

# THE RESPONSIBILITY OF NON-STATE ACTORS. TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS OBLIGATIONS

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## 1. INTRODUCTION

Moral philosophy is struggling to discover an adequate conception of our obligations in global and regional contexts. The prevailing common sense morality says that the primary moral actor is the individual, and that 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 different, however, when we turn to political theory and law, and when we look at human rights obligations in international relations. Here, we are confronted with a state-centric conception of human rights. It is the primary responsibility of the state to protect, to respect and to promote human rights. The problem with this is not so much that states bear responsibility for human rights (indeed, they *should* be responsible); instead, the problem is that it is *only* the states that are in charge which have to comply with international moral norms, while non-state actors, including corporations and international organisations, hardly have *any* obligations.

We, therefore, face the somewhat awkward situation that, in moral frameworks, the obligations attributed to the individual have become quite extensive, while, in political theory frameworks, the influence of the individual and of other actors in global human rights agreements has been curtailed, and it is mainly the state that bears moral responsibilities. However, both frameworks have their pitfalls. Our understanding of the moral obligations required to address large-scale problems is as inadequate as the prevailing ideas concerning human rights responsibilities in international relations. In this paper, I will rebut both

positions, focusing mainly on the obligations of private collective actors, to wit, transnational corporations, and their moral obligations in international relations.

This topic became urgent as the transnational corporation (TNC) became the one of the main international actors during the second half of the Twentieth century.<sup>1</sup> The revenue of some transnational corporations exceeds the gross national product of the smaller European states, not to mention the African states, which gives them inordinate influence over both international market regulations and national legislative and political processes.<sup>2</sup> More than 54 million people are employed by TNCs, and this number is even higher when one includes non-equity relationships such as sub-contracting and licensing. Poverty worldwide is very often poverty despite having work. A comprehensive study conducted in 2003 shows that 1.39 billion people work hard, but, nevertheless, do not have an income at their disposal which will allow them a decent standard of living.<sup>3</sup> Poverty despite work is not necessarily *caused* by transnational corporations, but, all too often, transnational corporations pay so little that their workers suffer poverty nonetheless.<sup>4</sup>

At the centre of these developments is the issue of the *obligation* of transnational corporations to respect basic human rights. The latter embody the most basic moral rules with global scope. It is widely held that human rights treaties and their corresponding obligations are, first and foremost, addressed both to individuals and to states. However, individuals seem to be too overburdened to engage in human rights issues on a global scale, while 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

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<sup>1</sup> See M. Koenig-Archibugi, "Transnational Corporations and Public Accountability", (2004) 39 *Government and Opposition*, pp. 234-259, at 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, O. de Schutter, "Transnational Corporations and Human Rights: An Introduction", 2005, Hauser Global Law Working Paper, [http://www.nyulawglobal.org/workingpapers/GLWP\\_0105.htm](http://www.nyulawglobal.org/workingpapers/GLWP_0105.htm).

<sup>2</sup> The value of the exchanges at Merrill Lynch every day exceeds the total GDP of the whole of Africa. Many thanks to Chris Engert for this remark.

<sup>3</sup> See World Employment Report 2004-05, at [www.ilo.org/public/english/employment/strat/wer2004.htm](http://www.ilo.org/public/english/employment/strat/wer2004.htm). See also Global Employment Trends Brief, January 2007.

<sup>4</sup> A seamstress in China gets 10-13 Cents per hour, a worker in El Salvador earns 75 cent per hour. This is not enough to make a living even in these countries. Whereas a seamstress in El Salvador gets 21 cent for a Nike swoosh, which are 0,4% of the production costs, the swoosh is sold in the US for 55 Dollars. 10% of this price is invested into advertisement. The Brazilian national soccer team get 350 million Dollars for wearing a Nike swoosh for 10 years, and the concurrent Adidas pays 161 million Dollar lifelong pension for David Beckham wearing this brand. See for this information the Swiss NGO "Bern Declaration" ("Erklärung von Bern"), English website: <http://www.evb.ch/en/f25000188.html>.

to the treaty bodies, and cannot participate in the election of the expert members.<sup>5</sup> This position, however, no longer seems tenable and has raised pressing theoretical questions.

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 individuals, on the one hand, and the state, on the other? In contra-distinction to the common sense morality that stresses the obligation of the individual, I will first argue that collective private actors *do* have obligations. These include avoiding violating human rights and mitigating in situations in which human rights are being violated by others. The given fact that corporations have the capacity to do so, is one of the reasons why they are responsible (Section 2). As one could object that it is the responsibility of the state to ensure that human rights are respected through private collective and other non-state entities, it is advisable to have a closer look at the proponents of this position. I will argue that the assumption which prevails in political theory and human rights is no longer convincing (Section 3). On what has been said so far, I will defend a conception of responsibility which I call “preventive liability”. It combines responsibility based upon the principle of causality, as well as upon a notion of competence to prevent future damage (Section 4). Fourthly, the question of what might be the content and scope of these obligations also arises. And does arguing in favour of collective responsibilities mean that the individual is discharged of his or her obligations in any way? Having broached upon the subject of an extended notion of corporate obligations, I will lay out what “sphere specific obligations” of a private collective actually means. Against the intuitively convincing assumption that, if an individual member of a collective is part of a hierarchical organisation structure and not very influential at all, I will argue that, under certain conditions, he or she nevertheless still has moral obligations (Section 5). Normative studies are often criticised for being trapped in the powerlessness of “ought to” language. My approach combines a normative and an empirical perspective, connecting the normative grounds for corporate obligations to an empirical analysis of the current global and EU policies which work towards the implementation of corporate obligations. One further question is, therefore, what entities, and what institutional, contractual arrangements and strategies support, or hinder, the implementation of the new modes of governance, which aim to establish human rights standards both within market processes and beyond. I will demonstrate that a network of diverse regulations concerning the responsibility of non-state

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<sup>5</sup> On this claim, see P. Alston, “The “Not-a-Cat-Syndrome”: Can the International Human Rights Regime Accommodate Non-State Actors?” In: P. Alston (ed): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 3-37, at 9; however, this is not the position, which he defends.

actors has brought about a new institutional context of justification and control (Section 6). However, not all of these new policies meet the standards of democratic legitimation. I will conclude with a sceptical note on the political equality of private collective actors within global governance processes).

## 2. THE OBLIGATIONS OF THE COLLECTIVE ACTOR

Generally speaking, responsibility indicates the possibility of confronting a person (or a collective) with the effects of his or her (or its) action. To hold someone (or something) responsible is to compel that person (or entity) to accept or to reject this claim.<sup>6</sup> Responsibility entails a both descriptive and a normative dimension. The former refers to the causal effect of a subject on an object, while the latter provides us with criteria with which to judge both actions and their effects, and refers to a four dimensional relation:<sup>7</sup>

1. Somebody (or an entity) is;
2. for something (an action, the effect of an action, a situation) or for someone;
3. towards a person, a group of persons or an institution;
4. with view to a responsible normative criteria.

In moral philosophy, most approaches bear the hallmarks of what Samuel Scheffler has called “common sense morality”. It includes assumptions that not only influence theory, but are also entrenched in everyday practices.<sup>8</sup> It is very difficult to speak about the *obligations* of a collective actor; in other words, Point 1 above is mainly a natural person, not a legal person or a group of natural people.<sup>9</sup> Four assumptions, in particular, make it difficult to accept collectives as being responsible; these are: that collective actors do not act intentionally (1); that the individual (and not the collective) is the primary moral actor (2); that action is more morally significant than omission (3); and that consequences which have proximity in both time and space are more significant than remote consequences (4). In the

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<sup>6</sup> See K. Beyertz, *eine kurze Geschichte de Verantwortung*, in: ders. (Hg.), *Verantwortung: Prinzip oder Problem?*, (Darmstadt: Wissenschaftliche Buchgesellschaft 1995), p. 3-71.

<sup>7</sup> *Ibid.*, and St. Gosepath 2006, *Die Beseitigung von Übeln*, in: L. Heidbrink/A. Hirsch (eds.), *Verantwortung in der Zivilgesellschaft*, Frankfurt am Main: Campus, 387-416, 389.

<sup>8</sup> S. Scheffler, “Individual Responsibility in a Global Age”, in: *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, (New York: Oxford University Press, 2001), pp. 32-48, at 37.

<sup>9</sup> The first assumption is not mentioned in S. Scheffler, “Individual Responsibility in a Global Age”, in: *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, (New York: Oxford University Press, 2001), pp. 32-48. For the other three, see, also, the very illuminating article of M. Green, “Institutional Responsibility for Moral Problems”, in: A. Kuper (ed): *Global Responsibilities. Who must deliver on human rights?*, (New York, Oxford: Routledge, 2005), pp. 117-135.

sub-section 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 the obligations of corporations do not transform either the corporation or any other collective actor into a moral person.

## 2.1. THE “UNINTENDED-ACTION-ARGUMENT”

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

In an argument that can be traced to Adam Smith, Friedrich von Hayek, and later to Niklas Luhmann, it is commonly held that the activities of corporations are *not regulated intentionally*, but arise spontaneously as a result of the establishment of a sub-system 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>10</sup> whose outcome is not foreseeable, but is, instead, unpredictable, and has both winners and losers. The economic system is metaphorically driven by an “invisible hand” (Adam Smith) or by a “steering medium” (Niklas Luhmann).<sup>11</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 maximising of profits 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 that the corporate actor was ever in a position to act otherwise.<sup>12</sup>

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<sup>10</sup> See F.A. von Hayek, “Law, Legislation and Liberty”, Vol.2: *The Mirage of Social Justice*, (London, Chicago: University of Chicago Press, 1976), p. 71.

<sup>11</sup> See A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (ed. by R.H. Campbell, A.S. Skinner & W.B. Todd, (Oxford: Clarendon Press, [1776] 1976) (The Glasgow Edition of the Work and Correspondence of Adam Smith.); F.A. von Hayek, “Law, Legislation and Liberty”, Vol.2: *The Mirage of Social Justice*, London, Chicago: University of Chicago Press, 1976; N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp, 1997).

<sup>12</sup> For the relationship between responsibility and the freedom to act otherwise, see J.M. Fischer & M. Ravell, “Responsibility for Consequences”, in: J.M. Fischer & M. Ravizza (eds), *Perspectives on Moral Responsibility*, (Ithaca: Cornell University, 1993), pp. 322-349.

This emphasis on an interest-neutral and completely un-intended co-ordination of activities seems to be overly one-sided.<sup>13</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, benchmarking, and peer review.<sup>14</sup> Corporations clearly 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 which, at first glance, seems to contradict one of the major aims of a corporation, which is, to increase its profits. The impact of oil extraction on the *Ogoni* people and the on the Niger Delta environment and, in particular, 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 of its role in Nigeria was to strengthen the “division of work” between the state and the corporation.<sup>15</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 its future activities. This potential for corporations to change their behaviour paves the way for further normative consideration of the foundation of the obligations of collective actors. Let us consider the three remaining assumptions of common sense morality, which restrict the notion of corporate obligations.

## **2.2. THE PRIORITY OF THE INDIVIDUAL OVER THE COLLECTIVE**

The second assumption is the idea that individuals are the primary bearers of moral obligations.<sup>16</sup> This means that my independent actions are regarded as being 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, rather than as a member of a group or school. The focus on the relative contribution of the individual to the final product has consequences on our daily assessment of our obligations.

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<sup>13</sup> See J. Gray, “Hayek on Liberty, Rights, and Justice”, in: (1981) 92 *Ethics*, pp. 73-84.

<sup>14</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 upon voluntary and non-sanctioned forms of policy-making (public or non-public). See, for one of the first articles on this, F. Snyder, “Soft Law and Institutional Practice in the European Community”, in: M. Stephen (ed), *The Construction of Europe. Essays in Honour of Emile Noel*, (Dordrecht: Kluwer, 1994), pp. 197-225; later E. Best, “Alternative Regulations or Complementary Methods? Evolving Options in European Governance”, in: (2003) 3 *Eipascope*, pp. 2-18.

<sup>15</sup> D. McBarnet, “Human Rights, Corporate Responsibility and the New Accountability”, in: T. Campbell & S. Miller, (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, (Dordrecht: Kluwer, 2004), pp. 63-81, at 67.

<sup>16</sup> See, for the following aspect, M. Green, Institutional Responsibility for Moral Problems, in: A. Kuper (ed): *Global Responsibilities. Who must deliver on human rights?*, (New York, Oxford: Routledge, 2005), pp. 117-135, at 118.

This is one reason why it is difficult to address direct responsibility for climate change. 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 that our actions have in concert with those of others. This shapes our ideas about collectives. In so far as collective actors play a substantial role in common sense morality at all, their actions and obligations are seen as being derived from those of individuals.

This perspective, however, seems short-sighted; it neglects the overall effects of uncoordinated collective harm. This is also true with regard to the activities of the collective actor. Even though the market system operates according to economic demands, any examination of the effects of a corporation's activities allows a normative evaluation of the collective activities. Against von Hayek's assumption, the systemic mechanisms (power and the exchange of goods) are "embedded" in society through the effects of the collective actions,<sup>17</sup> which means that economic actors are "linked" to processes of co-operation and interaction in the "life-world". In a global economy, this "link" is more or less reduced to confronting the sometimes desired, but often undesired, aggregated effects of radical modernisation. Growing political awareness beyond national borders has triggered an *evaluation of the effects*<sup>18</sup> of the activities of corporations 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.

### **2.3. 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 failing to take 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 duty to prevent others from committing harm.<sup>19</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

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<sup>17</sup> For the notion of "embeddedness", see K. Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, (Boston: Beacon Press, [1944] 2001).

<sup>18</sup> U. Beck, A. Giddens & A.S. Last, *Reflexive Modernization. Politics, Tradition and Aesthetics in the Modern Social Order*, (Cambridge: Polity Press, 1994).

<sup>19</sup> T. Pogge, "Assisting" the Global Poor", in: D.K. Chatterjee (ed), *The Ethics of Assistance. Morality and the Distant Needy*, (Cambridge: Cambridge University Press, 2004), pp. 260-289, at 279-280.

too weak to be effective. These considerations may postpone a decision, but they do not actually change the duty to offer help.

The situation is less complicated if we change the example slightly. Imagine a person who sees one 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 that the bystander is co-responsible for what happened as he or she 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, bears responsibility for the results, then we have another argument for the obligations of corporations.<sup>20</sup> If collective actors profit from the current domestic or international system, they are not only bystanders, but also participants, and, by this, they contribute to the negative effects on peoples' lives. Think of an oil company, for example, that lays a pipeline through a country whose government forcibly re-settles its indigenous peoples in order to accommodate the pipeline. The company is indirectly implicated, and, by this, it is obliged to cease engaging in a process that causes harm.<sup>21</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.

#### **2.4. THE PRIORITY OF NEAR OVER REMOTE OUTCOMES**

The fourth assumption of common sense 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* own 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 which will, nevertheless, be felt for generations to come in the future. One could add that this makes sense, as it has become very difficult, if not impossible, to trace the origins of damage. 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 as to

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<sup>20</sup> T. Pogge, *World Poverty and Human Rights*, (Oxford: Polity Press, 2002).

<sup>21</sup> See R.G. Steinhardt, "The New Lex Mercatoria", in: P. Alston (ed): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 177-227, at 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.



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 technology has become so complex, and the concomitant risks have become so overwhelmingly incalculable, that it is often both impossible to attribute responsibilities to single agents, or for agents to know how to take sufficient precautions. In a “global risk society”,<sup>22</sup> all human beings are - in a more or less equal manner - exposed to uncontrollable risks which, ironically, have their origin in modern technology and in industries developed in the effort to improve our way of life.<sup>23</sup> Irreversible climate changes and interventions in human genetics cause incalculable effects across both space and time. Long functional chains within these complex developments make it difficult to trace both their causes and their (harmful) effects. Thus, these new global threats undermine the very logic of individual responsibility: the more widespread a technical innovation and its related risks (such as toxic emissions or genetic modification), the more difficult it is to assign the origin of an effect to a single originator: When there are so many producers, how can we know who is at fault for hazardous emissions?

This position is, however, only partly accurate and needs some differentiation. It exaggerates, to a certain degree, the complexity of circumstances, and, at the same time, underestimates the technical and political potential for tracking down the causes of global or regional damage. We have to distinguish between limited incidents or cases of liability – even though they are not “unintentional” accidents given that a catastrophe is part of the overall calculation — and unlimited catastrophes. The former are restricted both geographically and in terms of their possible effects on generations to come. They also include calculable risks such as industrial injuries caused by unsafe machines or regional oil spills by oil companies. Undoubtedly, even if the damage could be localised beforehand, there is the risk that catastrophes are not unlimited in a predictable manner. The scale of the catastrophes can only be determined *ex post*, but cannot be comprehensively anticipated *ex ante*.<sup>24</sup> As not all catastrophes are unlimited, it is important to track down the catastrophes which are responsible for the damage as far as this is possible. There are some promising cases. The

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<sup>22</sup> U. Beck, *Weltrisikogesellschaft*, (Frankfurt aM: Suhrkamp, 2007). U. Beck, *World Risk Society*, (Cambridge MA; Polity Press, 1999) is a much earlier version of the German edition, which is revised in many parts.

<sup>23</sup> U. Beck, *Weltrisikogesellschaft*, (Frankfurt aM: Suhrkamp, 2007) p. 65.

<sup>24</sup> U. Beck: *Weltrisikogesellschaft*, (Frankfurt aM: Suhrkamp, 2007), p. 243.

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>25</sup>

Notwithstanding this, one may still reply here that, if the situation is not transparent, this may be an indication that it is impossible for the collective actor to foresee the negative effects of its actions. And if the unwanted effects could not have been foreseen, it would not be right to attribute obligations to the actor. This, however, is an untenable assumption. One major difference between collective actors and individual actors concerns knowledge, and the ability to apply it in practice. Collective actors, especially corporations, are able to gather data, conduct their own research, process information, and use this knowledge for their purposes through competent agents.<sup>26</sup> Corporations have become powerful actors precisely because they possess highly specialised and differentiated knowledge across many fields, which they can also effectively use in politics: they sometimes impose an entire package of labour and tax rights before making an investment and settling in a country. Moreover, they are well-prepared to respond to the challenges of an international information society and are very capable of contributing towards the upholding of human rights.

To sum up, we have four arguments for why transnational corporations have human rights obligations: they react to external demands through various moves, so that corporations can be said to act intentionally; they have a broad, potentially negative, influence on people's lifeworlds; they profit from the disadvantages of those 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 the damage 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.

By addressing the capacities of collective actors, we cross a theoretical watershed. The collective actor's obligation becomes less dependent on its role in causing damage, and it becomes sufficient to show that the collective actor has contributed to the damage and had the means both to prevent the damage *and* to respect human rights. But we still have to clarify what this precisely means. I will come back to this shortly. Before that, let me turn to question

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<sup>25</sup> D. McBarnet, "Human Rights, Corporate Responsibility and the New Accountability", In: T. Campbell & s. Miller, (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, (Dordrecht: Kluwer, 2004), pp. 63-81.

<sup>26</sup> See P. Zumbansen, "The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Forms and States", in: R. Miller & R. Bratspies, (eds), *Transboundary Harms: Lessons from the Trail Smelter Arbitration*, (Cambridge: Cambridge University Press, 2005), pp. 245-254.

of why non-state actors, and not just *states* should be addressed as an international actor with normative obligations.

### 3. THE STATE-CENTRIC POSITION

The current human rights policy is characterised by a paradox. States are the main human rights violators. One reason for this is that we only speak about a human right's violation, in contrast to a violation of law in general, if a kind of official party, and not just a criminal, is involved. On the other hand, states are seen as the main legal subject, as they are in charge of controlling the respecting of human rights internationally. Undoubtedly, there is now a widespread concern about 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 organisations in the development of mechanisms to enforce human rights-related standards, such as adequate wages and leisure time for workers, as well as environmental protection. Thus, the corporation appears both as a potential human rights violator, and as a political bargaining partner in the governance processes that establish human rights standards. However, is it not sufficient for the state, in its official role, to be the sole collective in charge of human rights? Are non-state actors really better human rights' guardians? One danger in transferring responsibility to transnational corporations might be that this would strengthen their position of international power as they will demand to participate in the rule-setting processes in which the ascription of responsibility is debated.

Let us have a closer look at those who defend a state-centric notion of human rights. Here, Thomas Nagel offers a paradigmatic statement of this position.<sup>27</sup> Similar to Thomas Hobbes, Nagel argues that there is no justice beyond the nation state – except under the condition of a world state. However, a world state would have other problems, Nagel admits. Like Kant, he thinks that this would lead to a graveyard of freedom. A *normative* order can only exist within a state that has the authority to enforce it in the name of all legal subjects. Beyond the state, there is no justice, but only the amoral realm of international politics. But why does Nagel assume this?

His argumentation is based upon a certain idea about legitimating legal force. The state demands unique requirements from its citizens.<sup>28</sup> For example, it expects its citizens to

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<sup>27</sup> Nagel, Thomas (2005), »The Problem of Global Justice.« In: *Philosophy & Public Affairs*, 33, no. 2, S. 113–147.

<sup>28</sup> Ibid, at p. 130.

pay taxes, to do military service and to submit to a number of other rules. This force to which the citizens have to be subjected requires explanation and legitimation. The state obtains moral legitimation because it allows the establishing of a public and force-based law system which offers the necessary pre-conditions for security and co-operation among citizens. The important point seems to be that the citizens, in return for being exposed to legal force, can expect the state to offer resources and services, including the realization of positive obligations such as the creation of security, political equality, equality of opportunity and social justice.<sup>29</sup> The legitimation basis is that the state exercises force on the one hand, and produces a just social order on the other. To be precise, a state can be called a legitimate state if it carries out “political justice”, that is, it “requires a collectively imposed social framework, enacted in the name of all those governed by it, and aspiring to command their acceptance of its authority even when they disagree with the substance of its decision”.<sup>30</sup>

It seems to be clear to Nagel that justice and sovereignty are inseparably connected with one another: without justice, there can be no legitimate force, and without force, the necessary conditions for political justice cannot be created. Political justice is based upon “associative” obligations which presume shared legal relationships.<sup>31</sup> The bitter involuntariness of being a member of a particular state more or less involuntarily has its sweet downside in the advantages of domestic justice.

But what does this mean for international relations and the obligations of non-state actors? To clarify this point, Nagel refers to the authorisation of power by the citizens. A state, as we have seen, can enforce law legitimately only if it is the result of the authorisation by those selfsame citizens who are subject to this legal force. If force should not be just “pure force”, the rules need to be justified, at least hypothetically, towards the members of the collective who have to submit to these rules.<sup>32</sup> Nagel talks about active co-operation. But this, however, does not mean democracy in all events. In the same breath, he mentions that the society asks us to be “responsible for its acts which are taken in our name and on which, in a democracy, we may even have some influence (...)”.<sup>33</sup> Thus, it is clear that the legitimation of a legal order does not depend on a domestic democracy. Instead, democracy is just a welcome supplement of what Nagel calls “active co-operation”.<sup>34</sup>

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<sup>29</sup> Ibid, at p. 130.

<sup>30</sup> Ibid, at p. 140.

<sup>31</sup> Ibid, at p.121.

<sup>32</sup> Ibid, at p. 129.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

The question upraises as to why international rule systems and transnational actors should not have any obligations in Nagel's model? One reason is that Nagel claims that economic treaties and human rights regimes are "voluntary" associations whose basic structures are not characterised through force.<sup>35</sup> Since these relations are not enforceable relations, they cannot establish moral obligations among the parties. But are these relations really voluntary associations? Is there no *continuum* between an order among states and transnational systems of governance? I think that Nagel is mistaken here.

He argues that the chain of legitimation between the state and transnational governance regulations are interrupted at two points. However, he maintains that these new modes of governance do not speak in favour of everybody; treaties, contracts and other forms of co-operation remain in a nation state-bound language and aim to be realised in international relations from a national point of view. Secondly, international rules cannot be enforced as long as there is no supranational authority; however, this remains the task of the sovereign nation state.<sup>36</sup> Upon basis of this, Nagel assumes that, without collective authorisation, decision processes would be arbitrary.

But it remains unclear *whether* that is actually so, and, indeed, if so, why it should be so. From an empirical point of view, things look different. International institutions are able to speak in the name of all those affected by their decisions. The International Monetary Fund, for example, links its structural adjustment programmes to the conditions of reducing trade barriers, of creating rule of law within a state, and so on. One can say, even if one does not agree with these measures, that they are conducted with view to the well-being of the world population. When the International Monetary Fund and the World Bank make a decision, then they presume a hypothetical presence of the world population.<sup>37</sup> Moreover, one can doubt that the above-mentioned international organisations are voluntary arrangements. Not a single state is able to take the liberty of not being a member of the WTO or the World Bank.

The situation is a little different for transnational corporations, though. As they are private collectives, corporations are voluntary associations, and, as such, they are usually not interested in representing or promoting the well-being of world citizens. However, corporations are not so free in making decisions as would seem to be the case at first glance.

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<sup>35</sup> Ibid at p. 128

<sup>36</sup> Ibid at p. 140

<sup>37</sup> Klasen, Stephan (2004), In Search of the Holy Grail: How to Achieve Pro Poor Growth? In Tungodden, B./Stern, N./Kolstad, I. (Hg.), *Toward Pro Poor Policies-Aid, Institutions, and Globalization*. New York: Oxford University Press, S. 45–62 (reprinted in Krakowski, M. (Hg.), *Attacking Poverty: What makes growth pro-poor?* Baden-Baden).

International rule systems which impose constraints on corporations already exist, and among them, there is the International Labour Organisation (ILO), which establishes “core human rights” in the realm of labour (such as the prohibition of child work and of discrimination at the workplace). Moreover, international politics is not an amoral arena, as Nagel assumes. There are normative assumptions inscribed in many relations of international politics. Just think about what would happen if the International Labour Organisation, which had signed the United Nations Charter, issued a report one day that announced that “core human rights” no longer applied to workers in the informal sector. As a justification for this, the ILO claims that, beyond state borders, only minimal humanitarian principles, which are beyond the reach of the ILO, are valid.<sup>38</sup> This would be a rather abstruse decision and one would be outraged at this arbitrary distinction regarding what falls within the realm of the ILO. So Nagel’s argument that only the state is able to establish international norms other than minimum humanitarian principles on other organisations is not tenable.

Nagel sketches a Manichaean world order, characterised by *either* single national states, surrounded by a sea of international law which is free from morality, with small islands of humanity (absolute minimal assistance in cases of natural disasters), *or* a world state with complete justice. It seems to be that Nagel expects only an exercise in patience: in the long run, the current inadequate world of international institutions will be transformed into global statehood. Until then, the lovers of international justice and transnational responsibility need to resist the temptation to create global rules of law which do not reach the ideal of world statehood at all. This very static idea of the world with norms of justice just within the nation state and injustice outside does not admit any alternatives – and this is one of the biggest problems of this approach.<sup>39</sup> If we think about the already mentioned and existing international moral norms (in the UN system, for example), then it becomes clear that there is little empirical evidence for Nagel’s proposal of justice linked to the nation state. This paves the way for the responsibility of non-state actors. But before I turn to this, I would like to discuss another state-centric approach that offers other arguments in favour of the state as the only guardian of human rights that one should take seriously.

David Miller’s defence of the nation state is not so much based upon sovereignty and legitimate force as on culturally-shared values and the idea that almost all relevant problems relating to poverty have their roots in nation state politics. Because of this, responsibility in

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<sup>38</sup> See also the criticism of Cohen, Joshua/Sabel, Charles (2006), *Extra Rempublicam Nulla Justicia*, in: *Philosophy & Public Affairs*, vol. 34, no. 2, S. 147–165, at p. 170.

<sup>39</sup> *Ibid.*

international relations should fall to the responsibility of the state. Let us have a closer look at this.

For David Miller, loyalty and social justice are both important elements for a successful integration of society. Both flourish only among citizens who understand themselves as members of a political community integrated through the idea of political self-determination.<sup>40</sup> For Miller, as well as for Will Kymlicka, to mention another proponent of the state-centric position, it is not just a manageable political community, but also a common culture and language that are a necessary pre-condition for domestic democracy. If they are not embedded into community, the pre-conditions for solidarity and politically active citizens who are willing to sacrifice parts of their wealth and time for the demands of their fellow-citizens simply do not exist.<sup>41</sup> Miller does not speak about solidarity, but uses the, in philosophical discourse, not very common notion of loyalty. This includes members of the community subordinating their own interests to the shared interests of the members of the community.<sup>42</sup> This conception aims at one point in particular: the legitimation of obligations, which grants priority to the obligations of our co-nationals over those of non-members of the community.

What does this state-bound notion of obligations mean for those beyond the nation state? Miller's book *National Responsibility and Global Justice* brings together his ideas on cosmopolitanism, national responsibility and related issues, and he develops a sophisticated approach that takes the complexity of the real world into consideration.<sup>43</sup> His initial assumption is, and this comes as no surprise, that we *do not* owe the world's poor everything that we owe our compatriots as a matter of social justice. We *do not* owe the world's poor everything that we owe our compatriots as a matter of social justice because we owe it to our compatriots? At the same time, he defends the idea of a global minimum that is due to every human being as a matter of justice "in general", including basic human rights. Many societies, as we all know, are unable to fulfil their duties or to guarantee human rights to their own citizens, and thus it seems, according to Miller, that the responsibility to protect these people falls to outsiders. But what kind of responsibility is this? And how should we decide what

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<sup>40</sup> Miller, David (1988), The Ethical Significance of Nationality, in: *Ethics*, 98, 4 (July), S. 647–662.

<sup>41</sup> Kymlicka, Will (2001), Territorial Boundaries: A Liberal Egalitarian Perspective, in: Miller, David/Hashmi, Sohail H. (Hg.), *Boundaries and Justice. Diverse Ethical Perspectives*. Princeton/Oxford, S. 249–275, at p. 265.

<sup>42</sup> Miller, David (1988), The Ethical Significance of Nationality, in: *Ethics*, 98, 4 (July), S. 647–662, at 649.

<sup>43</sup> Miller, David, *National Responsibility and Global Justice*, Oxford: Oxford University Press 2007

belongs to the realm of domestic justice and what belongs to the realm of international justice?

Miller makes a distinction between “outcome” and “remedial” responsibility.<sup>44</sup> The first kind of responsibility that we have for the benefits and the damage which result from our actions, and the second, remedial responsibility, is our responsibility to relieve harm and suffering when we are able to do so.<sup>45</sup> The former focuses on the consequences of our actions and the corresponding compensation, the latter on our capacities and competences and our ability to help others effectively.

Miller’s respective critiques of Peter Singer and of Thomas Pogge led directly to his own approach, which is secured somewhere “between” both positions. He criticises Peter Singer’s consequentialist approach because it focuses only on remedial responsibility and does not take the factors which have caused poverty, such as a corrupt governments or unfair international trade regulations, into account. Singer’s position would lead us, according to Miller, to adopt bad policies, namely, policies which would only administer the transfer of aid without bringing about any structural change.<sup>46</sup> Thomas Pogge, in contrast, directs our attention to the institutional pre-conditions of worldwide poverty. However, against Pogge, Miller argues that even if we, the inhabitants of the wealthy countries, were able to remedy the defects in the current international order – for example, if we were able to get rid of the negative effects of the so-called resource privilege – local sources of poverty would not disappear (contrary to what Pogge suggests) and we would still have remedial responsibilities towards those who remained in poverty (because of local circumstances, such as corruption, for example).

And he goes on to argue that we first have to find out where the responsibility *really* lies,<sup>47</sup> and we do this by distinguishing between the different factors which determine who is able to discharge outcome or remedial responsibility for both the domestic and the international realms of justice. His assumption is that the outcome responsibility does not always lie with those agents – *i.e.*, the wealthy – who are able to fulfil remedial duties. (“Can” does not always imply “ought”.) Instead, the point of departure is that *everybody* – including the poor countries – is a possible subject of outcome responsibility in the absence of proof of

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<sup>44</sup> Ibid.

<sup>45</sup> This distinction reminds us on the already introduced distinction between liability based on harms caused and prospective liability, based on the competence of parties involved to remedy a future harm.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid, p. 260



the contrary. The ascription of responsibility, however, follows a principle of subsidiarity, starting at the level of the community, and includes outsiders only if responsibility cannot be discharged by the community.

It is a very interesting point that, according to Miller, a clear case of the outcome responsibility of the industrial countries is provided by the international rule system. Since societies profoundly influence each others' prospects, rules governing interactions between them must be fair to all participants. The latter condition, Miller concedes, is definitely not fulfilled, and because the industrial countries are the ones which have the power to shape international rules of economic and financial co-operation to fit their needs, they have a duty to rectify this unfairness in the international rule system. What poor countries can legitimately demand is an international order in which they enjoy sufficient protection against rigid and unfavourable economic guidelines, against tariff barriers that deny their products fair access to other markets, and so on. This is reminiscent of Pogge's proposal, but Miller's approach is different.

Miller never became detached from the priority of the nation state as the major actor in international politics. His notion of outcome responsibility remains entrapped in the priority of the demands that stem from the community. This has to do with Miller's distinction between duties, which result from *outcome* responsibility and the fall in the realm of international justice, on the one hand, and duties incurred domestically, on the other. Miller uses the analogy of a roundabout: two cars collide on a roundabout, and we are able to identify the driver of one of the cars as a reckless driver. But should we conclude, that the cause of the accident resides not with the driver (the people of the poor countries), but with the road engineers (governments and international organisations)?<sup>48</sup> Everything depends on whether the rules are "good enough"; if they are good enough, there is no outcome responsibility for the road engineers (or the governments of industrial countries).

This is not just an empirical question concerning what rules have which effect. (And I will not say much about this here.) It is also a normative question concerning the notion of international justice. What is the criteria for an international rule system that is "good enough"? An international order should give poor societies adequate opportunity "to develop", Miller says.<sup>49</sup> But then the question upraises with regard to what needs to be done to achieve this. Miller's suggestion is that industrial countries have negative obligations not to

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid, p. 253.

impose “rigid economic guidelines as a condition of receiving development aid, preventing all governments from erecting tariffs barriers to protect their own industries, and taking steps to stabilize prices of commodities”. These are, more or less, conservative measures that aim at not interfering with the interests of others. And this does not seem to be enough to enable an “adequate opportunity” to develop. Especially, as the international rule system does not resemble a roundabout, but is more like a German highway (*autobahn*) on which cars can drive as fast as they want most of the time, and the slow ones are blithely pushed aside. Thus, the negative duties described above will not make a huge difference.<sup>50</sup> So we should ask ourselves whether we need incentives for private banks to grant loans only to democracies or to future democracies.<sup>51</sup> We should ask ourselves whether we need to think about how to reform international law in such a way that despots are not permitted to do whatever they like with the natural resources of their countries. We should ask ourselves whether it would be necessary to strengthen the rules and the law of the International Labour Organisation so that transnationally operating corporations produce under equal and fair conditions. These are more demanding activities that require positive action of the industrial countries. And as all of this *does not* fall within the realm of domestic responsibility and is not in the hands of poor people, there seems to be no reason why it should not fall within the domain of the duties of justice which correspond to outcome responsibility. So, the question that remains is that of where, in Miller’s approach, the line between his suggestions and a more demanding international justice should be drawn.

A second criticism concerns the distinction between “duties of justice and humanitarian duties”. Under fair conditions, in which the international rules fulfil the criteria of “good enough”, but the people still suffer, the outcome responsibility lies, in the first instance, with the government of the country concerned. Outsiders, however, still have a strong reason to intervene (even though they have not caused the situation) but only as a humanitarian duty, which is much weaker than a duty of justice. The reason is that “the outsider cannot be required to act, given that the primary responsibility rests on the

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<sup>50</sup> Here is another example: Three years ago, a European consortium, despite a World Bank moratorium, bought the right to an amount of hard wood forest in the Congo for a period of 20 years, a forest bigger than the United Kingdom in size; they bought it from the local chief for sugar, salt and tools worth £55 (\$100 USD) – each tree is worth £4,000. Most of the companies have benefited from the World Bank’s failure to ensure that the moratorium it negotiated with the transitional Congo government has been enforced. The companies supply wood all over Europe, mostly as finished products such as flooring, windows, furniture and doors. [www.guardian.co.uk/environment/2007/apr/11/congo.conservationandendangeredspecies](http://www.guardian.co.uk/environment/2007/apr/11/congo.conservationandendangeredspecies).

<sup>51</sup> See T. Pogge, *World Poverty and Human Rights*, (Oxford: Polity Press, 2002), at pp. 142.

government”.<sup>52</sup> But I fail to see why this follows from Miller’s assumptions. First, we have accepted that poverty is an injustice (and thus we have a *strong reason* to intervene). And as far as I see, even in Miller’s approach, we have a strong reason to help because the poor are not responsible for their situation, the rulers neglect their duties of justice, and we, the outsiders, have the means to act, so they are next in line. Under these assumptions, it is unclear why we do not we have a duty of justice. We would violate outcome responsibility if we did nothing to support the people suffering. In this case, forbearance of action causes injustice and violates outcome responsibility (for example, the possibility of putting pressure on the government). It seems that Miller, on the one hand, would like to minimise transnational obligations, even those of states, while, on the other hand, some of his normative pre-suppositions require action by states and individuals that exceed minimal humanitarian help.

To sum up, we have seen that, with regard to responsibility beyond the nation state, the two prominent approaches of the state-centric position are not convincing. The first ignores the enforceable power of international organisations and the already existing normative regimes, and concomitantly over-estimates both the power and the responsibility of states. Since we do not live in a world society that is characterised only by sovereign nation states and one world organisation (the UN), but in a world that can best be described as a multilevel system with different non-state actors and regimes that already enforce international and private law, Nagel’s approach is too limited. The second position fails to recognise damage caused by the international rule system and has too narrow an idea of outcome responsibility. Because of this, obligations beyond those of states are also far too restricted.

#### **4. FROM CAUSING HARM TO COMPETENCE: PREVENTIVE LIABILITY**

So far, I have rebutted the assumption that it is only individuals who have moral obligations. Private collectives, I have argued, should be addressed as actors capable of dealing with normative demands not simply because they have the potential to cause harm, but because they have the financial means and the knowledge to prevent it. Against the objection that it is, and should be, exclusively the state that controls compliance with human rights norms, I have put on the table the empirical argument that international normative rule systems and international organisations beyond the nation state with partly enforceable power have already created new forms of transnational responsibility without the state being the main actor.

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<sup>52</sup> Ibid, p. 258.

Transnational corporations are part of this system, they are capable of complying with norms, and thus it is not clear why they should not be addressed as responsible international legal subjects. However, we still need to clarify this conception of the responsibility of corporations in greater detail. I will suggest a conception of “preventive liability” that re-interprets the more traditional conception of liability and offers a notion of liability that is based upon causality in combination with “prospect liability”.

I will discuss three characteristic elements of the “traditional” conception of liability and will provide revisions of these.<sup>53</sup> A first characteristic element of liability is the above-mentioned idea that an action needs to be an *intentional* action. But it does not make sense to take intentional action as the basis for ascribing responsibility in every situation. Larry May has offered a conception of “strict liability”,<sup>54</sup> by which either a person or a collective can be held responsible even if the action was not intended but nonetheless still caused harm. This is already familiar to us from daily life and criminal law: if I hit another car, then I am liable for the accident even though I did not do it by purpose. Liability is ascribed even though one has no joint guilt. This kind of liability is widespread within society, and is very often the subject of a public debates, reflections and decisions; suffice it to think about the pollution of a river or the air. In many societies, we find a concept of responsibility in which the joint guilt is a very weak element, but in which political considerations about efficiency and moral judgements about fairness determine who is liable for what kind of damage. This is a kind of lump-sum responsibility.<sup>55</sup> Ideally, the criteria for this form of collective responsibility are determined by citizens publicly.

Second, one of the central aspects of liability is the precise ascription of responsibility to an individual or an entity. Responsibility is ascribed to those subjects whose action can be causally linked to an event. The effects of an action need to be ascribable in a non-ambiguous manner. This sounds intuitively convincing, but is nevertheless problematical, in that only those who directly caused the damage are put into the picture, in our case, the corporation as a legal entity, and maybe the CEO of a company. In most cases, however, the situation is much more complex. With a view to the working poor, it is hard to say who exactly has caused the

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<sup>53</sup> May, Larry (1992), *Sharing Responsibility*. Chicago/London; Iris Marion Young also criticizes this notion of liability. Young, Iris Marion (2007), Responsibility, Social Connection, and Global Labor Justice, in: Young, I, *Global Challenges. War, Self-Determination and Responsibility for Justice*. Cambridge, S. 157–186, and, Iris Marion (2004), Responsibility and Global Labor Justice, in: *The Journal of Political Philosophy*, Vol. 12, No. 4, S. 365–388.

<sup>54</sup> May, Larry (1992), *Sharing Responsibility*. Chicago/London.

<sup>55</sup> See also St. Gosepath 2006, 402; K. Günther 2000, Verantwortlichkeit in der Zivilgesellschaft, in, St. Müller-Doohm (ed.), *Das Interesse der Vernunft*, Frankfurt am Main 2000, 465-485.

poverty, despite their having work, as many factors go hand in hand. The poor education of workers, an international enterprise culture that promotes a hard competition among companies, the strict and sometimes not context-specific guidelines of the International Organisations, an under-developed social policy in a country, an incomplete international labour law – all these factors both contribute and exacerbate the problem. Each factor alone is not harmless but can hardly be seen as the cause of millions of working poor worldwide. It is the mixture of factors, interests, and constellations that brings about the catastrophic outcome.<sup>56</sup> The concept of liability does not come to grips with this.

But that is not the end of the debate. In cases where a lack of knowledge, power and a confusing situation make it difficult to trace the causes of a harm and thereby make an institution liable for what has happened, it makes sense to re-consider the way in which we usually judge factual dilemmas. Let us consider that following example. In criminal cases where there are doubts about both the facts and the role of an alleged perpetrator, we are inclined to exonerate the accused from any responsibility or obligations. However, “regular” criminal offences and institutional cases under complex conditions make for an uneasy comparison. Thus, it becomes apparent that the obligations of a collective actor are not restricted in the same way as that of an individual actor.<sup>57</sup> Our unease with this comparison stems from the fact that the smallest actions of collective actors can be on an enormous scale, affecting many people, maybe over generations. Given this, we should pursue a new line of argument. In situations in which our knowledge is limited and conclusive evidence is unlikely, but the harm is nonetheless enormous, it makes sense to reverse the burden of proof. A corporation needs to prove that, even though there is a reasonable suspicion, it has not participated in causing the harm in question. And even though the evidence of direct culpability is in doubt, we can still speak of a co-responsibility.<sup>58</sup> So the second revision of the concept of liability concerns the co-responsibility of corporations which exists in so far as they are entangled in a network of complex causal relationships.

And thirdly, the traditional conception of liability refers mainly to events that happened in the past. It stresses the *ex post* perspective, judges incidences which have already happened and defines both the amount and the scope of compensation. But in so doing, it neglects alternative perspectives on responsibility, which focus on prospective responsibility.

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<sup>56</sup> See also Derek Parfit’s “harmless torturer, in Parfit, Derek (1984), *Reasons and Persons*. Oxford, at 80ff.

<sup>57</sup> M. Green, “Institutional Responsibility for Moral Problems”, in: A. Kuper (ed): *Global Responsibilities. Who must deliver on human rights?*, (New York, Oxford: Routledge, 2005), pp. 117-135.

<sup>58</sup> See, for this, C. Barry, Applying the Contribution Principle, in: A. Kuper (ed): *Global Responsibilities. Who must deliver on human rights?*, (New York, Oxford: Routledge, 2005), pp. 135-155.

However this perspective can be of paramount importance. When I discussed the second element, I affirmed that, in cases of substitutive liability, that is, liability without shared guilt, in the group of people or the legal entity, every member of the group or the entity as a whole is responsible because the harm cannot be attributed to single members. What is required is collective liability, an obligation to work together, to organise measures, to establish rules, to bear risks collectively. As a next step, it is reasonable to anticipate future risks and to try to prevent them. Clearly, this requires that tasks be distributed among all the parties concerned effectively. And it is here that the competence of an actor comes into play. We have to find out how future risks are most effectively prevented and who can most adequately establish measures. This kind of responsibility balances *ex post* liability with an *ex ante* perspective which can best be named “prospective liability”. This notion of liability has two sides; it rests on a retrospective idea of liability that includes all the actors that have caused damage. And it has a future orientation. Actors can be held responsible for their failure to take measures to prevent a hazard for which they are responsible from an *ex post* perspective. Think about environmental pollution. A French Court of Appeal confirmed a ruling that the oil colossus *Total* and related parties were responsible for environmental damage caused by a disastrous oil spill from the tanker *Erika* off Brittany in 1999.<sup>59</sup> *Total* and the other parties (among them, the owner of the boat, the shipping agent, the Italian maritime certification company), were judged to as being liable for the damaged caused by the incident, and claimants were award to over 200 million Euros. The beneficiaries include the French state, regional governments and environmental groups. This decision was the first time that a French court had recognised the existence of ecological damage “resulting from an attack on the environment”, which cleared the way for communities along the coastline to seek financial damages in the future. This decision has led to other repercussions. The European Union also imposed new controls on maritime safety, eliminating single-hull tankers like the *Erika*.

This case shows that we are usually bound to ascribing responsibility when it is very clear who has actually caused the damage. But, in this case, the parties indirectly involved (such as the certification company) were held responsible, and rules were created to prevent future maritime hazards – even though one has to admit that they are still limited. However, the advantage of this approach is that it can be used even in cases when a causal relation cannot be identified or a clear-cut ascription among several parties (like the *Erika* case) is not

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<sup>59</sup> French Court Upholds Verdict in Oil Spill, in New York Times, March 30, 2010.

possible even though the situation is dramatic for the victims. The “preventive liability” approach combines liability based upon causal evidence with prospective liability built upon competence in order to avoid future damage. The competence side dependent upon the liability side. Those who can potentially be the cause of harm or damage are usually those who are potentially best able to prevent it. Both liability, especially substitute liability, and competence supplement each other.

## **5. THE CONTENT OF THE COLLECTIVE AND INDIVIDUAL OBLIGATIONS**

### **5.1. OBLIGATIONS OF THE COLLECTIVE**

This justification of the preventive responsibility of collective actors sets the stage for specifying the *content* of the obligations. Both, the aspect of causality as well as that of competences suggests that we begin by identifying “*sphere-specific*” obligations.<sup>60</sup> These are linked to the influence and the capacity of a firm. Within their sphere of conduct, collectives can establish 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 which regulate working hours and workplace safety, so their sphere of obligations concerns mainly these aspects. Companies providing security consulting services to a government may specifically violate the rights of citizens to physical security, and thus it makes sense to concretise their obligations, accordingly. Obligations may vary in relation to the specific working field, but they also vary with a view to the size, influence and capacity of a firm.

But what is the role of the individual in this approach which strengthens the obligations of private collectives? If collectives, as I have argued, are so much better equipped and so much more competent to comply with international norms, then does the individual still have responsibilities, and, if so, which are they? I will not discuss the numerous approaches that deal with the problem of individual responsibility in a global world, but I will, instead, concentrate on the problem of the responsibility of the individual who is a member of a corporation.<sup>61</sup> One could argue that a member of a collective cannot or, at least not totally, be held responsible, because it is the legal entity that is the main bearer of obligations.

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<sup>60</sup> T. Campbell, “Moral Dimensions of Human Rights”, in: T. Campbell & S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, (Dordrecht: Kluwer, 2004), pp. 11-31.

<sup>61</sup> For many theories on individual responsibility in a global world, see only Pogge, Thomas (2002), *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Cambridge UK: Polity, expanded 2<sup>nd</sup> edition 2008; Caney, Simon (2005), *Justice Beyond Borders*. Oxford: Oxford University Press.

Moreover, one could say that collectives with an internal decision structure are more than the sum of all their members because they differ from a group of people who just gathered without a plan or without being involved in an organisation (like soccer fans who kick up a fuss). The grammar of decision-taking processes in a firm determines the action of its member in a way in which they cannot decide freely for themselves but have to submit to the objective target of the company.<sup>62</sup> I do not think this is a convincing argument in order for the unburdening of the private conscience of the members of a collective. We have seen that structural organisation processes are not disconnected from intentional actions, and, at the end of day, it is a single member or a group of people that takes decisions. Clearly, this does not mean that every member has the same responsibility.<sup>63</sup> The degree of responsibility depends on the way in which one is connected and entrapped in the economic and political structures of power (the company *Calvin Klein* can do more than the seamstress *Xiau Hong*); it also depends on the interests of the actors (both employers and employees); and also on the consumption culture (“cheap is best” as you find in most of the industrial countries). But also those at the bottom of the chain are not without their own burden. Responsibility manifests itself locally, at the workplace, in the town, in community meetings and churches. Moreover, the victims of injustice are also asked to intervene and to become the catalysts of change. Those who suffer under the exploitive regimes, however, are also the first people eligible to demand a change in the unjust situation. It is not their obligation, but their *right* to remind all the others to discharge their obligations in order to abolish the predicament by means of political means (from Aung San Suu Kyi to all unknown workers).

This does not mean that sphere-specific obligations and the tiered responsibility of the individual are determined once and for all, which would seem too narrow an approach. We also have not answered the question of what this entails, and who decides which obligations belong to which sphere. A major principle of organisation for national affairs, the “*principle of affectedness*”, should also be applied to international relations. This says that, in a social relationship, those who are affected by the actions of an individual or a collective actor cannot just ask for compensation, they can also *demand the justification* of the conduct of the actors.<sup>64</sup> This means that the fact that a person or community is substantially affected by the

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<sup>62</sup> P. French, *Individual and Collective Responsibility*, (London: Schenkman 1998).

<sup>63</sup> See for a tiered responsibility M. Bovens, *The Quest for Responsibility. Accountability and Citizenship in Complex Organizations*, Cambridge: Cambridge University, 2008; Young, Iris Marion (2007), Responsibility, Social Connection, and Global Labor Justice, in: Young, I, *Global Challenges. War, Self-Determination and Responsibility for Justice*. Cambridge, 2006.

<sup>64</sup> On this topic, see S. Benhabib, *Another Cosmopolitanism*, (Oxford: Oxford University Press, 2006); J. Habermas, *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, (Oxford,



activities of a transnational actor implies – in ethical terms - a relation of justification between them.

This is not a new principle in governance theory. It has been interpreted narrowly as “internal justification”,<sup>65</sup> in which case the individuals affected are those who, similar to owners and creditors, have delegated power to an agent who manages their affairs. In a globalised economy, this seems insufficient, and we can require a supplementary notion. “External justification” embraces a wider public and would allow us to focus on stakeholders, that is, on 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 concretised among *all* the participants in “value-based networks”<sup>66</sup> - business partners, stakeholders, shareholders, NGOs, science and consumer associations, *etc.*, - who must try to come to an agreement in bargaining processes.

This wider notion leaves room for two interpretations. The first understands justification as “accountability”, and assumes that what is required from the actor is a public and transparent justification of the said actor’s conduct in the past.<sup>67</sup> This notion of accountability is cut off from any idea of reciprocity or participation by stakeholders. It does not, for example, merely set forth rule-setting procedures, such as rules that allow those who have been affected by harmful outcomes to be heard. A second interpretation, therefore, seems necessary. According to this second notion of justification, one should understand the principle of affectedness as being intrinsically linked to reciprocal justification: everyone who has to submit to a norm should also be 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>68</sup> This includes an anticipatory perspective, addressing future events and their negative or positive effects.

In this form of justification, the prevailing notion of accountability fails to be legitimate if the actors who have been, or may be, significantly affected are not represented in the norm-setting process. A collective’s concrete obligations should be determined publicly,

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Polity Press 1997).

<sup>65</sup> See R. Keohane, “Global Governance and Democratic Accountability”, in: D. Held & M. Koenig-Archibugi (eds), *Taming Globalization. Frontiers of Governance*, (Cambridge: Polity Press, 2003), pp. 130-160, at 144.

<sup>66</sup> See D. Wheeler, B. Colbert & R.E. Freeman, “Focusing on Value: Reconciling Corporate Social Responsibility, Sustainability and a Stakeholder Approach in a Network World”, in: (2003) 28 *Journal of General Management*, pp. 1-28.

<sup>67</sup> See A. Benz & I. Papadopoulos (ed), *Governance and Democracy*, (London: Routledge, 2006).

<sup>68</sup> See R. Forst, “The basic right to justification: Towards a constructivist conception of human rights”, (1999) 6 *Constellations*, pp. 35-59, at 44.

with input from all the 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 both the formal and the informal political arenas in which decisions - which can have long-lasting effects on stakeholders - are made.

This approach should not be seen as an attempt to replace common-sense ideas of morality; instead, it seeks to supplement common sense notions, and by doing so, open new ways of understanding international obligations. An attempt to overcome the moral common-sense ideas completely would not only be empirically over-confident, but also problematical from a theoretical point of view. We have seen that the capacities and the 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 globalisation. Nevertheless, the collective actor does not become a moral person simply because one recognises its human rights obligations. There is one further difference between a collective entity and an individual which makes it clear why it is misleading to talk about the moral obligations of corporations. A moral person who has moral obligations follows his or her moral principles from the conviction that these are the most reasonable rules possible – at least, for the time-being. In contrast, a legal person - and a corporation is undoubtedly one - might follow a rule for a variety of reasons, be it the fear of penalties or the loss of prestige, or the realisation that a certain activity and its effects might be wrong.<sup>69</sup>

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

The picture that emerges is that, despite the fragmentary and seemingly weak regulatory structure, there is the potential for the slow crystallisation of new comprehensive international human rights norms that specifically bind transnational corporations and other business entities. Its realisation has a realistic chance only if the moral codes are embedded in a legal surrounding that exerts some pressure on the participating actors in order to obtain compliance. There are developments both in transnational and in European governance, as well as in international law, that can be interpreted as an *institutional context* which, by creating pressure for justification and control, promotes the implementation of the obligations of collective actors. Various attempts are under way to expand the restricted legal status of corporations. One example is that, recently, the United Nations Sub-Commission for the

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<sup>69</sup> See J. Habermas, *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, (Oxford: Polity Press, 1997), p. 267.

Promotion and Protection of Human Rights approved the “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>70</sup> They establish the responsibilities of companies to respect, secure, and promote the fulfilment of human rights with a special focus on consumers’ rights and workers’ rights, environmental protection, and national sovereignty. One result of the Commission’s meetings was to define TNCs as fully-fledged legal persons. This is analogous with the status of natural persons in that these entities have both rights and obligations.<sup>71</sup> This would be a landmark in Economic Law.

There are also other developments. One can distinguish at least three trends in this direction, which could be expanded and further developed:

*Liability.* In international labour law, we find a perspective that focuses on the effects of the economic exchange processes when it comes to civil liability. A corporation, for example, can be held liable for damages that have been 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 labour or benefited from the 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 was probably aimed to ensure that pirates captured in the US could be sued by their foreign victims in order 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 the injuries suffered by Nigerian citizens as a result of an experimental antibiotic administered without their informed consent.<sup>72</sup>

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<sup>70</sup> D. Weissbrodt & M. Kruger, “Human Rights Responsibilities of Businesses as Non-State Actors”, in: P. Alston, (ed), *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp.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>71</sup> See D. Weissbrodt & M. Kruger, “Human Rights Responsibilities of Businesses as Non-State Actors”, in: P. Alston, (ed), *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 315-351.

<sup>72</sup> See, among others, P. Zumbansen, “The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Forms and States”, in: R. Miller & R. Bratspies (eds): *Transboundary Harms: Lessons*

*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 v 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>73</sup> It is interesting that the *Unocal I* case did not place 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. Instead, the court mentioned the circumstances under which a private actor can, nonetheless, be held responsible: most importantly, the court established *when* the corporation commits one, or some, of the narrow class of wrongs identified by treaty and custom.<sup>74</sup>

*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>75</sup> This can be observed within the European Union. One main channel for firms had been to lobby effectively at national level in order to influence the consensus in the Council of Ministers, but the European Commission has introduced a reverse process.<sup>76</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>77</sup>

But there are also hindering factors that are mainly the responsibility of the state, and these have to do with the *international trade system*. Regulating influences on the international market include the international trade system and the WTO, and various US and EU agriculture policies (for example, the "Common Agricultural Policy (CAP)" - a system of

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*from the Trail Smelter Arbitration*, (Cambridge: Cambridge University Press, 2005), pp. 245-254.

<sup>73</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 R.G. Steinhardt, "The New Lex Mercatoria", in: P. Alston (ed): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 177-227, at 195.

<sup>74</sup> See R.G. Steinhardt, "The New Lex Mercatoria", in: P. Alston (ed): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 177-227, at 195.

<sup>75</sup> For rule-making processes in global regulatory networks, see A-M. Slaughter, *A New World Order*, (Princeton: Princeton University Press, 2004); H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart Publishing, 2005).

<sup>76</sup> See C. Woll, "Trade Policy Lobbying in the European Union: Who Captures Whom?" MPIfG Working Paper 06/7,2006, <http://www.mpifg.de/pu/workpap/wp06-7/wp06-7.html>.

<sup>77</sup> On the value of advanced modes of administrative co-operative experimentalism that leads to creative problem solutions, see the article by Ch. Joerges & J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology", in: (1997) 3 *European Law Journal*, pp. 273-299.

European Union agricultural subsidies and programs). The northern countries, for example, reduced their tariffs in the Uruguay Round by less than what the poor countries did. Subsidies for production in the northern countries are still enormous. Dairy farmers, for example, receive annual subsidies of \$2,700 per cow per year in Japan and \$900 in Europe. Every textile job saved by tariffs and subsidies in an industrialised country costs about 35 jobs in developing countries.

## **7. CONCLUSION**

What I have defended a notion of “preventive responsibility”, a notion of responsibility based upon liability and the future-oriented prevention of harms. I have made the following points: first, I think we have good reasons to expand the notion of human rights duties beyond the constraints of the common sense morality approach, and to speak about the obligations of collective actors. Collective actors have adapted to the demands of today’s information society and are much better prepared to deal with complex problems than the individual. Secondly, I have demonstrated that a state-centric approach is no longer tenable since we are already confronted with international human rights regimes and international organisations that are in charge of controlling the compliance with human rights. Corporations violate these norms and, at the same time, have the capacity to prevent the damage which makes them a good candidate for human rights obligations as well. Therefore, thirdly, the best we can do to fulfil the human rights obligations of collective actors might be - one out of a bundle of strategies - to create a normative legal institutional context that sustains the “pressure for justification” on corporations, and promotes the reform of the unjust global order.

However, let me conclude on a more sceptical note about the problem of legitimate governance. We have said that the collective actor has enormous capacity to create a tight network of binding rules and controls that would help preserve respect for human rights. But do rights for corporations follow from obligations to respect human rights? From a democratic theory perspective, it should be questioned whether the expansion of status for TNCs should go this far. What is the problem with this?

If international regulations are decided by private (collective) actors who make decisions according to economic rationality, and not by democratic representatives who 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 the further self-

empowerment of the already powerful.<sup>78</sup> This will strengthen private soft law and will lead to a pluralisation of labour standards as corporations create their own normative rule systems. ILO norm-setting, one should bear in mind, is obliged to respect universal norms, while corporations are not.

At this point, the role of citizens and the public sphere comes into play, and, with it, the question of duty allocation between corporations and politics. It is only 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 accomplishing human rights in their specific fields of competence. However, at the end of day, it is the task of the citizen to determine what the responsibility of corporations and other international actors actually entails.

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<sup>78</sup> H. Brunkhorst: *Solidarität*, (Frankfurt a.M.: Suhrkamp, 2002); for a defence of a “deliberative democratic constitutionalism”, see, also, P. Nanz, “Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory”, in: Ch. Joerges & E-U. Petersmann (eds): *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford, Portland OR: Hart Publishing, 2006), pp. 59-82.