

The Obligations of Transnational Corporations in the Global Context

Normative grounds, real policy, and legitimate governance

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Dr. Regina Kreide

Johann Wolfgang Goethe-University
Department of Political and Social Sciences
Robert Mayer Strasse 5
50054 Frankfurt am Main
Kreide@soz.uni-frankfurt.de

Abstract

This article argues that our prevailing notion of obligations is inadequate for regulating large-scale problems. Collective actors, especially corporations, should be recognized as having obligations in human rights issues as they are much better prepared to deal with complex problems than individuals. Secondly, it is argued that ascribing such obligations is not loftily idealistic, but has its roots in current political phenomena. Contemporary international law and non-legal arrangements create an institutional framework that pressures collectives to justify their actions. Nevertheless, some of these new modes of governance lack legitimacy because they neglect the participation of the individual.

Keywords:

Corporate obligation, individual obligation, human rights, private self-regulation, global governance

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

It needs to address that the international world order has changed rapidly during the last decades. The state-centred international system of law included only one type of “player”, the nation state. The current international political order, however, consists of a multi-level system without a world government but with multiple players in functionally differentiated fields of activities. The international community has established the world organization as the single power on a supranational level that has the authority to implement enduring peace and prevent massive human rights violations. On the level “below”, the transnational level, networks and organizations converge and overlap to satisfy the different functional demands of coordination. The various forms of coordination between transnational state organizations, state and non-state actors, and simple private self-regulation address not only “technical” problems like quality standards, telecommunication, and the prevention of catastrophes; they are also increasingly involved in regulations of a genuinely political nature such as financial and economic issues, energy and the environment, poverty reduction and health care.

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In keeping with current notions of international governance, the citizen has given way to collectives as the primary political actor. Private collectives in particular have gained increasing prominence in international negotiations, public deliberation, and rule-setting.

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

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

At the centre of these developments is the issue of transnational corporations' obligations to respect basic human rights. They embody the most basic moral rules with global scope. It is widely held that human rights treaties are first and foremost addressed to individuals and to states. States, for various reasons, no longer sufficiently control the implementation of human rights law. *Non-state actors* - not by accident defined in contrast to the "state" - are not parties to such treaties because - or so it is said -- they have not been involved in the drafting process, cannot report to the treaty bodies, and cannot participate in electing the expert members.² This position, however, no longer seems tenable and has raised pressing theoretical questions. I will address two of these questions in this article.

The first question focuses on the normative side of the topic: Do corporations have human rights obligations, and if so, do they differ fundamentally from the human rights obligations of states on the one hand, and of individuals on the other? I will argue that collective actors do have obligations to avoid directly violating human rights, and to mitigate

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

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

situations where rights are being violated by others, if they have the power to intervene. Moreover, having broached the subject of an “extended notion of corporate obligations”, what should be the content of those obligations? (Section 1).

Normative studies are often criticized for being trapped in the powerlessness of “ought” language. My approach combines a normative and empirical perspective, connecting the normative grounds for corporate obligations to an empirical analysis of the current global and EU policies that work toward implementation of corporate obligations. Against the background of the normative proposal offered in section 1, I will look at some institutional arrangements and corporate initiatives that aim at norm compliance and asks the following question: Which modes of governance already allow for private-public cooperation in the implementation of human rights obligations? I will offer three criteria for the critical evaluation of just two (because of time constraints) international initiatives that aim at enhancing corporate human rights compliance. (Section 2)

Thirdly, I will argue that one has to put these analyses into a broader institutional context. A third question therefore is what entities, what institutional, contractual arrangements and strategies support or hinder the implementation of new modes of governance that aim to establish human rights standards within market processes and beyond. I will argue that a network of diverse regulations concerning the responsibility of non-state actors has brought about a new institutional context of justification and control. (Section 3)

However, not all of these new policies meet the standards of democratic legitimation. I will conclude with a skeptical note on the political equality of private collective actors within global governance processes. (Section 4)

1. The obligations of the collective actor

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

In moral philosophy and political theory, most approaches bear the hallmarks of what Samuel Scheffler has called commonsense morality. It includes assumptions that influence theory but are also entrenched in everyday practices.³ Four assumptions in particular make it very difficult to speak about the obligations of a collective actor.⁴ These are that: collective actors do not act intentionally; that the individual (and not the collective) is the primary moral actor; that action is more morally significant than omission; and that consequences that have proximity in time and space are more significant than remote consequences. In the subsection that follows I will first address these four assumptions and argue that we should in fact attribute obligations to collective actors, including transnational corporations, as there are advantages to assigning obligations to collectives rather than to individuals. Secondly, I will focus on the content of these obligations, thereby taking into consideration that corporation's obligations does not transform the corporation or any other collective actor into a moral person.

1.1. The "unintended-action-argument"

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

In an argument that can be traced to Adam Smith, Friedrich Hayek and later to Niklas Luhmann, it is commonly held that corporations' activities are *not regulated intentionally* but arise spontaneously as a result of the establishment of a subsystem in an expanding capitalist world economy. Market processes, they say, can best be understood in terms of a game, "partly of skills and partly of chance"⁵ whose outcome is not foreseeable but is rather unpredictable and has winners and losers. The economic system is metaphorically driven by an "invisible hand" (Adam Smith) or "steering medium" (Niklas Luhmann).⁶ As part of the systematic economic order, corporations are self-referential entities, subject to the imperatives of economic rationality, such as the exchange of economic goods, the maximizing of profit

³ Scheffler 2001: 37.

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

⁵ Hayek 1976: 71.

⁶ Smith 1976 [1776]; Von Hayek 1976; Luhmann 1998.

under conditions of competition, and the accumulation of power. The argument for restricted corporate obligations concludes that because the actors in the market are driven by the forces of economic rationality, and do not have intentionality, one cannot say the corporate actor was ever in a position to act otherwise.⁷

This emphasis on an interest-neutral and completely unintended coordination of activities seems to be overly one-sided.⁸ 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.⁹ Corporations obviously react to new external demands, and can be said to be involved in learning processes. Shell in Nigeria is a prominent example of a firm dealing with external demands in a way that, at first glance, seems to contradict the primary aim of a corporation to increase its profit. The impact of oil extraction on the Ogoni people and the Delta environment and especially the execution of Ken-Saro-Wiwa led to very negative publicity for the company worldwide. For a long time, Shell's standard answer to criticism over its role in Nigeria was to strengthen the "division of work" between the state and the corporation.¹⁰ A change in opinion came after public pressure against the company strengthened. Shell admitted that "not to take action could itself be a political act", and declared a commitment to a wider concept of responsibility for future activities. This potential for corporations to change their behavior paves the way for further normative consideration of the foundation for the obligations of collective actors. Let us consider the three remaining assumptions of commonsense morality that restrict a notion of corporate obligations.

1.2. The priority of the individual over the collective

The second assumption is the idea that individuals are the primary bearers of moral obligations.¹¹ This means that my independent actions are regarded as more important for an outcome than my actions as a member of a group. If I produce a piece of artwork that becomes very famous, I will receive much more attention for my effort if I produce it alone than as a member of a group or school. The focus on the relative contribution of the individual

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

⁸ Gray 1981.

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

¹⁰ Cited in McBarnet 2004: 67.

¹¹ See for the following aspect also Green 2005, 118.

to the final product has consequences for our daily assessment of our obligations. This is one reason why it is difficult to address responsibility for climate changes. If I drive my car every day and use electricity, this activity on its own cannot cause global warming. We see our contribution without focusing on the aggregated effects our actions have in concert with those of others. This shapes our ideas about collectives. Insofar as collective actors play a substantial role in commonsense morality at all, their actions and obligations are seen as being derived from those of individuals.

This perspective, however, seems shortsighted; it neglects the overall effects of uncoordinated collective harm. This is true also with view to the collective actor's activities. Even though the market system operates according to economic demands, examination of the effects of a corporation's activities allows a normative evaluation of the collective activities. Against Hayek's assumption, the systemic mechanisms (power and the exchange of goods) are "embedded" in society through the effects of the collective actions¹², which means that economic actors are "linked" to processes of cooperation and interaction in the "lifeworld". In a global economy, this "link" is more or less reduced to confronting the sometimes desired but often undesired aggregated effects of radical modernization. Growing political awareness beyond national borders has triggered an *evaluation of the effects*¹³ of corporations' activities in different public spheres. Consider, for example, the debates on the ecological and human rights abuses caused by multinationals. Because they affect people's lives in massive, not marginal ways, corporations are being said to bear some responsibility for their actions.

1.3. The priority of action over omission

A third common assumption is the idea that actions and their direct effects are more morally relevant than omissions and their possible effects. If I cheat someone out of their money, this is a greater wrong than watching somebody cheat someone else and not taking any steps to intervene. We could be tempted to conclude that we have a strong duty not to undertake certain actions that harm others but much less so a duty to prevent others from committing harm.¹⁴ 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

¹² For the notion of „embeddedness“ see Polanyi 2001 [1944].

¹³ Beck, Giddens and Last 1997.

¹⁴ Pogge 2004: 279-280.

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

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

1.4. The priority of near over remote outcomes

The fourth assumption of commonsense morality is that outcomes that occur near to us are of greater moral importance than remote ones. We usually decide that an outcome is the result of my action only if it can be directly related in time and space to what I have done. Remote effects that may occur in the future or happen somewhere else in the world are not clearly linked to my action. This is why we feel much less responsible for environmental effects that nevertheless will be felt for generations. One could add that this makes sense, as it has become very difficult, if not impossible, to trace the origins of harms. For example, it requires great effort, and is sometimes technically impossible, to single out the source of a hazardous substance that pollutes the air. And sometimes the question arises of whether one

¹⁵ Pogge 2002.

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

could have known that this substance would become toxic when it was released into the air, or whether it would have been possible to avoid the dangerous emission.

Some sociological researchers have made the case that modern technologies have grown so complex, and risks have become so overwhelmingly incalculable, that it is often impossible to attribute responsibilities to single agents or for agents to know how to take sufficient precautions. In a “global risk society” (Ulrich Beck 2007) all human beings are in more or less equally exposed to uncontrollable risks that, ironically, have their origin in modern technologies and industries developed in the effort to improve our way of life.¹⁷ Irreversible climate changes and interventions in human genetics cause incalculable effects across space and time. Long functional chains within these complex developments make it difficult to trace both their causes and (harmful) effects. These new global threats undermine the logic of individual responsibility: the more widespread a technical innovation and its related risks (like toxic emissions or genetic modification), the more difficult it is to assign the origin of an effect to a single originator: when there are many producers, how can we know who is at fault for hazardous emissions? And secondly, it may be impossible for an actor to foresee the negative effects of its actions; and that if the unwanted effects could not have been foreseen, it is not right to attribute obligations to the actor.

This position is only partly accurate and needs some differentiation. First of all, it exaggerates to a certain degree the complexity of circumstances and underestimates the technical and political potential for tracking down the causes of global or regional harms. We have to distinguish between limited accidents or cases of liability – even though they are not “unintended” accidents as long as a catastrophe is part of the overall calculation—and unlimited catastrophes. The former are restricted 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 an oil company. Surely, even if the damage would first be localized, there is a risk that catastrophes are not in an expected way unlimited and might happen nevertheless. The scale of the catastrophes can be determined only *ex post* but cannot be anticipated *ex ante* comprehensively.¹⁸ As not all catastrophes are unlimited, it is important to track down those who are responsible for the damage as far as it is possible. There are some promising cases. The disposal of the Brent Spar oil storage facility is

¹⁷ Ulrich Beck (2007): *Weltrisikogesellschaft*, Frankfurt am Main:65. World Risk Society (1999) is a much earlier version of the German edition which is revised in great parts.

¹⁸ Ulrich Beck (2007): 243.

a prominent example of how responsibility has been legally assigned to a huge corporation, through the auspices of a watchful public.¹⁹

Secondly, a well-known domestic principle has indeed come under pressure, the principle of compensation: what can serve as compensation for something that massively and irreversibly changes the conditions of human life? The idea of compensation is being replaced by the principle of prevention, which includes anticipating and preventing risks that cannot be proven to even exist.²⁰ You may immediately object that the focus on prevention does not bring us far if we have to anticipate harmful effects under conditions of limited knowledge. If there are cases where a lack of knowledge and power makes it difficult to trace the causes of a harm and thereby make an institution liable for what has happened, it makes sense to reconsider the way we usually judge factual dilemmas.

In criminal cases where there are doubts about the facts and the role of an alleged perpetrator, we are inclined to exonerate the accused from any responsibility or obligations. However, “regular” criminal offenses and institutional cases under complex conditions make for an uneasy comparison. It becomes apparent that the obligations of a collective actor are not restricted in the same way as an individual actor’s.²¹ Our unease with this comparison stems from the fact that the smallest actions of collective actors can be of an enormous scale, affecting many people, maybe over generations. Given this, it makes sense to pursue a new line of argument and come to the third reason for collective obligations. In situations where our knowledge is limited and conclusive evidence is unlikely, but the harm is enormous, it makes sense to reverse the burden of proof. When the evidence of direct culpability is in doubt, we can still often speak of a co-responsibility.²²

One still may reply here that if the situation is not transparent this may be an indication that it was impossible for the collective actor to foresee the negative effects of its actions. This is an untenable assumption. A major difference between collective actors and individuals concerns knowledge and the ability to apply it in practice. Collective actors, and especially corporations, are able to gather data, conduct their own research, work through information, and use this knowledge for their purposes through competent agents.²³ Corporations have become powerful actors because they possess highly specialized and

¹⁹ McBarnet, 2004, 63-81.

²⁰ Ulrich Beck (2007), 104.

²¹ See also Green 2005.

²² See for this Barry 2005.

²³ See Zumbansen 2005: 10.

differentiated knowledge across many fields, which they can also effectively use in politics: they sometimes impose an entire package of labor and tax rights before making an investment and settling in a country. They are well prepared to respond to the challenges of an international information society and are very capable of contributing toward the upholding of human rights.

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

To sum up, we have four arguments for why transnational corporations have human rights obligations: they react to external demands through various moves, such that corporations can be said to act intentionally; they have broad, potentially negative influence on people's lifeworlds; they profit from the disadvantages caused for others who are much worse off; and they have the competencies and power to influence and address complex problems. The last point switches the focus from the cause of harm to the capacity to act otherwise on a global scale. As powerful entities, corporations seem to be very capable of shaping their social and political surroundings according to human rights standards.

What does this mean for the widespread trend in sub-contracting? Sub-contractors are often small, with less influence and capacities than the primary contractors. It is not possible for an individual to dissolve his or her moral obligations by simply delegating a morally reprehensible task to another party. For this case, of collective entities, it is sufficient to state that if we have agreed that a collective has human rights obligations, then those obligations must entail ensuring that any subcontractors meet those same obligations.²⁴

²⁴ These demands are part of the *Global Compact*. See also OECD's Principles of Corporate Governance 2004, http://www.oecd.org/document/49/0,2340,en_2649_34813_31530865_1_1_1_1,00.html.

1.5 The Content of the Obligations

This justification of collective actor obligations sets the stage for specifying the content of the obligations. We can begin by identifying "sphere-specific" obligations²⁵, intrinsically linked to the influence and the capacity of a firm. Within their sphere of conduct, collectives can bring about social and economic rights, for example, by offering adequate wages and leisure time to their workers, by implementing anti-discrimination rules, guaranteeing security at the workplace, using environmental protection technology, and so on. Manufacturing firms, for example, may specifically violate employee rights regulating working hours and workplace safety, so their sphere of obligation concerns mainly these aspects. Companies providing security consulting services to a government may specifically violate citizens's rights to physical security, and so it makes sense to concretize their obligations accordingly. Obligations may vary in relation to the specific working field, but also with view to the size, influence and capacity of a firm.

This does not mean that sphere-specific obligations are determined once and for all, which seems too narrow an approach. We also have not answered the question of what this entails and who decides which obligations belong in which sphere. A major principle of organization for national affairs, the "*principle of affectedness*," should be applied to international relations too. It says that in a social relationship, those who are affected by the actions of an individual or collective can not only ask for compensation, they can also *demand justification* of the conduct of the actors.²⁶ This means that the fact that a person or community is substantially affected by the activities of a transnational actor ethically implies a relation of justification between them.

This is not a new principle in governance theory. It has been interpreted narrowly as "internal justification"²⁷ in which case the individuals affected are those who, like owners and creditors, have delegated power to an agent who manages their affairs. In a globalized economy this seems insufficient and we can call for a supplemented notion. "External justification" embraces a wider public and would allow us to focus on stakeholders, that is, all those *directly* exposed to the activities of collectives through environmental disasters, unhealthy products, low wages, and so on. The obligations mentioned above have to be

²⁵ Campbell 2004.

²⁶ On this topic see Habermas 1997, and also Forst 1999.

²⁷ Keohane 2003:144.

concretized among *all* the participants in “value-based networks”²⁸ - business partners, stakeholders, shareholders, NGOs, science and consumer associations - who try to come to an agreement in bargaining processes.

This wider notion leaves room for two interpretations. A first understands justification as “accountability” and assumes that what is required from the actor is a public and transparent justification of the actor’s conduct in the past.²⁹ This notion of accountability is cut off from any idea of reciprocity or participation by stakeholders. It does not, for example, set forth just rule-setting procedures such as rules that allow hearing from those who have been affected by harmful outcomes. A second interpretation therefore seems necessary. According to this second notion of justification, one should understand the principle of affectedness as intrinsically linked to reciprocal justification: everyone who has to submit to a norm should be equally an author in the process of norm setting. Or, as Rainer Forst has put it: everyone has a basic right to justification, which allows every individual a “veto-right”.³⁰ This includes an anticipatory perspective, addressing future events and its negative or positive effects.

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

This approach should not be seen as an attempt to replace commonsense ideas of morality; instead, it seeks to supplement commonsense notions, and by doing so, open new ways of understanding international obligation. An attempt to completely overcome the moral commonsense idea would not only be empirically overconfident, but also problematic from a theoretical point of view. We have seen that the capacities and possible influence of collective entities on the lifeworld differ fundamentally from those of individuals. The collective is to a certain extent much better prepared to deal with the challenges of globalization. Nevertheless, the collective actor does not turn into a moral person simply because one recognizes its

²⁸ Wheeler, Colbert and Freeman 2003.

²⁹ Benz and Papadopoulos 2006.

³⁰ Forst 1999: 44.

human rights obligations. There is one further difference between a collective entity and an individual that makes clear why it is misleading to talk about moral obligations of corporations. A moral person who has moral obligations follows his or her moral principles out of the conviction that these are the most reasonable rules possible – at least for the time being. In contrast, a legal person -- and a corporation doubtlessly is one -- might follow a rule for a variety of reasons, be it the fear of penalties or loss of prestige, or the realization that a certain activity and its effects might be wrong.³¹ Human rights obligations are not directly deduced from the moral obligations of individuals, because they have distinct characteristics. It is more precise to say that we have good *moral arguments* for why collective entities have or should have legal human rights obligations. However, it seems undeniable that collectives rely on individuals; without individuals and their participation in internal rule-setting and decision procedures there would be no collective actor.

2. Evaluation of human rights initiatives

What has been said so far provides a setting for the evaluation of current initiatives that aim, generally speaking, at norm compliance by corporations. These initiatives are in one way or another a reaction to the new roles of transnational corporations of being object of human rights obligations. This leads us to the thesis of the second section of this paper.

Initiatives aiming at human rights compliance of collective actors are legitimized if they meet three conditions relating to internationally accepted norms, the congruence of subject and authorship of norms, and the sustainable control of power.

Firstly, initiatives should be *compatible with human rights standards*. To be more precise: All non-state agents who affect people's essential interests have enduring duties to respect, protect, and fulfill social and economic human rights within their functional domain of influence.³²

Secondly, initiatives need to respect the above-mentioned *principle of affectedness*. According to this principle, to recall, those who are or may be affected by a rule or an

³¹ Habermas 1997: 267.

³² To be more concrete: *Respecting* these rights requires that production sites and business practices should not destroy local, essential living conditions, nor obstruct access to economic and social rights. *Protecting* economic and social human rights means TNCs must prevent third parties – mainly their subcontractors – from violating these rights. And finally, TNCs should contribute toward *fulfilling* economic and social human rights by, for example, respecting international labor laws and/or participating in voluntary agreements on labour standards. Those agents who have *caused* harm and are capable of offering compensation in accordance with the realization of these rights have a strong duty to do so – again, within their functional area. If a direct causal involvement cannot be identified, those who *are* capable of realizing social and economic human rights have an equally strong duty to comply.

initiative based on rules can expect to participate in the rule-setting process³³ This means that if a person or community is substantially affected by the activities of a transnational actor, a relation of justification is created between them.

A third criterion addresses the sustainable *norm enforcement*. A primary concern in this area is guaranteeing norm compliance over a long period of time. Adequate enforcement also requires a transparent process for assigning responsibility after an accident (both for effects that may extend into the future and in response to accidents that occurred in the past). Furthermore, a positive evaluation of a TNC's initiatives should depend on the presence of effective mechanisms for preventing future violations. This may include institutional incentives that may hinder or support addressing accountability. I will come back to this latter point later (section 3).

Let me briefly sketch out the implications of these criteria through two examples. One example is a relatively new ILO initiative, which I am including to represent an internationally known public-private initiative. The second is a rather new, private, self-regulation initiative that explicitly aims at maximum compatibility with market regulation processes.

A private-public initiative: The International Labor Organization (ILO)

The International Labor Organization (ILO) is an example of an institution that sets *private-public regulations* on the activities of states, including binding laws and non-binding recommendations. The ILO's norm-setting is beholden to universal norms and explicitly supports some core human rights.³⁴ This was part of its founding ideas set out almost one hundred years ago. But with respect to the principle of affectedness, the ILO has run into problems of representation. One criticism is that the number of organized union members world-wide – unions are a main party of the ILO -- is decreasing steadily, which makes it questionable whether an ILO can still represent employees adequately. At the same time, NGOs are not yet represented in the ILO and the ILO's first negotiations with them have been difficult because the NGOs fear becoming entrapped in old, encrusted organizational structures. Furthermore, when it comes to mechanisms for norm enforcement, the ILO reporting systems have been weak and as a result the number of binding conventions has

³³ On this topic see Habermas 1997, and also Forst 1999.

³⁴ Blanplain, R. and Engels, C. 2001.

decreased while the number of non-binding recommendations has increased. Some core human rights, such as the prohibition of child labor, have become binding law, not through state consent but through ILO membership. A new ILO initiative now helps with the implementation of human rights standards. The prohibition of child labor in developing countries, for example, is supported by offering social security payments to very poor families whose income heavily relies on the children's contribution. So we have here a mixed result concerning the legitimacy of ILO initiatives.

Private Self-Regulation: Cotton-Made in Africa.

We are currently witnessing a range of market-based initiatives where firms compete for sales and capital through making a public commitment to human rights. Precursors of these measures are the so-called *Sullivan Principles*, first articulated in 1977, which amounted to a voluntary code of conduct for companies doing business in South Africa under the apartheid regime.³⁵ Despite their uncertain impact in South Africa, the Sullivan Principles have served as a model for similar activities such as social accountability auditing and verification, unilateral Codes of Conduct, and "human rights-sensitive" product lines and brands. Starbucks offers "fair trade coffee" and the World Diamonds Council has developed the "Kimberley Process," which is a protocol for assuring that profits from the sale of gems do not support governments or paramilitary groups that violate human rights.³⁶ One prominent example of a pact between private actors (TNCs) and a public actor, (in this case the United Nations) is the *Global Compact*, brought to life by Kofi Annan in January 1999. Along with the UN High Commission for Human Rights, the International Labor Organization (ILO), and representatives of the UN Environmental Program, about 50 corporations take part, among them Nike, Shell, BP, Amoco and Rio Tinto. The agreement is that the corporations must go public on the Global Compact Internet site by describing their progress in implementing human rights, labor standards and environmental protection. In turn they are allowed to use a UN logo for their advertising.

The project Cotton-Made in Africa that I will discuss in some more detail here, was initiated by Michael Otto, a German mail-order business, in close cooperation with three African cotton-producing and cotton-manufacturing firms in Zambia, Burkina Faso and

³⁵ The principles required an integrated workplace, fair employment practices, and affirmative action programs, Braithwaite and Drahos 2000: 254; Steinhardt 2005: 180.

³⁶ See, among others, Kuper 2005.

Benin.³⁷ It is not a case of pure self-regulation, as Cotton-Made in Africa gets support from the German Ministry of economic cooperation and development and from some NGOs such as the World Wide Fund for Nature. Unlike the Fair Trade approach, which tries to implement human rights standards primarily through fixed prices, Cotton-Made aims to build local capacity so as to make African cotton capable of competing on the world market. By increasing quality, the project tries to stimulate higher demand for African cotton. The project is only indirectly obligated to respect human rights insofar as it increases the income of the local farmers and thus reduces poverty. Within the scope of the project, the participation of those affected seems pretty good; the African farmer is very well integrated into the process of setting quality standards. But NGOs have complained that economic aims always trump ecological and sometimes even social goals. Norm enforcement is based on a genuine economic principle: profit maximization, without any further intervention in the chain of value. The market compatibility is a high incentive for integrating the rules of conduct into the ongoing process of production. Nevertheless, it turns out that it is difficult to convince other firms to join the initiatives mainly because most of them are busy setting up their own codes of conduct. In the long run, this could mean a competitive disadvantage for the Otto project. In addition, a survey showed that Otto customers are more or less uninterested in this initiative and tend not to change their buying behavior.

	ILO	Cotton Made in Africa
Human rights compatibility	Yes	Indirect
Principle of Affectedness	Problem of Representation	Difficult position of NGOs
Sustainable human rights compliance	New strategies	High incentive through market compatibility

To sum up, we can say that the involvement of states and international government organizations can ensure a focus on human rights standards. But this is far from being a guarantee that states will become actively engaged in implementing human rights standards. Furthermore, norm-enforcement is a major problem for both approaches. Corporations often engage in image-friendly international initiatives that have no influence on their activities. Work conditions have improved in some places in the world, but one cannot overlook that

³⁷ www.cottonmadeinafrica.com; This is part of my own empirical research. See also the master thesis of Nicole Barth 2007: *Wie fair ist fairer Handel?* Frankfurt am Main.

self-imposed restrictions are often no more than mere “human rights rhetoric”.³⁸ Moreover, it is the enduring distrust that many NGOs and customers have of the genuineness of corporate activities that sustains public awareness and maintains the pressure on corporations. Paradoxically, if this distrust wears out, the initiatives that aim to create norm compliance will cease to exist.

A crucial aspect concerning self-regulation is the motivation of corporations. A recent study on this topic identifies a quite selfish reason: the codes are an answer to the risks associated with civil action and consumer boycotts.³⁹ Economic rationality is not being simply replaced by moral norms or a practical discourse, nor are corporations expected to become agents motivated primarily by morality. Rather, a normatively colored context creates a pressure that becomes a variable in the rational calculation. One way to maintain the pressure is to measure corporations by their promises and publicly disclose if they fail to comply, for they cannot renege on their promises without losing credibility. They agree on moral codes at first only for tactical reasons but then “talk themselves into moral obligations” and become entangled in their own moral standards.⁴⁰

3. The institutional context for implementing corporate obligations

The picture that emerges is that despite the fragmentary and seemingly weak regulatory structure, there is potential for the slow crystallization of new comprehensive international human rights norms that specifically bind transnational corporations and other business entities. Its realization has a realistic chance only if the moral codes are embedded in a legal surrounding that puts some pressure on the participating actors to comply with. There are developments in transnational and European governance as well as in international law that can be interpreted as an *institutional context* that, by creating pressure for justification and

³⁸ Nike, for example, a prominent member of the “Global Compact”, was sued by an American labor law activist, Mark Kasky, for false or misleading statements in its advertisements. Nike had assumed that work conditions in their subcontracting firms had improved – an assumption Kasky said was untrue. In September 2003, one month after the suit was filed, Nike, which claimed it was engaged in fully protected free speech, agreed to an out-of-court settlement and paid 1.5 million dollars to a fair trade organization. Greenhouse 2003. See also the contribution on an evaluation of the “Global Compact” by Kuper 2005.

³⁹ Conzelmann and Wolf 2007.

⁴⁰ Thomas Risse shows that argumentation, deliberation and persuasion plays an important role in international negotiations. He speaks of “moral entrapment”: even participants who enter the negotiations in strategic intention at some point have to switch to discursive rules and the attitude oriented towards a common understanding (“Verständigungsorientiertes Handeln”). Risse 2000: 1-39; Risse, Ropp and Sikkink 1999.

control, promotes the implementation of collective actors' obligations. One can distinguish at least three trends in this direction that could be expanded and further developed:

2.1. Liability. In international labor law we find a perspective that focuses on the effects of economic exchange processes when it comes to civil liability. A corporation, for example, can be held liable for damages caused “intentionally” or through the negligence of its employees. Domestic courts have a history of ordering corporations to pay for damages that occur as a result of their complicity in abuses perpetrated by governments. Since World War II, for example, survivors have successfully sued companies that relied on slave labor or benefited from property seized from Jews during the Nazi Holocaust. A wide range of cases is filed under the so called Alien Tort Statute (ATS) in the United States, which was adopted as part of the First Judiciary Act in 1789, and provides that district courts have jurisdiction over any civil action for a tort committed in violation of US law anywhere in the world. The ATS probably aimed to assure that pirates captured in the US could be sued by their foreign victims to recover damages, and that foreign diplomats assaulted in the United States could similarly use the federal courts. A recent and very prominent case was brought against one of the world's largest pharmaceutical companies, Pfizer, for injuries suffered by Nigerian citizens hurt by an experimental antibiotic administered without their informed consent.⁴¹

2.2. Complicity. ATS actions have also been filed in US federal courts against some of the largest multinationals for their alleged complicity in human rights violations around the world. In *Doe vs. Unocal*, a group of Burmese villagers sued the US corporation Unocal, and Total, S.A., a French company, for their complicity in slavery-like practices and other human rights violations in a joint venture pipeline project with the government in Burma.⁴² It is interesting that the *Unocal I* case did not rest liability on the assertion that the firm maintained business relationships with a state that violates human rights, nor was it claimed that the corporation was liable for the actions of the state that was the joint venture partner. Rather, the court mentioned circumstances under which a private actor nonetheless can be held

⁴¹ See, among others, Zumbansen: 2005.

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

responsible: most importantly, when the corporation commits one or some of the narrow class of wrongs identified by treaty and custom.⁴³

2.3. *Policy-making.* While corporations have historically had to lobby for influence in legislative processes, they have now become an integral part of policy-making, bringing with them much needed expertise and practical knowledge.⁴⁴ This can be observed within the European Union. A main channel for firms had been to lobby at the national level to effectively influence the consensus in the Council of Ministers, but the European Commission has introduced a reverse process.⁴⁵ 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.⁴⁶

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 (e.g. the "Common Agricultural Policies"). The northern countries, for example, cut their tariffs in the Uruguay Round by less than the poor ones 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 industrialized country costs about 35 jobs in developing countries.

4. The problem of legitimate governance

We have said that the collective actor has enormous capacities to create a tight network of binding rules and controls that would help preserve respect for human rights. Does a right to political participation follow from obligations to respect human rights?

We can currently observe a development that counteracts the previously mentioned four assumptions of commonsense morality. In governance theory we have the widespread

⁴³ See Steinhardt 2005: 195.

⁴⁴ For rule-making processes in global regulatory networks see Slaughter 2004; Schepel 2005.

⁴⁵ See Woll 2006.

⁴⁶ On the value of advanced modes of administrative co-operative experimentalism that leads to creative problem solutions see the article by Joerges and Neyer 1997.

presupposition that the individual is no longer the primary political actor internationally but, if at all, one among many collective actors such as NGOs, transnational governmental organizations and transnational corporations. While a commonsense morality places a great deal of obligations on the individual, a commonsense governance theory favors the collective actor as the political agent at the international level.

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 Promotion and Protection of Human Rights approved 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights,' which can be said to be the first comprehensive international human rights norms that specifically address transnational corporations and other business entities.⁴⁷ They lay out the responsibilities of companies to respect, secure, and promote the fulfillment of human rights with a special focus on consumers' and workers' rights, environmental protection, and national sovereignty. One result of the Commission's meetings was to define TNCs as a fullfledged legal persons. This is analogous to the status of natural persons in that these entities then have both rights and obligations.⁴⁸ This would be a landmark in Economic Law. But from a democratic theory perspective, it has been questioned whether the expansion of status for TNCs should go that far.⁴⁹ 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 that voice the interests of their constituents, then a basic democratic principle will be turned upside down: the constitutional and law-giving power of the people to which all other powers, persons, and associations should be subject, will no longer be supreme and we face the danger that private self-regulation will become an instrument for further self-empowerment of the already powerful. This will strengthen private soft law and will lead to a pluralization of labour standards as corporations create their own normative rule systems. ILO norm-setting, one should keep in mind, is obliged to respect universal norms whereas corporations are not.

At this point the role of the state comes into play and with it the question of duty allocation between corporations and the state. The state as the representative of its citizens should continue to bear the lion's share of the burden of creating an institutional environment that facilitates implementation of human rights duties. It is only through the participation of

⁴⁷ Weissbrodt and Kruger 2005: 315-351. The full text of the approved 'Norms' is also available at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument).

⁴⁸ Weissbrodt and Kruger 2005.

⁴⁹ See for this assumption the in other respect different approaches of Habermas 1997; Joerges and Vos 1999.

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

Conclusion

What I have defended here were the following four points. First, I think we have good reasons to expand the notion of human rights duties beyond the constraints of the commonsense morality approach and to speak about the obligations of collective actors. Collective actors have become so powerful and influential that they, along with states, contribute to human rights violations. They have adapted to the demands of today's information society and are much better prepared to deal with complex problems than the individual. Their capacities mean we should recognize them as important agents in human rights issues and doing so has advantages over emphasizing the obligations of the individual.

Secondly, I have demonstrated that public norm compliance initiatives have some advantages over private-public self-regulation might, even though both are weak when it comes to sustainable norm enforcement.

Therefore, thirdly, the best we can do to realize human rights obligations of collective actors might be - one out of a bundle of strategies - to create a normative legal institutional context that sustains a "pressure for justification" on corporations and promotes the reform of the unjust global order. Finally, I pointed out that we nevertheless have to be cautious, as not all initiatives of private self-regulation are desirable or legitimate.

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