New Approaches to the International Legal Personality of Multinational Corporations
Towards a Rebuttable Presumption of Normative Responsibilities

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1. Introduction

In the contemporary perspective of some multinational corporations being more economically powerful than many states,[1] it is virtually self-evident that these entities are commonly considered "a major, perhaps *the* major, phenomenon of the international economy today".[2] Furthermore, this category of non-state actors is generally regarded as one of the "driving forces" of the various processes of globalization.[3] However, multinational corporations are not only from an economic perspective influential participants in the current international system. Rather, they are also to a growing extent participating, albeit in most cases still indirectly, in the international law-making as well as the law-enforcement processes, thereby considerably contributing to the "inherent heterogeneity of modern partnerships in international law-making and international law adjudication".[4] Multinational corporations played a key role, *inter alia*, in the adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[5] In addition, these

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[1] On this perception see only 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; Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC', in P. Alston (ed), *The EU and Human Rights* (1999) 553; Chesterman, 'Oil and Water: Regulating the Behavior of Multinational Corporations through Law', 36 *New York University Journal of International Law and Politics* (2004) 307.

[2] Cox, 'Labor and the Multinationals', in G. Modelski (ed), *Transnational Corporations and World Order* (1979) 414 (italic emphasis in the original); see also, e.g., Petersmann, 'International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order', in R. S. J. Macdonald and D. M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983) 227, at 251; P. Dicken, *Global Shift: Reshaping the Global Economic Map in the 21st Century*, 4th ed. (2003) 198 *et seq.*

[3] Ietto-Gillies, 'The Role of Transnational Corporations in the Globalisation Process', in J. Michie (ed), *Handbook of Globalisation* (2003) 139, at 144; J. Kleinert, *The Role of Multinational Enterprises in Globalization* (2004) 28; Jarczewska-Romaniuk, 'Corporations in the Process of Globalization', 12 *Polish Quarterly of International Affairs* (2003) 124, at 145; generally on the various processes of globalization see only Delbrück, 'Globalization of Law, Politics, and Markets – Implications for Domestic Law – A European Perspective', 1 *Indiana Journal of Global Legal Studies* (1993) 9.

[4] Dupuy, 'Proliferation of Actors', in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (2005) 537, at 541.

[5] For a detailed analysis see, e.g., S. K. Sell, *Private Power, Public Law* (2003); D. Matthews, *Globalising Intellectual Property Rights – The TRIPs Agreement* (2002); M. P. Ryan, *Knowledge Diplomacy – Global Competition and the Politics of Intellectual Property* (1998).

entities are – to mention only one further example – often involved in the various phases of WTO dispute settlement proceedings[6] – a development which has already been appropriately characterised as the evolution of "public-private partnerships in WTO litigation".[7]

The increasingly important role of multinational corporations as economic and political actors on the international scene results in chances for, but especially also risks to, the promotion of community interests,[8] also known as global public goods,[9] such as, for example, the protection of human rights and the environment, as well as the enforcement of core labour and social standards. On the one side, these non-state actors, because of their potential influence on the home as well as the host countries, could in the course of their economic and political activities effectively contribute to the enforcement of the above mentioned international community interests.[10] On the other side, however, multinational corporations also have the potential to frustrate the universal promotion and protection of the environment, as well as human and labour

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[6] See only Tietje/Nowrot, 'Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law', 5 *European Business Organization Law Review* (2004) 321, at 334 *et seq.*; Reinisch/Irgel, 'The Participation of Non-Governmental Organisations (NGOs) in the WTO Dispute Settlement System', 1 *Non-State Actors and International Law* (2001) 127; Ohlhoff/Schloemann, 'Transcending the Nation-State? Private Parties and the Enforcement of International Trade Law', 5 *Max Planck Yearbook of Untited Nations Law* (2001) 675.

[7] G. C. Shaffer, *Defending Interests – Public-Private Partnerships in WTO Litigation* (2003); Shaffer, 'The Blurring of the Intergovernmental: Public-Private Partnerships behind US and EC Trade Claims', in M. A. Pollack and G. C. Shaffer (eds), *Transatlantic Governance in the Global Economy* (2001) 97; Arup, 'The State of Play of Dispute Settlement "Law" at the World Trade Organization', 37 *JWT* (2003) 897, at 905.

[8] See thereto only Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994) 217, at 235 *et seq.*; Delbrück, '"Laws in the Public Interest" – Some Observations on the Foundations and Identification of *erga omnes* Norms in International Law', in V. Götz, P. Selmer and R. Wolfrum (eds), *Liber amicorum Günther Jaenicke* (1998) 17, at 29 *et seq.*; Frowein, 'Das Staatengemeinschaftsinteresse – Probleme bei Formulierung und Durchsetzung', in K. Hailbronner, G. Ress and T. Stein (eds), *Staat und Völkerrechtsordnung – Festschrift für Karl Doehring* (1989) 219.

[9] On the notion of global public goods see, e.g., Kaul/Grunberg/Stern, 'Defining Global Public Goods', in I. Kaul, I. Grunberg and M. A. Stern (eds), *Global Public Goods – International Cooperation in the 21st Century* (1999) 2; Chen, 'International Institutions and corporate governance', in J. Chen (ed), *International Institutions and Multinational Enterprises: Global Players – Global Markets* (2004) 6; Drahos, 'The Regulation of Public Goods', 7 *JIEL* (2004) 321.

[10] With regard to these positive potentials of multinational corporations see only Kline, 'Political Activities by Transnational Corporations: Bright Lines versus Grey Boundaries', 12 *Transnational Corporations* (No. 1, 2003) 1; G. F. Schuppert, *Staatswissenschaft* (2003) 883 *et seq.*; Lietzmann, 'Nichtregierungsorganisationen als Gemeinwohlakteure', in G. F. Schuppert and F. Neidhardt (eds), *Gemeinwohl – Auf der Suche nach Substanz* (2002) 297, at 310; K. Nowrot/Y. Wardin, *Liberalisierung der Wasserversorgung in der WTO-Rechtsordnung – Die Verwirklichung des Menschenrechts auf Wasser als Aufgabe einer transnationalen Verantwortungsgemeinschaft* (2003) 56 *et seq.*

rights either directly through their own conduct or indirectly by way of supporting state actors, predominantly in oppressive regimes, in their respective actions.[11]

In view of this seemingly quite ambivalent potential of multinational corporations regarding the protection and promotion of global public goods,[12] the question arises whether these non-state actors, in addition to their de facto influential position in the current international system, are also in a normative sense integrated in the international legal order, and thus under an obligation to contribute, *inter alia*, to the protection of human rights, core labour and social standards as well as the environment or whether the multinational corporation – as has recently been reiterated – "remains 'outside the tent' in terms of international law".[13] Considering the overwhelming importance of this issue for the future direction and consequences of the ongoing processes of globalization, it is hardly surprising that an intensive debate – as evidenced by the ever-growing literature on this topic[14] – is currently taking place with regard to the need and possibilities for making multinational corporations responsible for the promotion of international community interests. By adding a number of new thoughts, this article is meant to be a small contribution to the ongoing discussion on this evolving issue.

2. An Overview: The Subjectivity of Multinational Corporations in Light of the Traditional Prerequisites of International Legal Personality

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[11] From the numerous literature on this issue see, e.g., Paust, 'Human Rights Responsibilities of Private Corporations', 35 *Vanderbilt Journal of Transnational Law* (2002) 801, at 817 *et seq.*; Clapham/Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', 24 *Hastings International and Comparative Law Review* (2001) 339; Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where From Here?', 19 *Connecticut Journal of International Law* (2003) 1; Dine, *supra* note 1, at 11 *et seq.*

[12] For a similar assessment see, e.g., Reinisch, 'Governance Without Accountability?', 44 *GYIL* (2001) 270, at 287; Sally, 'Public Policy and the Janus Face of the Multinational Enterprise: National Embeddedness and International Production', in P. Gummett (ed), *Globalization and Public Policy* (1996) 64; Jacoby, 'Multinational Corporations and National Sovereignty', in P. M. Boarman and H. Schollhammer (eds), *Multinational Corporations and Governments – Business-Government Relations in an International Context* (1975) 3, at 13.

[13] Carver, 'Remedies for Wrongful Acts of Transnational Corporations: Alien Torts, BITs or International Compensation', in International Law Association (ed), *Report of the Seventy-First Session* (2004) 430, at 431.

[14] From the numerous literature see only the contributions by Kinley/Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', 44 *Virginia Journal of International Law* (2004) 931; Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises', in M. T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2000) 75; Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal* (2001) 443; Muchlinski, 'The Development of Human Rights Responsibilities for Multinational Enterprises', in R. Sullivan (ed), *Business and Human Rights* (2003) 33; Meyer, 'Activism and Research on TNCs and Human Rights: Building a New International Normative Regime', in J. G. Frynas and S. Pegg (eds), *Transnational Corporations and Human Rights* (2003) 33; Aguierre, 'Multinational Corporations and the Realisation of Economic, Social and Cultural Rights', 35 *California Western International Law Journal* (2004) 53.

According to the currently still predominant view among international legal scholars, not all of the various different entities participating in contemporary international relations can be regarded as international legal persons, even if they may have some degree of influence on the international society. De facto participation is not equivalent to acting on the international scene in legally relevant ways, and thus does not convey the status of a subject of international law.[15] Rather, international legal personality requires some form of community acceptance through the granting by states of rights and/or obligations under international law to the entity in question.[16] There are in general no systematic reasons why non-state entities may not participate in the international legal system as legally recognized actors, and thus no *numerus clauses* of subjects of international law exists.[17] However, on the basis of these generally recognized prerequisites for achieving international legal personality,[18] the currently still prevailing view among international legal scholars is that multinational corporations cannot be regarded as subjects of international law in the sense of being addressees of international legal obligations to promote the realization of the global public goods.[19]

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[15] See, e.g., G. Dahm/J. Delbrück/ R. Wolfrum, *Völkerrecht*, Vol. I/1, 2nd ed. (1989) 21 *et seq.*; M. N. Shaw, *International Law*, 5th ed. (2003) 176 *et seq.*; A. Verdross/B. Simma, *Universelles Völkerrecht*, 3rd ed. (1984) § 446; A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001) 227.

[16] See only Sir R. Jennings/Sir A. Watts, *Oppenheim's International Law*, Vol. I, Introduction and Part 1, 9th ed. (1992) 16; I. Brownlie, *Principles of Public International Law*, 6th ed. (2003) 57; J. Crawford, *The Creation of States in International Law* (1979) 25; P. Fischer/H. F. Köck, *Völkerrecht*, 6th ed. (2004) 109; Menon, 'The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine', 1 *Journal of Transnational Law and Policy* (1992) 151, at 152 *et seq.*; Jägers, 'The Legal Status of the Multinational Corporation under International Law', in M. K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 259, at 262.

[17] Mosler, 'Die Erweiterung des Kreises der Völkerrechtssubjekte', 4 *BDGVR* (1961) 39, at 71; P. C. Jessup, *A Modern Law of Nations* (1949) 21 *et seq.*; Tietje, 'Die Beilegung internationaler Investitionsstreitigkeiten', in T. Marauhn (ed), *Streitbeilegung in den internationalen Wirtschaftsbeziehungen – Völkerrechtliche Einhegung ökonomischer Globalisierungsprozesse* (2005) 47, at 61; and as early as 1927 H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 79.

[18] On the discussion about further prerequisites of international legal personality being suggested in the literature see only Mosler, 'Réflexions sur la Personnalité Juridique en Droit International Public', in *Mélanges Offerts a Henri Rolin – Problèmes de Droit des Gens* (1964) 228, at 231 *et seq.*; Barberis, 'Nouvelles Questions Concernant la Personnalité Juridique Internationale', 179 *RdC* (1983) 145, at 160 *et seq.*; M. Hempel, *Die Völkerrechtssubjektivität internationaler nichtstaatlicher Organisationen* (1999) 56 *et seq.*; as well as, also from a historical perspective, recently the comprehensive analysis by J. E. Nijman, *The Concept of International Legal Personality* (2004) 29 *et seq.*

[19] See, e.g., P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997) 102; Carver, *supra* note 13, at 431; Rigaux, 'Transnational Corporations', in M. Bedjaoui (ed), *International Law: Achievements and Prospects* (1991) 121, at 129; C. Tomuschat, *Human Rights – Between Idealism and Realism* (2003) 91; Zemanek, 'The Legal Foundations of the International System', 266 *RdC* (1997) 9, at 46 *et seq.*; Sanders, 'Codes of conduct and sources of law', in P. Fouchard, P. Kahn and A. Lyon-Caen (eds), *Le droit des relations économiques*

Although it has already for quite some time been argued in the legal literature that international human rights treaties may be interpreted as also being directly applicable to private actors such as multinational corporations,[20] the majority of international legal scholars, by taking recourse to the drafting history of the respective conventions and the teleological method of treaty interpretation, has quite convincingly demonstrated that human rights treaties as well as, for example, the increasing number of international conventions aimed at combating bribery, do not impose direct obligations on any other entity than the states being parties to the particular convention.[21] Furthermore, despite some notable recent developments, such as attempts to enforce alleged human rights obligations towards corporations before domestic courts in the

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internationales – Études offertes à Berthold Goldman (1982) 281, at 295; Arzt/Lukashuk, 'Participants in International Legal Relations', in L. Fisler Damrosch, G. M. Danilenko and R. Müllerson (eds), *Beyond Confrontation* (1995) 61, at 75; Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises', in N. Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980) 3, at 8; S. Hobe/O. Kimminich, *Einführung in das Völkerrecht*, 8th ed. (2004) 158; Hailbronner, 'Der Staat und der Einzelne als Völkerrechtssubjekte', in W. Graf Vitzthum (ed), *Völkerrecht*, 3rd ed. (2004) 149, at 167; H. Booysen, *Principles of International Trade Law as a Monistic System* (2003) 55; for a recent overview on the respective opinions in the legal literature see also Dumberry, 'L'Entreprise, Sujet de Droit International? Retour sur la Question a la Lumiere des Developpements Recents du Droit International des Investissements', 108 *RGDIP* (2004) 103, at 105 *et seq.*

[20] In this connection see only Paust, 'The Reality of Private Rights, Duties, and Participation in the International Legal Process', 25 *Michigan Journal of International Law* (2004) 1229, at 1242 *et seq.*; Paust, *supra* note 11, at 813 *et seq.*; N. M. C. P. Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (2002) 36 *et seq.* This argumentation has to be differentiated from the issue of whether the state parties to an international convention can in certain circumstances be under an obligation to ensure the realization of human rights in relations exclusively involving individuals or other private actors, on the last mentioned topic see, e.g., A. Clapham, *Human Rights in the Private Sphere* (1993) 89 *et seq.*; Clapham, 'The 'Drittwirkung' of the Convention', in R. S. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993) 163; A. Peters, *Einführung in die Europäische Menschenrechtskonvention* (2003) 15 *et seq.*; Kamminga, 'Corporate Obligations under International Law', in International Law Association (ed), *Report of the Seventy-First Session* (2004) 422, at 424.

[21] See thereto Tomuschat, 'Grundpflichten des Individuums nach Völkerrecht', 21 *AVR* (1983) 289, at 304 *et seq.*; Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements', in H. Fischer *et al.* (eds), *Krisensicherung und Humanitärer Schutz – Festschrift für Dieter Fleck* (2004) 573, at 574; Delbrück, 'Third-Party Effects of Fundamental Rights through Obligations under International Law?', 12 *Law and State* (1975) 61, at 64 *et seq.*; Kamminga, *supra* note 20, at 423 *et seq.*; Peters, *supra* note 20, at 15; C. Grabenwarter, *Europäische Menschenrechtskonvention* (2003) 121 *et seq.*; Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights', 46 *NILR* (1999) 171, at 175; Schmalenbach, 'Multinationale Unternehmen und Menschenrechte', 39 *AVR* (2001) 57, at 65 *et seq.*; as well as recently the Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/2005/91, 15 February 2005, paras. 7 (a), 50.

United States,[22] as well as in the realm of so-called "soft law" the adoption of the "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" by the UN Sub-Commission on the Promotion and Protection of Human Rights on 13 August 2003[23] (which, however, received a rather "cool" response by the Commission on Human Rights on 20 April 2004[24]), one cannot but agree with the above mentioned predominant view that multinational corporations have neither under treaty law nor in the realm of customary international law[25] – except for a small number of very specific regulations[26] – received a

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[22] From the numerous literature on this issue see only S. Joseph, *Corporations and Transnational Human Rights Litigation* (2004) 21 *et seq.*; Jägers, *supra* note 20, at 179 *et seq.*; but see also the judgement of the United States Supreme Court in *Sosa v. Alvarez-Machain et. al.*, 124 S. Ct. 2739 (2004), also reprinted in 43 *I.L.M.* (2004) 1390, which, according to *Shamir*, 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility', 38 *Law and Society Review* (2004) 635, at 642, is probably "significantly limiting the type of future claims that may be brought against MNCs"; for a related view see also, e.g., Carver, *supra* note 13, at 433 ("Thus, the category of potential claim is not closed; but the threshold that will now have to be overcome in order to use the ATS is much higher than had been supposed in the wake of *Filartiga*.") (italic emphasis in the original).

[23] Sub-Commission resolution 2003/16, 13 August 2003, para. 2, reprinted in: Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-Fifth Session, UN Doc. E/CN.4/2004/2, E/CN.4/Sub.2/2003/43, 20 October 2003, 51 *et seq.*; on the drafting history and contents of the "UN Norms" see only Weissbrodt/Kruger, 'Business and Human Rights', in M. Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide* (2003) 421; Weissbrodt/Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *AJIL* (2003) 901; Muchlinski, 'Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations', 3 *Non-State Actors and International Law* (2003) 123, at 135 *et seq.*; K. Nowrot, *Die UN-Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights – Gelungener Beitrag zur transnationalen Rechtsverwirklichung oder das Ende des Global Compact?* (2003) 5 *et seq.*

[24] Commission on Human Rights decision 2004/116, 20 April 2004, reprinted in: Commission on Human Rights, Report on the Sixtieth Session, UN Doc. E/2004/23, E/CN.4/2004/127, 332 *et seq.*; see thereto Nowrot, 'Nun sag, wie hast du's mit den Global Players? Fragen an die Völkerrechtsgemeinschaft zur internationalen Rechtsstellung transnationaler Unternehmen', 79 *Die Friedens-Warte* (2004) 119, at 137; as well as generally Kamminga, *supra* note 20, at 427 ("No doubt the Norms will not be adopted very soon by the Commission on Human Rights or its parent bodies and no doubt the drafting may be improved here and there.").

[25] Generally on the non-recognition of international legal obligations of multinational corporations under customary international law see, e.g., Tomuschat, *supra* note 19, at 91; Hobe/Kimminich, *supra* note 19, at 158; Zemanek, *supra* note 19, at 47; Karl, 'Aktuelle Entwicklungen im Internationalen Menschenrechtsschutz', in W. Hummer (ed), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende* (2002) 275, at 303; Schmalenbach, *supra* note 21, at 65 *et seq.*

[26] See, e.g., Art. III of the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, being replaced by its 1992 Protocol as amended in 2000; as well as Art. 137

sufficient degree of normative recognition by states and international organizations with regard to the imposition of obligations unter international law.

3. Increasing Inadequateness of the Traditional Approach to International Legal Personality

However, it appears to be increasingly questionable whether these thus far almost generally recognized prerequisites for the achievement of international legal personality in itself – namely the explicit granting by states of rights or duties under international law to the entity in question – can in light of the changing structure of the international system still be regarded as an appropriate approach for the identification of normative responsibilities of influential non-state actors on the international scene.

The starting point of this criticism is the widely shared perception that the normatively binding force of international law is based on the necessity of this legal order for the "satisfaction of needs and the pacification of social life".[27] Thus it is the underlying purpose of the international legal order to pursue international stability and to avoid disputes and the arbitrary use of power.[28] Based on the so-called notion of "positive peace", this pacification of international relations also encompasses, *inter alia*, the protection of human rights and the environment as well as the creation of conditions of social justice.[29] Therefore, by transforming into what has already been called a "comprehensive blueprint for social life",[30] international law

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of the United Nations Convention on the Law of the Sea of 10 December 1982, see thereto only Kamminga, *supra* note 20, at 424.

[27] Dahm/Delbrück/Wolfrum, *supra* note 15, at 40 *et seq.*; Delbrück, 'Peace Through Emerging International Law', in J. Delbrück, *Die Konstitution des Friedens als Rechtsordnung* (1996) 275, at 283; for a related view see, e.g., R. Higgins, *Problems and Process – International Law and how we use it* (1994) 1; Mosler, 'Völkerrecht als Rechtsordnung', 36 *ZaöRV* (1976) 6, at 34; Sir G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *RdC* (1957) 1, at 38 *et seq.*; D. P. O'Connell, *International Law*, Vol. I, 2nd ed. (1970) 83; Lim, 'Authority and Personality: Non-State Entities as Law-Givers?', in C. Harding and C. L. Lim (eds), *Renegotiating Westphalia – Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (1999) 53, at 63.

[28] See, e.g., Watts, 'The International Rule of Law', 36 *GYIL* (1993) 15, at 21 *et seq.*; Jessup, 'The Subjects of a Modern Law of Nations', 45 *Michigan Law Review* (1947) 383, at 384; Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals', 31 *New York University Journal of International Law and Politics* (1999) 697, at 704; Higgins, 'International Law in a Changing International System', 58 *Cambridge Law Journal* (1999) 78, at 95; Howe, 'The Role of International Law in World Affairs', 33 *ICLQ* (1984) 737.

[29] On the notion of "positive peace" see only Wolfrum, 'Article 1', in B. Simma (ed), *The Charter of the United Nations – A Commentary*, Vol. I, 2nd ed (2002) paras. 8 *et seq.*; Randelzhofer, 'Der normative Gehalt des Friedensbegriffs im Völkerrecht der Gegenwart', in J. Delbrück (ed), *Völkerrecht und Kriegsverhütung* (1979) 13; Hobe, 'The Era of Globalisation as a Challenge to International Law', 40 *Duquesne University Law Review* (2002) 655, at 658 *et seq.*

[30] Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *RdC* (1999) 9, at 63.

is more and more independent of the will and interests of individual states.[31] Rather, its substantive norms are increasingly focusing on the realization of community interests, the promotion of global public goods[32] – a process that for valid reasons has already been labelled the "constitutionalization of international law".[33] Thereby, the mechanisms for the enforcement of the values covered by this notion of "positive peace" have to be anchored in the international legal order itself, since "a system of peace which is not at the same time a system of law cannot exist".[34]

In order to pursue these goals, being necessary for the continued existence of the international community,[35] in an effective way – and it is inherent to every legal order to strife for effectiveness[36] – the development of international law, being "a realistic legal system",[37] is already in general fundamentally dependent upon and because of the open character of this legal order[38] also capable of a close conformity to the changing realities on the international scene,[39]

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[31] Tomuschat, 'Obligations Arising for States Without or Against their Will', 241 *RdC* (1993) 195; Tietje, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung', 118 *Deutsches Verwaltungsblatt* (2003) 1081, at 1092 *et seq.*; K. Nowrot, *Global Governance and International Law* (2004) 14 *et seq.*

[32] Simma, *supra* note 8, at 235 *et seq.*; Delbrück, 'Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State', 11 *Indiana Journal of Global Legal Studies* (2004) 31, at 32 *et seq.*; Tomuschat, 'The Complementarity of International Treaty Law, Customary International Law, and Non-Contractual Lawmaking', in Wolfrum/Röben (eds), *supra* note 4, 401, at 407; Riedel, 'International Environmental Law – A Law to Serve the Public Interest? – An Analysis of the Scope of the Binding Effect of Basic Principles (Public Interest Norms)', in J. Delbrück (ed), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest* (1997) 61; Tietje, 'Recht ohne Rechtsquellen? Entstehung und Wandel von Völkerrechtsnormen im Interesse des Schutzes globaler Rechtsgüter im Spannungsverhältnis von Rechtssicherheit und Rechtsdynamik', 24 *Zeitschrift für Rechtssoziologie* (2003) 27, at 39 *et seq.*; *Fassbender*, 'Die Souveränität des Staates als Autonomie im Rahmen der völkerrechtlichen Verfassung', in H.-P. Mansel *et al.* (eds), *Festschrift für Erik Jayme*, Vol. II (2004) 1089, at 1093.

[33] See, e.g., Frowein, 'Reactions by not Directly Affected States to Breaches of Public International Law', 248 *RdC* (1994) 345, at 355 *et seq.*; Frowein, 'Konstitutionalisierung des Völkerrechts', 39 *BDGVR* (2000) 427; Delbrück, 'Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization', 11 *SZIER* (2001) 1, at 35; Thürer, 'Recht der internationalen Gemeinschaft und Wandel der Staatlichkeit', in D. Thürer, J.-F. Aubert and J. P. Müller (eds), *Verfassungsrecht der Schweiz* (2001) 37, at 41 *et seq.*

[34] Kewenig, 'The Contribution of International Law to Peace Research', 10 *Journal of Peace Research* (1973) 227, at 233.

[35] See thereto P. Allott, *Eunomia – New Order for a New World* (1990) 372; Mosler, 'International Legal Community', in R. Bernhardt (ed), *E.P.I.L.*, Vol. II (1995), 1251, at 1254.

[36] G. Radbruch, *Einführung in die Rechtswissenschaft*, 11th ed (1964) 13; Menzel, 'Das Völkerrecht und die politisch-sozialen Grundstrukturen der modernen Welt', in G. Picht and C. Eisenbart (eds), *Frieden und Völkerrecht* (1973) 401, at 409; W. H. Balekjian, *Die Effektivität und die Stellung nichtanerkannter Staaten im Völkerrecht* (1970) 8.

[37] A. Cassese, *International Law*, 2nd ed. (2005) 12.

[38] On the open character of the international legal order see only Crawford, 'International Law as an Open System', in J. R. Crawford (ed), *International Law as an Open System* (2002) 17;

thereby trying to perpetuate itself as an international legal system.[40] As a consequence, the recognition of international legal personality also has to orientate itself to the central aims pursued by the international legal order as well as to the changing sociological circumstances on the international scene.[41] Since it is the primary function of international subjectivity to be a technical means of implementing the substantive values of the international legal order,[42] international law is also with regard to its subjects doctrine not capable of keeping more than a marginal distance from reality.[43] Therefore, on the one side, the international legal order needs to set the relations between all the de facto powerful entities in the international system on a legal basis,[44] because international law's ordering and pacification functions are only being preserved

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Dahm/Delbrück/Wolfrum, *supra* note 15, at 30; Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law', 6 *Indiana Journal of Global Legal Studies* (1999) 579, at 613 *et seq.*

[39] *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174, at 178; Huber, 'Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft', 4 *Jahrbuch des öffentlichen Rechts der Gegenwart* (1910) 56, at 62; Charney, 'Transnational Corporations and Developing Public International Law', *Duke Law Journal* (1983) 748, at 769; *Friedmann*, 'The Changing Dimensions of International Law', 62 *Columbia Law Review* (1962) 1147, at 1155 *et seq.*; Higgins, *supra* note 27, at 49; Dahm/Delbrück/Wolfrum, *supra* note 15, at 69; Verdross/Simma, *supra* note 15, at § 68.

[40] On the argumentation that international law as an "autopoietic system" is constantly striving for self-perpetuation by, *inter alia*, "favouring claims that promote systematic order while coding as 'illegal' those claims that point toward anarchy and the death of the legal system" see recently D'Amato, 'International Law as an Autopoietic System', in Wolfrum/Röben (eds), *supra* note 4, 335, at 341 *et seq.*

[41] See, e.g., *Mosler*, 'The International Society as a Legal Community', 140 *RdC* (1974) 1, at 48; Wengler, 'Der Begriff des Völkerrechtssubjektes im Lichte der politischen Gegenwart', 51 *Die Friedens-Warte* (1951/53) 113, at 128 *et seq.*; *Meron*, 'International Law in the Age of Human Rights – General Course on Public International Law', 301 *RdC* (2003) 9, at 371; E. A. Duruigbo, *Multinational Corporations and International Law* (2003) 202 *et seq.*; Tietje/Nowrot, 'Völkerrechtliche Aspekte militärischer Maßnahmen gegen den internationalen Terrorismus', 44 *Neue Zeitschrift für Wehrrecht* (2002) 1, at 12; Peters, 'Wie funktioniert das Völkerrecht?', *Basler Juristische Mitteilungen* (2004) 1, at 19 *et seq.*; Hobe/Kimminich, *supra* note 19, at 64 *et seq.*; Bleckmann, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen', 37 *ZaöRV* (1977) 107, at 117.

[42] Mosler, 'Die Erweiterung des Kreises der Völkerrechtssubjekte', 22 *ZaöRV* (1962) 1, at 17; *Mosler*, 'Völkerrechtsfähigkeit', in K. Strupp and H.-J. Schlochauer (eds), *Wörterbuch des Völkerrechts*, Vol. 3, 2nd ed. (1962) 665; Bleckmann, *supra* note 41, at 117.

[43] See already Krüger, 'Das Prinzip der Effektivität, oder: Über die besondere Wirklichkeitsnähe des Völkerrechts', in D. S. Constantopoulos, C. T. Eustathiades and C. N. Fragistas (eds), *Grundprobleme des internationalen Rechts – Festschrift für Jean Spiropoulos* (1957) 265, at 281.

[44] G. Dahm/J. Delbrück/ R. Wolfrum, *Völkerrecht*, Vol. I/2, 2nd ed. (2002) 257; C. N. Okeke, *Controversial Subjects of Contemporary International Law* (1974) 217; Thürer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State', in R. Hofmann (ed), *Non-State Actors as New Subjects of International Law* (1999) 37, at 58; Allott, *supra* note 35, 372; Tietje/Nowrot, *supra* note 41, at 12; Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law

if the state-centric understanding is replaced by the perception of this legal regime as a *jus inter potestates*.[45] On the other side, international law furthermore has to legally discipline the conduct of all influential entities also in their interactions with less powerful – and thus being in need of protection – actors, in order to effectively and comprehensively enforce the normative principles enshrined in its legal structure.[46] To summarize, it is thus first and foremost "through subjects doctrine that the international allocation of values take place".[47]

In light of these findings, the traditional prerequisites for international legal personality can no longer be regarded as an adequate approach for the allocation of community interests through the identification of normative responsibilities of de facto powerful non-state actors in the international system.[48] As mentioned above, in the apparent absence of a sufficient degree of recognition by the international community through the imposition of international legal obligations by states on multinational corporations, it is under the currently still predominant subjects doctrine not possible to regard these influential entities as being normatively integrated in the international legal order in the sense of being legally required to contribute to the promotion of global public goods. However, an approach to international legal personality that is incapable of making all of the important actors in the international system subject to the "international rule of law"[49] creates intolerable gaps in the structure of the international normative

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and Legal Theory', 19 *Melbourne University Law Review* (1994) 893, at 894; S. Anderes, *Fremde im eigenen Land: Die Haftbarkeit transnationaler Unternehmen für Menschenrechtsverletzungen an indigenen Völkern* (2001) 212; Duruigbo, *supra* note 41, at 202 *et seq.*

[45] See Wengler, *supra* note 41, at 129; for a related perception see also Cassese, *supra* note 37, at 217 ("international law […] is gradually heading towards a *civitas maxima* (a human commonwealth encompassing individuals, States, and other aggregates cutting across boundaries of States)") (italic emphasis in the original).

[46] On the image of the international legal order as a structural system oriented towards to the realization of values see already Simma, 'Bemerkungen zur Methode der Völkerrechtswissenschaft', in H. von Bonin, E. Lang and H. G. Knitel (eds), *Festschrift für Ernst Kolb zum sechzigsten Geburtstag* (1971) 339, at 340; Menzel, *supra* note 36, at 408; Verosta, 'Rechtsgeschichte und Reine Rechtslehre: Zugleich ein Beitrag zum Problem der Beziehung zwischen Faktizität und Normativität', in S. Engel and R. A. Mètall (eds), *Law, State, and International Legal Order – Essays in Honor of Hans Kelsen* (1964) 347, at 364.

[47] Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors', in J. Petman and J. Klabbers (eds), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi* (2003) 351, at 369.

[48] See also, but with regard to the non-recognition of powerful private terrorist organizations, recently for example the strong criticism by Klabbers, *supra* note 47, at 353 *et seq.* ("That main point seems to be the point that September 11 demonstrates just how outdated the system of international law has become, and has allowed itself to become. […] Many of our international legal concepts, so September 11 suggests, are no longer able to deal with present-day developments, and the main cause is that international law has failed to seriously incorporate non-state actors into its framework. […] Either way, what emerges is a picture of conceptual helplessness: confronted with nasty behaviour from entities that are not generally to be considered states, the law runs into problems.").

[49] See thereto Watts, *supra* note 28, at 15 *et seq.*

order[50] and "imposes unnecessary risks on the inherently frail international legal system".[51] Thus, "if international law withholds legal status from effective […] entities, the result is a legal vacuum undesirable both in practice and principle".[52] The prevailing view thereby not only contradicts the character of international law as "a realistic legal system"[53] since "[n]ation states aside, TNCs are the most powerful actors in the world today and to not recognize that power would be unrealistic".[54] Rather, this traditional subjects doctrine also forestalls the realization of community interests being at the centre of the current international legal order, and – as a kind of still "living" but nevertheless not worth protecting "fossil" originating from the so-called "Westphalian system"[55] – thus contravenes the above mentioned evolving perception of international law as a "comprehensive blueprint of social life". "No accumulation of power should remain unchecked under a system of 'rule of law'" – as has been rightly pointed out by Daniel Thürer – "[t]his is a requirement dictated by the *raison du système international* as opposed to the *raison d'état* dominating the traditional world of international law".[56] The severe consequences of an international legal methodology that for the implementation of its underlying normative values does not adequately take into account the sociological realities in the international system have already been quite explicitly emphasized in 1924 by James L. Brierly: "To do that means that we are consenting to a divorce between the law and the ideas of justice prevailing in the society for which the law exists; and it is certain that as long as that divorce endures, it is the law which will be discredited."[57]

Therefore, the current predominant view concerning the prerequisites of international legal personality is neither compatible with the central aim of the current international legal order, nor is it reflective of the resulting necessity for international law to be in sufficient conformity with the changing realities in the international system. Rather, this traditional approach ignores to a disconcerting extent the vital connection between the above mentioned basis of the normatively binding force of international law and the granting of international legal personality that Chris N. Okeke concisely formulated more than thirty years ago: "[I]f

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[50] Bleckmann, *supra* note 41, at 117; see also Kamminga, *supra* note 20, at 425 ("accountability gap"); Allott, *supra* note 35, 372; Anderes, *supra* note 44, at 212; for a related argumentation in favour of the declaratory nature of the recognition of states Dahm/Delbrück/Wolfrum, *supra* note 15, at 191 *et seq.*

[51] Charney, *supra* note 39, at 754.

[52] Crawford, 'The Criteria for Statehood in International Law', 48 *BYIL* (1976/77) 93, at 145; Crawford, *supra* note 16, at 79.

[53] Cassese, *supra* note 37, at 12.

[54] Charney, *supra* note 39, at 768; see also Duruigbo, *supra* note 41, at 203.

[55] Generally on the traditional state-centric international system and its legal order that developed through and after the Westphalian peace treaties of 1648 Delbrück, *supra* note 33, at 2 *et seq.*; Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', in J. Habermas, *Der gespaltene Westen – Kleine politische Schriften X* (2004) 113, at 117 *et seq.*; Fatouros, 'International Law in the Era of Global Integration', in *Mélanges en l'Honneur de Nicolas Valticos – Droit et Justice* (1999) 131, at 139; with regard to the image of a "New Medievalism" as a possible "Post-Westphalian System" see only Friedrichs, 'The Neomedieval Renaissance: Global Governance and International Law in the New Middle Ages', in I. F. Dekker and W. G. Werner (eds), *Governance and International Legal Theory* (2004) 3 with further references.

[56] Thürer, *supra* note 44, at 58.

[57] Brierly, 'The Shortcomings of International Law', 5 *BYIL* (1924) 4, at 16.

international law failed to influence and to regulate adequately the course of international relations, it would have lost its value."[58]

4. The Need for a Partial Reconceptualization of International Legal Personality

If one rightly hesitates to draw the undesirable conclusion of calling into question the continued suitability of the international legal order to effectively implement its central aims, the increasing inadequateness of the traditional understanding of international legal personality inevitably leads to the need for an at least partial reconceptualization of subjects doctrine. Against this background, a new approach to the creation of normative responsibilities of powerful actors in the international system will be introduced in the following.[59] Although it will probably first be met with scepticism,[60] this new concept appears to be a far more appropriate doctrinal component of the current international legal order than the predominant view. Thereby, it is furthermore submitted that this reoriented subjects doctrine is not merely meant to be a suggestion *de lege ferenda*. Rather, *inter alia* because of this approach finding its normative foundation in the generally recognized legal concept of presumptions, it fits already *de lege lata* in the normative structure of current international law. Furthermore, in realistic anticipation of opposition to this new subjects doctrine a number of possible objections will be discussed.

A. Rebuttable Presumption of Normative Responsibilities of De Facto Powerful Actors

As indicated, the reconceptualized subjects doctrine is based on the perception of the international legal order as a "system of normative presumptions".[61] The structure of international law, at least to the same extent as most domestic legal systems, is and has already for quite some time been shaped by rules of presumptions.[62] From the numerous examples supporting this view, one only needs to mention the rules on the interpretation of multilingual treaties,[63] the

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[58] Okeke, *supra* note 44, at 217; for a similar assessment see also, e.g., Charney, *supra* note 39, at 769; Bleckmann, *supra* note 41, at 117.

[59] For some preliminary ideas on this issue see already Nowrot, *supra* note 24, 139 *et seq.*; Nowrot, *supra* note 31, 17 *et seq.*; K. Nowrot, *Transnational Corporations and Global Public Goods: Towards a Presumption of Normative Responsibilities* (2004) 2 *et seq.*

[60] On this usual reaction in response to the introduction of new approaches to international legal personality see only von der Heydte, 'Rechtssubjekt und Rechtsperson im Völkerrecht', in Constantopoulos/Eustathiades/Fragistas (eds), *supra* note 43, 237, at 246.

[61] See Bleckmann, 'Die Völkerrechtsordnung als System von Rechtsvermutungen', in N. Achterberg, W. Krawietz and D. Wyduckel (eds), *Recht und Staat im sozialen Wandel – Festschrift für Hans Ulrich Scupin zum 80. Geburtstag* (1983) 407.

[62] Generally on the rules of presumptions in various areas of international law see, e.g., B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953) 304 *et seq.*; J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law* (2003) 240 *et seq.*; Mosk, 'The Role of Facts in International Dispute Resolution', 304 *RdC* (2003) 9, at 139 *et seq.*; as well as the comprehensive analysis by J.-M. Grossen, *Les Présomptions en Droit International Public* (1954) 53 *et seq.*

[63] See Article 33 (3) of the Vienna Convention on the Law of Treaties; Kuner, 'The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning', 40 *ICLQ* (1991) 953; M. Hilf, *Die Auslegung mehrsprachiger Verträge* (1973) 73 *et seq.*

"presumption against conflict" with regard to treaties concluded between the same parties,[64] the presumption that parties to a treaty act in conformity with the obligations arising from this agreement,[65] the presumption that actions taken by organs of international organizations being appropriate for the fulfilment of the purposes of that organization are not *ultra vires*,[66] as well as the famous – although hardly being compatible anymore with the structure of the current international legal order[67] – negative presumption established by the PCIJ in the *Lotus* case with regard to restrictions upon states' freedom of action.[68]

Applying this concept of presumptions to subjects doctrine, it is argued that, in light of the above mentioned primary aims pursued by international law as well as the need for a close conformity of this legal order to the changing sociological circumstances on the international scene, a rebuttable presumption arises – already on the basis of a de facto influential position in the international system – in favour of the respective actor being subject to applicable international legal obligations with regard to the promotion of community interests such as the protection of human rights, the environment and core labour and social standards. This methodological approach ensures that – independently from an explicit imposition of obligations by states through treaty or customary international law – all interactions between the influential entities in the international system as well as their relations to less powerful actors are *prima facie* subject to the international rule of law, thereby ensuring that the international legal order is able to fulfil its central purpose of comprehensively civilizing international relations in an effective way. Only with regard to those actors whose limited participation in the interactions within the international system does not qualify them as being sufficiently influential, the existence of international legal obligations is still dependent upon an explicit imposition by states through treaty or customary international law. This last mentioned categorization currently applies especially to individuals.

The presumption can only be refuted by way of a contrary expression of the international community – states and international organizations – in a legally binding form stating that the respective influential category of actors is not obliged to observe, *inter alia*, human rights, as well as recognized environmental and labour standards. Thereby, the decision of rebutting the presumption is not left to individual states or international organizations. Such an approach

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[64] On this presumption see, e.g., WTO, *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Panel of 31 May 1999, WT/DS34/R, paras. 9.92 *et seq.*; Jenks, 'The Conflict of Law-Making Treaties', 30 *BYIL* (1953) 401, at 427 *et seq.*

[65] See thereto WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Original Complaint by the United States, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, Decision by the Arbitrators of 12 July 1999, WT/DS26/ARB, para. 9; Grossen, *supra* note 62, at 60 *et seq.*

[66] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, ICJ Reports (1962) 151, at 168; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, ICJ Reports (1993) 114, at 126.

[67] See only Tietje, *supra* note 31, at 1093; von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 *EJIL* (2004) 885, at 887 fn. 4; as well as already more than forty years ago Jenks, 'Interdependence as the Basic Concept of Contemporary International Law', in *Mélanges Offerts a Henri Rolin – Problèmes de Droit des Gens* (1964) 146 *et seq.*

[68] *The Case of the S.S. „Lotus"*, 1927 PCIJ Series A, No. 10, at 18.

would lead to a respective category of influential non-state actors being subject only to relative international legal obligations towards those states and international organizations that have not rebutted the presumption – a, from the point of view of legal certainty, undesirable consequence being for quite some time critically discussed especially in connection with the constitutive doctrine of the recognition of states.[69] Rather, in order for the presumption to be rebutted, it is necessary to demonstrate the existence of a respective normative expression of the international community as a whole[70] or at least a sufficiently uniform practice of states and international organizations. In so doing, this approach also corresponds to the normative structure of current international law by adequately taking into account the above mentioned perception – increasingly being emphasised in the legal literature – that the law-making processes in the international system, by focussing the practice of the international community as a whole, are more and more independent of the will and interests of individual states.[71]

Indeed, it has been frequently pointed out in the legal literature that the processes of globalization have lead to an increasing loss by states of their previously held ability to control and channel these processes due to a growing lack of steering capacity.[72] Nevertheless, the option of rebutting the presumption has to be regarded as a currently still necessary concession to the important position of states in the international system and the resulting potential of these actors to influence, to a certain extent, the granting of legal personality under international law. However, it should be emphasized that this option accorded to states is also merely based on their currently de facto powerful position in the international system of today, and is not an inalterable feature of the international legal order itself.[73]

Yet, also this possibility of rebutting the presumption in favour of the existence of international legal obligations is, again in light of the purposes pursued by the international legal order, not in the absolute discretion of states and international organizations. They would subject

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[69] See thereto, e.g., Jennings/Watts, *supra* note 16, at 133; Brownlie, *supra* note 16, at 88; Dahm/Delbrück/Wolfrum, *supra* note 15, at 193 *et seq.*

[70] On the perception of the will of the international community as a possible normative source of international law see only recently Tsagourias, 'The Will of the International Community as a Normative Source of International Law', in I. F. Dekker and W. G. Werner (eds), *supra* note 55, at 97 with further references.

[71] In addition to the references given *supra* in note 31, see also on this issue, e.g., Charney, 'Universal International Law', 87 *AJIL* (1993) 529, at 543 *et seq.*; Orrego-Vicuña, 'Law Making in a Global Society: Does Consent still matter?', in J. Bröhmer *et al.* (eds), *Festschrift für Georg Ress* (2005) 191.

[72] See, e.g., Delbrück, 'Prospects for a „World (Internal) Law?": Legal Developments in a Changing International System', 9 *Indiana Journal of Global Legal Studies* (2002) 401, at 409 *et seq.*; Schachter, 'The Decline of the Nation-State and its Implications for International Law', 36 *Columbia Journal of Transnational Law* (1997) 7; C. Tietje, *Internationalisiertes Verwaltungshandeln* (2001) 165; A. Peters, *Elemente einer Theorie der Verfassung Europas* (2001) 132 *et seq.*; Cottier/Hertig, 'The Prospects of 21st Century Constitutionalism', 7 *Max Planck Yearbook of United Nations Law* (2003) 261, at 268 *et seq.*

[73] On the "false intellectual prison" caused by the assumption "that it is simply a matter of fact that the world consists of states" see already Lim, *supra* note 27, at 63; W. Wengler, *Völkerrecht*, Vol. I (1964) 163 *et seq.*; Higgins, *supra* note 27, at 49 *et seq.*; and as early as the beginning of the 1930th Scheuner, 'Staat und Staatengemeinschaft', 5 *Blätter für Deutsche Philosophie* (1931/32) 255, at 269.

themselves to the prohibitions of abuse of rights as well as of *venire contra factum proprium*[74] and thus forfeit their right to rebut the presumption[75] if they would release a category of de facto powerful actors from the *prima facie* existing obligations to contribute to the promotion of community interests, even though such a discharge jeopardises the effective fulfilment of the central aims – as being recognized by the international community as a whole and necessary for its continued existence – of the international legal order. Therefore, states and international organizations only enjoy a limited discretion in their decision whether to rebut the presumption by being required to undertake a careful assessment of the possible adverse consequences for the promotion and protection of global public goods.[76]

B. Distinction from Previous Criticism Towards the Traditional Understanding of International Legal Personality

Taking into account the increasing inadequateness of the currently still predominant approach to international legal personality, it is hardly surprising that the traditional conception has already for quite some time met with substantial criticism in legal literature.[77] For example, it has been suggested in this connection to set the term "international legal person" and the resulting distinction between subjects and objects aside and instead – thereby including non-state actors such as multinational corporations and NGOs – to refer to "participants" in the international system,[78] to actors within a "constitutional approach to international law",[79] or to "constitutional

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[74] Generally on these doctrines see, e.g., H. Lauterpacht, *The Function of Law in the International Community* (1933) 286 *et seq.*; Taylor, 'The Content of the Rule Against Abuse of Rights in International Law', 46 *BYIL* (1972/73) 323.

[75] On forfeiture in international law as being closely related to the principle of estoppel see only Doehring, 'Zum Rechtsinstitut der Verwirkung im Völkerrecht', in K.-H. Böckstiegel *et al.* (eds), *Völkerrecht-Recht der Internationalen Organisationen-Weltwirtschaftsrecht – Festschrift für Ignaz Seidl-Hohenveldern* (1988) 51.

[76] Generally on the principle of limited discretion in international law already Leibholz, 'Das Verbot der Willkür und des Ermessensmißbrauchs im völkerrechtlichen Verkehr der Staaten', 1 *ZaöRV* (1929) 77; A. Bleckmann, *Grundprobleme und Methoden des Völkerrechts* (1982) 252.

[77] See, e.g., Allott, *supra* note 35, at 372 ("international law must abandon the conceptual category of *subjects of international law*") (italic emphasis in the original); D. P. O'Connell, *supra* note 27, at 83 ("fallacious"); A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (2001) 31 ("empty notion"); Klabbers, *supra* note 47, at 354 ("conceptual helplessness"); for a more detailed analytical description of the criticism being voiced in the legal literature see recently Nijman, *supra* note 18, at 347 *et seq.*

[78] See especially Higgins, *supra* note 27, at 49 *et seq.* ("Finally, 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. […] But I believe that there is room for another view: that it is not particulary helpful, either intellectually or operationally, to rely on the subject-object dichotomy that runs through so much of the writings. […] Now, in this model, there are no 'subjects' and 'objects', but only *participants*. Individuals *are* participants, along with states, international organizations […], multinational corporations, and indeed private non-governmental groups.") (italic emphasis in the original); as well as Arzt/Lukashuk, *supra* note 19, at 62 *et seq.*

subjects" of a variety of emerging "civil constitutions".[80] These approaches are motivated, *inter alia*, by "the necessity of an extension of constitutionalism beyond purely intergovernmental relations" because of "the massive human rights infringements by non-state actors",[81] or by the desire to "avoid the intensely debated but largely sterile question as to whether or not NGOs or transnational enterprises have emerged as new subjects within the international legal order".[82]

All of the just mentioned concepts have in common that they are striving for an almost complete renunciation of the concept of international legal personality. By contrast, the subjects doctrine argued for in this article – while retaining the established terminology and resulting only in a partial deviation from the traditional approach, namely with regard to the international legal obligations of influential actors in the international system – finds its normative basis in the concept of presumptions that is, as shown above, in general a well-recognized methodological component of the current international legal order.

C. Discussion of Possible Objections to this New Subjects Doctrine

In anticipation of possible objections, it first has to be emphasised that this new subjects doctrine does not run contrary to the – for convincing reasons generally held – perception of the necessity to base the methodology of international legal personality on a realistic approach not being influenced in any way by "wishful thinking".[83] Rather, it should be noted that the currently predominant view with regard to the prerequisites of international subjectivity itself – contrary to its assertion in theory that it solely takes into account the explicit recognition by states through the granting of specific rights and obligations under international law to the entity in question – in practice frequently does not go without precisely the same principled considerations about the central purposes of the international legal order and the importance of de facto influence in the international system that also constitute the basis of the new approach argued for in this article.

This discrepancy between theory and practice is for example reflected in the argumentation of the International Court of Justice and an increasing number of legal scholars on the issue of whether international organizations are bound by general rules of international law such as the protection of human rights. In the absence of a sufficient degree of normative recognition by the international community with regard to the imposition of respective obligations, recourse has frequently been taken to the purposes pursued by the international legal

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[79] Thürer, *supra* note 44, at 51 *et seq.*

[80] Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in C. Joerges, I.-J. Sand and G. Teubner (eds), *Transnational Governance and Constitutionalism* (2004) 3, at 6 *et seq.*

[81] Teubner, *supra* note 80, at 7.

[82] Thürer, *supra* note 44, at 53; see also, e.g., Herdegen, 'Discussion', in Hofmann (ed), *supra* note 44, 63, at 64 ("As to the multinational, transnational enterprises, I sympathize with Professor Thürer's concept that we should approach these phenomena with a more flexible view of a legal community, that it is not always necessary to harp on legal personality under public international law."); Wedgwood, 'Discussion', in Hofmann, *supra* note 44, at 93 ("First, in general, it is not clear that analytical purity about the nature of a 'subject' of international law will serve much point in describing the real evolution of the international system.").

[83] On this perception see, e.g., F. Berber, *Lehrbuch des Völkerrechts*, Vol. I, 2nd ed. (1975) 114.

order as well as the influential position of these actors in international relations,[84] a certain relativization of the otherwise generally accepted separate character of these entities from their member states,[85] or the increasingly popular argumentation that whoever has rights under international law and is thus at least a derivate legal subject must automatically also have duties as well.[86] However, since at least on the basis of a consistent application of the predominant view

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[84] See only Ginther, 'International Organizations, Responsibility', in Bernhardt (ed), *supra* note 35, 1336, at 1339 ("Faced with an increasing number of international organizations *executing tasks with a highly injurious potential*, the international legal order needs to define responsibilities clearly.") (emphasis added); M. Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (2004) 281 ("Thus to the extent these organizations are assuming and administrating functions which bear the capacity to eventually compromise fundamental rights of individuals, they appear to be constrained by international law and its general human rights (humanitarian) obligations."); Reinisch, 'Securing the Accountability of International Organizations', 7 *Global Governance* (2001) 131, at 136 ("strong arguments in favor of an obligation to observe customary international law may be derived from *more general reflections* concerning the status of the UN as an organization enjoying legal personality under international law") (emphasis added); Bleckmann, *supra* note 41, at 117; Schreuer, 'Die Bindung Internationaler Organisationen an völkerrechtliche Verträge ihrer Mitgliedstaaten', in K. Ginther *et al.* (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität – Festschrift für Karl Zemanek zum 65. Geburtstag* (1994) 223, at 243; M. Hirsch, *The International Responsibility of International Organizations towards Third Parties – Some Basic Principles* (1995) 8.

[85] See, e.g., recently Tomuschat, *supra* note 21, at 574 ("In the case of intergouvernmental organizations, it can be argued that such entities are no more than common agencies of States and that hence all the commitments of their members apply to them as well.").

[86] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports (1980) 73, at 89 *et seq.* ("International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law"); the Dissenting Opinion of Judge Fitzmaurice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 220, at 294 ("This is a principle of international law that is as well-established as any there can be, – and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are."); Eagleton, 'International Organization and the Law of Responsibility', 76 *RdC* (1950), 319, at 385 ("But where there are rights, there are also duties;"); Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', 95 *AJIL* (2001) 851, at 858 ("A related consideration that does not focus on the powers and obligations of organizations as state creatures but, rather, on the general perception that they enjoy international legal personality leads to the same result: the United Nations – whose personality under public international law has been beyond doubt since the *Reparations* case – is subject to public international law precisely because it partakes of personality under this legal system."); Reinisch, *supra* note 12, at 281 *et seq.* ("The underlying *theoretical issue* also appears to be largely settled by accepting that the UN as a subject of international law is subject to general international law") (emphasis added). It should be noted that the same argumentation can be occasionally found with regard to multinational

concerning the prerequisites of international legal personality it is far from obvious that such a converse conclusion from the status of a subject of international law to the existence of specific obligations can be regarded as permissible,[87] it is hardly surprising that this argument has already met with considerable criticism.[88]

A further example, this time in the realm of the so-called "original" subjects of international law, is the still predominantly accepted declaratory nature of the recognition of states. In the absence of a sufficiently consistent state practice,[89] this doctrine is also primarily based on considerations with regard to international law's ordering and pacification functions, the necessity of a close conformity to the realities in the international system, the undesirability of normative gaps in the structure of the international legal order[90] as well as the greater practical feasibility of the declaratory theory.[91] The same applies to recently expressed views in legal literature to make belligerents and insurgents – in addition to their generally accepted incorporation in the legal regime of international humanitarian law[92] – also subject to the observance of international human rights which "according to traditional wisdom, cannot be asserted vis-à-vis insurgent groups".[93] This possible extension of the scope of application of

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corporations, see e.g., Koh, 'Separating Myth from Reality about Corporate Responsibility Litigation', 7 *JIEL* (2004) 263, at 265 ("If corporations have rights under international law, by parity of reasoning, they must have duties as well."); Malanczuk, 'Discussion', in Hofmann (ed), *supra* note 44, 155, at 157 ("One could argue that if non-state actors have rights under international law, they must also have duties.").

[87] See also the respective doubts expressed by Schreuer, *supra* note 84, at 241; Tomuschat, *supra* note 21, at 573 *et seq.*; Reinisch, *supra* note 86, at 854.

[88] See only Mosler, *supra* note 42, at 19 *et seq.*; H.-H. Nöll, *Die Völkerrechtssubjektivität der Europäischen Gemeinschaften und deren Bindung an das allgemeine Völkerrecht* (1986) 136 *et seq.*; Schmalenbach, *supra* note 21, at 65; as well as Klabbers, *supra* note 47, at 367 ("subjectivity as such does not entail any automatic rights or obligations"); and the references given by Dine, *supra* note 1, at 189 ("The IMF strongly rejects any claim to be directly bound by international human rights norms. Mr. Gianviti, General Counsel to the IMF argues: 'First, at the most general level, the Fund and the Bank saw themselves (and continue to see themselves) as international organizations separate from their members, governed by their respective charters.'").

[89] See thereto, e.g., Jennings/Watts, *supra* note 16, at 129 ("state practice is inconclusive and may be rationalised either way").

[90] See only Dahm/Delbrück/Wolfrum, *supra* note 15, at 191 *et seq.*; Cassese, *supra* note 37, at 74 ("This view [the constitutive theory] is, however, fallacious because it is in strident contradiction with the principle of effectiveness whereby ‚effective' situations are fully legitimized by international law").

[91] Brownlie, *supra* note 16, at 88 ("Constitutivist doctrine creates a great many difficulties."); Schoiswohl, *supra* note 84, at 35 ("logical and practical deficiencies involving the constitutive theory").

[92] See thereto as well as to the problematic distinction between belligerents and insurgents Dahm/Delbrück/Wolfrum, *supra* note 44, at 299 *et seq.*; Jennings/Watts, *supra* note 16, at 165 *et seq.*; B. R. Roth, *Governmental Illegitimacy in International Law* (1999) 173 *et seq.*

[93] Tomuschat, *supra* note 21, at 575; see also Fleck, 'Humanitarian Protection Against Non-State Actors', in J. Abr. Frowein *et al.* (eds), *Verhandeln für den Frieden/Negotiating for Peace – Liber Amicorum Tono Eitel* (2003) 69, at 78.

international human rights law is also for the most part grounded in considerations concerning the changing factual nature of international conflicts,[94] the need for a protection of the affected civilian population,[95] reasons of fairness,[96] as well as – again – the already above mentioned converse conclusion.[97] In addition, also the argumentation that non-state terrorist groups have to be regarded as at least partial subjects of international law, thereby subjecting them to the prohibition on the use of force and thus opening the scope of application of Article 51 UN Charter,[98] is first and foremost founded on considerations concerning the fundamental pacification functions of international law and the resulting necessity of a close conformity of this legal order to changing realities in the international system.[99]

Finally, the existence of an international legal status of so-called "stabilized de facto regimes" is worth noticing in this context.[100] Current legal literature on this subject almost generally recognises incorporation of these entities in the international legal order by, *inter alia*, extending the active and passive scope of application of the prohibition on the use of force to them.[101] However, this argumentation is – in light of the inconsistent state practice in this

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[94] Fleck, *supra* note 93, at 78 *et seq.*

[95] See Fleck, *supra* note 93, at 78 *et seq.*; Tomuschat, *supra* note 21, at 575 *et seq.*

[96] Tomuschat, *supra* note 21, at 576 ("Why should only the Government be charged with breaching human rights? Is it not a requirement of fairness to measure the behaviour of both sides by the same yardstick?").

[97] Fleck, *supra* note 93, at 79 ("If non-state actors have human rights, it appears logical that they also must have responsibilities, no different from the obligations insurgents have under international humanitarian law.").

[98] From the numerous literature on this issue see generally on this discussion only recently Stahn, '"Nicaragua is dead, long live Nicaragua" – The Right to Self-Defence under Article 51 UN Charter and International Terrorism', in C. Walter *et al.* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004) 827, at 848 *et seq.*; on the currently probably still predominant view that a terrorist act committed solely by non-state actors does not amount to an "armed attack" in the sense of Article 51 UN Charter see, e.g., Randelzhofer, 'Article 51', in Simma (ed), *supra* note 29, para. 34 with further references also with regard to the contrary view.

[99] See, e.g., Frowein, 'Der Terrorismus als Herausforderung für das Völkerrecht', 62 *ZaöRV* (2002) 879, at 887; Bruha/Bortfeld, 'Terrorismus und Selbstverteidigungsrecht', 49 *Vereinte Nationen* (2001) 161, at 165; Klein, 'Zur Rechtsträgerschaft von Individuen im Völkerrecht', in E. Klein and C. Menke (eds), *Menschheit und Menschenrechte – Probleme der Universalisierung und Institutionalisierung* (2002) 133, at 136; as well as already prior to September 11, albeit *de lege ferenda*, Delbrück, 'Effektivität des UN-Gewaltverbots – Bedarf es einer Modifikation der Reichweite des Art. 2 (4) UN-Charta?', 74 *Die Friedens-Warte* (1999) 139, at 156.

[100] For a comprehensive analysis of this phenomenon see J. Abr. Frowein, *Das de facto-Regime im Völkerrecht* (1968); see also, e.g., Frowein, 'De Facto Régime', in R. Bernhardt (ed), *E.P.I.L.*, Vol. I (1992), 966; as well as recently Schoiswohl, *supra* note 84, at 206 *et seq.*

[101] See only Fischer, 'Taiwan: Der Staat, der nicht sein darf: Die Stellung der Republik China „Revisited"', in J. Bröhmer *et al.* (eds), *Internationale Gemeinschaft und Menschenrechte – Festschrift für Georg Ress zum 70. Geburtstag am 21. Januar 2005* (2005) 77, at 90; Randelzhofer, 'Article 2 (4)', in Simma (ed), *supra* note 29, para. 28 with further references.

regard[102] – almost exclusively based on principled considerations concerning the pacification functions of international law,[103] the need for the protection of the affected population,[104] the ordering function of the international legal order,[105] the "needs of international intercourse in the various stages of development",[106] logical reasoning,[107] the principle of effectiveness,[108] the "process of analogy"[109] or "practical necessity and pragmatism".[110] The same argumentation is taken recourse to with regard to the international responsibility of de facto regimes[111] that is also based on considerations with regard to, *inter alia*, the effective exercise of the ordering functions of the international legal order,[112] "commonsense",[113] and the fact that international law does not explicitly exclude de facto regimes from international responsibility.[114] Finally, quite similar

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[102] See thereto Frowein, *supra* note 100, at 66; Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft* (1998) 754 *et seq.*; Schoiswohl, *supra* note 84, at 266.

[103] Frowein, *supra* note 100, at 66; Verdross/Simma, *supra* note 15, at § 406; Dahm/Delbrück/Wolfrum, *supra* note 44, at 304; Bothe, 'Friedenssicherung und Kriegsrecht', in Graf Vitzthum (ed), *supra* note 19, 589, at 599.

[104] K. Doehring, *Völkerrecht*, 2nd ed. (2004) para. 259; Oppermann, 'Der Beitrag des Internationalen Rechts zur Bekämpfung des internationalen Terrorismus', in I. von Münch (ed), *Staatsrecht – Völkerrecht – Europarecht – Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag* (1981) 495, at 504.

[105] Frowein, *supra* note 100, at 21; H. Krieger, *Das Effektivitätsprinzip im Völkerrecht* (2000) 94.

[106] Mosler, 'Subjects of International Law', in R. Bernhardt (ed), *E.P.I.L.*, Vol. IV (2000), 710, at 721.

[107] Schoiswohl, *supra* note 84, at 210 ("On the one hand, there is no reason why *de facto* regimes which effectively govern a territory without enganging in warfare against the 'parent' State should enjoy less rights than one in combat. The rules of international humanitarian law applicable to internal armed conflicts in this respect furnish *de facto* regimes with (objective) international legal personality to the extent determined by their rights and obligations. It would appear somewhat paradox if this (limited) international legal personality should suddenly vanish once the bloodshed has given way to protracted political negotiations or even peaceful co-existence based on mutual sufferance.") (italic emphasis in the original).

[108] Brownlie, *supra* note 16, at 57; Doehring, *supra* note 104, para. 259; Oppermann, *supra* note 104, at 504; Epping, 'Völkerrechtssubjekte', in K. Ipsen, *Völkerrecht*, 5th ed. (2004) 55, at 107.

[109] Crawford, *supra* note 16, at 79 ("The process of analogy from legal rules applicable to States is quite capable of providing a body of rules applicable to non-State entities."); see also Crawford, *supra* note 52, at 145.

[110] Schoiswohl, '*De Facto* Regimes and Human Rights Obligations – The Twilight Zone of Public International Law?', 6 *Austrian Review of International and European Law* (2001) 45, at 52; Schoiswohl, *supra* note 84, at 209.

[111] See thereto only Frowein, *supra* note 100, at 71 *et seq.*; Balekjian, *supra* note 36, at 150 *et seq.*; Schoiswohl, *supra* note 84, at 256 *et seq.*

[112] Frowein, *supra* note 100, at 83; Balekjian, *supra* note 36, at 151.

[113] S. Pegg, *International Society and the De Facto State* (1998) 192 ("Commonsense leads one to think that the best way to ensure compliance with such [international] standards is not to cast the *de facto* state as far as possible into the juridical equivalent of outer darkness.") (italic emphasis in the original).

[114] Schoiswohl, *supra* note 84, at 266 ("Notwithstanding international law's reluctance to explicitely incorporate *de facto* regimes into its framework, it is to the same extent reluctant,

considerations can be found concerning the recently articulated view that these entities are bound by international human rights,[115] an argumentation that has been equally grounded on the ordering function of international law,[116] logical reasoning[117] as well as generally "the inexhaustible argumentative treasure of reason and practical necessity".[118] However, also this line of reasoning with regard to the international legal personality of de facto regimes, which is hardly compatible with the traditional prerequisites of international subjectivity as constantly emphasised in theory, has on the basis of a consistent application of the predominant view understandably also received sporadically quite strong opposition.[119]

To summarize, these more or less randomly chosen examples illustrate the considerable discrepancy between "Rome" and "Home" in the currently still dominant approach to international legal personality. In addition to the need for a new subjects doctrine arising from this growing incongruity between theory and practice,[120] this overview shows that the new approach argued for in this article cannot simply be dismissed as being merely "wishful thinking". Rather, it should be regarded as an attempt to overcome the dogmatic problems that

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particularly in an area of such major concern to human beings, to explicitly exclude them from any 'responsibility' for the harm inflicted.") (italic emphasis in the original).

[115] See thereto Schoiswohl, *supra* note 84, at 214 *et seq.*; Schoiswohl, *supra* note 110, at 45 *et seq.*

[116] Schoiswohl, *supra* note 84, at 282 *et seq.* ("it is necessary to take recourse to the somewhat vague construction of 'implied mandate' to determine the functions of *de facto* regimes – and thus the extent of limited personality 'opposable' to international legal obligations. However, if one is willing to accept that *de facto* regimes come into legal 'being' as a matter of fact and that they fulfil specific functions to accommodate the needs of the international community, consisting of the necessity to maintain some kind of structure responsibility for day-to-day order as well as the capacity of meeting the interest of the international society (other States), it appears inevitable to simultaneously acknowledge their limited international legal personality and thus their legal capacity to be correspondingly bound to international law.") (italic emphasis in the original).

[117] See the judgment of the United .States Court of Appeals (Second Circuit) in *Kadic v. Karadzic; Doe I and Doe II v. Karadzic* of 13 October 1995, reprinted in: 104 *I.L.R.* (1997) 149, at 158 ("It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime – sometimes due to human rights abuses – had the perverse effect of shielding officials from liability for those violations of international law norms that apply only to state actors."); the same line of reasoning is occasionally applied with regard to multinational corporations, see Kamminga, *supra* note 20, at 425 *et seq.* ("It would be an anomaly if it continued to be accepted that companies, unlike other non-state actors, should have only minimal obligations under international law. Why should individuals and armed opposition groups have fundamental international legal obligations while companies that may be much more powerful have practically none?").

[118] Schoiswohl, *supra* note 84, at 283.

[119] See especially Hillgruber, *supra* note 102, at 759; Hillgruber, 'The Admission of New States to the International Community', 9 *EJIL* (1998) 491, at 498.

[120] Generally on the connection between the appearance of a discrepancy between theory and practice and the need for a revision of the respective theory see, e.g., Luhmann, 'Die Weltgesellschaft', 57 *Archiv für Rechts- und Sozialphilosophie* (1971) 1, at 18; Kaufmann, 'Die modernen nicht-staatlichen internationalen Verbände und Kongresse und das internationale Recht', 2 *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1908) 419, at 438.

the traditional understanding is apparently confronted with,[121] thereby taking – however, on the basis of a consistent theoretical framework – recourse to precisely the same principled considerations about the central purposes of the international legal order and the importance of de facto influence in the international system upon which also the predominant doctrine in practice frequently at least implicitly relies in determining the circle of subjects of international law and their respective obligations. In other words, the present author is far from being opposed to, *inter alia*, subjecting international organizations, belligerents and insurgents, de facto regimes – and, of course, multinational corporations – to international legal obligations with regard to the promotion and protection of human rights. However, it is submitted that this undertaking requires bidding, at least a partial, farewell to the traditional state-centric approach to international legal personality and consequently relying on a reconceptualization of subjects doctrine in the form as outlined above.

With regard to further possible objections to this new subjects doctrine, it has to be pointed out that this approach is not confronted with the problem of being based on an insufficiently determinable, because not objectively identifiable, prerequisite for the presumption by taking recourse to the terms "de facto influential or de facto powerful position" in the international system. Admittedly, the determination of a sufficient degree of influence of a respective actor to give rise to the presumption cannot simply be based on the famous benchmark "I know it when I see it",[122] originally coined in a totally different context. Such an approach is already prohibited because of the legitimate interests of the possibly affected entities in question with regard to an appropriate level of legal certainty concerning their normative obligations under international law. However, it is submitted that the degree of influence that a specific category of actors is able to exercise in international relations can to a considerable extent be measured on the basis of objective criteria such as the extent of direct or indirect participation in the international law-making and law-enforcement processes, economic power, the de facto ability to positively contribute to the realization of community interests as well as the possible negative effects of the actor's activities on the promotion and protection of global public goods. The remaining amount of textual indeterminacy then follows – however, taking also into account the possibility of a subsequent concretization of the terms though practice and legal literature only for a transitional period – directly from the limited linguistic and regulatory capacity of general and abstract rules inherent to every legal system[123] and thus also a well-known phenomenon in international law.[124] Furthermore, it has to be recalled that also the traditional approach to international legal personality is in many situations confronted with a certain amount of textual indeterminacy. One only needs to mention the difficulties connected with the ascertainment – on the basis of the

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[121] For a considerably stronger characterization of these dogmatic difficulties see recently Klabbers, *supra* note 47, at 354 ("Either way, what emerges is a picture of conceptual helplessness: […].").

[122] See the Concurring Opinion of Justice Potter Stewart in the judgement of the U.S. Supreme Court in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

[123] See only Schmidt-Aßmann, 'Der Rechtsstaat', in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. II, 3rd ed. (2004) 541, at 573 *et seq.*

[124] On the frequent use of indefinite terms in international law see, e.g., O. A. Elias/C. L. Lim, *The Paradox of Consensualism in International Law* (1998) 178 *et seq.*; F. Schoch, *Unbestimmte Rechtsbegriffe im Rahmen des GATT* (1994) 71 *et seq.*

declarative theory of recognition – of whether an entity fulfils the prerequisites of statehood.[125] In addition, the same problems arise when determining the existence of "stabilized de facto regimes"[126] or insurgents.[127]

Finally, it should be emphasised that the new approach argued for in this article is neither merely a specification of the, for valid reasons disputed, principle of *ex factis ius oritur*,[128] nor is it relinquishing the important differentiation between the levels of the "being" and the "ought to be".[129] Admittedly, this subjects doctrine is – due to its emphasis on the importance of de facto power in international relations and the need for a close conformity to the changing realities in the international system – governed by a considerable closeness to the sociological school of international law.[130] This characterization, however, finds itself in full conformity with the prevailing perception in legal literature – contrary to the concept of "pure normatism" prominently being represented by Hans Kelsen[131] – with regard to the generally increasingly important role of an interdisciplinary approach to international legal methodology.[132] Based on

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[125] See, e.g., Frowein, *supra* note 100, at 966 ("no possibility exists of clarifying whether entities have the quality of States although they are not recognized as such"); Jennings/Watts, *supra* note 16, at 132 ("There is often no sharp line to be drawn between statehood and its absence."); Cassese, *supra* note 37, at 73 ("It is, therefore, difficult to ascertain in practice whether a State fulfils the requisite conditions."); Klabbers, *supra* note 47, at 352 ("While most will agree that states are subjects of international law, it is not entirely clear what exactly a state is"); Schoiswohl, *supra* note 84, at 11 ("One could thus question whether there existed a legal concept of statehood at all, *i.e.*, whether statehood is determined by law and does not vary according to the context of each individual case.").

[126] On these problems see especially Frowein, *supra* note 100, at 67 *et seq.*; Schoiswohl, *supra* note 84, at 208 *et seq.*

[127] See thereto only Dahm/Delbrück/Wolfrum, *supra* note 44, at 301 *et seq.* with further references.

[128] On the controversy over the applicability of this principle in international law see, e.g., Balekjian, *supra* note 36, at 8 *et seq.*

[129] With regard to the importance of this distinction in the perception of the international legal order see only Simma, *supra* note 46, at 339; Delbrück, 'Völkerrecht und Weltfriedenssicherung', in D. Grimm (ed), *Rechtswissenschaft und Nachbarwissenschaften*, Vol. II (1976) 179, at 191.

[130] On the sociological school of international law see especially Huber, *supra* note 39, at 56 *et seq.*; as well as for example Schindler, 'Contribution a l'Étude des Facteurs Sociologiques et Psychologiques du Droit International', 46 *RdC* (1933) 233; Stone, 'A Sociological Perspective on International Law', in Macdonald/Johnston (eds), *supra* note 2, at 263 *et seq.*; Landheer, 'Contemporary Sociological Theories and International Law', 91 *RdC* (1957) 1; Wackernagel, 'Über rechtssoziologische Betrachtungsweise, insbesondere im Völkerrecht', in Juristische Fakultät der Universität Freiburg (Schweiz) (ed), *Ius et Lex – Festgabe zum 70. Geburtstag von Max Gutzwiller* (1959) 119; and more recently O. Diggelmann, *Anfänge der Völkerrechtssoziologie* (2000) 13 *et seq.* with further references.

[131] See, e.g., H. Kelsen, *Reine Rechtslehre*, 2nd ed. (1960) 1 *et seq.*; H. Kelsen, Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze (1911) 42 *et seq.*

[132] See only Verdross/Simma, *supra* note 15, at § 22; Simma, 'Völkerrechtswissenschaft und Lehre von den internationalen Beziehungen: Erste Überlegungen zur Interdependenz zweier Disziplinen', 23 *Österreichische Zeitschrift für öffentliches Recht* (1972) 293, at 300 *et seq.*;

these considerations, it has furthermore already been pointed out more than forty years ago by, for example, Hermann Mosler that such an approach of "methodological pluralism" is also essential when dealing specifically with subjects doctrine in international law.[133]

Nevertheless, the subjects doctrine suggested in this article differs considerably from the frequently criticised pure sociological approach to international legal personality that exclusively relies on the factual power or functions exercised by the respective actor in international relations.[134] It is based on a normatively more differentiated conception than the sociological approach by constituting only a presumption in favour of international legal personality that can be rebutted in accordance with the above mentioned prerequisites. The international subjectivity of the respective actor thus not merely arises from its de facto powerful position or function in the international system. Rather, what is equally necessary for the continued existence of the entity's subjectivity is – as a normative prerequisite – the legally relevant inactivity of states and international organizations with regard to the rebuttal of this presumption. Only this additional normative element, the legally relevant omission of states and international organizations, combined with the factually influential position in the international system, constitute the basis of the respective actor's continued international legal subjectivity in the sense of being obliged to contribute to the promotion of community interests. Therefore, as mentioned above, it is far from being merely the well-known "normative force of the facts"[135] that forms the underlying perception of this new theoretical framework for the identification of international legal obligations of influential actors in the international system.

To summarize, it is submitted that this new concept concerning the establishment of international legal personality – which would in the realm of non-state actors currently apply especially to multinational organizations, but also to a number of NGOs – is clearly more in conformity with the evolving image of an international legal community which has as its central aim the civilization of international relations and the promotion of global public goods to the benefit of all.

Delbrück, 'Zum Funktionswandel des Völkerrechts der Gegenwart im Rahmen einer universalen Friedensstrategie – Menschenrechtsschutz und internationales Wirtschafts- und Sozialrecht', 58 *Die Friedens-Warte* (1975) 240, at 241 *et seq.*; Schüle, 'Methoden der Völkerrechtswissenschaft', 8 *AVR* (1959/60) 129, at 143 *et seq.*; W. L. Gould and M. Barkun, *International Law and the Social Sciences* (1970) 3 *et seq.*; as well as more recently Slaughter, 'International Law and International Relations', 285 *RdC* (2000) 9.

[133] Mosler, *supra* note 42, at 16 *et seq.*

[134] On this purely sociological or functional perception see, e.g., J. J. Lador-Lederer, *International Non-Governmental Organizations and Economic Entities – A Study in Autonomous Organization and Ius Gentium* (1963); Lador-Lederer, 'Nichtstaatliche Organisationen und die Frage der Erweiterung des Kreises der Völkerrechtssubjekte', 23 *ZaöRV* (1963) 657, at 661 *et seq.*; Seyerstedt, 'Objective International Personality of Intergovernmental Organizations – Do Their Capacity Really Depend Upon the Conventions Establishing Them?', 34 *Nordisk Tidsskrift for International Ret* (1964) 1, at 9 *et seq.*; H. M. Dahlgrün, *Funktionen und Rechtspersönlichkeit der Internationalen Handelskammer* (1969) 233 *et seq.*; with regard to the criticism articulated against this approach see only Fassbender, 'Die Völkerrechtssubjektivität internationaler Organisationen', 37 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1986) 17, at 45 *et seq.*; Hempel, *supra* note 18, at 60 *et seq.* with further references.

[135] See thereto especially G. Jellinek, *Allgemeine Staatslehre*, 3rd ed. (1914) 337 *et seq.*

5. Conclusion

In concluding, the question raised in the introduction with regard to the normative integration of multinational corporations into the international legal order can – taking recourse to this new subjects doctrine – be answered in the affirmative. In an economic as well as political sense, these non-state actors are among the most influential participants in the current international system, thereby being endowed with a considerable potential to positively contribute to, but also to frustrate the promotion and protection of global public goods. Thus, in light of the central aims pursued by the international legal order and because of the need of a close conformity of international law to the changing realities in the international system, a presumption – until today not rebutted by states and international organizations – arises in favour of multinational corporations being subject to international legal obligations to contribute to, *inter alia*, the promotion and protection of human rights, core labour and social standards as well as the environment.

While reaching this conclusion, it is of course not possible to completely close one's eyes to the fact that the existence of such a rebuttable presumption has, at least so far, not been articulated in the practice of the dominant state and non-state actors on the international scene, a not so minor detail that raises suspicion as to whether the approach suggested here has to be merely considered as belonging to the realm of so-called "book law".[136] In response to this apparently at first sight quite proximate accusation, three points should be made: Firstly, the new subjects doctrine is based on the primary purposes pursued by international law, the necessity of a close conformity of this normative system to the realities in international relations, and the concept of presumptions, all of them being frequently articulated as important components of the current international legal order. The approach argued for in this article is thus in principle firmly grounded in the framework of international law. Secondly, it is generally accepted that international legal scholarship has – in addition to analyzing and conceptualizing the actual practice as well as making suggestions with regard to the future development of international law – also the function, with regard to the realm of *lege lata*, of carrying over the normative ideas enshrined in positive rules of international law to other areas within this legal system.[137] And finally, especially when taking into account that this new subjects doctrine is in conformity with the central aims of the international legal order, it seems to be not too impudent to recall the statement made by Immanuel Kant in his 1793 essay "On the Common Saying: 'This May Be True in Theory, but It Does Not Apply in Practice" specifically with regard to "the relationship of theory to practice in international law":

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[136] On the term "book law" see especially Oppenheim, 'Die Zukunft des Völkerrechts', in *Festschrift für Karl Binding zum 4. Juni 1911*, Vol. I (1911) 141, at 147 and 191; note however, that quite to the contrary this term has recently also been taken recourse to for the characterization of the view that non-state actors are not normatively incorporated in the current international legal order, see Spiermann, 'The *LaGrand* Case and the Individual as a Subject of International Law', 58 *Zeitschrift für öffentliches Recht* (2003) 197, at 198 ("The spell of the *Buchrecht* […] in which, therefore, the core building blocks are books citing books – has been surprisingly difficult to break, and nowhere more enduring than in respect of non-state actors in international law.") (italic emphasis in the original).

[137] See thereto only Verdross/Simma, *supra* note 15, at § 624; Oppenheim, *supra* note 136, at 157; Terz, 'Die Polydimensionalität der Völkerrechtswissenschaft oder Pro scientia lata iuris inter gentes', 30 *AVR* (1992) 442, at 445.

> I therefore cannot and will not see it [human nature] as so deeply immersed in evil that practical moral reason will not triumph in the end, after many unsuccessful attempts, thereby showing that it is worthy of admiration after all. On the cosmopolitan level too, it thus remains true to say that whatever reason shows to be valid in theory, is also valid in practice.[138]

[138] Kant, 'On the Common Saying: 'This May Be True in Theory, but It Does Not Apply in Practice'', in S. M. Cahn (ed), *Classics of Political and Moral Philosophy* (2002) 775, at 792.