

New Perspectives of Accountability: The Merging Concept of Corporate Responsibilities with regard to Human Rights

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1. Introduction

In 2002, prior to the World Summit on Sustainable Development, *Friends of the Earth International* led a campaign entitled “Holding Big Business Accountable”¹. The critique of transnational corporations by organisations like *Friends of the Earth*, *Oxfam* or *attac* and of meetings like the World Social Forum is well known. Deregulation and trade liberalization led to a self restriction of the state on one hand and an increase in the influence of global business on the other. Core concepts of international relations, such as sovereignty, national accountability and rule of law are under challenge. Globalization can be seen as rather political choice than an economic necessity. Nevertheless many concerned groups – nowadays referred as stakeholders – finding themselves excluded from these international political and economic decision-making processes. As a sort of countermovement these groups are starting to reshape globalization by demanding business accountability in general and corporate responsibility for human rights abuses in particular.

In August 2003 the United Nations Sub-Commission on the Promotion and Protection of Human Rights endorsed the so-called “Norms on Corporate Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”² Article 1 of which reads as follows:

States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.³

This article sets out to judge this concept of shared responsibilities between states and businesses with regard to human rights, within the existing system of international human rights

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¹ See for details www.foei.org – last visit on 3 May 2004

² Sub-Commission on the Promotion and Protection of Human Rights, hereinafter referred to as ‘Sub-Commission’ Res. 2003/16 13 August 2003

³ U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, hereinafter referred to as ‘Norms on Corporate Responsibilities’

law. The underlying question being whether the introduction of a new duty bearer under international human rights law has any added value or if businesses might become a scapegoat for states in order to escape their own human rights obligations and the already fragile international human rights protection mechanisms.

Firstly the context of the article will be set out by describing the role of business in international economic and political relations, as well as addressing the need for an international legal framework that considers these activities. The second part will focus on the definition of commonly used terms such as duty, obligation and responsibility as well as on their meaning within international human rights law. These observations will lead to a third part in which existing means of business accountability will be examined, like philanthropy, corporate social responsibility and law obedience. This assessment will also focus on the meaning of corporate accountability within existing initiatives, such as the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*⁴ and the *Declaration on Fundamental Principles and Rights at Work*⁵ of the International Labour Organization, the *Guidelines for Multinational Enterprises* of the Organization for Economic Cooperation and Development⁶ and the *Global Compact* of the United Nations.⁷ The final part will pose the argument for the inclusion of business human rights responsibilities into a concept of shared responsibilities, in order to strengthen the notion of sovereignty and democratic accountability in international law.

2. The Request of Human Rights Based Regulation of Business in the Context of Globalization

⁴ International Labour Organisation, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of the International Labor Office at its 204th Session (November 1977), 17 *ILM* 422 (1978), as amended at its 279th Session (17 November 2000), Official Bulletin, Vol. LXXXIII, 2000, 41 *ILM* 186 (2002), available also at : <http://www.ilo.org/public/english/employment/multi/download/english.pdf> – last visit on 30 October 2004; Para. 2: ‘*The aim of this Tripartite Declaration of the Principles is to encourage the positive contribution which multinational enterprises can make ...*’

⁵ International Labour Organisation, *Fundamental Principles and Rights at Work and its Follow Up*, adopted at the 86th session (18 June 1998); ILO Doc. GB.279/12, available at: http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN – last visit on 30 October 2004

⁶ Organisation for Economic Co-operation and Development: *Guidelines for Multinational Enterprises*, adopted 21 June 1976, 15 *ILM* 967 (1976), and revised on 27 June 2000, 40 *ILM* 237 (2001), available at www.oecd.org – last visit on 20 April 2004; See for voluntary nature: Article 1 (Preface) of *The OECD Guidelines for Multinational Enterprises*, in: OECD, *OECD Guidelines for Multinational Enterprises, Global Instruments for Corporate Responsibility*, Annual Report 2001, p. 127f. (127)

⁷ Issued by Secretary-General Kofi Annan in his address at the World Economic Forum in Davos (Switzerland) on 31 January 1999, U.N. Doc. SG/SM/6448 (1999); The original nine principles of the UN Global Compact, as well as the tenth principle against corruption (added at the first Global Compact Leaders Summit on 24 June 2004), can be found, together with a list of participating companies, on their website at: <http://www.unglobalcompact.org/Portal/Default.asp> – last visit on 30 October 2004

Transnational corporations constitute main actors and an engine for global competition.⁸ The *United Nations Conference on Trade and Development* (UNCTAD) has estimated the number of transnational corporations at almost 64,000, of which 90 percent are based within the European Union, USA or Japan, with approx. 870,000 regional or local subdivisions.⁹ Their locally and globally increased socio-economic influence is widely described as a power shift.¹⁰ UNCTAD figures have shown that among the 100 largest worldwide economic entities, 29 are transnational corporations.¹¹ These developments are not without consequences for human rights. In 1999, the *United Nations Development Programme* (UNDP) recognized that without an enforcement mechanism for human rights obligations, business' activities cannot structurally benefit people and their socio-economic environment.¹²

Corporations are legal persons, but are privileged with certain legal and civil rights, for instance privacy and free speech, as well as the intrinsic ability to limit their liability. These aspects have led to concerns that they could acquire significant power.¹³ The *Cardoso Panel* has stated that the increased power of corporations is able to threaten participation, political accountability, rule of law and transparency.¹⁴ The main tools for addressing corporate impact on human rights can be seen in the increase of the role of the state, as well as in the strengthening rule of law and in the direct contribution to human rights protection and acceptance by corporations.¹⁵

Human rights law is dealing with the relationship between states and people under their jurisdiction by setting norms and standards for this relationship. This human rights law can be seen as one exception to the general principle of international law as a law among states. Human rights law further sets principles for the relationship among states since human rights violations of a certain value are a threat to peace, which enables the Security Council to respond under Chapter VII of the Charter of the United Nations. But, furthermore, human rights law defines the relationship among nations because *jus cogens* norms of human rights law – such as the prohibition of genocide, racial discrimination, slavery or torture – are applicable *erga omnes*. In addition 'gross and reliably attested violations of human rights and fundamental freedoms which appear to reveal a consistent pattern' lead to the consideration of these violations within the

⁸ A. Zammit, *Development at Risk – Rethinking UN-Business Partnerships*, South-Centre / UNRISD (Eds.), Geneva 2003, p. 191; World Commission on the Social Dimension of Globalization: *A Fair Globalization: Creating Opportunities for All*, International Labour Office (eds.), 2004, p. 124

⁹ United Nations Conference on Trade and Development (UNCTAD): *World Investment Report 2003 'Policies for Development: National and International Perspectives'*, 2003, p. 5f. and Annex A.I.15, p. 222f.

¹⁰ World Commission on the Social Dimension of Globalization, *supra* note 8, p. 37

¹¹ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2002 'Transnational Corporations and Export Competitiveness'*, 2002, Box IV.1., p. 90

¹² United Nations Development Programme (UNDP), *Human Development Report 1999*, 1999, p. 35

¹³ J. Bendell, *Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement*, in United Nations Research Institute for Social Development, 'Technology, Business and Society Programme Paper Number 13', June 2004, p. 8.

¹⁴ Panel of Eminent Persons on United Nations-Civil Society Relations, *Report 'We the peoples: civil society, the United Nations and global governance'* of 11 June 2004, U.N. Doc. A/58/817, Paragraph 3, 8, 11

¹⁵ United Nations Development Programme (UNDP), *Human Development Report 1999*, 1999, p. 44

Charter-based human rights protection mechanism, namely the Commission on Human Rights.¹⁶ Finally, human rights law defines the relationship between individuals by obliging them to mutually respect the human rights of the other.

Taking these general observations into account, one has to distinguish between the indirect protection of people's human rights from corporate abuses via the interference of the state into business activities, and the direct human rights protection achieved by imposing human rights obligations on businesses and holding them responsible for human rights violations. Weak states and political objectives in deregulation on the one hand and corporate irresponsibility on the other lead to a higher interest in corporate responsibility.¹⁷ Consequently, this article will limit its examination to direct human rights duties and obligations of business entities and their localization within the existing system of procedural international human rights law. The main focus therefore is not on the state's obligation to protect individuals from human rights abuses of others,¹⁸ nor on the horizontal application¹⁹ of human rights principles between the rights holder and the business at the national level.

The call for greater corporate accountability to human rights standards arose from many quarters and diverse stakeholders. Different steps and initiatives originate from similar motivations, as expressed by United Nations Secretary-General Kofi Annan at the 1999 World Economic Forum, when he called on business leaders to 'embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices ... [in order] to choose between ... a selfish free-for-all in which we ignore the fate of the losers, and a future in which the strong and successful accept their responsibilities, showing global vision and leadership'.²⁰

¹⁶ See ECOSOC Res. 1235 (XLII), 6 June 1967; ECOSOC Res. 1503 (XLVIII) 27 May 1970; ECOSOC Res. 2003/3 16 June 2000

¹⁷ J. Nolan, 'Brought to Account: The Business of Honour in the Boardroom,' in Sydney Morning Herald, 23 July 2004, available at: www.smh.com.au/articles/2004/07/22/1090464797690.html?oneclick=true – last visit on 30 October 2004

¹⁸ See in this regard for instance the commitment at the World Summit on Sustainable Development (Johannesburg 2002) to '[a]ctively promote corporate responsibility and accountability, based on Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures ...'. Para. 49 of Plan of Implementation of the World Summit on Sustainable Development, adopted in Johannesburg on 04 September 2002; U.N. Doc. A/CONF.190/20

¹⁹ See generally C. Andrew, *Human Rights in the Private Sphere*, 1993, Chapter 4; J. Sarah, 'An Overview on the Human Rights Accountability of Multinational Enterprises', in M.T. Kamminga, S. Zia-Zarif (eds.), *Liability of Multinational Corporations under International Law*, 2000, p. 75-93; Relevant Cases includes Velásquez-Rodríguez v. Honduras, Inter. Am. Ct. H.R. (Series C) No. 4 [1988], 28 ILM (1989) page 291; Yilmaz-Dogan v. Netherlands, CERD Communication No. 1 [1988] reproduced in 2 Int'l Hum. Rts. Rep. 238 (1995); L.K. v. Netherlands, CERD Communication No. 4 [1991], reproduced in 1 Int'l Hum. Rts. Rep. 32 (1994); A. v. the United Kingdom, Eur. Ct. H.R. 1998-VI, No. 90 [1998] p. 2692

²⁰ K. Annan, UN Press Release SG/SM/6881, of 1 February 1999, available at <http://www0.un.org/News/Press/docs/1999/19990201.sgsm6881.html> – last visit on 20 April 2004

In so far as the increased power of corporations is able to limit state sovereignty in defining its own socio-economic objectives with regard to states human rights obligations, a shift of perspective on responsibilities is proposed. New and elaborate systems of corporate accountability in general, and corporate responsibility, are requested, as expressed by the United Nations General Assembly which ‘stresses the need to promote corporate responsibility and accountability, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships and appropriate national regulations, and to support continuous improvement in corporate practices in all countries’.²¹

These political commitments, as well as the objectives for further developments of international law lay out the rationale for the Norms on Corporate Responsibility which are noted in their Preamble of

global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacity of any one national system.²²

The underlying assumption is that sovereignty was transferred and will be transferred to new international actors. International Law has to shape this development, applying legal theories which include recent developments, into a broad and coherent picture of international law.

3. Definitions – the Concepts of Duties, Obligations and Responsibilities for Human Rights

In order to examine the responsibilities of business entities with regard to human rights, the clarification of the concepts of duties, obligations and responsibilities under international human rights law is required.

First of all a *duty* explains a particular required action or omission under a general obligation²³ or a concrete conduct under a general obligation to respect, protect and fulfil human rights.²⁴ Both Covenants on Civil and Political Rights as well as on Economic, Social and Cultural Rights use the word *duty* with regard to individuals and *obligations* toward the parties of the Covenants. But these duties imposed on individuals and organs of society, such as corporations, have to be seen as mere moral functions to observe national law which regulates

²¹ GA Res. 58/225, ‘Role of the United Nations in promoting development in the context of globalization and interdependence’, 23 December 2003

²² Norms of Corporate Responsibility, supra note 3, Preamble-Paragraph 10

²³ See for concrete duties: Committee on Economic, Social and Cultural Rights: 11th session (1994), Para. 12 General Comment No. 5; 21st session (1999), Para. 51 General Comment No. 13; Human Rights Committee: 52nd session (1994), Para 13 General Comment No. 14; Committee on the Elimination of Discrimination Against Woman; 20th session (1999), Para. 17 General Comment No. 24; UN Doc. HRI/GEN/1/Rev.5

²⁴ See for instance Committee on Economic, Social and Cultural Rights: 22nd session (2000), Para. 35f. General Comment No. 14; UN Doc. HRI/GEN/1/Rev.5; 29th session (2002), Para. 17ff. General Comment No. 15; UN Doc. E/C.12/2002/11

business activities in order to protect human rights and to undertake additional, voluntary efforts to contribute to a better human rights environment.²⁵

Even more precise is the use of *obligation* by the treaty bodies, which distinguish between *procedural obligations* of a contractual party, such as the obligation to report²⁶ and *substantive obligations*, such as the commitments towards the rights holder.²⁷ With regard to obligations of business entities it has to be clarified that procedural obligations do not exist. The meaning of *obligation* as being any substantive or material obligations referring to any binding human rights commitment is employed by treaty bodies.²⁸ With regard to material or substantive human rights obligations of corporations, treaty bodies adopted the position that human rights law has to be seen from the perspective of the right holder, victims or vulnerable groups.²⁹ By taking the right-holders-perspective as a point of departure for general recommendations and observations, substantive business' human rights obligations were defined, among others, with regard to the right to food, water, health and in general with reference to civil and political rights.³⁰ In addition, new developments in international human rights treaty law, such as the Optional Protocols of the International Convention on the Rights of the Child – are addressing direct obligations of non-state actors with regard to child soldiers³¹ as well as child pornography and sexual exploitation.³² Furthermore – besides these developments within international human rights law – it is by no means exceptional to impose *substantive obligations* on corporations within international treaties. Examples are the recent UN Convention against Corruption³³ or the Convention on Civil

²⁵ See Article 29 of Universal Declaration of Human Rights, adopted by GA Res. 217A (III), 10 December 1948, U.N. Doc A/810 at 71 (1948); and Preamble of both Covenants on Civil and Political Rights as well as on Social, Economic and Cultural Rights, adopted by GA Res. 2200 A (XXI), 16 December 1966; ICescR entered into force on 3 January 1976 and ICcpR entered into force on 23 March 1976; U.N. Doc. A/RES/2200 A (XXI)

²⁶ Committee on Economic, Social and Cultural Rights: 3rd session (1989), General Comment No. 1; Human Rights Committee: 13th session (1981), General Comment No. 1; Committee on the Elimination of Racial Discrimination: 5th session (1972), General Recommendation No. II; Committee on the Elimination of Discrimination Against Women: 8th session (1989), General Recommendation No. 11; Committee on the Rights of the Child

²⁷ Committee on Economic, Social and Cultural Rights: 5th session (1990), General Comment No. 3; Human Rights Committee: 57th session (1997), General Comment No. 25; Committee on the Elimination of Racial Discrimination: 5th session (1972), General Recommendation No. I

²⁸ ICcpR, *supra* note 25, See for instance Article 8, 11, 14

²⁹ See for instance Comment 2 of Explanatory comments to the revised text of the principles and guidelines, dated 24 October 2003, in: 'Report of the Second Consultative Meeting on the Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law' (Geneva, 20, 21, 23 October 2003) submitted by A. Salinas, Chairperson-Rapporteur; U.N. Doc. E/CN.4/2004/75 (Appendix I)

³⁰ See General Comment 12 (food), 14 (health) and 15 (water) by the Committee on ICescR and General Comment 24 and 26 by the Human Rights Committee under ICcpR; U.N. Doc. HRI/Gen.1/Rev.5

³¹ 1st OP (Child Soldiers) adopted and opened for signature, ratification and accession by GA Res. 54/263, 25 May 2000 entered into force on 18 January 2002; U.N. Doc. A/RES/54/263; Preamble Paragraph 11 expresses its concerns about the power and influence of armed groups and Article 4 states that non-state actors *should* respect the human rights of children under 18 within their recruitment.

³² 2nd OP (child pornography) adopted and opened for signature, ratification and accession by GA Res. 54/263, 25 May 2000, entered into force on 18 January 2002; U.N. Doc. A/RES/54/263; Preamble Paragraph 3 and 4 are concerned with as well as aware of the problem and need for international regulation as reaction of power and influence by private actors. Article 2 lit. (b) addresses groups and persons and Article 3 Para. 4 and 7: sets up the obligation for compensation and putative payments.

³³ Adopted by the GA Res. 58/4, 31 October 2003; U.N. Doc. A/RES/58/4

Liabilities for Oil Damages³⁴ and the International Convention on the Law of the Sea³⁵. But, nevertheless, these obligations – although clearly determining prohibited activities of corporations as legal persons – have to be enforced in domestic law and are therefore only examples for indirect protection from corporate human rights abuses throughout their member-states.

Finally a clear distinction has to be drawn between existing obligations and the normative demand of their enforcement at a national or international level. Only if this normative demand for operationalization is put into practice, can one speak of *responsibilities* under international law. *Responsibility* has two different functions, one in connection with a sanction or self-restriction and the other in the application of an abstract conduct with regard to specific duty or general obligation. But using *responsibility* within a body of international law one is bound to its meaning within this specific discourse. In international law there is, first of all, the concept of *state responsibility* and *individual responsibility*.³⁶ Under these concepts *responsibility* has a procedural meaning - as the new relationship between perpetrator and rights holder in order to re-establish the situation which is in accordance with the breach of duty, as well as to find means of satisfaction. The principles of monitoring, legal and administrative framework and reparations are means of responsibilities as part of procedural or formal international law.³⁷ As shown above, obligations of corporations with regard to human rights are linked to obligations of states to enforce them on the national level. The definition of human rights obligations of corporations are therefore – so far – commitments by states. As a part of indirect human rights protection, states are responsible for these commitments.

The question that is left open is whether these examinations differ when a state is unwilling or unable to fulfil these commitments or in cases where a corporation exercises quasi-state authority or collaborates with the authorities in human rights violations. In this regard business' human rights responsibilities are outlined in Principle 9 of the Articles of State Responsibility whereas, 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'.³⁸ One can argue that when acting with elements of authority, such as in *Export Possessing Zones* or in *Failed States*, corporations are already responsible for human rights violations.

³⁴ Adopted on 29 November 1969 and entered into force on 19 June 1975; replaced by 1992 Protocol adopted on 27 November 1992 and entered into force on 30 May 1996 and amended by 18 October 2000 entered into force on 1 November 2003, available at http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660 – last visit on 30 October 2004)

³⁵ Adopted at the Third United Nations Conference on the Law of the Sea on 10 December 1982; entered into force on 16 November 1994 available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm – last visit on 30 October 2004)

³⁶ See Article 25 of Rome Statute of the International Criminal Court (adopted on 17 July 1998 and entered into force on 2 July 2002; U.N. Doc. U.N. Doc. A/CONF.183/9)

³⁷ Norms of Corporate Responsibility, supra note 3, Para. 16

³⁸ Principles of Responsibility of States for internationally wrongful acts state responsibility, adopted by GA Res. 56/83 12 December 2001; U.N. Doc. A/RES/56/83 (Annex), Article 9

4. Existing Concepts of Corporate Accountability

The above outlined *quasi-state-approach* to corporate responsibilities does not fill the gap between gained influence and business' accountability when there are no elements of governmental authority, but economic power and ignorance towards human rights obligations are exercised. The question that therefore needs to be addressed is how to bring existing regimes of corporate accountability – as means of self restriction – into line with the normative demand for direct responsibility of corporations with regard to human rights.

Accountability in international law can be seen as a system of power control³⁹ which can – according to Article 25 International Covenant on civil and political rights⁴⁰ – be exercised in a democracy via elections. According to its semantic use *accountability* means 'to furnish substantial reasons or a convincing explanation'⁴¹ or 'explaining one's actions'.⁴² This perception was followed in the *Corfu-Channel-Case* where 'a state on whose territory an act contrary to international law has occurred, may be called upon to give an explanation'.⁴³ The theoretical background of this notion is that the misuse of transferred, delegated or assumed power will be prevented by accountability within a juridical or quasi-juridical framework.⁴⁴ In other words the use of power is justified if it is exercised in accordance with the law. With regard to human rights, *accountability* describes a system of political culpability on norms and standards which are internationally defined.

When speaking about *corporate accountability*, this term becomes blurred. In order to structure the following considerations, a system of four dimensions or levels of corporate compliance with human right standards should be introduced.⁴⁵ The first dimension is *legal compliance*, e.g. the obedience of existing tax, labour, environmental or human rights law. If a state incorporated human rights into its law on corporate charter and activities, corporations will be accountable at the national level and within domestic jurisdiction. The second dimension can be called *strategic corporate responsibility*, since its main aim is a modern structure of the corporation and the sustainable presence in the market. Mainly labour relations and security within the production process, as well as risk management are, applied within the second dimension. This dimension is important for human rights of the working process and labour related human rights such as health and education. Thirdly, the dimension of *remoulding competitive advantage* intends to secure and enlarge market performance via public relations, incorporation of general codes of conduct and institutionalisation of cooperation with states

³⁹ Committee on Economic, Social and Cultural Rights: 19th session (1998), Para. 2 General Comment No. 9, UN Doc. HRI/GEN/1/Rev.5 'Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.'

⁴⁰ ICcPR, supra note 25

⁴¹ Webster's Third New International Dictionary, 1981

⁴² Little Oxford English Dictionary of Current English, 1984

⁴³ ICJ Reports 1949, p. 18

⁴⁴ A.-M. Slaughter, 'The Accountability of Government Networks', Indiana Journal of Global Legal Studies, Vol. 8, p. 347f. (2001), p. 349, 360, 362

⁴⁵ Developed in lean on T. Swift, S. Zadek, *Corporate Responsibility and the Competitive Advantage of Nations*, The Copenhagen Centre & AccountAbility, 2002, p. 14 who speak of 'generations'.

authorities and civil society. In this dimension, consumer interests about production conditions and normative obligations by non-governmental organisations play a major role.

Since the first three dimensions mainly concern risk management, one can argue that whenever a human right has a market value or is covered by domestic law it can be enforced under one of the different dimensions. In addition, a fourth dimension of *philanthropy* can be defined where corporations contribute to a better human rights environment without it having any side effects on its own business. But in common to all the dimensions is the fact that the implementation of human rights obligations is a question of selectivity by governments, corporations or civil society, because they are voluntary. Even the extension of extraterritorial jurisdiction in the case of domestic international jurisdiction under the *American Tort Claims Act of 1789*⁴⁶ or common law tradition⁴⁷ is seen as highly contested.

Even existing international frameworks are based on voluntary concepts. The *OECD Guidelines for Multinational Enterprises* have been adopted by governments in all thirty OECD member countries and by eight non-members.⁴⁸ The *Guidelines* represent a commitment by adhering governments to make recommendations to multinational companies operating in or from their territories. As such, although they are addressed directly to companies, they are not binding. The same applies to the Instruments of the International Labour Organisation (ILO). Amended in 2000, the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* calls for direct acceptance of the fundamental labour standards by corporations.⁴⁹ These fundamental labour standards include the prohibition and abolishment of forced labour (ILO Conventions 29 and 105), prohibition of discrimination and unequal remuneration (ILO Conventions 100 and 111), outlaw of child labour (ILO Conventions 138 and 182), and the freedom of association and the right to collective bargaining (ILO Conventions 87 and 98).⁵⁰ ILO conventions and recommendations are only binding on member States, yet due to its tripartite composition, employers' and employees' interest groups, as participants in decision-making, have a moral obligation to include the International Labour Organization's adopted principles into their own policies. Finally, the United Nations Global Compact is also a voluntary corporate citizenship initiative which was launched by the United Nations Secretary-General in

⁴⁶ 28 U.S.C. § 1350: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'; See: P. I. Blumberg, 'Asserting Human Rights Against Multinational Corporations under United States Law: Conceptual and Procedural Problems', 50 Am. J. Comp. L. 493 (2001); C. Shaw, 'Uncertain Justice: Liability of Multinational under the Alien Tort Claims Act', Stan. L. Rev. 54 (2002), 1359, 1365-1366.

⁴⁷ See: R. Meeran, 'Liability of Multinational Corporations: A Critical Stage in the UK', in: M.-T. Kamminga, S. Zia-Zarifi (eds), supra note 19, p. 251-264; S. Joseph, *Corporations & Transnational Human Rights Litigation*, 2004, Chapter 6

⁴⁸ Member countries of the OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the UK, and the USA. Seven non-member countries - Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia - have also declared their adherence to the Guidelines, supra note 6

⁴⁹ ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, supra note 4

⁵⁰ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, supra note 5

2000. The initiative attempts to bring together companies, United Nations agencies, civil society, and labour organizations in support of ten principles drawn from international declarations. These principles offer general guidelines for corporate behaviour related to human rights, labour standards, environment, and anti-corruption.⁵¹ However, in terms of human rights, the principles are extremely vague, offering minimal guidance regarding the content, interpretation, and application of human rights responsibilities. While companies are asked to mainstream the ten principles within their spheres of influence, the United Nations Global Compact explicitly denies that it is a regulatory initiative. Instead, it claims to offer a values-based platform for voluntary peer review and institutional learning.

To conclude the status quo, one can say that business' international human rights obligations lack an international operationalization as applicable responsibilities. Domestic standards of corporations' human rights obligations – if not implemented in mandatory rules – are voluntary and as such very often lack international legitimacy, while creating an uneven playing field due to differing standards, limited adoption, and inconsistent implementation and monitoring. Voluntary initiatives may work for the well-intentioned, but the overwhelming majority of companies have no human rights policy, and few have made explicit commitments. As *Amnesty International* noted in a report 'Many codes are very vague in regard to human rights commitments. As far as AI is aware, fewer than 50 companies even refer explicitly to human rights in their codes.'⁵²

5. The Concept of Business' Responsibilities – Implementation of Business' Obligations at the International Level

As shown above business' human rights obligations lack a proper implementation at the international level. Furthermore, they are guided by voluntary principles and selectivity at the national level. Both deficits are in contradiction to the normative demand for respect, protection and fulfilment of human rights as universal, interdependent, interconnected and indivisible values.⁵³ The concept of business' responsibilities for human rights, as introduced by the Sub-Commission via the Norms of Corporate Responsibilities, is a challenge to have existing human rights obligations formalized and implemented as procedural responsibilities on an international level. This effort can be seen as an attempt to extract human rights protection from the sovereignty of states and their domestic jurisdiction⁵⁴ to an international level. The justification of such a challenge has to be judged by the impact on sovereignty and the improvement of human rights protection mechanism.

⁵¹ United Nations Global Compact, *supra* note 7

⁵² Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability*, 2004, available at: [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/\\$File/IOR4200204.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/$File/IOR4200204.pdf) – last visit on 30 October 2004, p. 5

⁵³ Chapter I, Article 5 Vienna Declaration and Programme of Action, adopted by World Conference on Human Rights, Vienna, June, 14.-25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), U.N. Doc. A/CONF.157/23

⁵⁴ Charter of the United Nations, UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119, Article 2 Para. 7

Sovereignty is the core concept of International Law.⁵⁵ It can be described as entailing a monopoly over fundamental political decisions, as well as over legislative, executive, and juridical powers, based on consolidated, durable institutional, organized economic and financial means.⁵⁶ Moreover, sovereignty describes the link between exercised power and the legitimate use of such influence over people's daily lives.⁵⁷ Finally, sovereignty can be explained as legitimate assignment and control of power.⁵⁸

Through this, human rights protection calls for the authority of state and its accountability. Introducing a concept of corporate responsibilities, through which normative human rights obligations become operationalized and implemented on an international level, would strengthen states sovereignty in cases where states are not able to implement these obligations on a national level. In addition, factual exercised power, whether economically or politically exercised, becomes reframed by human rights principles with a universal demand of implementation. Finally, the lack of accountability of economic actors with factual power becomes resolved.

Introducing corporate responsibility with regard to human rights is also an attempt to combat impunity. Recent examples of private security firms involved in torture during interrogation in Iraq are illustrations of the impunity of business.⁵⁹

The introduction of such a responsibility of business' for their human rights violations is not an attempt to dismiss the state of its primary responsibility for human rights. The Norms on Corporate Responsibilities have the potential to clarify the evolving system of shared responsibilities between state actors with their primary responsibilities and non-state actors' responsibilities with regard to human rights.⁶⁰ They are a contribution to the concept of *shared and partial responsibility*⁶¹ with regard to all possible threats to a human being. Within this notion, *primary responsibility* lies within the hands of states, but corporations have

⁵⁵ R.N. Haass, 'Sovereignty – Existing Rights, Evolving Responsibilities, Remarks at the School of Foreign Service and the Mortara Center for International Studies', Georgetown University 2003, available at: http://www.georgetown.edu/sfs/documents/haass_sovereignty_20030114.pdf – last visit on 30 October 2004

⁵⁶ I. Brownlie, *Principles of Public International Law*, 1990, p. 78

⁵⁷ S. Sassen, *Losing Control? – Sovereignty in an Age of Globalization*, 1996, p. 65

⁵⁸ T.M. Franck, 'The Emerging Right to Democratic Governance', *AJIL* Vol. 86 No. 1 (1992), p. 46f.; J.H. Jackson, 'Sovereignty-Modern – A New Approach to an Outdated Concept', *AJIL* Vol. 97 No. 4 (October 2003), p. 782f. (783, 790)

⁵⁹ J. Borger, '“Dirty” war for profit evades reach of law', *Guardian Weekly*, May 6-12, 2004, page 6, with references to CACI International, a military and intelligence contractor of the Pentagon and CIA.

⁶⁰ For an overview of the discussion see: A. Randelzhofer, 'The Legal Position of the Individual under Present International Law', in A. Randelzhofer, C. Tomuschat (eds.), *State Responsibility and the Individual*, 1999, p. 231-242, See also: S. Joseph, *supra* note 19, p. 75-93

⁶¹ This concept has its expression in the formulation of 'prime responsibility' as in GA Res. 53/144, 9 December 1998 (Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms), Article 2 Para. 1; as well as in the Optional Protocol to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by GA Res. 57/199, 18 December 2002 and available for signature, ratification and accession as from February 4, 2003, Preamble Paragraph 4

*'responsibility within their respective spheres of activity and influence.'*⁶² This concept was deepened by the *Sub-Commission on the Promotion and Protection of Human Rights* which, in August 2003, adopted *the Norms on the Corporate Responsibilities*. The Commission on Human Rights confirmed in its recent closed 60th session the 'importance and priority it accords to the question of the responsibilities of transnational corporations and related business enterprises to human rights'.⁶³ Nevertheless it should be recalled that the concept of shared responsibilities does not mean to dismiss the state from its primary responsibilities, but where a state is not existing, able or willing to regulate business, corporations become responsible for their conduct.

The remaining and final question concerns the current status of the Norms on Corporate Responsibility. If one considers these principles as an attempt to bring existing human rights obligations into action, then it is certainly not the Sub-Commission, with its mandate to make recommendations and to identify needs of international law developments, which is the proper body to enact new principles of international law. Since international law-making lies in the hands of states, the Sub-Commission requested that the Norms on Corporate Responsibility 'become generally known and respected'.⁶⁴ And the working group which drafted the Norms have already acknowledged that standard setting and that implementation needs time.⁶⁵ As with all manner of international law development, the Norms are a reaction to certain concerns and human rights violations as well as a process that begins by identifying the need for regulation and common international standards, followed by the formulation and adoption of such principles and finally their implementation. The improvement of human rights protection mechanism evolves very often from a reaction to people's needs and experiences of injustices and violations of human dignity. Recent examples are the introduction of individual criminal responsibility for gross violations of human rights by the Security Council in setting up the Ad-hoc tribunals for Rwanda and Yugoslavia under Chapter VII of the United Nations Charter.⁶⁶

Without diminishing the underlying binding obligations, the main added value of the Norms on Corporate Responsibility is their vision of the implementation of these obligations through business' responsibilities. If the Norms are seen as a point of departure for future international law developments that address corporate responsibilities with regard to human rights, it is *law in the making* often labelled as *soft law*. *Soft law* is artificially differentiated from binding *hard law* principles as *law in development* or law that comes into effect in a non-formalized way. *Hard law* is therefore developed by the formal processes that lead, amongst others, to customary and treaty law obligations. But very often hard law is kept in general terms in order to make it agreeable in a procedural way.⁶⁷ *Soft law* by comparison involves principles of

⁶² Norms of Corporate Responsibility, supra note 3, Para. 1

⁶³ Commission on Human Rights Decision 2004/116, 20 April 2004; adopted as orally amended Draft Decision E/CN.4/2004/L.73/Rev.1 without a vote, U.N. Doc. E/CN.4/2004/L.11/Add.1, p. 81f., Lit. a

⁶⁴ Norms of Corporate Responsibility, supra note 3, Preamble Paragraph 15

⁶⁵ Norms of Corporate Responsibility, supra note 3, Preamble Paragraph 11

⁶⁶ See SC Res. 825, 25 May 1993, and SC Res. 955, 11 November 1994

⁶⁷ See for instance general principles of human rights treaties as well as Article 204, Para. 1 and Article 217 Para. 2 United Nations Convention on the Law of the Sea (entered into force on 16 November 1994) with only programmatic importance.

less formal legal security⁶⁸ but specific and nevertheless binding and obeyed in practice.⁶⁹ This notion gives greater importance to the practical binding character of a norm than to its development. Such a perspective comes closer to the normative demand of human rights, that human rights principles such as the Norms on Corporate Responsibility should recognize the hybrid character of human rights obligations as legal and political as well as moral imperatives. Therefore it is not even an obstacle that the sources of the Norms itself are treaty law, resolutions by international organisations and voluntary obeyed codes of conducts. Under this consideration it would be misleading to judge the Norms only as *non-binding soft law*, *law in development* or *law with less formal security* if their underlying normative concepts are either agreed or a demand from potential human rights victims.

6. Conclusion

As shown above, the Norms on Corporate Responsibility are able to develop their own system of obligations by their use and reference to it. Through this they have their own political and moral standing and the potential of independent legal standing too. Although the essential question of monitoring and implementation of business' responsibilities with regard to human rights is open to further clarification, a few possible and already visible cornerstones of such a development can be described.⁷⁰

Firstly, the Norms are more concrete than the above mentioned voluntary approaches by *United Nations*, *OECD* and *ILO*. When trying to implement normative human rights obligations towards corporations directly, the Norms on Corporate Responsibility could, with regard to these existing voluntary but general initiatives, become a concretisation of human rights principles enshrined in these mechanisms, as well as a learning tool regarding contributions to a better human rights environment in areas that are not a core business sphere of activity and influence.

Secondly, the Norms could become a common standard for defining business misconduct within human rights obligations. In this way they could replace the *OECD Guidelines on Multilateral Enterprises* which are also seen as a voluntary set of principles, but used by the UN Security Council in order to define human rights violations by corporations, whether they are based in member states of the *OECD* or not.⁷¹

Thirdly – as explained above – the Norms on Corporate Responsibility are a restatement of existing obligations as well as an identification of needs for further developments of obligations and responsibilities in international human rights law. The recognition of such requirements is, on the one hand, the beginning of law-making processes and, on the other, political statements with their own value. Therefore – before having a legal standing – the Norms

⁶⁸ See among others for the discussion: R. Lubbers, 'Definition of Soft Law' available at <http://globalize.kub.nl/lexicon.asp?term=Soft%20Law> – last visit 7 August 2003, H. Hillenberg, 'A Fresh Look at Soft Law', *EJIL*, Vol. 10, No. 3, page 499-516

⁶⁹ Examples are: The 'Oral London Gentlemen's Agreement' on geographical composition of non-permanent members of the Security Council until Charta reform of 1966 (now Article 23, Para. 1, Sentence 3 Charter); The regional rotation for the candidates for the Secretary General; The Ad-hoc Tribunals for Former Yugoslavia and Rwanda by the Security Council.

⁷⁰ Commission Decision 2004/116, supra note 63, Lit. b); Sub-Commission Res. 2003/16, supra note 2, Para. 7

⁷¹ Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 'Final report', U.N. Doc. S/2003/1027

have a political and social as well as economic value that might be implemented inside and outside existing human rights protection mechanisms. In this way the Norms are also a contribution to the recognized need of corporate accountability as a fundamental principle to balance development, human rights and environment.⁷² Consequently, the Norms on Corporate Responsibilities strengthening of the role of the state, reaffirming its duty to protect human rights, and strengthening the indirect protection mechanism as is often requested that 'transnational] corporations respect regulatory frameworks set by Governments, as well as respecting their direct obligations towards the right to food (including water) under international human rights law, national legislation, intergovernmental instruments and voluntary codes of conduct'.⁷³

In the end, the Norms have the capacity to become a common understanding for business conduct with regard to human rights outside the human rights protection mechanism of the United Nations. This understanding is usually framed by a selectivity of states and corporations as well as NGOs as regards which standard should be applied or which corporations should be addressed. As a common standard, the Norms on Corporate Responsibility are already serving transnational corporations as the main tool for monitoring and judging corporate conduct towards human rights.⁷⁴ Pensions Funds, Social Responsible Investment and business' auditing might follow. As a result, the Norms become important for corporations in order to compete on an equal footing and to eliminate a poor human rights record as a competition benefit. The binding character of its incorporated obligations Norms and the normative demand for their implementation as responsibilities under international human rights law will move the protection of human rights from business' violations of the moral and ethical conduct of business into the rule of law.

⁷² F.-Z. Ouhachi-Vesely (Special Rapporteur), 'Report "Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights"', U.N. Doc. E/CN.4/2004/46, see for instance Para. 60, 62 and 117 of

⁷³ J. Ziegler (Special Rapporteur), 'Report "The right to food"', U.N. Doc. E/CN.4/2004/10, Para. 35ff., Para. 54 lit. (g) and (h)

⁷⁴ See for instance Business Leader Forum on Human Rights. Initiated by Mary Robinson's Ethical Globalisation Initiative and launched by ABB, Barclays, MTV Europe, National Grid Transco, Novartis, Novo Nordisk and The Body Shop International, the Business Leader Initiative on Human Rights endorsed the Norms and will road test it. See: Press Release of December 09, 2003 'Defining a role for business in human rights: Business Leaders announce a three-year initiative' (on file with author; more details at www.business-humanrights.org)