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To what extent private military corporations have international legal personality?

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TO WHAT EXTENT PRIVATE MILITARY CORPORATIONS HAVE INTERNATIONAL LEGAL PERSONALITY?

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ABSTRACT

The ongoing growth of multinational enterprises puts the traditional perception of subjects of international law into question. Setting the private miliatry contractors industry for a background, the article presents the current state of law, with a special focus on the possibility to confer international legal capacity and legal capacity to act on legal entities of domestic law. The analysis is based on the abundant framework of non-binding regulations targeting multinational enterprises coupled with the emerging need to make international corporate responsibility more effective.

KEYWORDS

international legal personality, private military corporations, multinational enterprises, human rights & business

INTRODUCTION

The concept of international legal personality is as basic and disputable an issue as the mere definition of public international law. Given the abscence of international customary or conventional norm providing for the comprehensive definition of international legal personality[1], the doctrine has elaborated several approaches regulating this question. Therefore, we can find the most conservative academics claiming that only state actors can be taken into account[2], more progressive ones, including international intergovernmental organisations, and finally transnational theories encompassing multinational enterprises as well as individuals. The latter one is split between those requiring the entity to have legal capacity[3] and those requiring legal capacity together with capacity to act[4]. Such classification is gradually evolving according to the principle of efficiency, one of the fundamental pillars of international law, entailing the need of legal norms to appropriately reflect the reality of international relations. As a result of the development of the law of international organisations over the 20th century the legal personality of those actors is no longer challenged. However, regarding the transnational theory, encompassing multinational enterprises and individuals, controversies still arise.

In this article, the authour seeks to establish whether in the current state of international law international legal personality can be conferred onto multinational enterprises. The ongoing growth of the private military corporation (PMC) industry, induced by the ongoing controversial privatisation of wars and the progressing outsourcing of military prerogatives of states, will serve as the background forming the theorethical debate on this matter.

CONCEPT OF INTERNATIONAL LEGAL PERSONALITY

Traditionally, legal personality is perceived as the aggregate of the legal capacity understood as the capacity of being a subject of rights and obligations whereas the capacity to act is definedas the capacity to enter into legally binding

1 A. Klafkowski, *Prawo międzynarodowe publiczne*, Warszawa 1979, s.133.

2 *Ibid.*

3 W. Góralczyk, S. Sawicki, *Prawo międznarodowe publiczne w zarysie*, Warszawa 2009, s. 118.

4 R. Bierzanek, J. Simonides, *Prawo międznarodowe publiczne*, Warszawa 2005, s.117.

commitments and to exercise exercising ones rights.

The second half of the 20th century brought with it new ideas and developments in international law as to the norms directly or indirectly targeting individuals, thereby endowing them with legal capacity. As will be demonstrated in the next section, the same tendency is becoming more and more discernible with regards to legal entities, especially multinational enterprises. The emergence of human rights and international criminal law has contributed significantly to the approach endowing individuals with rights and obligations in the realm of the international community. Henceforth, individuals protected by international instruments may claim their rights in front of international bodies and even bear responsibility for the most heinous acts[5]. Nevertheless, despite their receiving ability they continue to remain unable to create or modify international legal norms. Thus even if accepted, their legal personality remains limited whereas legal entities, while expanding their activities abroad, are usually contracting with states or international organizations under relevant domestic, not international, law. That is why their international legal personality is frequently rebuttable. Such a statement would have indeed been hard to refute 30 years ago. Nowadays we observe the emergence of a new approach within the international community construing a framework of Global Law or Humanity Law[6], placing no longer a single state but a single individual in the centre of interest. This alteration is founded on philosophical[7], political[8] and legal[9] contentions concerning the modern reality of international relations. It is even more observable from a regional perspective of consolidated legal regimes, like the European Union, where state borders are lifted and citizens are experessively addressed by regional legal norms[10].

According to W. Czapliński and A. Wyrozumska, the individual international legal personality can be classified as derivative (like in case of international organisations) because eventually it comes from the will of states or international organisations, and its component of legal acting is limited only to the extent allowed by states[11].

The dicussion on legal personality of legal entities raises comparable issues. Its optimists are evoking the efficiency principle and contending the economic power and influence of particular enterprises, sometimes more considerable than that of certain states[12]. Multinational enterprises are considered to be major phenomenona and driving forces of modern economy[13], not rarely having direct impact on local politics and the functioning of a state[14]. Legal entities may, unlike individuals, contract with states or international organizations, especially in the domain of international investment and may directly claim their rights in international investment arbitrations. Therefore, the conclusion drawn by K. Karski shall

5 See: UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 27 November 2013] or Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950,ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 27 November 2013].

6 J. Zajadło, *Konstytucjonalizacja prawa międzynarodowego*, „Państwo i Prawo" 3/2011, p. 11.

7 P. Singer, *Jeden świat. Etyka globalizacji*, Warszawa 2006.

8 UN General Assembly,The responsibility to protect : resolution / adopted by the General Assembly, 7 October 2009,A/RES/63/308,available at: http://www.refworld.org/docid/4ad6d1fd2.html [accessed 27 November 2013] .

9 R. Domingo, *The New Global Law*, Cambridge 2010; R. Teitel: *Humanity Law: A New Interpretive Lens on the International Sphere*, „Fordham Law Review" nr 2/2008, s. 667–702.

10 ECJ, Case 6/64, Flaminio Costa v. ENEL, [1964] ECR 585 and ECJ Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen 1963] ECR 1.

11 W. Czapliński, A. Wyrozumska, *Prawo międznarodowe publiczne. Zagadnienia systemowe*, Warszawa 2004, s.425.

12 J. Dine, *Companies, International Trade and Human Rights* (2005) 10; Eide, 'Universalization of Human Rights versus Globalization of Economic Power', [in:] F. Coomans et al. (eds), *Rendering Justice to the Vulnerable – Liber Amicorum in Honour of Theo van Boven* (2000) 99, at 105.

13 Ietto-Gillies, *The Role of Transnational Corporations in the Globalisation Process*, [in:] J. Michie (ed), Handbook of Globalisation (2003) pp. 139- 144.

14 See more: C. Day Wallace, *The Multinational Enterprise and Legal Control:Host State Sovereignty in an Era of Economic Globalization*, Martinus Nijhoff Publishers, 2002.

be praised: - He assumes that since states decided to contract a specific partnership with legal entities and exempt it from domestic legal framework, they thereby have tacitly acknowledged a norm endowing an international legal personality to legal entities[15].

Furthermore, legal entities may bear international criminal responsibility (a precedent case will be presented in the last part), are protected by international norms[16] and may claim their rights not only in international arbitration but may also become a party to the proceedings under Chapter XI of UNCLOS[17]. It should be equally noted that voices raised against such an extensive approach of the international personality date back to the different reality of international economy and political relations of the second half of the 20th century[18].

In order to verify whether private military corporations can be assigned international legal personality, we shall summarize their activities and refer to them in the light of the current understanding of multinational enterprises.

PRIVATE MILITARY CORPORATIONS AS MULTINATIONAL ENTERPRISES

The task of classifying PMCs as multinational enterprises is rather challenging given the lack of a formal definition of the latter. The OECD Guidelines for Multinational Enterprises (Guidelines)[19], discussed in a more detailed manner later on, similarly acknowledge that an explicit definition is not required and consequently refer to Multinational Enterprises (MNEs) as „(...) companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed."[20]

Although PMCs are usually established in one of following democratic countries: the United States, the United Kingdom, France or Germany[21], the nature of their activities and targeted clientele requires them to send employees to, contract with or support local powers in the zones of armed conflict, post-conflict regions, failed states or generally speaking, states with poor human rights records[22]. Moreover, the ability to quickly provide service in every corner of the world is one of their main trademarks, attracting clients in urgent need. Thereby, they presumably fall into the scope of MNEs provided by the OECD Guidelines.

INTERNATIONAL REGULATION: PMCS AS ADDRESSES OF INTERNATIONAL STANDARDS.

Having established that PMCs are indeed MNEs, we shall examine in what manner their international capacity is shaped. Apart from being regulated by the domestic law of the seat, they are functioning under several international regulations. We shall not analyze here the general human rights instruments like the European Convention on Human Rights but rather focus on the new type of legal regulations addressed especially to PMCs as private actors involved in the situations of both international and non-international armed conflicts.

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15 K. Karski, *Problem statusu korporacji ponadnarodowych w prawie międznarodowym (globalizacja a podmiotowośc prawa międznarodowego)*, [in:] *Nauka prawa międznarodowego u progu XXI wieku*, E. Dynia (ed.), Rzeszów 2003,. pp.114-134.

16 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, *op.cit.*, especially art. 6, 10, 11.

17 United Nations Convention on the Law of the Sea, Montego Bay, Jamaica 10.12. 1982.

18 See: Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1964 I.C.J. 6 (July 24) and Anglo-Iranian Oil Co., U.K. v. Iran, Judgment, 1952 I.C.J. 93 (July 22).

19 OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, avaialable at: http://dx.doi.org/10.1787/9789264115415-en [accessed 27 November 2013].

20 *Ibid*, p. 2.

21 64 PMC established in the US, 208 PMC established in the UK, 11 PMC established in France, 13 PMC established in Germany have signed ICoC as of November 30th, 2013. 58.7% (413 legal entities) of all signatories PMC are established in Europe.

22 BAE Systems selling 12 Typhoon fighter jets to Bahrain, G4S involved in Israeli prison system and settlements as well as in abuses in South Africa prisons, Bicuar involved in killings of diamond digger in Angola, employees of security company Eulen allegedly responsible to have run over a man in Mexico, Nikuv Intl. Projects accused of rigging vote in last elections in Zimbabwe.

The conventional legal framework is still missing due to the relatively novel nature of this phenomenon as well as due to a lack of consensus among states as to several issues concerning its regulation. It is even more remarkable and astounding if we try to compare the de facto activity of PMCs with the international customary norm prohibiting the resort to mercenaries. The current development of human rights seem to oblige states to proactively cooperate in order to secure rights of the most vulnerable groups, which include individuals suffering from reported abuses allegedly deriving from overseas activity of PMC contractors.

Therefore, while searching for relevant international documents we are astonished with the abundance of so-called soft-law, not rarely backed by all stakeholders[23]. It is salient that the international community of states remains satisfied with regulations deprived from sanctions and effective mechanisms of non-observance reprisals.

Despite the young life of PMCs, the most concerned states, by which we understand those which, according to the Draft Articles on Responsibility of States for Internationally Wrongful Acts[24], might be assigned with the conduct of their national PMCs, have already undertaken domestic initiatives to regulate the industry. Therefore, Egypt has drafted law aiming to regulate PMCs amidst concerns of use of excessive force and insufficient employee training. Switzerland, deemed to be a pioneer and main driving motor of international regulation, enacted a law prohibiting Swiss PMCs to conduct activities that are likely to lead to serious human rights abuses abroad. The United Kingdom government released its National Action Plan to implement the UN Guiding Principles on Business & Human Rights, including references to International Code of Conduct for Private Security Service Providers (ICoC), signed by British security service providers, certification of British PMCs, and the Voluntary Principles on Security and Human Rights Initiative. Finally, the United States State Department expressed its will to incorporate ICoC into protective security services contracts under the condition of industry participation. These developments prove the importance of an emerging business market for PMCs and their impact on national security policies and respect for human rights- at least when it comes to diplomacy and policy-making.

However, the presented enumeration, due to its national nature, does not in no way satisfy the argument on international legal personality of PMCs. That is why we shall now elaborate on selected international regulations concerning activities of PMCs.

Starting with the most general one, the OECD Guidelines for Multinational Enterprises are „the only existing multilaterally agreed corporate responsibility instrument that adhering governments have committed to promoting in a global context". The Guidelines cover all major areas of business ethics starting with information disclosure, through human rights, to taxation and consumer rights and include the UN Guiding Principles on Business & Human Rights[25]. The crucial part is expressed by the obligation addressed to adhering countries to set up National Contact Points charged with the inquiries handling and responsible for mediation and conciliation – procedures resolving issues that arise form alleged non-observance of the Guidelines. Consequently, companies may be called to change their abusive practices and reconcile with customers. The mere title of the document indicates that Guidelines are the soft law, and despite the government's support their non-binding nature prevails. However, the author argues that once backed by national governments, Guidelines directly target national PMC in a way endowing them with specific rights and obligations deriving from international human rights law. This would consequently allow international legal capacity to be established, albeit to a limited extent.

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[23] The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, September 2008, available at: http://www.eda.admin.ch/psc [accessed 27 November 2013].

[24] Art.5, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001,Supplement No. 10 (A/56/10), chp.IV.E.1,available at: http://www.refworld.org/docid/3ddb8f804.html [accessed 30 November 2013].

[25] The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

Regarding PMC-specific international initiatives the Montreux Document and establishment of the oversight mechanism of the International Code of Conduct for Private Security Service Providers should be presented in the first place[26]. The Association mandated with overseeing companies' adherence to the ICoC guidelines began its operation on September 20th, 2013. As of October 30th, 2013, 708 security companies have signed ICoC and 135 companies, 12 civil society organizations and 5 governments became funding members of the ICoC Association, expressing thereby their full backing of the initiative.

Also, the United Nations have expressed their human rights concerns in a resolution[27] stating that the use of security companies by the UN should be a „last resort". Similarly, the UN Working Group on the use of mercenaries hosted an expert meeting on the use of PMCs by the UN and called for more transparency on contracting their services by the UN. Furthemore, the International Organization for Standarization announced that it will develop new international standards for PMCs in line with human rights standards. Finally, ASIS International released two new standards for PMCs allowing them to better protect human rights in areas where the rule of law has been undermined due to war or natural disaster, as well as in the maritime environment.

The positive steps undertaken by the international community, especially concerning human rights abuses, contribute to the new approach towards PMCs, endowing them with specific rights and obligations, albeit provided and implemented by the national hubs of state administrations. The lack of a comprehensive and complete international convention may be provoked by the reluctance of states to take direct responsibility for the conduct of legal entities, which are frequently contracted in order to blur the delegation of power and responsibility. The outsourcing construction is notably propitious in situations where deployment of national armed forces may entail international responsibility[28]. The convenience of service outsourcing shall certainly not be underestimated in this case.

Despite the fact that the attention of the international community has been drawn to the emergence and importance of PMC phenomenon, their international personality still remains limited as they are not able to shape or create law in the international area. The international norms recipient's ability (human rights in particular), is not sufficient to elevate them to the identic level enjoyed by states or international organizations. In order to complete the analysis we shall now proceed to the examination of the existence, acceptance, and what is even more symptomatic, the need of international capacity to act or to bear international responsibility by PMCs.

INTERNATIONAL CAPACITY TO ACT

To be recognized as a subject of international law, an actor needs to be able to act and interact in international relations, therefore create and modify law, contract with international subjects, have legal rights, bear international responsibility and employ international dispute resolution mechanisms. Although PMCs may be endowed with limited legal capacity their legal capacity to act is deemed to be even more confined. In the current state of law we may only examine their capacity to bear international corporate or civil responsibility under international law.

Along with the developments in modern warfare the trend of privatization of war and the increased use of PMCs by governments in countries with important security deficiency raise issues of human rights abuses. Consequently, PMC employees have been accused under international criminal law or domestic law, including human rights based claims in several proceedings.

Lawsuits against PMCs were brought mainly in

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26 More: K. Kowalczewska, *Self-regulation of Private Military Corporations - the Optimal Solution?*, "Security Dimensions and Socio-Legal Studies no.9 , January-June 2013, pp. 112-127.

27 Kyodo News International, *U.N. hiring of armed contractors raises concern about rights abuses*, May 4, 2013, available at : http://www.globalpost.com/dispatch/news/kyodo-news-international/130504/un-hiring-armed-contractors-raises-concern-about-right [accessed 30 November 2013].

28 D. Francis, *U.S. Troops Replaced by an Outsourced Army in Afghanistan*, „The Fiscal Times", May 10, 2013. available at : http://www.thefiscaltimes.com/Articles/2013/05/10/US-Troops-Replaced-by-an-Outsourced-Army-in-Afghanistan#page1 [accessed 30 November 2013].

the US courts. The case against CACI, allegedly involved in torture at Abu Gharib prison in Iraq, was dismissed by the US state court and the new lawsuit is filed in the US federal court. Four former Blackwater guards were charged by the US Departments of Justice over the 2007 shootings of civilians in Baghdad on Nisur square. The claim against defense contractor KBR over alleged trafficking of Nepali men to Iraq was accepted by the US court and will go to trial in 2014. In the United Kingdom the inquest jury found G4S guards to act in an „unlawful manner", in the case of a man who died after being restrained on a plane by G4S guards during forced deportation. In Mexico, workers filed charges against security firm „Servicios Especiales de Seguridad Privada" over alleged sexual harassment and exploitative working conditions[29]. The growing number of lawsuits proportionally to the dimension of PMC activities shall implicitly supervene the proper protecting regulation.

Nevertheless all of the aforementioned cases concern individuals' responsibility and not that of a corporation. International criminal law, despite its permanent focus on individuals committing the most heinous acts, does not exclude the possibility to assign international responsibility to legal entities. It is very well exemplified in the Statute of the Special Court for Sierra Leone[30] whose authors have expressively omitted the precision as to the nature of entities which may be prosecuted. Article 1 states that „ the Special Court shall (…) have the power to prosecute persons who bear the greatest responsibility for serious violations(...)" and therefore allows to interpret the competence of the tribunal as including acts committed both by individuals and legal entities. Nevertheless, such a case has never happened until now, thus leaving this concept in the sphere of theoretical deliberations. It is even more regrettable given the growing need of MNE accountability. Consequently, in light of reported violations, the international community remains rather inactive or withdrawn when it comes to international criminal corporate liability. However, this reluctance cannot be explained by a lack of legal possibilities, because not only the Special Court for Sierra Leone but also a specific international ad hoc tribunal could be charged with overseeing relevant cases.

Likewise in the international individual criminal responsibility, the competence of international tribunals is auxiliary and the main burden rests on domestic jurisdictions, having priority in pursuing international criminals or wrongdoers.

In previous years, the most involved in the PMC discussion held their breath while awaiting the famous judgment in the Kiobel case which was expected to bring a new standard of international corporate responsibility[31]. The final decision on the lack of jurisdiction under ATS seemed to be rather disappointing . The US Supreme Court denied assuming the role of last resort for victims of overseas abuses of the law of nations. The opposite solution would allow all of those who were denied justice under other jurisdictions to bring their cases in front of a US court. Still, strong justifications fot certain PMCs to be held accountable under the ATS are to be considered among which the most persuasive is „the opportunity to provide legal redress, empowerment, and justice for tort victims"[32].

It could feel that the cause was lost, nevertheless, the new light in the tunnel of pursuit of justice has appeared in Switzerland where, thanks to successful national prosecutors, „the first ever instance of corporate responsibility for an international crime" will be established. The lawsuit is brought against Argor-Heraeus, leader of the world's largest refiners of precious metals, for having allegedly acquired approximately three tons of pillaged gold from the Congolese rebel groups through intermediaries in Uganda and the Jersey Islands[33]. The case reflects the long-awaited domestic implementation of the

29 Private Military & Security Companies and their impacts on human rights: Recent developments, PMSC Bulletin, Issue number 5 – 30 October 2013.

30 Statute of Special Court for Sierra Leone annexed to the Agreement between the United Nations and the Goverment of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.

31 Supreme Court of the United States, Kiobel vs. Royal Dutch Petroleum, April 17, 2013.

32 More: J. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, „California Law Review" Volume 97 Issue 5 Article 4, pp.1459- 1499.

33 More: J. G. Stewart, *Corporate War Crimes Begin*, „Opinio Juris", November 14th, 2013, available at : http://opiniojuris.org/2013/11/14/corporate-war-crimes-begin [accessed 30 November 2013].

contemporary law of pillage (consisting of international crime) applied to modern resource wars.

The presented case constitutes an important break-through and public acknowledgment of superiority of principles of international justice over national and financial interests. Such a brave move of the Swiss prosecution shall be praised and ought to be adopted as a future pattern. By doing so, the state is eventually admitting that a legal entity, regulated comprehensively by national law, may be held accountable for wrongful acts of an international nature. The ongoing penetration of international norms, infiltrating into national normative systems contributes to the progressive blur of classical divisions of these two legal regimes, enhancing a thesis of monistic doctrine. The challenge to track down the normative provenience of legal regulations is becoming redundant in a world of economic and legal globalization. Therefore, the narrow approach towards international personality should be replaced by a more effective and realistic attitude, bringing justice to the international reality. MNEs shall be no longer placed under the protective umbrella of states, simultaneously hindering the pursuit of international justice. The genuiness of legal commitments of states deciding to implement human rights instruments should entail the righteous treatment of those substantially responsible for abuses, regardless of their state or non-state affiliation.

Therefore, we may conclude that although up to this day all lawsuits were filed in national proceedings PMCs, as other MNEs, may bear international criminal responsibility, and such an open window of opportunity exists albeit limited by the will of the most powerful subjects of international law. Since states try to avoid, hinder and complicate the mission of the UN charged with the pursuit of its main goals expressed in Article 1 of the Charter[34], international personality would allow to bring justice, at least partly by holding PMCs and other MNEs liable for violations of international law, even more reprehensible than committed out of financial incentives.

CONCLUSION

Provided the extensive definition of international legal personality is acceptable, multinational enterprises like PMCs would benefit from it only to a very limited degree. Yet, the alteration of international politics and economy has brought a progressive change of perspective and approach to non-state actors of international relations. Nowadays it is no longer controversial that blurred lines between international and national norms, especially in a regional legal system like the that of the European Union, necessarily affect the international standing of legal entities and individuals. The formulation of modern international regulations, especially soft law, induces thoughts on a new transnational vision of the international community.

Having been placed in the canter of interest of many supranational bodies, PMCs seem to accept and support international regulations concerning their activities, like the Montreux Document or the ICoC, in a way that they voluntarily accept rights and obligations deriving from the international legal order. Despite the fact that the proliferation of international non-binding instruments produced little in the way of concrete results, concurrently it proved the growing, although still passive, role of MNEs in the creation of norms. The author argued that the legal capacity as well as the legal capacity to act are both tacitly implied by states and thus the global acceptance of their international personality would contribute in an important way to hold them accountable. Using the mechanisms elaborated at the occassion of individual criminal responsibility, international corporate liability would provide victims with reparations and positively impact the conduct of other PMCs and MNEs. Nowadawys, the essential challenge seems to entail providing individuals, both clients and victims, with proper instruments enabling them to benefit from a fair international justice system.

Even if referring to the MNEs as to the international legal subjects may be premature, it is not deniable anymore that because of their political and economic influence and wide outreach of their activities, they play an important role in the global system of human rights, and properly regulated, they may contribute in an important way to the observance and

[34] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 1 December 2013]

strengthening of the international normative system.

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