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EXTENDING INTERNATIONAL CORPORATE PERSONALITY TO TRANSNATIONAL COMPANIES.

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INTRODUCTION

The origin of the word "person" can be traced to the histrionic arts of the Greeks. Then, an actor was not allowed on stage unless he had on the mask of the character of the mask he represented, the idea was that the character being represented on the stage was speaking through the actor, hence the Latin phrase "persona" meaning "to sound through" and it was from this phrase that the English word "person" was derived. So, just as an actor was not permitted to appear on stage without putting on a mask, so also an entity is not permitted to appear on the legal stage without putting on a mask i.e corporate personality.

Corporate personality[1] therefore confers rights and duties on a subject within a legal framework. A learned author[2] said:

> *To be a legal person within the rules of the system (international or municipal law) implies three essential elements. First, a subject has duties, thereby incurring responsibility for any behaviour at variance with that prescribed by the system. Second, a subject is capable of claiming the benefit of a right since a considerable number of rules may serve the interests of groups of individuals who do not have a legal claim to the benefits conferred by the particular rules. Third, a subject possesses the capacity to enter into contractual or other legal relations with other persons recognized by the system of law.*

Legal personality is defined in the Dictionary of Law[3] as the sum total of a person's legal rights and duties. The rules of law are the main determinants of legal personality. They may select different entities and

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1 Also known as legal personality

2 Max Sorenson, Manual of Public International Law (London: Macmillan Press 1968) p 249

3 E.B Curzon, Dictionary of Law (4th edition, United Kingdom: Pitman Publishing 1994) p 285

endow them with different legal functions so that it will be a mistake to suppose that by merely describing an entity as a person, one is formulating capacities in law.

In the determining the personality of an entity, the following questions are essential.

i Do the rules of law establish that the claimant has the capacity which it claims?

ii What exactly is the capacity which it claims and which is allowed to it or in order words, just what sort of legal relations may this entity enter into?

iii Should the entity be recognized as having the capacity which it claims to have?

In essence the determination of corporate personality depends mainly on the capacity bestowed by law on the entity to perform certain acts and the competence to enforce rights if breached. Capacity implies personality, but it is the capacity to do particular acts. Therefore, personality as a term is only a short hand for the proposition that an entity is endowed by law with legal capacity.

Corporate personality is a relative phenomenon varying with circumstances. Entity A may have the capacity to perform acts X and Y but not act Z. Entity B may have capacity to perform acts Y and Z but not act X and Entity C to perform all three. Corporate personality therefore necessitates the consideration of the relationship between rights and duties and the capacity to enforce such rights.

There are essentially two species of corporate personality[4] i.e legal personality under municipal law and international legal personality. Under the municipal law, the assumption is that human beings are legal persons as the concept of legal personality resulted originally from an extension of that of natural personality.[5] However, this has not always been the case as some legal systems like America in the past refused to recognize slaves as persons. This is evident by the decision of the American Supreme Court in the Dred Scott[6] when it held that slaves were not persons but properties. On the other hand, some legal systems ascribed personality to idols[7]

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4 *Emisho Adaramola Basic Jurisprudence (Illinois, University of Illinois Printing Service 2004) p.191*

5. *J.M Elegido Jurisprudence (Ibadan, Spectrum Law Publishing 1994) p.230*

6 *Ibid. p230*

7. *Prematha Nath Mullick v. Pradyumna Kumar Mullick (1925) L.R 52 Ind. App 245. The privy council recognized Hindu idols as legal persons.*

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However, for the last century and a half, no modern system has refused to recognize the legal personality of any class of human beings. Although restrictions have been placed on the legal rights of some categories of human beings, for example, women in pre-independent Nigeria were restricted from taking up employment which will involve her leaving her usual place of residence.[8]

Apart from human beings, corporations sole and corporations aggregate are also recognized as having personality in law. Nigerian courts for example accord juristic personality to corporations sole as evident in the case of Fawehinmi v. N.B.A No2. Corporation sole is the personification and perpetuation of an office to enable it acquire, administer and dispose of property in perpetuity.[10]

Corporations aggregate are limited liability companies whether private or public. The law treats the corporations aggregate as persons in order to facilitate the investing of certain powers, rights on such enterprise e.g the capacity to sue and be sued, to own property, to enter into contractual relations e.t.c as illustrated by the classic English case of Salomon v. Salomon and Co Limited[11] where it was held that a company is separate and distinct from its owners or shareholders as it is an artificial person in law.

Also, the Companies and Allied Matters Act gives recognition to the legal personality of incorporated companies.[12] The concern of this essay however is on international corporate personality.

INTERNATIONAL CORPORATE PERSONALITY

The term "subject of international law" or an international legal person is capable of meaning:

i An incumbent of rights and duties under international law.[11]

ii The holder of a procedural privilege of prosecuting a claim before an international tribunal.[12]

iii The possessor of interest for which provision is made by international law.[13]

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8. *Section 143, Labour Code Act 1946*
9. *(1989) 2 NWLR at 577*
10. *Adaramola op cit (n.4) p.191*
12. *(1887) Ac 22; Lj ch 35*
13. *Micheal Akehurst A Modern Introduction to International Law (3rd edition London, George Allen & Unwin 1977) p 67*

An international person therefore is an entity that is recognized as having rights and duties in international law. Such an entity is a subject of international law as opposed to objects that has no rights and duties. The law commands its subjects but merely regulates the use of its objects.

Essentially, international law is concerned with the rights and duties of states. In fact, it owes its origin to the existence of the state and only the state is capable of possessing all the characteristics which derive from being a subject of that law. The bulk of international law concerns their conducts and relations. Before, the Reparations for Injuries Suffered in the Service of the United Nations case,[14] only states enjoyed the discretion as to whether or not to espouse a claim at an international tribunal on behalf of a national who has been aggrieved by another state.[15]

Since the birth of the United Nations in 1945, there has been an influx of different international organizations which are active participants on the international scene that international law can no longer be referred to as simply "inter – state law. It is safe to assert that states though the primary concern of international law, but it is not its sole concern. Other entities whether natural or legal now come within the dominion of international law.[16]

International personality has been accorded to entities other than states like the Holy See and international institutions like the United Nations as found by the International Court of Justice in the Reparations case.[17] Also, the interpretation of the agreement of March 25, 1951 between the World Health Organization and Egypt [18] recognized that international organizations are subjects of international law.

2.1 TRANSNATIONAL COMPANIES AS SUBJECT S OF INTERNATIONAL LAW.

In the years following the Barcelona Traction case,[19] an increasing amount of practice has been evident on the international plane dealing with transnational companies. Transnational companies are usually private business organizations comprising several legal entities linked together by parent corporations and are distinguished by size and multinational spread. They can be governmental or non-governmental

14 *(1949) ICJ Reports*

15 *Mavrommatis Palestine Concessions Case PCIJ Report (1924) Series A No4*

16 *Oppenheim International Law (8th edition Cambridge Longman, Green & Co 1955) p 19 - 214*

17 *ICJ Reports op cit to (4). The background to the request of the advisory opinion was the murder of the UN mediator in Palestine*

18 *(1980) ICJ Reports pp 73, 89 - 90*

19 *CJ Reports 19[illegible] pp 3 - 46.*

entities but owe their existence to one national system or another and their transactions are usually governed by the domestic laws of the states in which they operate.

The emergence of transnational companies reflects the globalization of economy requiring direct investment in foreign market. Flows of foreign direct investment is on the increase, an increasing number of developing countries have signed bilateral investment treaties with developed states in order to attract such investment. For example, Nigeria signed a bilateral investment treaty with France on 27th February 1990, with Netherlands on 2nd November, 1992 and the United Kingdom on the 11th December, 1990.[20] Besides, a number of international treaties have been signed which sets the framework for international trade and investment to flourish. They include the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), The proposed Multilateral Agreement on Investment (MAI).[21]

A direct consequence of this direct investment in foreign market is that transnational corporations do not loose their national allegiance and as a result, the relative strength of such corporations vis a vis developing states leads to objectionable practices in international law. Industrialized countries on the other hand, tend to be more worried about the protection of the investments of their companies in foreign countries and about legal certainty for their transactions.

Various international bodies have been engaged in finding a compromise by formulating codes of conduct of a recommendatory nature; an example is the International Chamber of Commerce founded essentially to serve world business by promoting trade and investment and also offers trade and investment dispute resolution services through the I.C.C International Court of Arbitration.[22]

Since the Second World War, transnational companies have become important actors on the world stage. Their spread and growth has been one of the outstanding phenomena of the last two decades. For example, the combined revenues of just General Motors and Ford Motors, two of the largest automobile corporations in the world exceed the combined Gross Domestic Product (GDP) for all of sub-Sahara Africa.[23]

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20. *http://www.unctad.org/sections/dite-pcbb/docs/bits-nigeria.pdf*
21. *Mhtml:file://L:\transnational%20corporations.mht*
22. *http://en.wikipedia.org/wiki/international_chamber_of_commerce*
23. *file://multinational corp-wikipedia the free encyclopedia.mht*

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In determining the status of these companies in international law, the following questions are sacrosanct.

1. Are transnational companies incumbent of rights and duties under international law?

2. Do they have the privilege of prosecuting a claim before an international tribunal?

3. Do they possess interests provided for under international law?

In answering the first question, Akehurst [24] opined that although many rules of international law exist for the benefit of transnational companies but this does not mean that the rules create rights for them under international law any more than municipal rules prohibiting cruelty to animals confer rights on animals. Some rules of international law are made for transnational companies. For example, the ICC established the Business Action to Stop Counterfeiting and Piracy BASCAP which makes rules to fight against piracy and counterfeiting.[25] Also, a transnational company may have rights under a special treaty. Besides, an agreement between a recognized international person like a state and a transnational company may be subjected to the rules of international law. This would have the effect of rendering such company an international person in the context of the agreement so as to enable it invoke in the field of international law, the rights it derives from that agreement. This is often done in case of oil concessions and in contracts between states and companies where extremely large sums of money are involved.[26]

For example, in the dispute involving TEXACO OVERSEAS PETROLEUM COMPANY V. LIBYAN ARAB REPUBLIC,[27] the arbitral tribunal deployed rules of international law to settle the dispute. In economic terms, major oil companies are often as powerful as states, and they are often reluctant to allow their oil concessions to be governed

24. *Micheal Akehurst (n.13)*
25. *http://www.iccwbo.org/bascap/id1127/index.html.*
26. *Micheal Akehurst op.cit (n13)p.75*
27. *53 ILR n.389, 457-62*

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by the law of the state granting the concession. On the other hand, the state granting the concession might feel humiliated if it allowed the concession to be governed by the law of a foreign country. The natural path therefore is to allow the concession to be governed by international law. Although, some draftsmen of oil concessions believe that a concession or other contract can exist independently of any legal system or can be governed by general principles of law.[28]

On the second question, to determine the status of transnational companies in international law is to show that it can enforce its rights before an international tribunal. Meanwhile, some international tribunals like the International Court of Justice are not open to transnational companies and even individuals. For example, Article 34 cap 4 of the Statute of the International Court of Justice provides that only states may be parties to contentious cases before the court. However, the International Chamber of Commerce has dispute resolution machinery known as the International Court of Arbitration and this tribunal is open to transnational companies who are members of the International Chamber of Commerce.[29]

Also, the effect of the Convention on the Settlement of Investment Disputes between states and nationals of other states (1965) developed under the auspices of the International Bank for Reconstruction and Development places such disputes on the international plane for the purposes of arbitration.

On the last question; on whether transnational companies have interests provided for under international law, it is sacrosanct that rules of international law have provisions affecting the workings of transnational companies. Many provisions contained in treaties affects transnational activities, example is the Convention for the International Carriage of Goods by Road GENEVA 1956. Besides, various international bodies have been engaged in formulating rules that affect the workings of transnational companies. Examples are the International Labour Organization and the International Chamber of Commerce.

There is no doubt that private international companies though an established feature in international law are partial subjects of international law. They have not yet achieved full independent status in

28. *Micheal Akehurst op.cit (n13)p.75*
29. *http://en.wikipedia.org/wiki/international chamber of commerce.*

international law; they may be classified as possessing limited international personality. They have not been upgraded to international subjects proper because states prefer to maintain control over them rather than accepting them on a legally equal footing even though it is often difficult to effectively regulate on the national level the activities of such global companies due to their extensive network of decision making and operational structures.

A special category of transnational companies are the inter-governmental companies, usually bi-national or multinational representing a form of organization intermediate between the public international agencies and private corporations operating on an international scale.[30] The need for economic cooperation is a factor leading to the emergence of this class of transnational companies. This is especially true of developing countries that are mainly dependent on foreign capital and are exporting similar commodities, instead of weakening their position by competing against one another, economic cooperation is only logical. The African Union, for example, has economic cooperation as one of its core objectives. Also, states in Europe have taken joint action to carry out transnational projects like the European Company for the Chemical Processing of Irradiated Fuel (EUROCHEMIC) established in 1957 by twelve European countries under the auspices of the European Nuclear Energy Agency (E.NE.A) which is a specialized agency of the Organisation for Economic Cooperation and Development (O.E.C.D). Also, the African Development Bank was established in 1964 with the aim of promoting economic and social development in Africa.

The three questions earlier asked are also useful I determining the international personality of these companies.

First, it is the constituent that determines whether intergovernmental companies are incumbent of rights and duties under international law. it is the convention establishing an intergovernmental company which creates the personality of such company. For example, Chapter vii (Article 50 and 59) of the Charter of the African Development Bank accords full international personality to it. Meanwhile, the Charter of the Bank for International Settlements incorporated in Switzerland by the Central Banks of several European countries and a group of American Banks provides that it shall not have international personality.[31]

30. *Friedmann The Changing Dimensions of International Law (Columbia Law Review Columbia,1962)pg1147*
31. *D.A Ijalaiye The extension of Corporate Personality in International Law(New York, Oceana Publications Inc 1979)p44*

Therefore, intergovernmental companies possess personality to the extent that this flows from the treaty establishing it.

The international status of intergovernmental companies may also depend upon the differences between municipal and international personality. If the entity is given a range of powers and is distanced sufficiently from municipal law, then an international person may be involved. Also important to the international status of intergovernmental companies is the issue of recognition by neutral states of the personality of such companies. It is the view of this writer that neutral states tend to recognize international personality of such companies. For example, the European Coal and Steel Community was able to raise a loan in the United States, a state not party to the treaty but which by authorizing the loan recognized the full capacity of the community. Besides, even a legal person constituted through the application of a municipal law exists as an objective fact whose reality can not be denied in the eyes of a foreign system of law. Therefore, whether the source of legal personality of a company is a municipal legal system or an international agreement, there should be no hesitation in recognizing the personality of a company declared by treaty to exist as an entity.

It is safe to assert that intergovernmental companies are usually clothed with some immunity and privileges at least vis a vis the states establishing it. This is to enable it to operate efficiently in spite of the political barriers inherent in transnational activities. The Articles of agreement of the World Bank contains provisions which accord to the Bank in the territory of each of its members, legal status and certain privileges and immunities. The archives of the Bank are inviolable. The assets are immune from seizure, attachment or execution prior to delivery of final judgment against it. The Bank, its assets, property, income and its authorized persons and transactions are immune from all taxation and from all custom duties. Besides, the systematic recognition by neutral states seems to confer some form of international personality on such companies.

Secondly, the constituent instruments of intergovernmental companies' makes provisions for specific mode of settling disputes and this is usually settled by an existing or adhoc international tribunal. This feature undoubtedly supports the international character of intergovernmental companies.

CONCLUSION

Transnational companies whether privately owned or intergovernmental are subjects of international law although they enjoy limited international personality and as such are partial subjects of international law.

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32 *Reparations case ICJ Reports op cit (n 14) pg185*

International legal personality can be unlimited in the sense that in principle, all international rights and obligations can be accorded to a subject. This applies only to states, the original, primary and universal subject of international law. It is the view of this writer that there are basically two categories of international personality; objective and qualified personality. In the former case, the entity is subject to a wide range of rights and duties and entitled to be accepted as an international person by any other international person with which it is conducting relations. The creation of objective international personality will require the action of the action of the international community as a whole or a substantial part thereof. The ICJ held thus:

> *Fifty states representing the vast majority of the international community have the power, in conformity with international law, to bring to being an entity possessing objective international personality and not merely personality recognized by them alone, together with capacity to bring claims.*

The attainment of qualified international personality binds only the consenting subjects. Any legal person may accept that another entity possesses personality in relation to itself and that determination will operate in personam. hence such entity has limited range of rights and duties.

RECOMMENDATIONS

As can be seen from this essay, new perspectives and conceptions have developed and continue to develop in contemporary public international law. The challenge to international law and international lawyers is to devise legal instruments in such a way to meet the challenges of the times. The United Nations through the International Law Commission should devise legal instruments that will ensure some form of proper classification and identification of international persons, in order to erase the controversy on the international legal personality of some entities.

It is hoped that the systematic recognition of intergovernmental transnational companies by neutral states will acquire a definitive status of an established rule of customary international law since Article 38(1)b of the statute of the I.C.J recognizes international custom as evidence of general practice accepted by law.

Another area is that Article 34(1) of the statute of the I.C.J should be revised in a way to allow entities other than states to be competent to bring cases before the court.

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