



# The Obligations of Transnational Corporations in the Global Context.

Normative grounds, real policy, and legitimate governance\*\*

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## RÉSUMÉ

Dans cet article nous défendrons l'idée que la notion courante d'obligation s'avère inadéquate pour régler des problèmes globaux. Nous ferions mieux de reconnaître des acteurs collectifs, spécialement des multinationales, comme des agents importants dans le domaine des droits de l'homme puisqu'ils sont beaucoup mieux préparés pour traiter des problèmes complexes que les individus. Deuxièmement, cet article défend l'idée que ceci n'est pas particulièrement idéaliste, car elle prend sa source dans des phénomènes politiques actuels. Le droit international et les arrangements extra-juridiques peuvent être interprétés comme un cadre institutionnel suscitant une contrainte de justification. Néanmoins, toutes les initiatives d'auto-régulation privée ne sont pas souhaitables ou légitimes.

## ABSTRACT

This article argues that our prevailing notion of obligations is inadequate for regulating large-scale problems. Collective actors, especially corporations, should be recognized as having obligations in human rights issues as they are much better prepared to deal with complex problems than individuals. Secondly, it is argued that ascribing such obligations is

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\*\* I would like to thank the participants at the IDEA-conference in Kampala and the members of Rainer Forst's Political-Theory-Colloquium for their very helpful questions and comments. I am also grateful for the detailed written commentary and suggestions of Des Gasper, Barbara Bleisch, Ana Garcia and Rainer Nickel. An extended and otherwise slightly different German version of this article will be published in: Barbara Bleisch/Peter Schaber (eds.) (2007): *Weltarmut und Ethik*, Paderborn: Mentis.

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not loftily idealistic, but has its roots in current political phenomena. Contemporary international law and non-legal arrangements create an institutional framework that pressures collectives to justify their actions. Nevertheless, some of these new modes of governance lack legitimacy because they neglect the participation of the individual.

**Key words:** Corporate obligation, individual obligation, human rights, private self-regulation, global governance

**JEL classification:** F20, L20

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We live in a world of complex global economic, political, and social processes that influence our lives enormously. It is difficult to trace the causes of these developments and determine who is obliged to remedy the massive problems we face today like global poverty, slavery and exploitation, and the destruction of our environment. Moral philosophy and political theory are struggling for an adequate conception of our obligations in global and regional contexts. The prevailing commonsense morality says that the primary moral actor is the individual and the obligations of collectives are often more or less ignored. From this perspective, the individual is overburdened with responsibility for mitigating large-scale problems effectively. Things look quite different, however, when we turn to political theory and look at the political legitimation of rules in international relations. While the individual is seen as the main and ideal actor in processes of democratic will formation and rule setting *within* the nation-state, governance beyond the nation-state has other demands. In keeping with current notions of good international governance, the citizen has given way to collectives as the primary political actor. Private collectives in particular have gained increasing prominence in international negotiations, public deliberation, and rule-setting.

We therefore face the somewhat awkward situation that in moral frameworks, the obligations attributed to the individual have become quite extensive, whereas in political frameworks, the legitimacy of a citizen's participation in global agreements has been curtailed. Both frameworks have their pitfalls. Our understanding of moral obligations to address large-scale problems is as inadequate as the prevailing ideas concerning legitimate governance in international relations. In this paper, I will discuss these issues, focusing on the obligations of transnational corporations in international relations.

The transnational corporation (TNC) became a main international actor during the second half of the twentieth century.<sup>1</sup> The revenue of some transnational corporations exceeds the gross national product of smaller European states, let alone African states, which gives them inordinate influence over international market regulations and national legislative and political processes. More than 54 million people are employed by TNCs, and this number is even higher when one includes non-equity relationships such as subcontracting and licensing.

At the centre of these developments is the issue of transnational corporations' obligations to respect basic human rights. They embody the most basic moral rules with global scope. It is widely held that human rights treaties are first and foremost addressed to individuals and to states. States, for various reasons, no longer sufficiently control the implementation of human rights law. *Non-state actors* - not by accident defined in contrast to the "state" - are not parties to such treaties because - or so it is said -- they have not been involved in the drafting process, cannot report to the treaty bodies, and cannot participate in electing the

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<sup>1</sup> See Koenig-Archibugi 2004: 234. Their growth has been enormous: In 1976, there were 11,000 TNCs with 82,600 foreign affiliates. In 2002, there were 64,592 TNCs with 851,167 foreign affiliates. It is not just the growth in TNCs that make them relevant in international relations; it is also that their roles have changed. While nation-states have lost important decision-making competencies at the international level, TNCs have gained tremendous political and economic power; see also De Schutter 2005.

expert members.<sup>2</sup> This position, however, no longer seems tenable and has raised pressing theoretical questions. I will address two of these questions in this article.

The first question focuses on the normative side of the topic: Do corporations have human rights obligations, and if so, do they differ fundamentally from the human rights obligations of states on the one hand, and of individuals on the other? I will argue that collective actors do have obligations to avoid directly violating human rights, and to mitigate situations where rights are being violated by others, if they have the power to intervene. Moreover, having broached the subject of an “extended notion of corporate obligations”, what should be the content of those obligations? (Section 1).

Normative studies are often criticized for being trapped in the powerlessness of “ought” language. My approach combines a normative and empirical perspective, connecting the normative grounds for corporate obligations to an empirical analysis of the current global and EU policies that work toward implementation of corporate obligations. Therefore the second part of this article addresses ongoing policy development, and asks the following questions: Which modes of governance already allow for private-public cooperation in the implementation of human rights obligations? This line of inquiry comes full circle with a normative evaluation of the forms of governance that address the obligations of corporations. I will argue that a network of diverse regulations concerning the responsibility of non-state actors has brought about a new institutional context of justification and control. However, not all of these new policies meet the standards of democratic legitimation. (Section 2)

## **1. THE OBLIGATIONS OF THE COLLECTIVE ACTOR**

States remain a major violators of human rights, but there is now also widespread concern at human rights abuses committed by corporations that have the power to escape national legal responsibilities. At the same time, TNCs have become an important partner to states, intergovernmental agencies, and non-governmental organizations in the development of mechanisms to enforce human rights-related standards such as adequate wages and leisure time for workers, and environmental protection. The corporation appears both as a potential human rights violator and as a political bargaining partner in governance processes that set human rights standards.

In moral philosophy and political theory, most approaches bear the hallmarks of what Samuel Scheffler has called commonsense morality. It includes assumptions that influence theory but are also entrenched in everyday practices.<sup>3</sup> Four assumptions in particular make it

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<sup>2</sup> On this claim, see Alston 2006: 9; however, this is not the position, which he defends.

<sup>3</sup> Scheffler 2001: 37.

very difficult to speak about the obligations of a collective actor.<sup>4</sup> These are that: collective actors do not act intentionally; that the individual (and not the collective) is the primary moral actor; that action is more morally significant than omission; and that consequences that have proximity in time and space are more significant than remote consequences. In the subsection that follows I will first address these four assumptions and argue that we should in fact attribute obligations to collective actors, including transnational corporations, as there are advantages to assigning obligations to collectives rather than to individuals. Secondly, I will focus on the content of these obligations, thereby taking into consideration that corporation's obligations does not transform the corporation or any other collective actor into a moral person.

## 1.1. The “unintended-action-argument”

When considering the obligations of corporations, we are first confronted with the commonsense-based objection that the actor we are talking about is a *collective* whose way of “acting” differs fundamentally from an individual. By a “collective actor” I mean an entity with an internal organization structure that is able to make decisions and direct its activities accordingly.

In an argument that can be traced to Adam Smith, Friedrich Hayek and later to Niklas Luhmann, it is commonly held that corporations' activities are *not regulated intentionally* but arise spontaneously as a result of the establishment of a subsystem in an expanding capitalist world economy. Market processes, they say, can best be understood in terms of a game, “partly of skills and partly of chance”<sup>5</sup> whose outcome is not foreseeable but is rather unpredictable and has winners and losers. The economic system is metaphorically driven by an “invisible hand” (Adam Smith) or “steering medium” (Niklas Luhmann).<sup>6</sup> As part of the systematic economic order, corporations are self-referential entities, subject to the imperatives of economic rationality, such as the exchange of economic goods, the maximizing of profit under conditions of competition, and the accumulation of power. The argument for restricted corporate obligations concludes that because the actors in the market are driven by the forces of economic rationality, and do not have intentionality, one cannot say the corporate actor was ever in a position to act otherwise.<sup>7</sup>

This emphasis on an interest-neutral and completely unintended coordination of activities seems to be overly one-sided.<sup>8</sup> This becomes obvious when we consider problems or conflicts that occur within the market that require reactions from corporations. Stakeholder demands, moreover, have led to new institutional mechanisms such as progress reports,

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<sup>4</sup> The first assumption is not mentioned in Scheffler 2001. For the other three see also the very illuminating article of Green 2005: 117-135.

<sup>5</sup> Hayek 1976: 71.

<sup>6</sup> Smith 1776 [1776]; Von Hayek 1976; Luhmann 1998.

<sup>7</sup> For the relationship between responsibility and the freedom to act otherwise see Fischer and Ravell 1993.

<sup>8</sup> Gray 1981.

benchmarking, and peer review.<sup>9</sup> Corporations obviously react to new external demands, and can be said to be involved in learning processes. Shell in Nigeria is a prominent example of a firm dealing with external demands in a way that, at first glance, seems to contradict the primary aim of a corporation to increase its profit. The impact of oil extraction on the Ogoni people and the Delta environment and especially the execution of Ken-Saro-Wiwa led to very negative publicity for the company worldwide. For a long time, Shell's standard answer to criticism over its role in Nigeria was to strengthen the "division of work" between the state and the corporation.<sup>10</sup> A change in opinion came after public pressure against the company strengthened. Shell admitted that "not to take action could itself be a political act", and declared a commitment to a wider concept of responsibility for future activities. This potential for corporations to change their behavior paves the way for further normative consideration of the foundation for the obligations of collective actors. Let us consider the three remaining assumptions of commonsense morality that restrict a notion of corporate obligations.

## 1.2. The priority of the individual over the collective

The second assumption is the idea that individuals are the primary bearers of moral obligations.<sup>11</sup> This means that my independent actions are regarded as more important for an outcome than my actions as a member of a group. If I produce a piece of artwork that becomes very famous, I will receive much more attention for my effort if I produce it alone than as a member of a group or school. The focus on the relative contribution of the individual to the final product has consequences for our daily assessment of our obligations. This is one reason why it is difficult to address responsibility for climate changes. If I drive my car every day and use electricity, this activity on its own cannot cause global warming. We see our contribution without focusing on the aggregated effects our actions have in concert with those of others. This shapes our ideas about collectives. Insofar as collective actors play a substantial role in commonsense morality at all, their actions and obligations are seen as being derived from those of individuals.

This perspective, however, seems shortsighted; it neglects the overall effects of uncoordinated collective harm. This is true also with view to the collective actor's activities. Even though the market system operates according to economic demands, examination of the effects of a corporation's activities allows a normative evaluation of the collective activities. Against Hayek's assumption, the systemic mechanisms (power and the exchange of goods) are "embedded" in society through the effects of the collective actions<sup>12</sup>, which means that economic actors are "linked" to processes of cooperation and interaction in the "lifeworld". In a global economy, this "link" is more or less reduced to confronting the sometimes

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<sup>9</sup> The European Union, for example, has increasingly used so-called *soft modes of governance* to orchestrate different actors, including TNCs, to solve complex social problems through deliberation, based on voluntary and non-sanctioned forms of policy-making (public or non-public). See for one of the first articles on this Snyder 1994; later Best, 2003.

<sup>10</sup> Cited in McBarnet 2004: 67.

<sup>11</sup> See for the following aspect also Green 2005, 118.

<sup>12</sup> For the notion of „embeddedness“ see Polanyi 2001 [1944].

desired but often undesired aggregated effects of radical modernization. Growing political awareness beyond national borders has triggered an *evaluation of the effects*<sup>13</sup> of corporations' activities in different public spheres. Consider, for example, the debates on the ecological and human rights abuses caused by multinationals. Because they affect people's lives in massive, not marginal ways, corporations are being said to bear some responsibility for their actions.

### 1.3. The priority of action over omission

A third common assumption is the idea that actions and their direct effects are more morally relevant than omissions and their possible effects. If I cheat someone out of their money, this is a greater wrong than watching somebody cheat someone else and not taking any steps to intervene. We could be tempted to conclude that we have a strong duty not to undertake certain actions that harm others but much less so a duty to prevent others from committing harm.<sup>14</sup> Not to help in a situation of need, however, is a failure to render assistance, which is usually also declared as a moral and even a legal wrong. I may have good reasons for inaction, such as fear of being attacked, being too shocked to act, or perhaps thinking myself too weak to be effective. These considerations may postpone a decision but do not actually change the duty to offer help.

The situation is less complicated if we slightly change the example. Imagine a person who watches a person cheat another, and then receives part of the take as a kind of hush money. In this case we speak of complicity and we would say the bystander is co-responsible for what has happened as she or he profits from the harm inflicted on others. These considerations have consequences for the question of corporation's obligations. It is not just the direct action and the influence of corporations that makes them a legitimate subject of obligations. If we say that everyone who contributes to the furtherance of injustice, including unjust institutions, and those who *profit* from it bear responsibility for the results, then we have another argument for corporations's obligations.<sup>15</sup> If collective actors profit from the current domestic or international system, they are not only bystanders, but also participants, and by this contribute to negative effects on peoples' lives. Think of an oil company, for example, that lays a pipeline through a country whose government forcibly resettles its indigenous peoples to accommodate the pipeline. The company is indirectly implicated and by this is obliged to cease engaging in a process that causes harm.<sup>16</sup> Even though a corporation cannot be held liable in a juridical sense for a host government's systematic violations of civil, political, economic, social and cultural rights, it can be held responsible for upholding an unjust domestic order.

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<sup>13</sup> Beck, Giddens and Last 1997.

<sup>14</sup> Pogge 2004: 279-280.

<sup>15</sup> Pogge 2002.

<sup>16</sup> See Steinhardt 2005: 185. There is no domestic legislation defining a comprehensive, enforceable code of human rights conduct for multinationals, but there are other models for TNCs, such as ethical investment strategies.

#### 1.4. The priority of near over remote outcomes

The fourth assumption of commonsense morality is that outcomes that occur near to us are of greater moral importance than remote ones. We usually decide that an outcome is the result of my action only if it can be directly related in time and space to what I have done. Remote effects that may occur in the future or happen somewhere else in the world are not clearly linked to my action. This is why we feel much less responsible for environmental effects that nevertheless will be felt for generations. One could add that this makes sense, as it has become very difficult, if not impossible, to trace the origins of harms. For example, it requires great effort, and is sometimes technically impossible, to single out the source of a hazardous substance that pollutes the air. And sometimes the question arises of whether one could have known that this substance would become toxic when it was released into the air, or whether it would have been possible to avoid the dangerous emission. Some sociological researchers have made the case that modern technologies have grown so complex, and risks have become so overwhelmingly incalculable, that it is often almost impossible to attribute responsibilities to single agents or for agents to know how to take sufficient precautions. Ulrich Beck suggests that because of the uncertainty of the effects triggered by new technical developments like nuclear power plants, for example, one should not undertake the project of building them at all.<sup>17</sup>

This position exaggerates to a certain degree the complexity of circumstances and underestimates the technical and political potential for tracking down the causes of global or regional harms. The disposal of the Brent Spar oil storage facility is a prominent example of how responsibility has been legally assigned to a huge corporation, through the auspices of a watchful public.<sup>18</sup> But if there are cases where a lack of knowledge and power makes it difficult to trace the causes of a harm and thereby make an institution liable for what has happened, it makes sense to reconsider the way we usually judge factual dilemmas. In criminal cases where there are doubts about the facts and the role of an alleged perpetrator, we are inclined to exonerate the accused from any responsibility or obligations. However, “regular” criminal offenses and institutional cases under complex conditions make for an uneasy comparison. It becomes apparent that the obligations of a collective actor are not restricted in the same way as an individual actor’s.<sup>19</sup> Our unease with this comparison stems from the fact that the smallest actions of collective actors can be of an enormous scale, affecting many people, maybe over generations. Given this, it makes sense to pursue a new line of argument and come to the third reason for collective obligations. In situations where our knowledge is limited and conclusive evidence is unlikely, but the harm is enormous, it makes sense to reverse the burden of proof. When the evidence of direct culpability is in doubt, we can still often speak of a co-responsibility.<sup>20</sup>

One may reply here that if the situation is not transparent and the contribution of the collective actor is hard to pinpoint, this may be an indication that it was impossible for the actor to foresee the negative effects of its actions; and that if the unwanted effects could not

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<sup>17</sup> Beck 1988.

<sup>18</sup> McBarnet, 2004, 63-81.

<sup>19</sup> See also Green 2005.

<sup>20</sup> See for this Barry 2005.

## The Obligations of Transnational Corporations in the Global Context.

Normative grounds, real policy, and legitimate governance

have been foreseen, it is not right to attribute obligations to the actor. This is an untenable assumption. A major difference between collective actors and individuals concerns knowledge and the ability to apply it in practice. Collective actors, and especially corporations, are able to gather data, conduct their own research, work through information, and use this knowledge for their purposes through competent agents.<sup>21</sup> Corporations have become powerful actors because they possess highly specialized and differentiated knowledge across many fields, which they can also effectively use in politics: they sometimes impose an entire package of labor and tax rights before making an investment and settling in a country. They are well prepared to respond to the challenges of an international information society and are very capable of contributing toward the upholding of human rights.

By addressing the capacities of collective actors we cross a theoretical watershed. The collective actor's obligation becomes less dependent on their role in causing harm and it becomes sufficient to show that the collective actor had the means to prevent harm and respect human rights. This discussion of capacities also reveals that the collective is not affected by the distinction between action and omission in the same way as the individual. While it may be excessively burdensome for an individual to figure out what to do to prevent a third party from harm, large corporations and other collective actors are in fact very capable of addressing these kinds of challenges.

To sum up, we have four arguments for why transnational corporations have human rights obligations: they react to external demands through various moves, such that corporations can be said to act intentionally; they have broad, potentially negative influence on people's lifeworlds; they profit from the disadvantages caused for others who are much worse off; and they have the competencies and power to influence and address complex problems. The last point switches the focus from the cause of harm to the capacity to act otherwise on a global scale. As powerful entities, corporations seem to be very capable of shaping their social and political surroundings according to human rights standards. What does this mean for the widespread trend in sub-contracting? Sub-contractors are often small, with less influence and capacities than the primary contractors. It is not possible for an individual to dissolve his or her moral obligations by simply delegating a morally reprehensible task to another party. For this case, of collective entities, it is sufficient to state that if we have agreed that a collective has human rights obligations, then those obligations must entail ensuring that any subcontractors meet those same obligations.<sup>22</sup>

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<sup>21</sup> See Zumbansen 2005: 10.

<sup>22</sup> These demands are part of the *Global Compact*. See also OECD's Principles of Corporate Governance 2004, [http://www.oecd.org/document/49/0,2340,en\\_2649\\_34813\\_31530865\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/document/49/0,2340,en_2649_34813_31530865_1_1_1_1.00.html).

## 1.5 The Content of the Obligations

This justification of collective actor obligations sets the stage for specifying the content of the obligations. We can begin by identifying "*sphere-specific*" obligations<sup>23</sup>, intrinsically linked to the influence and the capacity of a firm. Within their sphere of conduct, collectives can bring about social and economic rights, for example, by offering adequate wages and leisure time to their workers, by implementing anti-discrimination rules, guaranteeing security at the workplace, using environmental protection technology, and so on. Manufacturing firms, for example, may specifically violate employee rights regulating working hours and workplace safety, so their sphere of obligation concerns mainly these aspects. Companies providing security consulting services to a government may specifically violate citizens's rights to physical security, and so it makes sense to concretize their obligations accordingly. Obligations may vary in relation to the specific working field, but also with view to the size, influence and capacity of a firm.

This does not mean that sphere-specific obligations are determined once and for all, which seems too narrow an approach. We also have not answered the question of what this entails and who decides which obligations belong in which sphere. A major principle of organization for national affairs, the "*principle of affectedness*," should be applied to international relations too. It says that in a social relationship, those who are affected by the actions of an individual or collective can not only ask for compensation, they can also *demand justification* of the conduct of the actors.<sup>24</sup> This means that the fact that a person or community is substantially affected by the activities of a transnational actor ethically implies a relation of justification between them. This is not a new principle in governance theory. It has been interpreted narrowly as "internal justification"<sup>25</sup> in which case the individuals affected are those who, like owners and creditors, have delegated power to an agent who manages their affairs. In a globalized economy this seems insufficient and we can call for a supplemented notion. "External justification" embraces a wider public and would allow us to focus on stakeholders, that is, all those *directly* exposed to the activities of collectives through environmental disasters, unhealthy products, low wages, and so on. The obligations mentioned above have to be concretized among *all* the participants in "value-based networks"<sup>26</sup> - business partners, stakeholders, shareholders, NGOs, science and consumer associations - who try to come to an agreement in bargaining processes.

This wider notion leaves room for two interpretations. A first understands justification as "accountability" and assumes that what is required from the actor is a public and transparent justification of the actor's conduct in the past.<sup>27</sup> This notion of accountability is cut off from any idea of reciprocity or participation by stakeholders. It does not, for example, set forth just rule-setting procedures such as rules that allow hearing from those who have been affected by harmful outcomes. A second interpretation therefore seems necessary. According to this second notion of justification, one should understand the principle of affectedness as

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<sup>23</sup> Campbell 2004.

<sup>24</sup> On this topic see Habermas 1997, and also Forst 1999.

<sup>25</sup> Keohane 2003:144.

<sup>26</sup> Wheeler, Colbert and Freeman 2003.

<sup>27</sup> Benz and Papadopoulos 2006.

## The Obligations of Transnational Corporations in the Global Context.

Normative grounds, real policy, and legitimate governance

intrinsically linked to reciprocal justification: everyone who has to submit to a norm should be equally an author in the process of norm setting. Or, as Rainer Forst has put it: everyone has a basic right to justification, which allows every individual a “veto-right”.<sup>28</sup> This includes an anticipatory perspective, addressing future events and its negative or positive effects.

In this form of justification, the prevailing notion of accountability fails to be legitimate if actors who have been or may be importantly affected are not represented in the norm setting process. A collective’s concrete obligations should be determined publicly, with input from all actors directly affected by the collective. In the context of regional and global governance, this requires transparency in the corporation’s conduct towards the stakeholders and access to formal and informal political arenas in which decisions are made that can have tremendous effect on stakeholders.

This approach should not be seen as an attempt to replace commonsense ideas of morality; instead, it seeks to supplement commonsense notions, and by doing so, open new ways of understanding international obligation. An attempt to completely overcome the moral commonsense idea would not only be empirically overconfident, but also problematic from a theoretical point of view. We have seen that the capacities and possible influence of collective entities on the lifeworld differ fundamentally from those of individuals. The collective is to a certain extent much better prepared to deal with the challenges of globalization. Nevertheless, the collective actor does not turn into a moral person simply because one recognizes its human rights obligations. There is one further difference between a collective entity and an individual that makes clear why it is misleading to talk about moral obligations of corporations. A moral person who has moral obligations follows his or her moral principles out of the conviction that these are the most reasonable rules possible – at least for the time being. In contrast, a legal person -- and a corporation doubtlessly is one -- might follow a rule for a variety of reasons, be it the fear of penalties or loss of prestige, or the realization that a certain activity and its effects might be wrong.<sup>29</sup> Human rights obligations are not directly deduced from the moral obligations of individuals, because they have distinct characteristics. It is more precise to say that we have good *moral arguments* for why collective entities have or should have legal human rights obligations. However, it seems undeniable that collectives rely on individuals; without individuals and their participation in internal rule-setting and decision procedures there would be no collective actor.

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<sup>28</sup> Forst 1999: 44.

<sup>29</sup> Habermas 1997: 267.

## **2. THE INSTITUTIONAL CONTEXT FOR IMPLEMENTING CORPORATE OBLIGATIONS**

Before I turn to the question of legitimate international governance, I should indicate some developments in the current international rule system that support my suggestions. The collective actor approach is not merely idealistic but has its roots in actual phenomena. These developments in transnational and European governance as well as in international law can be interpreted as the *institutional context* that, by creating pressure for justification and control, promotes the implementation of collective actors' obligations. One can distinguish at least four trends in this direction that could be expanded and further developed:

*2.1. Liability.* In international labor law we find a perspective that focuses on the effects of economic exchange processes when it comes to civil liability. A corporation, for example, can be held liable for damages caused "intentionally" or through the negligence of its employees. Domestic courts have a history of ordering corporations to pay for damages that occur as a result of their complicity in abuses perpetrated by governments. Since World War II, for example, survivors have successfully sued companies that relied on slave labor or benefited from property seized from Jews during the Nazi Holocaust. A wide range of cases is filed under the so called Alien Tort Statute (ATS) in the United States, which was adopted as part of the First Judiciary Act in 1789, and provides that district courts have jurisdiction over any civil action for a tort committed in violation of US law anywhere in the world. The ATS probably aimed to assure that pirates captured in the US could be sued by their foreign victims to recover damages, and that foreign diplomats assaulted in the United States could similarly use the federal courts. A recent and very prominent case was brought against one of the world's largest pharmaceutical companies, Pfizer, for injuries suffered by Nigerian citizens hurt by an experimental antibiotic administered without their informed consent.<sup>30</sup>

*2.2. Complicity.* ATS actions have also been filed in US federal courts against some of the largest multinationals for their alleged complicity in human rights violations around the world. In *Doe vs. Unocal*, a group of Burmese villagers sued the US corporation Unocal, and Total, S.A., a French company, for their complicity in slavery-like practices and other human rights violations in a joint venture pipeline project with the government in Burma.<sup>31</sup> It is interesting that the *Unocal I* case did not rest liability on the assertion that the firm maintained business relationships with a state that violates human rights, nor was it claimed that the corporation was liable for the actions of the state that was the joint venture partner. Rather, the court mentioned circumstances under which a private actor nonetheless can be held responsible: most importantly, when the corporation commits one or some of the narrow class of wrongs identified by treaty and custom.<sup>32</sup>

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<sup>30</sup> See, among others, Zumbansen: 2005.

<sup>31</sup> 963 F.Supp. 880 (C.D. Cal.1997) (Unocal I), 110 F. Supp.2d 1294 (C.D. Cal.2000) (Unocal II), on appeal, 2002 WL 31063976 (9th Cir. 2002). It ends with a settlement of the case 2002. Another case: *Abdullahi vs. Pfizer*, F.Supp. 2d, 2002 Dist. Lexis 17436 (17. Sept. 2002). See Steinhardt 2005: 195.

<sup>32</sup> See Steinhardt 2005: 195.

## The Obligations of Transnational Corporations in the Global Context.

Normative grounds, real policy, and legitimate governance

2.3. *Policy-making.* While corporations have historically had to lobby for influence in legislative processes, they have now become an integral part of policy-making, bringing with them much needed expertise and practical knowledge.<sup>33</sup> This can be observed within the European Union. A main channel for firms had been to lobby at the national level to effectively influence the consensus in the Council of Ministers, but the European Commission has introduced a reverse process.<sup>34</sup> It now seeks to win over firms in order to strengthen the EC's position vis-à-vis third countries and EU member states. Corporations are now intensively involved in decisions on trade and trade policy that affect human rights standards.<sup>35</sup>

2.4. *Self-Regulation.* We are currently witnessing a range of market-based initiatives where firms compete for sales and capital through making a public commitment to human rights. Precursors of these measures are the so-called *Sullivan Principles*, first articulated in 1977, which amounted to a voluntary code of conduct for companies doing business in South Africa under the apartheid regime.<sup>36</sup> Despite their uncertain impact in South Africa, the Sullivan Principles have served as a model for similar activities such as social accountability auditing and verification, unilateral Codes of Conduct, and "human rights-sensitive" product lines and brands. Starbucks offers "fair trade coffee" and the World Diamonds Council has developed the "Kimberley Process," which is a protocol for assuring that profits from the sale of gems do not support governments or paramilitary groups that violate human rights.<sup>37</sup> One prominent example of a pact between private actors (TNCs) and a public actor, (in this case the United Nations) is the *Global Compact*, brought to life by Kofi Annan in January 1999. Along with the UN High Commission for Human Rights, the International Labor Organization (ILO), and representatives of the UN Environmental Program, about 50 corporations take part, among them Nike, Shell, BP, Amoco and Rio Tinto. The agreement is that the corporations must go public on the Global Compact Internet site by describing their progress in implementing human rights, labor standards and environmental protection. In turn they are allowed to use a UN logo for their advertising.

I will discuss the last two aspects in more detail as they are most relevant for international governance. A crucial aspect concerning self-regulation is the motivation of corporations. A recent study on this topic identify a quite selfish reason: the codes are an answer to the risks associated with civil action and consumer boycotts.<sup>38</sup> Economic rationality is not being simply replaced by moral norms or a practical discourse, nor are corporations expected to become agents motivated primarily by morality. Rather, a normatively colored context creates a pressure that becomes a variable in the rational calculation. One way to maintain the pressure is to measure corporations by their promises and publicly disclose if they fail to

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<sup>33</sup> For rule-making processes in global regulatory networks see Slaughter 2004; Schepel 2005.

<sup>34</sup> See Woll 2006.

<sup>35</sup> On the value of advanced modes of administrative coo-operative experimentalism that leads to creative problem solutions see the article by Joerges and Neyer 1997.

<sup>36</sup> The principles required an integrated workplace, fair employment practices, and affirmative action programs, Braithwaite and Drahos 2000: 254; Steinhardt 2005: 180.

<sup>37</sup> See, among others, Kuper 2005.

<sup>38</sup> Conzelmann and Wolf 2007.

## The Obligations of Transnational Corporations in the Global Context.

Normative grounds, real policy, and legitimate governance

comply, for they cannot renege on their promises without losing credibility. They agree on moral codes at first only for tactical reasons but then “talk themselves into moral obligations” and become entangled in their own moral standards.<sup>39</sup> It is the distrust that many NGOs have of the strength and genuineness of corporate morality and self-regulation that maintains public awareness and sustains the pressure on corporations.

*2.5. The problem of legitimate governance.* The picture that emerges is that despite the fragmentary and seemingly weak regulatory structure, there is real potential for the slow crystallization of new comprehensive international human rights norms that specifically bind transnational corporations and other business entities. Regimes of “corporate responsibility”<sup>40</sup> have emerged on a global level but are to a major extent also the product of regional initiatives, especially of the European Union.<sup>41</sup> Various attempts are under way to expand the restricted legal status of corporations. One radical example is that recently, the United Nations Sub-Commission for the Promotion and Protection of Human Rights approved ‘Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights,’ which can be said to be the first comprehensive international human rights norms that specifically address transnational corporations and other business entities.<sup>42</sup> They lay out the responsibilities of companies to respect, secure, and promote the fulfillment of human rights with a special focus on consumers’ and workers’ rights, environmental protection, and national sovereignty. One result of the Commission’s meetings was to define TNCs as a fullfledged legal persons. This is analogous to the status of natural persons in that these entities then have both rights and obligations.<sup>43</sup> This would be a landmark in Economic Law. But from a democratic theory perspective, it has been questioned whether the expansion of status for TNCs should go that far.

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<sup>39</sup> Thomas Risse shows that argumentation, deliberation and persuasion plays an important role in international negotiations. He speaks of “moral entrapment”: even participants who enter the negotiations in strategic intention at some point have to switch to discursive rules and the attitude oriented towards a common understanding (“Verständigungsorientiertes Handeln”). Risse 2000: 1-39; Risse, Ropp and Sikkink 1999.

<sup>40</sup> Steinhardt 2005: 180. The Regime of Corporate Responsibility embraces a human rights entrepreneurialism, “right-sensitive” product lines and branding, unilateral Codes of Conduct, Ethical Investment Organizations as well as shareholder pressure and the rise of NGOs; Braithwaite and Drahos 2000: 488-450.

<sup>41</sup> The Commission in the European Communities, for example, issued its “Green Paper” “Promoting a European Framework for Corporate Social Responsibility” and explained its underlying assumptions in the July 2002 paper “Communication Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development.” <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0366:EN:HTML>, COM (2001) 366, July (final) and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0347:EN:HTML>, COM (2002) 347, July.

<sup>42</sup> Weissbrodt and Kruger 2005: 315-351. The full text of the approved ‘Norms’ is also available at: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument).

<sup>43</sup> Weissbrodt and Kruger 2005.

## The Obligations of Transnational Corporations in the Global Context.

Normative grounds, real policy, and legitimate governance

If we accept that these new modes of so-called soft governance have a wide social reach, we have to examine their democratic legitimation.<sup>44</sup> We can currently observe a development that counteracts the previously mentioned four assumptions of commonsense morality. In governance theory we have the widespread presupposition that the individual is no longer the primary political actor internationally but, if at all, one among many collective actors such as NGOs, transnational governmental organizations and transnational corporations. While a commonsense morality places a great deal of obligations on the individual, a commonsense governance theory favors the collective actor as the political agent at the international level. What is the problem with this? We have said that the collective actor has enormous capacities to contribute to creating a tight network of binding rules and controls that would help preserve respect for human rights. Does a right to political participation follow from obligations to respect human rights?

First, if international regulations are decided by private (collective) actors who make decisions according to economic rationality, and not by democratic representatives that voice the interests of their constituents, then a basic democratic principle will be turned upside down: the constitutional and law-giving power of the people to which all other powers, persons, and associations should be subject, will no longer be supreme and we face the danger that private self-regulation will become an instrument for further self-empowerment of the already powerful. This will strengthen private soft law and will lead to a pluralization of labour standards as corporations create their own normative rule systems. ILO norm-setting, one should keep in mind, is obliged to respect universal norms whereas corporations are not.

Second, corporations often learn to how play this game as well. Work conditions have improved in some places in the world, but one cannot overlook the fact that self-imposed restrictions very often have the character of mere “human rights rhetoric”. Nike, for example, a prominent member of the “Global Compact”, was sued by an American labor law activist, Mark Kasky, for false or misleading statements in its advertisements. Nike had assumed that work conditions in their subcontracting firms had improved – an assumption Kasky said was untrue. In September 2003, one month after the suit was filed, Nike, which claimed it was engaged in fully protected free speech, agreed to an out-of-court settlement and paid 1.5 million dollars to a fair trade organization.<sup>45</sup>

Private and private-public self-regulation might be the best we can do now to realize human rights and get some social control of transnational companies; it might be one out of a bundle of strategies that can help create a normative context that sustains a “pressure for justification” on corporations. At this point the role of the state comes into play and with it the question of duty allocation between corporations and the state. The state as the representative of its citizens should continue to bear the lion’s share of the burden of creating an institutional environment that facilitates implementation of human rights duties. It is only

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<sup>44</sup> See for this assumption the in other respect different approaches of Habermas 1997; Joerges and Vos 1999.

<sup>45</sup> Greenhouse 2003. See also the contribution on an evaluation of the “Global Compact” by Kuper 2005.

## The Obligations of Transnational Corporations in the Global Context.

Normative grounds, real policy, and legitimate governance

through the participation of those affected by human rights violations that we can arrive at legitimate international rules that bind collective actors. Through this external pressure they have to become much more serious participants in the process of realizing human rights in their specific fields of competence.

### **CONCLUSION**

What I have defended here were the following three points. First, I think we have good reasons to expand the notion of human rights duties beyond the constraints of the commonsense morality approach and to speak about the obligations of collective actors. Collective actors have become so powerful and influential that they, along with states, contribute to human rights violations. They have adapted to the demands of today's information society and are much better prepared to deal with complex problems than the individual. Their capacities mean we should recognize them as important agents in human rights issues and doing so has advantages over emphasizing the obligations of the individual. Moreover, I have argued that setting out collective actor obligations does not lead to the disappearance of the individual's obligations within corporations or other collectives.

Secondly, I demonstrated that the collective actor approach is not loftily idealistic but has its roots in a variety of "non-ideal theory" phenomena. There have been developments in international law and some non-legal arrangements that can be interpreted as creating an institutional framework that promotes reform of the unjust global order by creating pressure for justification.

Finally, I pointed out that we nevertheless have to be cautious, as not all initiatives of private self-regulation are desirable or legitimate.

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