then the question is where the Multinational Enterprises stands in International law.

Since the sphere is limited to International law perspective, both elements will be viewed in this context. The study will analyse two subjects which are considered to be the ‘identity’ of MNE, namely, the legal status of MNE and the concept of corporation nationality. The former refers to the whole chain of enterprises and the letter refers to the entities constructing the economic entity named MNE. Determining the twin legal personality of MNE is very curial since law uses legal identity as a basis for description of norms, responsibility and accountability.\textsuperscript{96}

7. CONCLUSION

By examining the traditional and modern approach to the position of non-state actors, it was clear that international law has developed to realistic approach. States remains the main heart of international law. However, since there are several non-state entities have the facto come to the surface of international law, the relationship between states has been modified in responding to such reality.

These theories (classical and modern) have accepted new phenomena: the present of non state actor in different way and different levels. Traditional approach sees International law as more conceptualism than functionalism and pragmatism since

\textsuperscript{94} ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Responsibility adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session (Geneva, November 2000). The supervisory mechanism under the Tripartite Declaration was decided upon in early 1978 and was endorsed by the International Labour Conference at its 1978 session.

\textsuperscript{95} The Guidelines for Multinational Enterprises adopted in 1976 by the Organization for Economic Cooperation and Development (OECD)

this traditional system has been built up by rules including rules of admission – definition of legal personhood – for political and functional purposes. The absence of rules or the failure of fulfilling such rules results the denial of membership into the international relations. However, due to the recent development namely the present of non state actor, the theory becomes blurred. On the contrary, in the modern approach, the question whether a new actor has become part of the legal system is inaccurately put since in this theory, there is no conceptual barriers exist and since there are not objects or subjects. All actors including MNE that have an influence on the process of formulation of law are relevant participants. Though the theory of participants seems to appear as the answer of the problem, it needs further clarification on the meaning of ‘clarification’.

Regardless of the differences, both theories acknowledge that the notion of rights and duties/obligations as the crucial elements in accepting non state actor in international law.

The Nørgaard’s theory appears to be the bridge between different theories. He disintegrated the notion of rights to be substantive rights and proceeding and the notion of duties/obligation to be substantive obligation and responsibility. This tool has been considered to be appropriate to determine the position of MNE in the international law since it is not contradict with the concept of personality (classical approach) and it could also accommodate the concept of participations (modern approach).

In the context of MNC, it may be concluded that there is no conceptual obstacle to recognizing the status of Multinational Enterprises. It has been demonstrated that corporations have certain rights (substantive rights or/and proceedings as well as duties (substantive duties and/or responsibility) in various degrees. In other words, corporations have international legal personality and contribution to the development of international law.

The conclusion that MNCs are distinct and identifiable entity with the capacity to participate in the international plane is important as it implies that no inherent conceptual reason exists why corporations could not be bestowed with international human rights obligations.

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