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Transnational Enterprises and Global Public Goods: Towards a Presumption of Normative Responsibilities

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It hardly needs to be pointed out anymore that transnational enterprises are generally considered to be economic as well as – through the participation of these entities in the law-making processes – to an increasing extent, political actors in the current international system. The growing importance of these non-state actors on the international scene results in chances for but also risks to the realization of community interests, also known as global public goods, such as the protection of human rights and the environment as well as the enforcement of core labour and social standards. On the one side, transnational enterprises, because of their influence on the home as well as the host countries, could in the course of their activities effectively contribute to the enforcement of these community interests. On the other side, however, these entities also have the potential to frustrate the universal realization of the protection of human and labour rights and the environment either through their own activities or indirectly by way of supporting state actors, predominantly in oppressive regimes, in their respective conduct.

Taking into account this consequently at first ambivalent potential of transnational enterprises with regard to the realization of community interests in the international system, as well as the fact that the aim of promoting these global public goods is at the centre of the current international legal order, the question arises as to whether these non-state actors in addition to their *de facto* significance are – as subjects of international law – also in a normative sense integrated in the international system and thus under a legal obligation to contribute to the promotion of human rights, sustainable development and labour standards. Considering the overwhelming importance of this issue for the future direction and consequences of the processes of globalization, it is hardly surprising that an intensive debate is currently taking place with regard to the possibilities for making transnational enterprises responsible, under international law, for respecting global public goods. By adding a number of new thoughts, this article is meant to be a small contribution to the ongoing discussion on this evolving issue.

According to the predominant view among international legal scholars, not all of the various different entities participating in contemporary international relations can be regarded as subjects of international law, even if they may have some degree of influence on the international society. *De facto* participation in the international system is not equivalent to acting on the international scene in legally relevant ways, and thus not deserving of the qualification as a subject of international law. Rather, international legal personality requires factual participation and some form of community acceptance through the granting of rights and duties under international law to the entity in question. On the basis of these generally recognized prerequisites for achieving international legal personality, the still prevailing view among international legal scholars is that transnational enterprises cannot be regarded as subjects of international law in the sense of being addressees of interna-

tional legal obligations to promote the realization of the above mentioned global public goods. Despite some notable recent developments, such as the attempts towards the enforcement of human rights obligations towards these actors before domestic courts in the United States, as well as in the realm of "soft law" the adoption of the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights by the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2003 (which however received a rather "cool" response by the Commission on Human Rights in April 2004), one probably has to agree with the predominant view that transnational enterprises have neither under treaty law nor under international customary law received a sufficient degree of normative acceptance by the international community with regard to the imposition of obligations under international law.

However, it appears to be questionable whether the so far generally recognized prerequisites for the achievement of international legal personality – the explicit granting of rights or duties under international law by the international community – can in the light of the changing structure of the international system still be regarded as an appropriate approach for the identification of normative responsibilities of powerful actors on the international scene.

A broad consensus exists among international legal scholars that the international society can be characterized as a community governed by the rule of law. Thus it is the purpose of this society to pursue international stability and avoid disputes and the arbitrary exercise of power. In order to pursue these goals in an effective way, the development of international law is in general dependent upon a close conformity to the realities in the international system. As a consequence, the granting of international legal personality also has to orientate itself to the changing sociological circumstances on the international scene. Therefore, the international legal order needs to set the relations between all the *de facto* powerful entities in the international system on a legal basis, since a failure to bring the major actors under the rule of law imposes unnecessary risks on the inherently fragile international legal system.

It follows from these findings that – contrary to the currently still predominant view concerning the prerequisites of international legal personality – in the light of the aims to be pursued by the international legal order already on the basis of a *de facto* influential position in the international system a rebuttable presumption exists in favour of the respective actor being subject to international legal obligations with regard to the promotion of community interests. This presumption can only be refuted by way of a contrary expression of the international community in a legally binding form stating that the respective category of actors is not obliged to observe human rights as well as recognized environmental and labour standards. This last mentioned option has thereby to be regarded as a currently still necessary concession to the still predominant position especially of states in the international system and the resulting possibility of these actors to influence, to a certain extent, the granting of subjectivity under international law.

Consequently, since transnational enterprises are in an economic as well as political sense powerful actors in the current international system, they are subject to the presumption – not rebutted by the international community – of being bound to promote the realization of global public goods such as the protection of human and labour rights as well as recognized environmental standards.

It is submitted that this new concept concerning the establishment of international legal personality is clearly more in conformity with the evolving image of an international legal community which has as its central aim the civilization of international relations and the promotion of global public goods to the benefit of all.

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