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Corporate Obligations under International Law

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Whether socially responsible behaviour by companies should be enforced through international law has been debated in the literature since the 1960s. Wolfgang Friedmann suggested already in 1964 that private corporations are participants in the evolution of modern international law.¹ Authors like Antonio Cassese, on the other hand, have argued that multinational corporations possess no international rights and duties because states - whatever their ideological outlook - are reluctant to grant them international standing.²

Until recently the prevailing view of international organizations such as the UN,³ ILO,⁴ OECD⁵ and EU⁶ was that corporate social responsibility is a matter that can best be left to self-regulation by the industry. The consensus among these international organizations was that if any standard-setting or supervisory activity was required by them it should be of a gentle, voluntary nature only. Needless to say, this approach was also strongly advocated by the corporate sector itself.

This longstanding *laissez faire* attitude was challenged last year by the UN Sub-Commission on the Promotion and Protection of Human Rights. In August 2003 it adopted a text entitled Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.⁷ The Norms represent an ambitious attempt to codify the principles that companies must respect in the field of human rights, labour law, environmental protection, consumer protection, prevention of corruption etc. The Norms have been characterized by their main driving force, Sub-Commission member David Weissbrodt, as the 'first non-voluntary initiative' in this field.⁸ He has described the Norms as a soft law instrument that derives its authority from its sources in international law, and as a restatement of international legal principles applicable to companies.⁹

The Sub-Commission is merely an expert body at the bottom of the UN hierarchy and the Norms in their current shape therefore enjoy little formal authority. However, they may

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¹ Wolfgang Friedmann, *The Changing Structure of International Law* (1964) 230.

² Antonio Cassese, *International Law in a Divided World* (1986) 103.

³ UN Global Compact (2000), www.unglobalcompact.org.

⁴ ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), www.ilo.org.

⁵ OECD Declaration on International Investment and Multinational Enterprises (1976), www.oecd.org.

⁶ Promoting a European Framework for Corporate Social Responsibility, European Commission Green Paper (2001), www.europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf.

⁷ Responsibilities of transnational corporations and other business enterprises with regard to human rights, Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, 13 August 2003.

⁸ David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *AJIL* (2003) 901, 903.

⁹ *Ibid.*, 913.

in due course be adopted with or without modifications by the Sub-Commission's parent body, the Commission on Human Rights, or even by the UN General Assembly. This would of course greatly enhance their stature. At the annual session of the UN Commission on Human Rights earlier this year, the Norms received wide support from human rights and environmental groups but were criticized by business groups and some governments. The main criticism of the Norms was that by directly imposing binding standards on companies state obligations in this field would be 'privatized', i.e. shifted from states to companies.

Before addressing this point it seems worth considering first whether current international law permits direct regulation of corporate behavior or whether this would be a new departure.

Do companies currently have international legal obligations?

In domestic law, it has long been accepted that legal persons such as companies have legal obligations - for example under labour and environmental law - and that they may be held liable for breaches of these obligations. As a matter of fact, companies cannot be imprisoned but in most states they can be sentenced to other criminal sanctions such as fines.

In international law, there is no general rule that companies are responsible for their internationally wrongful acts. For obvious reasons it cannot be assumed that companies have the same obligations as states or even as individuals, even if developments appear to go in that direction. In 1998 the Rome Conference that adopted the Statute of the International Criminal Court came close to providing the Court with jurisdiction to try not only natural persons but also legal persons for the offences listed in the Statute. In the end, however, the proposal failed to gather sufficient support.¹⁰

¹⁰ See Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (2000) 139-195.

Multilateral treaties generally impose obligations on *states*, not on *companies*. For example, ILO Convention No. 29 on Forced Labour provides that states parties undertake to suppress the use of forced labour.¹¹ In order to achieve this objective states parties are required to adopt the appropriate measures, inter alia vis-à-vis companies, but the Convention does not directly prohibit companies from employing forced labour. Accordingly, in its longstanding campaign to end forced labour in Myanmar, the ILO can address only the Government of Myanmar, not the multinational enterprises that profit from this practice. This is of course the main reason for the ineffectiveness of the campaign. The 1997 OECD Convention against Corruption goes a step further by addressing not only host states but also home states. It requires states parties to establish jurisdiction not only over acts of bribery committed in their territory but also when committed by their nationals abroad.¹² But this Convention does not address companies directly either.

Nevertheless, some long-standing multilateral treaties do directly impose obligations on companies. The 1969 Convention on Civil Liability for Oil Pollution Damage provides that the owner of a ship (which may be a company) shall be liable for any pollution damage caused by it.¹³ The 1982 UN Convention on the Law of the Sea prohibits not only states but also natural and juridical persons from appropriating parts of the seabed or its minerals.¹⁴

¹¹ Art. 1(1), Convention Concerning Forced Labour (1930): ‘Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible time’.

¹² Art. 4(2), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997): ‘Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a public official, according to the same principles’.

¹³ Art. III, International Convention on Civil Liability for Oil Pollution Damage (1969): ‘... the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident’.

¹⁴ Art. 137(1), UN Convention on the Law of the Sea (1982): ‘No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized’.

No-one has suggested, as far as I am aware, that by adopting these provisions states have undermined or ‘privatized’ their own responsibility. On the contrary, the drafters of these treaties apparently considered companies to be such important players that in order to achieve the treaty’s objectives they had to be addressed directly, in addition to states.

These instances demonstrate that there are no reasons of principle why companies cannot have direct obligations under international law. The proper question to ask therefore is not whether direct international legal regulation of companies is possible but whether or not it is appropriate in specific instances.

Should the international legal obligations of companies be extended?

I certainly do not want to suggest that all companies are bad. Far from it. Foreign direct investment creates jobs, promotes the transfer of technology and may have numerous other positive side effects. However, the liberalization of world trade and the process of deregulation and privatization of state functions has greatly strengthened the comparative position of companies. This new strength enables unscrupulous companies to abuse their powers and influence. An accountability gap then occurs if host states are either *unable* or *unwilling* to hold companies to reasonable minimum standards (to borrow two concepts from the Statute of the International Criminal Court).

States may be *unable* to enforce principles of corporate social responsibility because globalization forces states to aggressively compete with each other to attract investments. The resulting race to the bottom obviously weakens their bargaining power vis-à-vis companies that may have a turnover that is much larger than the national income of the states they are investing in.

States may be *unwilling* to enforce principles of corporate social responsibility because unsavoury governments of host states may co-opt companies to collude with them against the local people and the environment. Studies by the OECD and others indicate that multinational enterprises involved in extractive industries, such as oil, gas and diamonds,

are particularly prone to such complicity with the host state.¹⁵ Angola, Congo, Myanmar, Nigeria and Sudan are among the states that have been referred to in this context. Companies may for example agree to pay their revenues secretly to the authorities of the host state thus enabling greedy officials to stuff their Swiss bank accounts. Or companies may conveniently look the other way if the authorities forcibly remove the local inhabitants from new exploitation areas.

In these two scenarios the classic method of host state responsibility offers no effective remedy because host governments are either unable to stand up to companies or they can afford to ignore international pressure because of the mineral riches they are able to exploit with the help from foreign business. Self-regulation and soft law is even less likely to be helpful in these circumstances.

It would be an anomaly if it continued to be accepted that companies, unlike other non-state actors, should have only minimal obligations under international law. Why should individuals¹⁶ and armed opposition groups¹⁷ have fundamental international legal obligations while companies that may be much more powerful have practically none? It would appear that all companies and governments of good will have a shared interest in creating a level playing field by addressing minimum obligations on corporate social responsibility directly to companies.

That leaves the question whether by extending direct corporate obligations under international law state obligations and state responsibility could somehow be undermined.

Will international corporate obligations serve to undermine state obligations?

The precise contents of the objections raised against the concurrence of state obligations and corporate obligations are somewhat of a mystery. It seems to me that concurrence of

¹⁵ See, for example, Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses, OECD Working Papers on International Investment, Number 2002/1, May 2002, available at www.oecd.org.

¹⁶ See, for example, the crimes listed in Articles 6-8 of the Statute of the International Criminal Court.

¹⁷ See, for example, Protocol II to the Geneva Conventions on international humanitarian law.

international obligations of states and of non-state actors is an inevitable result of the globalization process. The intention of the drafters of the Norms obviously was that obligations of companies would *supplement* and not *replace* the obligations of states. Just as individual responsibility under international law has not replaced but coexists with state responsibility for the same offences.¹⁸

Consider the example of the Californian multinational enterprise Unocal. Unocal is currently being sued in a US court by the victims of forced labour and other abuses carried out by the authorities of Myanmar. The victims are claiming that Unocal knowingly profited from these abuses when carrying out its business in Myanmar. If and when this lawsuit is ultimately successful it would not serve to replace or undermine the responsibility of the Government of Myanmar to stop the abuses. On the contrary, it would probably reinforce that responsibility.

Perhaps what really concerns some states is that by holding companies accountable at the international level their sovereign powers may be threatened. Nigeria presumably would not appreciate it if Shell were questioned before some international forum on alleged environmental destruction carried out on its territory. Of course, Shell would argue that whatever it did was done in full agreement with the Nigerian Government. To this concern I would respond that 94 states have currently accepted that their highest officials may be tried by the International Criminal Court. Surely this is a much greater challenge to state sovereignty than holding business enterprises accountable internationally.

The drafters of the Norms anticipated the reaction of the critics and included a clause in Principle I of the Norms according to which states continue to have *primary* responsibility to ensure respect for human rights. The same Principle provides that companies only have responsibilities ‘within their respective spheres of activity and influence’. In my view this is an important innovation in standard-setting. It means that, unlike states, companies do not, in principle, have uniform obligations. It implies that companies are not expected to play government and that bigger companies such as multinational enterprises have wider responsibilities than small businesses. In other

¹⁸ See André Nollkaemper, ‘Concurrence Between Individual Responsibility and State Responsibility in International Law’, 52 ICLQ (2003) 615-640.

words, small, local firms do not need to be concerned that they will have to comply with far-reaching obligations.

Moreover, Principle 19 of the Norms contains a savings clause according to which 'Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of states'. This would be in line with the case law of the supervisory bodies of human rights treaties. They have consistently taken the view by privatizing state functions (e.g. prisons or security forces or the supply of drinking water) a state does not absolve itself from its responsibility to ensure respect for human rights.¹⁹

Conclusion

In sum, I think the Sub-Commission on the Promotion and Protection of Human Rights should be applauded for having done a real service to the international community. No doubt the Norms will not be adopted very soon by the Commission on Human Rights or its parent bodies and no doubt the drafting may be improved here and there. But thanks to the very careful preparatory work by the members of the Sub-Commission the text may be expected to exert considerable influence even in its present form. For example, it can already be used as a yardstick in domestic law suits for determining whether a company has acted with the due diligence or due care that may be expected from it.

¹⁹ See, for example, *Costello-Roberts v. United Kingdom*, European Court of Human Rights, Series A vol. 48, para. 27.