## MODULE 04
### SUBJECTS OF INTERNATIONAL LAW

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INTRODUCTION

A subject is a concept upon which the rules confers rights and capacity and imposes duties and responsibility, Whereas an object enjoys and is not burdened by such competence The law commands its subjects but it merely regulates the use and disposition of objects. Subjects of law are those people on whom the law confers a capacity to perform particular act.\(^1\) Under the domestic or municipal law of a country, an individual is the primary subject, though law also confers capacity or legal personality to entities other than individuals such as companies, corporations and institutions.\(^2\)

These subjects are entitled to sue and to be sued or possess property or dispose of the property.\(^3\) Ordinarily its rules are for States, Generally it is the States who enter into treaties with each other and are thus bound by its provisions.

In the realm of International Law States are the primary subjects, according to traditional international law whereas, modern International Law has incorporated international organizations, international institutions and also certain other non-state entities such as, the Vatican City, even individuals today are considered as subjects of international law.\(^4\)

MEANING AND DEFINITION OF STATE

State is the main subject of international law. It is very difficult to define the term State, but certain jurist have made their endeavor to this respect\(^5\)

1. Salmond: State is a community of people which has been established for some objectives such as internal order and external security.
2. Oppenheim: the existence of state is possible only when people of state have settled under highest government authority and habitually follow its order.
3. H.L.A. Hart: State can be referred in two ways

\(^{1}\) Lauterpacht, International Law, p. 489  
\(^{3}\) Ibid, p.22  
\(^{4}\) Ibid, p.30  
\(^{5}\) A. James, Sovereign Statehood: The Basis of International Society, London, 1986
1) A population inhabiting in a territory live under that form of ordered government provided by a legal system which its characteristic structure of Legislature, Courts and primary rules

2) The government enjoys a vaguely defined degree of independence

4. Lawrence: State is a Society which is politically organized and its members are bound with each other by being under some central authority and most of the people automatically follow the rules of this central authority.

5. Stark: an ideal definition of the term state is not possible. But in the modern period it is finally settled as to what are the essential elements of State.

ESSENTIAL ELEMENTS OF A STATE

According to Art.1 of Montevideo Convention on Rights and Duties of States, 1933 "The state as a person of international law should possess the following qualifications:"6

a) A Permanent Population
b) A defined territory
c) Government, and
d) Capacity to enter into relation with other states

Sovereignty is also an essential element of Statehood. According to political thinkers, International Law has added one more essential element of Statehood i.e. ‘Capacity to fulfill obligations imposed by International Law’7. The famous jurist Holland has added one more essential element, namely, to some extent, ‘Civilization’.

KINDS OF DIFFERENT STATE IN INTERNATIONAL LAW

For the purposes of International law, States may be divided into following kinds

SOVEREIGN STATE

Independent States are fully sovereign members of the Family of Nations. They are termed in International Law as sovereign states. They are the normal type of subjects of

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6 International law does not require the structure of a state to follow any particular pattern: Western Sahara case, ICJ Reports, 1975, pp. 12

7 Shilpa Jain: Introduction to Public International Law (EBC 2016)
International Law, and exercise undivided authority over all persons and property within their borders and are independent of direct control by the other power.\(^8\)

Sovereign states are by international usage entitled to certain privileges and immunities. They are entitled to the privilege of sending diplomatic ministers to other states and of receiving representatives from them in return. They enter into treaties on their own name with other states. They meet at international conferences on the basis of perfect equality. In short, there is no party to intermeddle in their relations with other states. State like India, France United Kingdom etc. are sovereign.

**SEMI-SOVEREIGN STATES**

They are also called as dependent state. They independently have only a limited capacity for foreign relations and are imperfect subject of international law. They are subject to the authority of one or more other states.\(^9\) The idea of semi-sovereign necessarily implies a relation between a superior State and an inferior state or subject state. Superior state can legally impose its will and the inferior state is legally compelled to submit to that will.

**PROTECTORATE STATE**

In the case of a protectorate, a weak State seeks the protection of a strong State by the conclusion of a treaty, with the result that the important international business is left to the protecting state. The protecting state exercises a varying measure of control over the external relations and sometimes over internal affairs of the weak state depending upon the provisions of the treaty. Oppenheim calls the relationship a kind of international guardianship\(^10\)

**SIKKIM**

Sikkim, which is a small state embedded in the Himalayas lying between India and Tibet, was brought under the direct control of the Government of India in 1905, and continued to be a

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\(^8\) V.K. Ahuja, Public International Law (Lexis Nexus 2016)


\(^10\) Ibid p. 31
British protectorate since then. On Dec, 5 1950, the Govt. of India entered into a treaty with Sikkim whereby the latter would continue as a protectorate of India.\(^{11}\)

On April 23, 1975, the Constitution amendment bill was approved by both the houses of parliament by giving the status of full-fledged state to the Sikkim as demanded by the people of Sikkim. It becomes 22\(^{nd}\) State of Indian Union.

**BHUTAN**

Bhutan is the Protectorate of Union of India by virtue of the Treaty concluded between the two states in 1949, and the latter (India) is to advise, govern control and regulate the former’s (Bhutan) foreign relations and external affairs. Bhutan enjoys complete internal autonomy. In September 1971 the Bhutan was admitted as a member of the United Nations. Even after admission to the United Nations under, the 1949-treaty Bhutanese external affairs are to be conducted with the guidance of the Government of India.\(^{12}\)

**VASSAL STATE**

A vassal State is one which is completely under the suzerainty of another State. It has no position in International Law.

The suzerain absorbs all the functions of the Vassal State. A Vassal has no right of declaring war not of making alliances with foreign powers. In its foreign affairs, the vassal state possesses no power and all its foreign policies are governed by the State of which it is a Vassal State.\(^{13}\) There are, however, instances where vassal States have maintained certain international relations, and in such cases they have a limited international personality.

\(^{11}\) Ibid p. 35  
\(^{12}\) Gurdip Singh, International Law (2nd ed., 2011)  
\(^{13}\) V.K. Ahuja, Public International Law (Lexis Nexus 2016)
The Charter of the UNO introduced a new system of “trust-territories”. Article 77 of the Charter provides that the trusteeship system shall apply to;\textsuperscript{14}

a) Territories now held under mandate

b) Territories which may be detached from enemy states as a result of the Second world war; and

c) Territories voluntarily placed under the system by states responsible for their administration.

The trusteeship system does not apply to territories which have become members of the United Nations.

### DIFFERENCE BETWEEN PROTECTORATE AND VASSAL STATE

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<th>VASSAL STATE</th>
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<td>• Entrust its matters of security, defense and external affairs to another state</td>
<td>• Autonomous in its internal affairs, but completely dependent upon other state in external matters,</td>
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<td>• May become member of the international community.</td>
<td>• Not regarded a member of international community</td>
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<tr>
<td>• Sovereignty was taken by the country of which it becomes protectorate state.</td>
<td>• A vassal State is a Semi-sovereign State. Vassal state is bound by the treaty entered into by protectorate state</td>
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<tr>
<td>• Treaty entered into by the protecting state is not binding upon the protectorate state</td>
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### TRUST TERRITORIES

The Charter of the UNO introduced a new system of “trust-territories”. Article 77 of the Charter provides that the trusteeship system shall apply to;\textsuperscript{14}

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### NEUTRALIZED STATES

“A neutralized state is one whose independence and political and territorial integrity are guaranteed permanently by a collective agreement of great powers subject to the condition that the particular state concerned will never take up arms against another

state except to defend itself and will never enter into war”. States whose independence and neutrality are guaranteed for all future time by a treaty are known as “neutralized states”\(^{15}\)

The object of neutralization is to protect weak states from their powerful neighbors, but no state can be neutralized without its consent. e.g. Switzerland, Austria, Congo etc.

### HOLY SEA OR VATICAN CITY

Is a place where the religious head of Catholic Christians (Pope) resides. Holy Sea is smallest sovereign state. In the middle of 19\(^{th}\) century, the rulers of Italy seized the territory of Pope and occupied his capital. Rome. Consequently Pope went away and settled in his residential place called Vatican City. Since Pope was religious head, the Government of Italy passed a law in 1871 whereby some guarantee was given to Pope.

The said Act conferred some privileges and immunities upon Pope more or less equal to those which are enjoyed by Head of the States. In the year 1929 a treaty was concluded between Pope and the Government of Italy whereby Vatican City comprising of 100 acres of land was accepted as a state and Pope was conferred upon the right to enter into diplomatic relations with other states. The present position of Vatican City is that it is an international person and possesses all the rights and duties of a sovereign State. It is a neutral state. It is not a member of United Nations. Vatican City is an international person and is fully independent and sovereign State under international Law.

### INDIVIDUALS AS SUBJECTS AND OBJECT OF INTERNATIONAL LAW

Individuals are also treated to be the subject of international law although they enjoy lesser rights than states under international law, thus, it is no longer possible, as a matter of positive law, to regard states as the only subjects of international law, and there is an increasing disposition to treat individuals, within a limited sphere, as subjects of international law.

\(^{15}\) J.G.Strake, Introduction to International Law, (10th Ed. 1994), p. 31
In the beginning they were accepted as subjects of international law as an exception of the general rule, and number of jurist treated them as objects rather than the subject of international law. This view has now been discarded. In the recent times, several treaties have been concluded wherein rights have been conferred and duties have been imposed upon the individuals. Some of the provisions of international law under which rights have been conferred individuals and obligations that have been imposed upon them are as follows:

1. **PIRATES:** Under international law pirates are treated as enemies of mankind. Hence every state is entitled to apprehend them and punish them. Thus under international law it is the obligations of the parties not to commit piracy.\(^1\)

2. **HARMFUL ACTS OF INDIVIDUALS:** for the amicable and cordial relation of the states it is necessary that the individuals should not be involved in such acts as may prove detrimental for the good relation among states. Therefore under international law there are several such provisions which provide that the persons who commit such crimes may be punished. e.g. if a person causes harm to the ambassador of another state, then under international law he deserves to be given stringent punishment. A leading case on the point is Ex parte Petroff, 1971, decided by the Supreme Court of Australia, where in two persons, who were found guilty of throwing explosive substances on the Soviet Chancery, were convicted.

3. **FOREIGNERS:** According to international law, it is the duty of each state to give to them those rights which it confers upon its own citizens.

4. **WAR CRIMINALS:** War criminals can be punished under international law. This conception is based on the principle that rules relating to war crime are not only for the States, but individuals are also bound by them.

5. **ESPIONAGE:** Espionage is a crime under international law. Hence, when the spies are apprehended, they may be punished.

\(^{16}\)C. Norgaard, Position of the Individual in International Law, Leiden, 1962
6. **THE UNITED NATIONS CHARTER:**

   The preamble of the UN Charter begins with the words, “we the people of United Nations”.

   There are number of provision of the United Nations Charter, such as Article 1(3), Art. 13 (1) (b), Art. 55(c), Art. 62(3), Art. 68 and Art. 76 (c), which deals with individuals.

<table>
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<th>Article 1(3)</th>
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<td>To achieve international cooperation in</td>
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<td>solving international problems of an</td>
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<td>economic, social, cultural, or</td>
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<td>humanitarian character, and in</td>
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<td>promoting and encouraging respect for</td>
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<td>human rights and for fundamental</td>
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<td>freedoms for all without distinction as</td>
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<td>to race, sex, language, or religion;</td>
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| Art. 13 (1) (b) | The General Assembly shall initiate studies and make recommendations for the purpose of: b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. |

| Art. 55(c),     | With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of |
equal rights and self-determination of peoples, the United Nations shall promote:
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

| Art. 68. | The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions |
| Art. 76 (c) | The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; |

**UDHR, 1948**

This declaration mentions in detail the fundamental rights and freedoms of the individuals.
In the United Nations (UN) framework the term ‘multinational corporations’ was originally used and defined as ‘enterprises which own or control production or service facilities outside the country in which they are based’

*UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003* define the ‘transnational corporation’ as an ‘economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or

**GENOCIDE CONVENTION, 1948**: This convention adopted by the general Assembly imposes an obligation upon the individuals in respect of crimes of genocide. It is therefore clear that UNO has given much significance to the rights of

**Convention on the settlement of Investment disputes between States and the Nationals of other States.**

The persons who invest their money in foreign countries have been conferred upon certain rights against the State concerned.

**The International Covenant on Civil and Political Rights, 1966 and the Optional protocol**

Confer directly upon the individuals. These along with the UN Commission of Human Rights (now Human Rights Council since 19th June 2006)) have enabled the individuals to send petitions even against their own states.

**ROLE AND STATUS MNC’S**

In the United Nations (UN) framework the term ‘multinational corporations’ was originally used and defined as ‘enterprises which own or control production or service facilities outside the country in which they are based’

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collectively. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate 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.

MNCs have the capacity to flexibly move places of production and assets between countries. They structure management units independently of national borders and lose every tie to a nation state except for the formal nexus of incorporation. These characteristics are one of the main reasons why national legislators fail to put adequate checks on the power of MNCs, and why MNCs have moved into the focus of international law MNCs can thereby contribute to the economic and technological development of societies, but also harm human rights, damage the environment, or even commit crimes.

National legislation is often unable to create a stable regulatory environment in which MNCs can operate, as well as to exercise control over the harmful acts of entities which fragment their activities globally, operate in decentralized network structures, and flexibly relocate operations and profits. Economically weaker states depend on the investments of MNCs and may be unwilling to enact and enforce demanding human rights and environmental standards in order to enhance their attractiveness to foreign investors.

In this context it is important to discuss whether MNCs are subjects of international law and whether they have rights and obligations under International law. The focus will lie on four legal fields whose recent developments have particularly impacted the status of MNCs under international law: human rights protection and

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18 Andrew Clapham, Human Rights Obligations of Non-State Actors (OUP 2006) 199

19 Peter T. Muchlinski, Multinational Enterprises and the Law (2nd edn, OUP 2007) 6

20 Ibid p. 56
responsibilities, investment protection, environmental obligations, and accountability for international crimes.

**WHEATHER MNC’S ARE SUBJECTS OF INT. LAW**

Traditionally, international law was perceived as governing only the “mutual transactions between sovereigns”. With the rise of international organizations and international human rights law, however, the small circle of subjects of international law gradually expanded. Positivists assert that states – which remain the primary subjects of international law – can ‘upgrade’ non-state actors to subjects of international law by endowing them with rights and obligations. Non-state actors thus derive their subjectivity from states and are dependent on their recognition. Adhering to these formal prerequisites, the large majority of international legal scholars hold that MNCs do not possess international legal personality. A few international legal scholars, on the other hand, have recognized MNCs as subjects of international law. Some have adopted a *de facto* approach based on their significant participation at the level of international law.

Notwithstanding the discussion about their international legal subjectivity, it is widely recognized today that MNCs enjoy certain rights under international law, especially in the fields of international human rights law and investment protection. Therefore it is desirable to focus on ‘addressing which international rules apply to corporations rather than whether corporations are or are not subjects of international law’

**INTERNATIONAL HUMAN RIGHTS LAW**

**European Convention on Human Rights**

Art. 34 of the European Convention on Human Rights (ECHR or Convention) provides, ‘any person, non-governmental organization or group of individuals’ with the right to claim a violation of its rights before the Court, comprising corporations within the scope of ‘non-governmental organization’.

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21 Peter Muchlinski, ‘Corporations in International Law’ in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (OUP 2010).
Article 8 of the Convention may be construed as including the right to respect for a company’s registered office, branches or other business premises’. Art. 8(1) ECHR, which provides that ‘everyone has the right to respect for his private and family life, his home and his correspondence’.

**The Universal Declaration of Human Rights (UDHR)**

‘Every organ of society’ – a term which possibly includes MNCs ‘shall strive by teaching and education to promote respect for these rights and freedoms’.

**International Covenant on Economic, Social and Cultural Rights, (ICESCR)**

The Committee on Economic, Social and Cultural Rights observed with regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR) that ‘private enterprises are not bound by the Covenant’.

Art. 1 of the ECHR binds only the ‘high contracting parties to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.

**International Covenant on Civil and Political Rights (ICCPR)**

The UN Human Rights Committee, entrusted with overseeing the implementation of the International Covenant on Civil and Political Rights (ICCPR), has recognized that notwithstanding the lack of explicit wording, legal entities may enjoy certain rights under the Covenant, such as the freedom to manifest one’s religion or belief (Art. 18) and the freedom of association (Art. 22). However, according to Art. 1 of the Optional Protocol to the ICCPR, only individuals can claim the violation of their rights before the Human Rights Committee. Companies therefore have to rely on domestic fora in order to obtain protection of their rights.

**APPROACHES PROPOSED TO HOLD COMPANIES ACCOUNTABLE UNDER INTERNATIONAL HUMAN RIGHTS LAW.**

Guiding Principles on Business and Human Rights

OECD Guidelines for Multinational Enterprises

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

Global Compact

Self-regulation

Enforcement

MNCs incur no direct legal obligations under international human rights law and consequently no enforcement mechanism under international law exists. The picture changes, however, if one takes a look at the national level, where MNCs have been sued for human rights abuses before civil and criminal tribunals.

International investment law grants MNCs the most robust rights. Customary international law, bilateral and multilateral investment treaties, as well as agreements between MNC and host state, establish a set of rules for the protection of foreign direct investment.\(^{22}\)

Customary international law requires that for an expropriation to be lawful that it is undertaken in the public interest, without arbitrariness, and discrimination on the basis of nationality and accompanied by the payment of compensation.

The late 1950s saw the conclusion of the first bilateral investment treaties (BITs), designed to further and protect foreign direct investment. Today approximately 3,000 BITs are in force, and while no uniform standard exists, a typical BIT contains provisions on the following questions: personal and temporal applicability, definition of investment,

\(^{22}\) Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, OUP 2012) 99
treatment of foreign investment, expropriation, currency transfer, and dispute settlement.\textsuperscript{23}

\textbf{INTERNATIONAL ENVIRONMENTAL LAW}

Multilateral Environmental Agreements (MEAs) are addressed primarily at states and have at most indirect regulatory implications for MNCs. In accordance with the fundamental ‘polluter pays’ principle, a few specialized agreements establish civil liability rules for private actors which have the potential to cause particularly grave environmental damage, such as oil spills or nuclear leakages.\textsuperscript{24} All of these instruments rely on domestic implementation, and require the contracting parties to establish the necessary enforcement mechanisms.

Noteworthy are also the provisions on sustainable development in the non-binding OECD Guidelines and Agenda 21, last reaffirmed at the Rio+20 conferences. Compared to international human rights law, self-regulation by companies through codes of conduct or certification systems, e.g. so called eco-labels, is more developed.\textsuperscript{25} While the systems’ institutional designs vary considerably, many provide for third- or second-party conformity assessments and a few contain dispute settlement or appeal mechanisms.

\textbf{INTERNATIONAL CRIMINAL LAW}

International criminal law does not and has never provided for jurisdiction over legal persons. Already the first international criminal tribunal, the International Military Tribunal in Nuremberg, only exercised jurisdiction over individuals.\textsuperscript{26} It famously held: ‘Crimes against International Law are committed by men, not by abstract entities, and

\textsuperscript{23} Ibid p. 66
\textsuperscript{25} Ibid p. 76
\textsuperscript{26}Bismuth (n 26) 209; Harmen van der Wilt, ‘Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities’ (2013) 12 Chinese Journal of International Law 43, 45
only by punishing individuals who commit such crimes can the provisions of International Law be enforced’. 27

The 1998 Draft Statute of the International Criminal Court, on the other hand, provided that ‘the Court shall also have jurisdiction over legal persons, with the exception of states, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives’. 28 This approach was later abandoned, firstly because corporate criminal accountability is unknown to many domestic legal systems, which would have caused difficulties for the application of the complementarity principle, and secondly because some feared that states might be considered hypocritical if they established criminal responsibility for every entity except for themselves.

The extension of jurisdiction to corporate entities made it onto the agenda of the 2010 Kampala Review Conference, but received only limited attention due to the strong focus on the crime of aggression. There are, however, several domestic jurisdictions which recognize the criminal liability of legal persons, among them Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom, and the United States. It is also noteworthy that several international instruments contain criminal liability provisions for legal persons, such as the European Convention on the Protection of the Environment through Criminal Law, the United Nations Convention against Corruption, the United Nations Convention on the Suppression of the Financing of Terrorism and the United Nations Convention against Transnational Organized Crime.29

All of these conventions oblige the state parties to establish the liability of legal persons for the commission of crimes as defined under the respective instrument. Liability is, however, never reduced to criminal liability alone, but leaves the Member States a leeway to adopt administrative or civil measures instead.

28Draft Statute for the International Criminal Court (1998) UN Doc A/Conf.183/2/Add. 1, art 23
The individuals have become a subject of international law not having the same quality as a state but capable of asserting his right himself before some international tribunals although lacking procedural capacity to bring actions in most cases.

Article 34 of the Statute of ICJ\(^{30}\) should be amended in order that individuals may have access to the court. Thus slowly and gradually individuals are occupying place of importance under international law. They are no more mere objects of international law. They are in fact the subjects of international law. It can not however denied that even today States are the main subjects of international law and the bulk of international law deals with their rights and duties.

It has been seen in this contribution that, on the one hand, MNCs can contribute to economic and technological development, increasing the wealth and the living conditions of society. They therefore merit protection against undue government interference and for the safeguarding of a stable and reliable business environment. On the other hand, MNCs can severely impact human rights or the environment and even commit crimes for which they should be held accountable. Both objectives are insufficiently achieved at the domestic level. MNCs defy concepts of nationality and elude the grip of the unwilling or unable national legislator.

But the turn to international law has encountered difficulties as well. Lengthy debates about the international legal subjectivity of MNCs have precluded involvement with the

\(^{30}\)1. Only states may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted there under is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.
substantive question of the rights and obligations of companies under international law. Subjectivity has been used as a threshold, waiting the positive granting of rights and obligations by states. This cannot, however, hide the fact that MNCs already enjoy considerable rights under international investment law and under international human rights law. They can ensure protection of their assets before domestic courts and through arbitration processes and can claim violations of their rights before the ECtHR.

Conversely, MNCs do not have binding obligations under international law. Most importantly, they are not bound by international human rights law, notwithstanding a range of initiatives, attempting to create both voluntary and non-voluntary instruments. At most, they bear certain responsibilities not to harm human rights, but implementation and enforcement depend on the respective government authorities.