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Changing International ‘Subjectivity’ and Rights and Obligations under International Law – Status of Corporations

Merja Pentikäinen*

1. Doctrine of the subjects of international law

1.1. Broadening the circle of subjects

Introductory textbooks on public international law invariably include a section on the subjects of international law appearing as part of the fundamentals of this branch of law.¹ The doctrine of international ‘subjectivity’² is also among the international law topics that have attracted the attention of a number of scholars who have entered the debate on the content and reach of this ‘subjectivity’. The subject of international law has been defined, for instance, in the following way: it is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims;³ it is capable of independently bearing rights and obligations under international law.⁴ The idea of subjects of the international legal system is often linked – even conflated – with the notion of international legal personality.⁵ It has been suggested that international legal personality arises in three principal contexts: capacity to make claims in respect of breaches of international law; capacity to make treaties and agreements valid on the international plane; and the enjoyment of privileges and immunities from national jurisdictions.⁶ A review of the literature addressing the issue of international ‘subjectivity’ suggests that varying kinds of links are made between international (legal) ‘subjectivity’, international (legal) capacity and international (legal) personality.⁷

* LL.D., Acting Professor of International Law, University of Turku (Finland). E-mail: merpen@utu.fi. The writer participates in the research project on ‘How to Rule the Economy’ running in the Law Faculty of the University of Turku in 2011-2014 and funded by the Academy of Finland.

1 See e.g. I. Brownlie, *Principles of Public International Law*, 1999, pp. 57-68; A. Cassese, *International Law*, 2005, pp. 71-150; M. Dixon, *Textbook on International Law*, 2007, pp. 111-141.

2 The word ‘subjectivity’ is probably not a very eloquent English expression. It is said to be a Germanism (J. Klabbers, *An Introduction to International Institutional Law*, 2009, p. 40, fn. 10), but since it does appear in the literature on international law addressing the subjects of international law, the author feels it is appropriate to use it.

3 See Brownlie, *supra* note 1, p. 57. Brownlie’s definition echoes the elements put forth in the ICJ’s advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. See the remarks on this case below. Brownlie considers this conventional definition to be circular when it recognizes the capacity to act at the international level of an entity that is already capable of acting at the international level. See also A. Clapham, *Human Rights Obligations of Non-State Actors*, 2006, p. 64. Challenging this circularity, see A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, 2001, p. 24.

4 See Klabbers, *supra* note 2, p. 38.

5 *Ibid.*, p. 39. Klabbers points out that hypothetically entities can possess legal personality under any legal system, p. 44.

6 See Brownlie, *supra* note 1, p. 57.

7 See also Meijknecht, *supra* note 3, pp. 23-63; Clapham, *supra* note 3, p. 64; J. Wouters et al., ‘Introductory Remarks’, in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations*, 2010, pp. 1-18, at p. 6. In his publication from the 1970s C.N. Okene considers international ‘subjectivity’ through treaty-making capacity. See C.N. Okene, *Controversial subjects of contemporary international law. An examination of the new entities of international law and their treaty-making capacity*, 1974.

In the past, when international law was viewed as regulating solely inter-state relations, *states* were the only subjects of international law. Departure from this exclusively state-centric model of the international legal system in the course of the years – thus recognising the changes in the dynamic of the international system – has also resulted in the widening of the group of entities labelled as international law subjects. An important step was taken in 1949 when the International Court of Justice (ICJ) gave its advisory opinion concerning the international rights and duties of *international organisations*, more specifically the UN in the case at hand. In the case of *Reparation for Injuries Suffered in the Service of the United Nations* the UN was characterised as an international person and as a subject of international law, capable of possessing international rights and duties and capacity to maintain its rights by bringing international claims.⁸ Subsequently, international 'subjectivity' of international organisations has been widely recognised, and the capacities of international organisations are regarded as also encompassing the capacity to become parties to international agreements and the capacity to enjoy certain privileges and immunities.⁹

While states have the status of primary subjects of international law with the most extensive capacities (full legal capacity),¹⁰ the 'subjectivity' of international organisations is limited and determined by the powers vested in them.¹¹ The scope of this 'subjectivity' does give rise to various interpretations. Among other things, the issues of human rights obligations of international organisations and the accountability of international organisations for human rights violations have sparked vivid debates.¹² While it has been concluded that universally recognised human rights are binding upon international organisations, international law is still in a state of flux, e.g. where it concerns the division of responsibilities between international organisations and their Member States.¹³

The contemporary literature on international law also lists other actors among the subjects of international law, including *insurgents*, *national liberation movements*, and certain *sui generis* or *state-like entities*.¹⁴ Even *individuals* have appeared on some of these lists of subjects.¹⁵ Those who challenge this view of seeing individuals as subjects of international law underline the fact that individuals are under the exclusive control of states. When treaties provide for the rights and duties of individuals, this would mean that each state only undertakes (by agreement *vis-à-vis* the other Contracting States) to confer such rights and impose duties on individuals solely within its own legal system. Individuals' rights to file complaints with international judicial or quasi-judicial bodies are just exceptional, being no more than a procedural right which lacks any attendant substantive right or the power to enforce a possible decision

8 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949) ICJ Reports 174, at p. 179. The advisory opinion arose out of the establishment of the state of Israel. The resulting unrest in the Middle East forced the UN to nominate a mediator, the Swedish Count Folke Bernadotte, to consider the issue. Count Bernadotte and a number of his associates were killed in Jerusalem in September 1948, allegedly by a private gang of terrorists. After this incident the UN General Assembly sought an advisory opinion from the ICJ. The question was raised as to whether the UN, as an organisation, could claim reparation for these injuries from the responsible state.

9 See Brownlie, *supra* note 1, p. 58. See also Klabbers, *supra* note 2, pp. 40-42, 131-152, 251-270; D.E. Arzt & I.I. Lukashuk, 'Participants in International Legal Relations', in C. Ku & P.F. Diehl (eds.), *International Law. Classic and Contemporary Readings*, 1998, pp. 155-176, at p. 155.

10 Cassese refers to states as fundamental subjects of international law. See Cassese, *supra* note 1, p. 71.

11 For remarks on attributed and implied powers of international organisations, see Klabbers, *supra* note 2, pp. 53-73. Brownlie calls states and international organisations the 'normal types' of legal person on the international plane. See Brownlie, *supra* note 1, p. 58.

12 See e.g. the publication by Wouters et al., *supra* note 7.

13 For discussion of whether or not international organisations are bound by international human rights obligations under international law, see O. De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scale in the Law of International Responsibility', in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations*, 2010, pp. 51-128, at pp. 55-73, 104, 125.

14 See Cassese, *supra* note 1, pp. 124-150. Insurgents and national liberation movements are noted to have special links to states since they are entities potentially on their way to becoming states. The former come into being through their struggle against the state to which they previously belonged. The latter group is viewed as consisting of organised groups particularly fighting against colonialism, racist regimes or alien domination. This legitimisation is based on the principle of self-determination. Cassese labels the Holy See, the sovereign order of Malta and the International Committee of the Red Cross as being *sui generis* entities. Clapham calls *de facto* regimes, the Holy See and the Order of Malta as the entities with state-like qualities also often counted among the subjects of international law. See Clapham, *supra* note 3, p. 59. For Brownlie, 'established legal persons' include states, political entities legally proximate to states, condominiums, internationalised territories, international organisations, agencies of states and agencies of organisations. Non-self-governing peoples, states in *statu nascendi*, legal constructions, belligerent and insurgent communities, entities *sui generis* and individuals he describes as having 'special types of personality'. See Brownlie, *supra* note 1, pp. 59-66.

15 See *ibid.*, pp. 58, 66; Cassese, *supra* note 1, pp. 142-150; Clapham, *supra* note 3, p. 61.

of an international body.¹⁶ However, developments in international law over the years have made the international position of individuals complex and multifaceted. Under modern international law, individuals have gradually come to be regarded not only as holders of material interests acknowledged at the international level, but they are also capable of infringing fundamental values of the world community. The development of international human rights law and the doctrine of individual criminal responsibility under international law have introduced important changes in the international legal system. The most recent affirmation of individual criminal responsibility at the international level is to be found in the 1998 Statute of the International Criminal Court (ICC) which provides for criminal jurisdiction over individuals accused of genocide, crimes against humanity, war crimes and the ‘crime of aggression’.¹⁷ These changes have influenced the debate on the international ‘subjectivity’ of individuals. As a result of both granting individuals legal rights and placing obligations on them that are operational at the international level, there are scholars who are of the opinion that individuals possess international legal status as subjects of international law.¹⁸

1.2. Multinational corporations – contested subjects

If there are different scholarly views on the international ‘subjectivity’ of individuals, the status of corporations as subjects of international law is even more contested. The debate on the international ‘subjectivity’ of corporations revolves around the business entities that operate across national borders, labelled ‘multinational corporations’, for instance.¹⁹ Debates on this matter are characterised by a strong resistance to include corporate entities among the subjects of international law, and until recently suggestions that corporations be considered as having international legal personality were exceptional. Many authors have simply left the question open.²⁰

Those scholars who have addressed the issue have noted, for instance, that multinational corporations have ‘controversial candidatures’ which in principle have no international legal personality.²¹ According to some views, these entities are sometimes counted among the subjects of international law.²² It is acknowledged that the situation becomes more complex when a corporation is closely controlled by a government so that it could be considered as a state agency, with or without some degree of autonomy. Additionally, ownership of shares may give a state a controlling interest in a ‘private law corporation’.²³ The rights and responsibilities of corporations that are state-owned or otherwise controlled by a state raise important questions from the viewpoint of human rights protection. The prevailing state of affairs

16 See Cassese, *supra* note 1, pp. 144-150. For the denial of international ‘subjectivity’ of individuals (in earlier literature), see e.g. H. Lauterpacht, *International Law and Human Rights*, 1968, pp. 6-9.

17 See Art. 5 of the Statute of the ICC, Rome, 17 July 1998, in force 1 July 2002, UN Doc. A/CONF.183/9, United Nations Treaty Series, Vol. 2187. Nowadays individual criminal responsibility under international law also extends to such international crimes as slavery, disappearances and torture. See Clapham, *supra* note 3, p. 29.

18 For remarks on the status of individuals in international law, see Cassese, *supra* note 1, pp. 142-150. See also Arzt & Lukashuk, *supra* note 9, pp. 157-166.

19 These entities have been described using different combinations of the terms multinational, transnational, business and enterprise. Regardless of the exact term used, this kind of entity is characterised by its ability to operate across national borders and outside the effective supervision of domestic and international law that makes them important actors from the viewpoint of international law. M.T. Kamminga & S. Zia-Zarifi, ‘Introduction’, in M.T. Kamminga & S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, 2000, pp. 1-15, at pp. 2-3. For the remarks on defining multinational corporations, see also C. Wells & J. Elias, ‘Catching the Conscience of the King: Corporate Players on the International Stage’, in P. Alston (ed.), *Non-State Actors and Human Rights*, 2005, pp. 141-175, at pp. 148-150. Clapham has opted for the term transnational corporations. See Clapham, *supra* note 3, pp. 76-80, 199-201. Arzt & Lukashuk refer to transnational enterprises, *supra* note 9, pp. 166-173.

20 See Clapham, *supra* note 3, pp. 76-77.

21 See Brownlie, *supra* note 1, p. 66. Brownlie notes that although corporations can make agreements with foreign governments, a concession or contract between a state and a foreign corporation is not governed by the law of treaties. See also Arzt & Lukashuk, *supra* note 9, pp. 167, 173.

22 See Klabbbers, *supra* note 2, p. 38. See also Kamminga & Zia-Zarifi, *supra* note 19, p. 4; S. Tully, *Corporations and International Lawmaking*, 2007, p. 323.

23 Brownlie notes that legal persons created by states by treaty nowadays perform important functions, and the status of the bodies is regulated by the national law of one or more of the parties. Brownlie calls these bodies ‘intergovernmental corporations of private law’ and ‘établissements publics internationaux’. A corporation may receive a privileged status in (even independence from) national law, and it may have both a considerable quantum of delegated powers and organs with autonomy in decision- and rule-making. In this case, the body concerned has the characteristics of an international organisation. Despite this, Brownlie does not view it as representing a distinct species of legal person on the international plane. See Brownlie, *supra* note 1, pp. 67-68.

appears to enable the state to escape its human rights obligations when the state operates in the business context as a company actor.

As regards the broader question of whether corporations have rights and obligations under international law, they are viewed as possessing rights, for instance, under international investment law, including the right not to be discriminated against *vis-à-vis* national firms and a right to receive compensation in the event of expropriation. Under human rights law, corporate entities enjoy such rights as the right to a fair trial, the right to privacy, the right of freedom of expression, and property rights.²⁴ Corporations have been granted *locus standi* before some international tribunals.²⁵ A corporate entity can be an applicant even before a human rights supervisory body. This possibility was created under the European Convention on Human Rights.²⁶ In one of the seminal judgments of the European Court of Human Rights, i.e. in the case of *The Sunday Times v United Kingdom*, the first applicant was Times Newspapers Ltd.²⁷ In some cases, the legal person may be the only appropriate victim that can complain to the Strasbourg Court.²⁸ In a recent case in which the Strasbourg Court ruled, the applicant was a publicly-traded private open joint-stock company.²⁹

There are scholars who consider that it is at least theoretically possible that international law could impose some human rights obligations directly on corporations.³⁰ Some of the existing general rules of international human rights law found in public international law, and traditionally applicable only to states, can be said to apply also to non-state actors. This is to recognise the importance of non-state actors and their influence without suggesting that they have achieved the role of legislator. The situation has been described as states having fixed non-state actors with some rights and duties, whereby these actors have become *subjects of interest* without any automatic legitimising effect.³¹ It is worth noting that corporate accountability was actively discussed in the preparatory process of the Statute of the ICC, and that references to the prosecution of corporate entities were even inserted in the draft Statute. Eventually, however, these references were left out from the final text of the Statute.³² It has been pointed out that the lack of international jurisdiction does not mean that corporations are under no international legal obligations, nor does it prevent us from speaking about corporations breaking international law. International human rights obligations can fall on states, individuals and other non-state actors. Where obligations exist, different jurisdictions may or may not be able to enforce them. In the absence of in-

24 J.A. Zerk, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, 2006, p. 75. See also Clapham, *supra* note 3, pp. 80-81.

25 This is the case before the International Convention for the Settlement of Investment Disputes (ICSID) Tribunals. Corporations may also submit amicus briefs to WTO panels. See Tully, *supra* note 22, p. 323. The Iran-United States Claims Tribunal was established in the aftermath of the Iranian Islamic revolution of 1979 to resolve claims between Iran and the United States as well as between Iranian and US nationals, including corporations. Arzt & Lukashuk, *supra* note 9, pp. 167-168. A corporation could be a respondent in the Seabed Disputes Chamber of the Law of the Sea Tribunal. See Arts. 187 and 291(2) of the UN Convention on the Law of the Sea (1982), United Nations Treaty Series, Vol. 1833. See also Clapham, *supra* note 3, p. 31.

26 See Clapham, *supra* note 3, p. 81.

27 [1979] ECHR, Ser. A. No. 30.

28 See Clapham, *supra* note 3, p. 81. Clapham refers to the case of *Agrotexim and Others v Greece*, judgment of 24 October 1995. The Strasbourg Court interpreted the concept of 'non-governmental organisations', regarded as possible victims of violations of the rights stipulated in the Convention, as extending to legal persons more broadly, hence also corporations. See Clapham, *supra* note 3, pp. 81-82.

29 Case of *OAO Neftyanaya Kompaniya Yukos v Russia*, judgment of 20 September 2011, [2011] ECHR 1342. Among other things, the Court found that the respondent state had violated the company's rights under Art. 6 of the European Convention on Human Rights (right to a fair trial). For remarks on the standing of corporations before the Strasbourg Court, see S. Joseph, 'Scope of Application', in D. Moeckli et al. (eds.), *International Human Rights Law*, 2010, pp. 150-170, at p. 153.

30 See Zerk, *supra* note 24, pp. 76-79.

31 See Clapham, *supra* note 3, p. 28. In his earlier writings Clapham noted that non-state bodies, including corporations, have long been subject to human rights obligations, as implemented and enforced under domestic and regional law. See A. Clapham, *Human Rights in the Private Sphere*, 1993. It is worth noting that corporate actors can contribute to international law making through the work of the International Labour Organization (ILO) in which 'tripartism' enables the representation of employers' interests and thereby can incorporate corporate contributions in the work of the organisation. See also Tully, *supra* note 22, p. 321. For some remarks on historical developments of corporate contributions to international law making, see pp. 320-321.

32 This is noted to be a result of concern over the practicalities of prosecuting corporate defendants, rather than doubt as to whether international criminal law actually applies to companies. See Zerk, *supra* note 24, p. 76. See more elaborately A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in M.T. Kamminga & S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, 2000, pp. 139-195, at pp. 143-160. Several international treaties have expressly included corporate crimes, including the Apartheid Convention, and treaties governing corruption and bribery, hazardous wastes, and other environmental violations. B. Stephens, 'The Amoral Profit: Transnational Corporations and Human Rights', 2002 *Berkeley Journal of International Law* 20, pp. 45-90, at p. 77.

ternational enforcement mechanisms open to claims against corporate actors, international law is being used to hold corporations accountable for human rights violations at the national level.³³ Among the most notable national context to hold corporations accountable for the violations of international human rights is the Alien Tort Claims Act (ATCA) in the USA.³⁴

The debate on the status of corporations in the international legal system has features similar to that on the 'subjectivity' of individuals, including whether rights and obligations stipulated in international documents apply directly to corporations under international law or indirectly through national legal systems. The traditional way of seeing the human rights regulation of corporations is as 'indirect' regulation through national law when, on the basis of states' international obligations, states are obligated to ensure that human rights norms are not breached by private actors.³⁵ Based on states' obligation to protect human rights, states are obliged to take steps to ensure protection against human rights abuses by private actors operating under or within their jurisdiction. Under this traditional 'indirect' form of regulation and state-centred framework, human rights standards are imposed on corporations at national level and states may be held responsible for human rights violations if these violations result from their failure to regulate corporate activity effectively. In these situations states' performance is assessed on the basis of the standard of *due diligence*.

There are strong arguments as to why human rights law should be applied directly to corporations, i.e. why international law should 'directly' regulate corporate activities: corporations can and do affect enjoyment of human rights, and they enjoy considerable rights and benefits flowing from international law.³⁶ Additionally, in practice, states have different capacities to regulate corporate activities effectively at the national level. For instance, developing host states that are highly dependent on foreign investment may face particular problems to effectively regulate the activities of multinational corporations. In these situations when it is not possible to depend exclusively on host states to hold multinational corporations accountable for human rights violations, attention has been drawn to the regulatory potential of corporations' home states.³⁷ This state of affairs has also strengthened demands to render corporations directly accountable under international law.

However, for the time being any agreement on the direct applicability of international human rights law on corporations is lacking.³⁸ The traditional 'indirect' regulation model according to which states are the only bearers of human rights obligations under international law still appears to be the prevailing standpoint. In defence of this traditional view, it is claimed that attempting to extend legal duties under human rights law to non-state actors bestows on such actors an unfortunate legitimacy, which will undermine the authority of the state and dilute the responsibilities of states with respect to their human rights obligations. Changing the original course would allegedly cause the unravelling of the whole human rights project.³⁹

The role of corporations in the area of human rights protection has recently acquired considerable attention when the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises (the Special Representative of the UN Secretary General on Business and Human Rights (SRSG)) submitted his reports, and the final one in the

33 See Clapham, *supra* note 3, pp. 31, 58.

34 *Ibid.*, p. 237. For regimes of domestic regulation (including civil liability) of corporate behaviour, see R.G. Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The Next *Lex Mercatoria*', in P. Alston (ed.), *Non-State Actors and Human Rights*, 2005, pp. 177-226, at pp. 187-202.

35 See Zerk, *supra* note 24, pp. 76-93.

36 Corporations acquired benefits under international law when a huge number of international treaties contributed to a conducive business environment. See also Zerk, *supra* note 24, pp. 76-79. The Special Representative of the UN Secretary General on Business and Human Rights (SRSG) points to a far-reaching role of bilateral investment treaties and host government agreements. See SRSG 2010, *infra* note 40, p. 6. For advantages of direct regulation of multinational corporations, see S. Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises', in M.T. Kamminga & S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, 2000, pp. 75-93, at pp. 87-88.

37 See Zerk, *supra* note 24, pp. 83-91. The SRSG draws attention to the use of extraterritorial jurisdiction. See e.g. SRSG 2010, *infra* note 40, p. 11; SRSG 2011, *infra* note 40, p. 7.

38 The existing international regulation of business conduct in the area of human rights is characteristically of a non-binding nature. See Steinhardt, *supra* note 34, pp. 202-213. See also D. Weissbrodt & M. Gruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in P. Alston (ed.), *Non-State Actors and Human Rights*, 2005, pp. 315-350.

39 See Clapham, *supra* note 3, p. 25. For remarks on states' reservations about upgrading the status of multinational corporations (transnational enterprises) at the international level, see also Arzt & Lukashuk, *supra* note 9, pp. 168-169.

spring of 2011.⁴⁰ These reports have sparked an unprecedented debate on the responsibilities of corporate actors for human rights violations. The SRSG introduced the 'Protect, Respect and Remedy' Framework, underlining the crucial and primary role of states to protect human rights but also drawing attention to the role of corporations in the area of human rights protection. The Framework underlines different roles and duties of states and corporate actors⁴¹ and calls for corporate responsibility to respect human rights.⁴² The 'Remedy part' of the Framework draws attention to the need to strengthen effective access to remedies with respect to human rights violations linked to corporate activities. The SRSG's proposals have been vividly discussed – also criticised – by academics.⁴³ The business community appears to have welcomed them since they are viewed to clarify the situation on the responsibilities of business actors in the area of human rights protection.⁴⁴ In his reports the SRSG neither expressly calls for changing the international law system on responsibilities nor touches upon the issue of international 'subjectivity' (nor personality or capacity), but he labels his approach as 'principled pragmatism'.⁴⁵ Obviously the SRSG's proposals cannot result in changes in international law as such, but actions of states are crucial for any substantive modifications of the existing international law system. However, the SRSG's reports are of great significance because they have set off an extremely useful debate, e.g. on the existing gaps in human rights regulation and responsibilities of corporate actors under international law. Furthermore, the reports have been instrumental in putting the spotlight on the role of business actors in conflict situations when human rights are at particular risk – often left unprotected to a great extent –⁴⁶ and on the operation of corporations that are state-owned or otherwise state-controlled.⁴⁷ Although the question of whether the SRSG's remarks and proposals will have any concrete effects on the international legal system remains to a great extent in the hands of states, it is nevertheless notable that the 'Protect, Respect, Remedy' Framework has already influenced legislation at the national level and practices of international organisations, e.g. in the area of responsible supply chain management of business actors. These effects have been concretised in the context of the minerals originating from conflict-ridden Eastern Congo resulting, among other things, in the introduction of a piece of national legislation in the USA (the Dodd-Frank Act). The SRSG's proposals have also influenced UN and OECD practices.⁴⁸

2. 'Subjectivity' as a relative notion; criticism of the doctrine of 'subjectivity'

Whatever is viewed to be the exact group of subjects of international law, apart from states, the other subjects possess limited legal capacity under international law: they have a limited capacity to be granted international rights and powers or to be under international obligations, or a limited capacity to act, i.e.

40 The UN Secretary General appointed Professor John Ruggie from Harvard University as his Special Representative on this matter. The most important reports summarizing the work of the SGSR are the reports published in 2008, 2009 and 2010, as well as the final report of 2011: Reports of the SRSG on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 2008 (SRSG 2008); *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework*, A/HRC/11/13, 2009 (SRSG 2009); *Business and human rights: Further steps towards the operationalization of the 'protect, respect and remedy' framework*, A/HRC/14/27, 2010 (SRSG 2010); *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Advanced edited version, A/HRC/17/31, 2011 (SRSG 2011).

41 Among other things, the SRSG refers to the lack of democratic legitimacy of companies. See SRSG 2010, supra note 40, para. 64.

42 The SRSG's Framework is intended to apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. See SRSG 2011, supra note 40, Annex, p. 6.

43 Note e.g. the critical remarks of Radu Mares.

44 For the remarks on the positive reception of the proposal on the Framework, see e.g. SRSG 2011, supra note 40, Introduction to the Guiding Principles, Para. 8.

45 The SRSG notes that the normative contribution of his proposal does not lie in the creation of new international law obligations but 'in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved'. See SRSG 2011, supra note 40, Introduction to the Guiding Principles, Para. 14. See also Annex, p. 6.

46 See e.g. SRSG 2010, supra note 40, Paras. 12, 44-45, 61, 69.

47 See e.g. SRSG 2011, supra note 40, Annex, Paras. 4-6. According to the SRSG, where a business enterprise is controlled by the state, or where its acts can be attributed otherwise to the state, an abuse of human rights by the business enterprise may entail a violation of the state's own international law obligations. *Ibid.*, Para. 4.

48 M. Rajavuori, *Corporate Human Rights Due Diligence and Congolese Conflict Mineral Supply Chains*, Master of Laws thesis, Law Faculty of the University of Turku, 2011.

to put into effect their rights and powers in judicial and other proceedings (to enforce their rights) at the international level.⁴⁹ Already in its *Reparation for Injuries* opinion, the ICJ noted that there is neither a uniform nature nor content for the subjects of international law.⁵⁰ In general, there is no standard set of rights and obligations for each and every subject of international law, but ‘subject’ is a relative notion, the precise contents of which may differ from subject to subject and even between various subjects of the same category.⁵¹ At best, the legal situation can be characterised as complex, and the number of entities with personality for particular purposes is considerable. A great deal depends on the relation of the particular entity to the various aspects of the relevant substantive law. For instance, while the individual is in certain contexts regarded as a legal person, he/she has no treaty-making capacity under international law.⁵²

In light of the debates revolving around the question of international ‘subjectivity’, it is hardly surprising that many scholars view the very idea of ‘subjects’ in the international legal system as confusing, even misleading.⁵³ The confusion is seen to stem in part from the doctrine of ‘subjectivity’ being conflated with the notion of international legal personality and international capacity.⁵⁴ Some authors see ‘subjectivity’ and legal personality as being the same, while others do not equate these concepts. It has been underlined that the elements of international legal personality, international legal capacity and international ‘subjectivity’ should not be tightly linked.⁵⁵

Andrew Clapham has discussed the issue of international ‘subjectivity’ under the heading of ‘subjects as prisoners of doctrine’.⁵⁶ He considers the traditional treatment of the question regarding subjects of international law both confusing and incomplete. According to him, it makes complete sense to talk about limited international personality of corporations, but the problem is that the question of international legal personality has remained entangled with the misleading concept of subjects of international law and the related question of attributions of statehood under international law. Increasing the categories of international legal persons recognised under international law is assumed to lead to an expansion of the possible authors of international law. This is seen to threaten the viable development of a decentralised, state-centred international legal order.⁵⁷ In Clapham’s view, the concept of a subject of international law is often useless. While the role of non-state actors on the international plane cannot be ignored, the doctrine of ‘subjectivity’ developed to explain the framework of rights and duties under international law constrains the debate. Therefore, scholars are increasingly rejecting the whole notion of subjects and exposing the fact that there seem to be no commonly agreed rules to determine who can be classed as a subject. Clapham suggests concentrating on the rights and obligations of entities rather than their personality and moving from the debate on ‘subjectivity’ to the capacity of the entity to enjoy rights and bear obligations. Rights and obligations under international law should not depend on the ‘mysteries of subjectivity’.⁵⁸

Jennifer A. Zerk points to the fact that the development of human rights law and international economic law has dramatically increased the scope for participation in international law by non-state actors. According to her, rather than dividing participants into ‘subjects’ and ‘objects’ of international

49 See Cassese, *supra* note 1, pp. 72, 150. The ‘subjectivity’ of non-state entities is characterised as derivative. J. Klabbers, ‘(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors’, in J. Petman & J. Klabbers (eds.), *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi*, 2003, pp. 351-369, at p. 361.

50 The Court held: ‘The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community’. *Reparation for Injuries Suffered in the Service of the United Nations*, *supra* note 8, p. 178.

51 See Klabbers, *supra* note 2, p. 39.

52 See Brownlie, *supra* note 1, p. 68.

53 See e.g. Clapham, *supra* note 3, p. 80; Klabbers, *supra* note 2, p. 39.

54 See Klabbers, *supra* note 2, p. 39.

55 Meijknecht points out that international legal personality and international (legal) ‘subjectivity’ are not identical, but rather they are two different aspects of the fact that an entity enters the field of international law. See Meijknecht, *supra* note 3, pp. 24-25, 34.

56 See Clapham, *supra* note 3, pp. 59-63.

57 *Ibid.*, p. 59. Clapham mentions two fears that create resistance to the recognition of international legal personality for corporations. First, the fear that foreign corporations would somehow more easily be able to interfere in the political and economic affairs of states if they were acknowledged as possessing a degree of international personality. Second, the fear that these foreign corporations would be able to trigger excessive diplomatic protection for national companies of the host state where the foreign nationals are controlling shareholders in those companies, p. 78.

58 *Ibid.*, pp. 60-62, 68-69, 83.

law, as has traditionally been done, a more useful approach would be to consider the degree to which international law recognises the existence of different kinds of participants in the international legal system.⁵⁹ Rosalyn Higgins' criticism of the division of 'subjects' and 'objects' of international law is perhaps the most compelling. She has concluded that 'the whole notion of "subjects" and "objects" has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint'. Higgins notes that it is more helpful, and closer to perceived reality, to view international law as a particular decision-making process including a variety of participants.⁶⁰

Jan Klabbers has referred to the non-existence of any agreement among international lawyers about the identity of international law subjects.⁶¹ He describes the 'subjectivity' of international law as a status conferred by the academic community: a subject of international law is the legitimate subject of international research and reflection. Personality, in turn, is a status conferred by the legal system. The confusion results from the circumstance that the international legal system has no single authority endowed with the power to confer personality. Consequently, the very notion of subjects of international law is characterised by fluidity. Given the circumstance that different subjects may have different sets of rights and obligations under international law, the precise degree of rights and obligations is a matter of analysis. Klabbers concludes that personality in international law, like 'subjectivity', is but a descriptive notion: useful to describe a state of affairs, but normatively empty, as neither rights nor obligations flow from it automatically. Personality is by no means a threshold that must be crossed before an entity can participate in international legal relations; instead, once an entity does participate, it may be described as having a degree of international legal personality.⁶²

3. Rethinking 'subjectivity' in international law – discarding the doctrine altogether?

The creation of large multinational corporations and the ensuing increase in corporate power have made corporations increasingly visible actors in international relations. Presently, corporate entities enjoy a considerable number of rights and obligations deriving from international law. The role of corporations has also resulted in including multinational corporations among the subjects of international law. However, it appears that the doctrine of international 'subjectivity', at least in its present form, has difficulties accommodating non-state entities.⁶³ In the background one can detect states' hesitancy to broaden the circle of subjects and the fear of weakening the state-centric system of international regulation.⁶⁴ As discussed in this article, the doctrine of subjects of international law has also come under critical scrutiny by a number of scholars. Combining 'subjectivity' with such notions as personality and capacity in various – often vague – ways has rendered the doctrine confusing, even misleading, and out of step with the present-day needs of the international community. Many authors have suggested shifting the focus from the debate on the subjects of international law to the participants in international legal relations, concentrating on the capacity of an actor to enjoy rights and incur obligations under international law. A number of remarks appear to favour discarding the very doctrine of international 'subjectivity'.

If the doctrine of international 'subjectivity' were discarded and, for instance, the doctrine of participants in international legal relations introduced in its stead, it would still be necessary to ask if this 'trick' helps to solve the problems linked to the former. Perhaps the doctrine of participants in international legal relations is not as empty and 'mysterious' as that of 'subjectivity', but in order to move forward from

59 See Zerk, *supra* note 24, pp. 73-74.

60 R. Higgins, *Problems and Process. International Law and How We Use it*, 1994, pp. 49-50. Remarks on the subject-object dichotomy in international law, see also Meijknecht, *supra* note 3, pp. 46-48.

61 See Klabbers, *supra* note 49, p. 352.

62 See Klabbers, *supra* note 2, pp. 39, 51-52. Klabbers refers to views according to which the very metaphor of personality (in this case as regards international organisations) is misleading, p. 52. Also Arzt & Lukashuk deem it more important to concentrate on actual participation in the process of creating, making claims under, and enforcing international law, rather than focusing on the formal issues of international 'subjectivity' or international legal personality. See Arzt & Lukashuk, *supra* note 9, p. 156. R. Urueña puts forth interesting views on 'subjectivity' and participation in international law in R. Urueña, *No Citizens Here: Global Subjects and Participation in International Law*, Centre on Excellence in Global Governance Research, Faculty of Law, University of Helsinki, 2010.

63 See also Klabbers, *supra* note 49, p. 369.

64 See also *ibid.*, pp. 362, 364-365, 367; and Meijknecht, *supra* note 3, p. 551.

the confusion created by the ‘subjectivity’ doctrine, any doctrine introduced to replace it would also need to be clarified. Who are the relevant participants, what kinds of rights and obligations do they have under international law, and how are accountability and responsibilities to be concretised are some of the questions that would need to be answered. However, before we discard old concepts and introduce new ones, it may be worthwhile to consider if the existing doctrine of subjects of international law could be clarified and modified in such a way as to make it workable. It is quite possible that after some proper academic brainstorming the doctrine of international ‘subjectivity’ may well function as an umbrella concept for the roles of different participants in international legal relations, also pointing to their rights and obligations as well as making sense of accountability and responsibilities of various actors.

The Special Representative of the UN Secretary General on Business and Human Rights (SRSG) chose – and undoubtedly wisely so – to adopt the approach of ‘principled pragmatism’ in his work that enabled him to avoid entering endless debates on theories and interpretations of international law, including international ‘subjectivity’ characterised by disagreements and even deadlocks. The ‘Protect, Respect and Remedy’ Framework proposed by the SRSG provides a good basis for the development of the international legal system in the direction of increasing its ability to accommodate the accountability of corporations for human rights violations. Strengthening this accountability is crucial in filling the existing gaps in the area where the system of international law, including the allocation of responsibilities, does not correspond to reality. Far too often corporations escape any accountability, for instance, in situations when the host state is unwilling or unable to protect human rights. Furthermore, as the SRSG pointed out, there are serious gaps in the protection of human rights in conflict situations and in contexts having a state-business nexus.

What further complicates the issue of responsibilities nowadays is the privatisation of many functions, such as medical care, that in many states have been taken care of by the public sector. This privatisation development also concerns armed conflicts, when many states contract private firms to carry out direct military activities or activities supporting them. In these circumstances of the privatisation of conflicts the very question of state responsibility for violations of international law has become complicated and blurred.⁶⁵ This has also brought to the fore the question of the accountability of private corporations participating in activities in conflict situations.⁶⁶ Furthermore, it is not uncommon that many corporations working and investing in conflict zones or having other business links to conflicts are state-owned or otherwise state-controlled. These are just a few examples to highlight how challenging many present-day situations may be from the viewpoint of human rights protection which also have links to the debates on international ‘subjectivity’ and participation in international legal relations. There are major gaps in human rights protection when various state interests (such as economic and military ones) come into play. To fill these gaps the existing norms of international law on accountability and responsibilities require thorough rethinking and redirecting, and, in general, more responsible thinking particularly on the part of governments.

Paying attention to the roles and duties of various actors that are relevant to human rights protection is crucial, regardless of labels, i.e. whether they are called subjects, participants or something else. The role and duties of states are of the utmost importance, as is underlined by the SRSG in his reports. While it is crucial to strengthen accountability of all actors affecting the protection of human rights, the role of corporations as profit-creating actors and their different roles and capacities *vis-à-vis* states should be paid due regard in considerations of ‘translating’ human rights obligations for corporate actors.⁶⁷ Furthermore, there are compelling reasons for maintaining the international legal system in which states retain their principal position as the drafters of international law norms. States are – if not always in practice, at least potentially – more democratic actors than corporations. Governments must be able

65 These challenges are elaborated upon in K. Creutz, *Transnational Privatised Security and the International Protection of Human Rights*, publications of the Erik Castrén Institute of International Law and Human Rights, University of Helsinki, the Erik Castrén Institute Research Reports 19/2006.

66 For instance, it has been pointed out that in these contexts private security forces have often become part of the problem instead of becoming part of the solution. One of the solutions offered to this challenge is to consider private security firms as (modern) mercenaries in armed conflicts or agents of the state. At the same time it has been stated that this legal analysis fails to capture the full picture. See Clapham, *supra* note 3, p. 302.

67 See also Zerk, *supra* note 24, pp. 76-79.

to assess competing public interests and freely discharge their regulatory responsibilities for achieving social welfare objectives. It is precisely this capacity for performing important filtering functions that justifies the state-centric fiction of international law making.⁶⁸

68 See also Tully, *supra* note 22, pp. 330-332, 345.