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The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?

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The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?

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1. THE 'NOT-A-CAT' SYNDROME

When one of my daughters was eighteen months old she deftly transcended her linguistic limitations by describing a rabbit, a mouse, or a kangaroo as a 'not-a-cat'.[1] In the arenas of international law and human rights an almost identical technique is pervasive. Civil society actors are described as *non*-governmental organizations. Terrorist groups or others threatening the state's monopoly of power are delicately referred to as *non*-state actors. But so too are transnational corporations and multinational banks, despite their somewhat more benign influence. International institutions, including those which wield immense influence while disavowing all pretensions to exercise authority *per se*, such as the International Monetary Fund (IMF) and the World Bank, are classified either as *non*-state entities or as *non*-state actors.

Apart from its ability to obfuscate almost any debate, this insistence upon defining all actors in terms of what they are not combines impeccable purism in terms of traditional international legal analysis with an unparalleled capacity to marginalize a significant part of the international human rights regime from the most vital challenges confronting global governance at the dawn of the twenty-first century. In essence, these negative, euphemistic terms do not stem from language inadequacies but instead have been intentionally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve. Accordingly, for the purposes of

* Thanks to Nehal Bhuta for his excellent research assistance in the preparation of this Chapter.

[1] This description of the not-a-cat syndrome draws on Philip Alston, 'The "Not-a-cat" Syndrome: Re-thinking Human Rights Law to Meet the Needs of the Twenty-first Century', in *Progressive Governance for the XXI Century* (Florence, European University Institute and New York University School of Law, 2000) 128.

international legal discourse—the language of human rights—those other entities can only be identified in terms of their relationship to the state. Just like my daughter's rabbit, anything that is not a state, whether it be me, IBM, the IMF, Shell, Sendero Luminoso, or Amnesty International, is conceptualized as a 'not-a-state'.

It is thus neither accidental, nor perhaps surprising, that the United Nations has an editorial rule which requires that the word 'State' should always be capitalized (i.e. that upper-case format be used).[2] Apart from recalling the insistence of religious publications that god must always be acknowledged as God, this usage merely encapsulates the assumptions of 1945. But the problem is that it also sets those assumptions in stone at a time when that particular stone is competing with quite a few others as the embodiment of power and even authority. It is revealing that no matter how subversive of the legitimacy of a given state it might be, every human rights document produced under the auspices of the United Nations requires its author(s) to genuflect in this way before the altar of 'State' sovereignty every time the word is mentioned. None of this is to suggest that the state is not important, let alone to endorse the more extreme versions of the 'state is dead' thesis. It is simply to underline the fact that the world is a much more poly-centric place than it was in 1945 and that she who sees the world essentially through the prism of the 'State' will be seeing a rather distorted image as we enter the twenty-first century.

The thrust of this Chapter is that such a uni-dimensional or monochromatic way of viewing the world is not only misleading, but also makes it much more difficult to adapt the human rights regime in order to take adequate account of the fundamental changes that have occurred in recent years. The challenge that it lays down is one of re-imagining, as the social scientists would put it, the nature of the human rights regime and the relationships among the different actors within it. Lawyers, not being noted for their willingness to depart from precedents, might prefer to see the task in terms of re-interpreting existing concepts and procedures rather than re-imagining. Either way, the nature of the challenges that lie ahead emerge clearly from this volume.

Notwithstanding the questionable utility of the terminology, non-state actors are looming ever larger on the horizons of international and human rights law. They are a recognized category of partners for the European Union in development and humanitarian activities,[3] they are the subject of a specialized law journal in the field

[2] Interestingly, the only UN document in which it is not capitalized is the UN Charter itself. That document pays linguistic homage to 'Members' rather than states *per se*.

[3] See Article 4 of the Cotonou Agreement of 2000 between the EU and the African, Caribbean, and Pacific states which recognizes 'the complementary role of and potential for contributions by non-State actors to the development process'. It then provides that 'non-State actors shall, where appropriate:

- be informed and involved in consultation on cooperation policies and strategies . . . and on the political dialogue;
- be provided with financial resources . . . to support local development processes;
- be involved in the implementation of cooperation project and programmes . . . ;
- be provided with capacity-building support in critical areas . . . '

of international law,[4] a separate book series has been dedicated to them,[5] and scholarly articles are emerging at a great rate.[6] Yet the membership of this group is difficult to define and virtually open-ended. The resulting grab-bag of miscellaneous players ranges from transnational corporations and small-time businesses and contractors, through religious and labour groups, organized epistemic communities, civil society more broadly, and international organizations, to terrorist bands and armed resistance groups.[7]

Not much more than a decade ago the category of non-state actors remained all but frozen out of the legal picture by international law doctrines and had received only passing recognition even from scholars. While the case-law of the regional human rights systems had begun to address some violations committed by private actors, the resulting jurisprudence was neither systematic nor especially coherent. At the international level, human rights groups, along with many governments, treated the category with the utmost caution because they were extremely wary of dignifying the nefarious activities of certain such actors by focusing specifically upon them or by seeking to give even a few among them a place at the international table. The result, somewhat ironically, was that groups classified by international law as non-state actors (human rights NGOs) were lobbying strongly against the recognition of other groups classified in the same way.

Today, however, at least a subset of non-state actors has suddenly become a force to be reckoned with and one which demands to be factored into the overall equation

http://europa.eu.int/comm/development/body/cotonou/agreement/agr05_en.htm. See also Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee of 7 November 2002: 'Participation of non-state actors in EC development policy' COM (2002) 598 final, at http://europa.eu.int/scadplus/leg/en/lvb/r12009.htm.

[4] *Non-State Actors and International Law*, published by Brill.

[5] See series entitled: Non-State Actors in International Law, Politics and Governance, published by Ashgate.

[6] See e.g. J. Oloka-Onyango 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa', 18 *Am. U. Int'l L. Rev.* (2003) 851; William A. Schabas, 'Theorical and International Framework: Punishment of Non-State Actors in Non-International Armed Conflict', 26 *Fordham Int'l L.J.* (2003) 907; Richard A. Rinkema, 'Environmental Agreements, Non-State Actors, and the Kyoto Protocol: A "Third Way" for International Climate Action?', 24 *U. Pa. J. Int'l Econ. L.* (2003) 729; Michael G. Heyman, 'Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence', 36 *U. Mich. J.L. Ref.* (2003) 767; Norman G. Printer, Jr., 'The Use of Force against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen', 8 *UCLA J. Int'l L. & For. Aff.* (2003) 331; Daniel Wilsher, 'Non-State Actors And The Definition Of A Refugee In The United Kingdom: Protection, Accountability Or Culpability?', 15 *Int'l J. Ref. L.* (2003) 68; Rachel Lord, 'The liability of non-state actors for torture in violation of international Humanitarian Law: an assessment of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *Melbourne J. Int'l L.* (2003) 112.

[7] For three systematic and wide-ranging surveys of the issues see Andrew Clapham, *Human Rights in the Private Sphere* (Oxford, Oxford University Press, 1993); Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 11 *Yale L.J.* (2001) 443; and International Council on Human Rights, *Beyond Voluntarism: Human Rights and the developing international legal obligations of companies* (2002).

in a far more explicit and direct way than has been the case to date. As a result, the international human rights regime's aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors. In practice, if not in theory, too many of them currently escape the net cast by international human rights norms and institutional arrangements.

For practical purposes, much of the focus of the international human rights regime in the years ahead will be on transnational corporations and other large-scale business entities, private voluntary groups such as churches, labour unions, and human rights groups, and on international organizations including the United Nations itself, the World Bank, the International Monetary Fund, and the World Trade Organization. The purposes of this Chapter, apart from surveying the issues raised by the various contributors to this volume, include putting the issue very briefly into some historical perspective, examining more closely the issue of definition, and identifying the key contexts in which non-state actors have risen to the fore in the past couple of decades. The Chapter then explores the nature of, and the reasons for, the reluctance of mainstream international law to accord a real place at the table to non-state actors.

2. THE RAPID EVOLUTION OF THE STATUS OF NON-STATE ACTORS

In the early 1980s I was asked by one of the United Nations' specialized agencies to write a consultancy study on legal aspects of the role of non-state actors in the field of human rights. I am ashamed to say that I was as keen to take on the job as I was perplexed about the real meaning or utility of the assignment. Several then recent developments seemed to suggest that my concern should be with armed opposition groups, national liberation movements, and perhaps transnational corporations, although the human rights dimensions of even those issues were, curiously in retrospect, not especially obvious. In relation to the first group, the 1977 Additional Protocol II to the Geneva Conventions had recently given status to certain types of non-state forces involved in an armed conflict within the territory of a state.[8] In relation to the second, the United Nations and other international organizations had been making an effort, under pressure from the non-aligned group of developing states, to take account in its own work of the role played by national liberation movements in a number of key conflict areas, such as in Namibia, South Africa, and Palestine.[9] In relation to the third, the United Nations had been engaged throughout

[8] For a critique see Antonio Cassese, *International Law* (Oxford, Oxford University Press, 2001), 346–48.

[9] See Malcolm Shaw, *International Law* (5th ed., Cambridge, Cambridge University Press, 2003) 220–23.

the late 1970s in drafting a code of conduct for transnational corporations.[10] But the bottom line was that the human rights framework remained somewhat distant from these important forays into unknown territory, and the issues were largely absent from the agendas of most international human rights groups. The reasons were not difficult to see: humanitarian and human rights norms were considered separate; national liberation movements were strong on the right to self-determination but not overly concerned with many other rights; and the focus on transnationals had more to do with the New International Economic Order and the sovereignty of host states than with the human rights of workers or anyone else.

But in the space of only a couple of decades, all this has changed. Human rights and humanitarian law have moved much closer together, as the statute of the International Criminal Court attests and the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda illustrate. National liberation movements have either gone into the business of government (as in Namibia, Zimbabwe, South Africa, and East Timor) or been pushed towards outlaw status as terrorist groups. The right to self-determination is now a struggle that is expected to be fought at the ballot box rather than through guerilla warfare in the jungles or urban areas.[11] And consumer movements and human rights groups have reignited international concern about the activities of transnational corporations by successfully focusing public opinion on labour, environmental, and human rights abuses in which those corporations are increasingly seen to be involved.

Perhaps most importantly, in the aftermath of the Cold War and the triumph of liberal economic systems, private actors are being asked to undertake a wide range of functions and responsibilities which it had previously been unimaginable to entrust to them.

3. SOME CASE STUDIES TO ILLUSTRATE THE REAL-WORLD CHALLENGES

Using a term such as non-state actors risks transforming the analysis of very concrete issues into a purely academic exercise, detached from the sometimes harsh realities and often very practical dilemmas that arise. In order to avoid such a sanitizing effect, it will be instructive if we bear in mind some case studies which illustrate the ways in which non-state actor-related issues have arisen in international human

[10] For the text of the draft code, work on which was effectively, but not formally, abandoned in 1983 under pressure from the Reagan Administration, see Draft United Nations Code of Conduct on Transnational Corporations, UN doc. E/1983/17/Rev.1 (1983). For a review of this process and its aftermath see Peter Muchlinski, 'Attempts To Extend the Accountability of Transnational Corporations: The Role of UNCTAD', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (2000) 97.

[11] See generally Philip Alston, 'Peoples' Rights: Their Rise and Fall' in P. Alston (ed.), *Peoples' Rights* (Oxford, Oxford University Press, 2001) 259, at 270–73.

rights law. Four different types of situation are not far below the surface of most of the analyses that are undertaken in the Chapters contained in this volume.

A. Is there Freedom of Speech in a Private Shopping Centre?

The first case study concerns a case brought under the European Convention on Human Rights involving a private shopping centre in which local residents seek to exercise their right to freedom of speech by collecting signatures on a petition.[12] The issue in question is a matter of considerable importance to the residents of the town, but does not directly concern the owners of the Town Centre, as the area is known. A range of public services such as the police station, the public library, and the health and social services centres are all located either in or very close to it. The owners of the shopping centre insist, however, that it is private property and that permitting citizens to gather signatures would violate their 'stance on all political and religious issues [which] is one of strict neutrality'.[13] They are supported by the United Kingdom government which rejects the claim that such gathering places for the citizenry can be considered to be 'quasi-public' land, a designation which might be considered to trigger human rights obligations.[14] The European Court of Human Rights upholds the right of the private owners and dismisses the free speech claim brought by the citizens' group, thus giving strong reign to the notion that human rights do not run in the private sphere.[15]

B. If the United Nations Administers a Territory, is it Bound by Human Rights?

A second, generic, case study involves forces sent under United Nations auspices to take control of a territory after the government has collapsed, fled, or been forced out of office as a result of internationally endorsed measures. The forces take directions from a UN civilian administrator and are subject to exclusive United Nations command. In seeking to establish law and order in a hostile environment they promulgate a range of orders which are not in compliance with international human rights law but which many observers feel are justified under the circumstances. When criticized, UN officials point out that the UN is not a state, and does not have the capacity to become a party to the International Human Rights Covenants, and that it cannot therefore be bound by specific human rights requirements.

A variation on the same theme is illustrated by the position taken in relation to human rights obligations by the International Monetary Fund, and to which various other international organizations would probably be happy to subscribe if they

[12] *Appleby and Others v. United Kingdom*, Application no. 44306/98, 6 May 2003.
[13] Ibid., para. 16. [14] Ibid., para. 38.
[15] For an excellent critique of this case see Oliver Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law', 17 *Canadian Journal of Law and Jurisprudence* (2004) 61.

could. Human rights treaties are addressed to states, international organizations are not permitted to become parties, they were not involved in any way in the drafting, they do not and cannot report to the relevant treaty bodies, and nor can they participate in electing the expert members. Because of the importance of maintaining a workable division of labour within the international system it must be for the human rights bodies to promote and seek to uphold human rights and for the more functionally oriented agencies to do what they, in turn, have been mandated to do. If the governments of the world had wanted all international agencies to have a human rights mandate they would have given them one or would do so now. But they have chosen not to, and the conclusion is that the relevant agencies are, for these purposes at least, non-state actors upon whom human rights obligations do not and cannot fall directly.

C. Are there any Human Rights-Based Constraints on the Actions of Private Security Contractors?

The third case study addresses the role of private contractors in the reconstruction of Iraq following the invasion in 2003. A starting point is to acknowledge that, although Iraq has been the best publicized of the cases in this area, it is not the first and will not be the last, since the 'privatized military industry has been estimated at US$100 billion in annual global revenue'.[16] In Iraq, the number of contractors working as civilian security guards is agreed to be between 15,000 and 20,000. The roles they play range 'from handling military logistics and training the local army, to protecting key installations and escorting convoys'.[17] It has been reported that their conduct 'more and more [gives] the appearance of private, for-profit militias'.[18] According to other reports some of these civilian contractors, who were working as translators and interrogators, were deeply implicated in the torture and humiliation of inmates in the Abu Ghraib prison. A secret report prepared for the U.S. military, but subsequently leaked, recommended disciplinary action for those employees.[19]

But the issues go much further than those well publicized incidents. As a recent report noted: 'Stressed and sometimes ill-trained mercenaries operate in Iraq's mayhem with apparent impunity, erecting checkpoints without authorisation, and claiming powers to detain and confiscate identity cards'.[20] Security contractors who are asked to carry out tasks normally undertaken by public authorities, be they police or military, are in a position to infringe dramatically on the rights of the citizens

[16] Peter Singer, 'Warriors for Hire in Iraq', *Salon.com*, 15 April 2004, at http://www.brook.edu/views/articles/fellows/singer20040415.htm.
[17] Peter Singer, 'Outsourcing the War', *Salon.com*, 16 April 2004, at http://www.brook.edu/views/articles/fellows/singer20040416.htm.
[18] David Barstow, 'Security Companies: Shadow Soldiers in Iraq', *New York Times*, 19 April 2004, p. 1.
[19] Report by Major-General Antonio Tagubas, at http://www.globalpolicy.org/security/issues/iraq/attack/law/2004/0430torture.htm, p. 48.
[20] 'The Baghdad Boom: Mercenaries', *Economist*, U.S. Edition, 27 March 2004, p. 25.

whom they are, in effect, being called upon to police. The situation is thus about as close as one could possibly get to replicating all the elements that underpin the classic doctrine of state responsibility for human rights violations. And yet, the private nature of the forces involved would argue, according to classical international law theory, that there is no human rights accountability. Rather than looking at the individual contractors or the transnational corporations which employ them, the response is that only one or other of the relevant governments can be held to account.

The principal problem is that the legal situation of the contractors, and the means by which they might be held accountable for human rights breaches, remain very unclear. Under an order issued by the Coalition Provisional Authority in 2003, renewed in June 2004, and the content of which the 'sovereign' Iraqi Government was requested to renew or extend for the period following 30 June 2004, all 'Contractors', 'Private Security Companies', and 'International Consultants' are granted immunity from 'Iraqi legal process' with respect to all acts and omissions committed. This would include serious violations of human rights standards. While their home state governments could opt to subject them to their home jurisdiction for crimes committed, there is no obligation to do so. The very first preambular paragraph of the Order signed by Paul Bremer notes that it is being issued in accordance with 'the laws and usages of war, and consistent with relevant U.N. Security Council resolutions . . .'[21]

While the private contractors could be charged with war crimes under international law, this is a relatively high threshold to meet and will not cover a very wide range of human rights violations that might be committed in their daily work. Human Rights Watch has noted that there are various U.S. Federal laws under which contractors could be prosecuted,[22] and indeed the Center for Constitutional Rights filed a lawsuit in June 2004 in a U.S. Federal Court under the Alien Tort Claims Act and the Racketeer Influenced and Corrupt Organizations Act (RICO).[23] Nevertheless, *The Economist* has observed that 'the standards of proof required by a American court are unlikely to be met in Iraq—or in any other war zone, for that matter'.[24] In response to the fear that these contractors have been permitted to operate within a legal vacuum, a group of Democrats in the U.S. Senate has called upon the Pentagon to 'adopt written guidelines, with supporting legal justification, for the rules of engagement security contractors should follow'.[25] But such guidelines were actually being sought by the security companies before that initiative and, according to reports, an initial draft would give the contractors 'the right to detain

[21] Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq, doc. CPA/ORD/27 June 2004/17, at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

[22] Human Rights Watch, Private Military Contractors and the Law, at http://hrw.org/english/docs/2004/05/05/iraq8547.htm.

[23] See text accompanying note 53 below.

[24] 'Dangerous Work: Private Security Firms in Iraq', *Economist*, 10 April 2004, pp. 26–27.

[25] David Barstow, 'The Struggle for Iraq: The Contractors', *New York Times*, 9 April 2004, p. 1.

civilians and to use deadly force in defence of themselves or their clients'.[26] The bottom line might still be a set of guidelines that lie beyond the reach of either United States or international courts.

D. What Can be Expected of a Transnational Corporation in a Situation in which it is a Dominant Actor?

The fourth and final case study, concerning transnational corporations, is explored in some depth in recognition of the centrality of this issue to a number of the Chapters that follow in this volume. It concerns the Shell Oil Company and its operations in Nigeria. In the early 1990s the Movement for the Survival of the Ogoni People, led by a well known playwright Ken Saro-Wiwa, protested against environmental damage caused by the activities of the oil companies, and in particular Royal Dutch/Shell, in Ogoniland, an oil-rich state whose people lived in dire poverty. In response, Shell 'acknowledged frequent spills but has said the Ogoni movement exaggerated their impact'. The protesters also demanded that a fairer share of Nigeria's oil wealth should be spent in Ogoniland. The response by the military regime was to mount 'a kind of scorched-earth campaign against the Ogoni, burning villages and committing murders and rapes', and to declare that the death penalty would be carried out against anyone who interfered with efforts to 'revitalize' the oil industry. In November 1995 Saro-Wiwa and eight other protesters were executed.[27]

In March 1996 a complaint was submitted to the African Commission on Human and Peoples' Rights alleging that a consortium consisting of a Nigerian state-owned oil company and Shell had 'exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways, . . . [caused] numerous avoidable spills in the proximity of villages [resulting in] serious short- and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems'.[28] The complaint also alleged that the government had 'condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies'.[29] Although the Commission did not publish its response to the complaint until 2002, it sent an investigative mission to Ogoniland in March 1997 and kept the matter under active review in the meantime.

Non-state actors were among those bringing pressure to bear on Shell. The Body Shop launched a campaign under the headline 'Someone's Making a Killing in

[26] Barstow, note 18 above.

[27] Howard French, 'Nigeria Executes Critic of Regime, Nations Protest', *New York Times*, 11 November 1995, p. 1.

[28] African Commission on Human and Peoples' Rights, Decision Regarding Communication 155/96 (*Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*), 27 May 2002. Case No. ACHPR/COMM/A044/1. At <http://www.umn.edu/humanrts/africa/comcases/allcases.html>, para. 2.

[29] Ibid., para. 3.

Nigeria'. Underneath it was a picture of a petrol pump nozzle looking like a smoking gun. The message about the role of the oil companies was clear but the private enterprise messenger was unusual.

In 1996 Shell produced a 'Plan for Ogoni' in which it commited itself to cleaning up oil spills and underwriting community development. In 1999 Human Rights Watch (HRW) produced a lengthy report which noted allegations that the company had collaborated with the military regime in suppressing protests and violating human rights on a significant scale. 'A document alleged to be a leaked government memorandum from 1994 implicated Shell in planned "wasting operations" by the Rivers State Internal Security Task Force, stating that the oil companies should pay the costs of the operations'. The report also noted that detained protesters had 'alleged that they were detained and beaten by Shell police'.[30]

HRW used the occasion of this report to spell out a long list of demands directed to the various international oil companies operating in Nigeria, but Shell was singled out for a range of specific recommendations which throw into sharp relief the authors' vision of the appropriate limits of human rights-friendly corporate responsibility. Among the recommendations of general applicability were calls to:

> develop guidelines on making or maintaining investments in or withdrawing from countries where there is a pattern of ongoing and systematic violation of human rights;
> adopt explicit company policies in support of human rights; establish procedures to ensure that company activities do not result in human rights abuses . . .

It was explicitly suggested that Shell should:

> . . . call for and cooperate with an independent judicial inquiry into the situation in Ogoni, including the role of Shell staff and contractors, as well as the security forces, in past human rights violations . . .
>
> . . . call on the Nigerian government to allow freedom of assembly, association and expression, in particular with respect to grievances directed against the oil industry . . .
>
> . . . call on the Nigerian government to release unconditionally all those detained for exercising their rights . . . and to ensure fair and prompt trials before independent tribunals for all those charged with criminal offences . . .
>
> review programs of community assistance to ensure that development projects are planned by people who are professionally trained, that all members of communities can participate in devising development plans . . .
>
> develop and publicize policies to provide compensation to victims of human rights abuse committed by the Nigerian security forces or oil company private security . . . . Consider establishing independently and professionally administered funds for this purpose . . .
>
> arrange independently funded verification, by national and international nongovernmental organizations and other appropriate bodies, of compliance by the company with international human rights and environmental standards.

[30] Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York, 1999).

In 2003, after riots and clashes with security forces around the city of Warri in the Niger Delta in which scores of people were killed, HRW addressed itself to both the Nigerian government and the multinational oil companies in calling for measures to prevent further violence. The companies, including Shell, were urged 'to publicly state that the response of government security forces must not be disproportionate to the threat; that they should only resort to force as absolutely necessary in accordance with international standards; that their operation should be conducted in a manner that ensures respect for due process and fundamental human rights; is focused on arresting and prosecuting the actual perpetrators rather than retaliating against whole communities; and any allegations of human rights violations should be thoroughly and impartially investigated and the perpetrators brought to justice'.[31]

The basis upon which HRW invoked the responsibility of these corporations was their approval of the Voluntary Principles on Security and Human Rights in the Extractive Industries,[32] which had been adopted in 2000 under the auspices of the U.S. and U.K. governments, in conjunction with concerned companies and human rights NGOs. The Principles state, *inter alia*, that '[i]n their consultations with host governments, Companies should take all appropriate measures to promote observance of applicable international law enforcement principles'; urge investigations of violations; and 'actively monitor the status of investigations and press for their proper resolution'. Highlighting the complexity of seeking to hold oil companies account in this way was the fact that even before HRW had sent its letters, the three big foreign oil companies had announced the shutdown of their operations and the evacuation of their staff.[33] In March 2004 Shell indicated that it was planning to cut a significant percentage of its jobs in Nigeria, close various offices, and move more of its drilling activities offshore. These developments meant, as *The Financial Times* put it, 'that the company will need less land-based infrastructures and is likely to experience fewer problems with community protests'.[34]

This final case study, which could readily have been concerned instead with a range of other transnational corporations operating either in the extractive industries or in a wide range of others such as apparel or footwear manufacturing, serves to raise the key issues with which those wanting to apply human rights standards in their fullness to private entities need to grapple. They include the following. Are there any fundamental differences in the nature of the human rights obligations that fall upon governments and those that fall upon corporations? If the only difference is that governments have a comprehensive set of obligations, while those of corporations are limited to their 'spheres on influence', as the Global Compact puts it, how

[31] Human Rights Watch, 'Letter to Shell Petroleum Development Company of Nigeria', 7 April 2003, at http://www.hrw.org/press/2003/04/nigeria040703shell.htm.

[32] Available at http://www.state.gov/g/drl/rls/2931.htm.

[33] 'Shell, Chevron and Elf all Quit Nigerian Delta' 24 March 2003, at http://www.srimedia.com/artman/publish/article_466.shtml.

[34] M. Peel, 'Nigerian Moves Come at Time of Turbulence for Shell', *Financial Times*, 22 March 2004, p. 25.

are the latter to be delineated? Does Shell's sphere of influence in the Niger Delta not cover everything ranging from the right to health, through the right to free speech, to the rights to physical integrity and due process? But if the private sphere is distinguished from the public sphere by virtue of its emphasis on autonomy, risk-taking, entrepreneurship, and the rational pursuit of self-interest, what are the consequences of saddling it with all of the constraints, restrictions, and even positive obligations which apply to governments? Are all of the demands articulated by Human Rights Watch reasonable under the circumstances? If many or most of them are, to what extent do similar obligations apply to smaller corporations, and at what point can a corporation plead that although it does not have the resources to fulfil such obligations it is nevertheless in the interests of all concerned that its business enterprise should proceed? And what are the limits of concepts such as complicity to which Human Rights Watch and the International Council on Human Rights Policy[35] have attached such importance?

4. DEFINING NON-STATE ACTORS

Although much discussed in the literature, definitions of the concept of non-state diverge widely.[36] Indeed the concept is often left undefined. As Kamminga notes below, the same is true of the term non-governmental organizations and there are some authors who would define both categories as embracing multinational corporations, national liberation movements, and voluntary agencies.[37] A recent 'Report of the Panel of Eminent Persons on United Nations—Civil Society Relations' bravely begins with a glossary of terms but then goes on to concede that '[t]here is considerable confusion surrounding [the term NGO] in United Nations circles'.[38] NGOs are then described mainly in terms of the roles accorded them within the UN, while civil society is defined very broadly but in a way which excludes the private and public sectors. The problematic nature of such attempts at definition is illustrated by the description of the private sector which notes that although 'the category includes small and medium-sized enterprises, some of these are supported by non-governmental organizations or are cooperatives and may also have characteristics closer to civil society'. It is perhaps noteworthy that, while the report does use the term non-state actors, it does not attempt to define it, although it

[35] *Beyond Voluntarism*, note 7 above, 121–42.

[36] Richard A. Higgott *et al.* (eds.) *Non-State Actors and Authority in the Global System* (2000); Bas Arts, Math Noortmann, and Bob Reinalda (eds.), *Non-State Actors in International Relations* (2001); Panel, 'Human Rights and Non-State Actors', 11 *Pace Int'l L. Rev.* (1999) 205; 'Non-State Actors and the Case Law of the Yugoslavia War Crimes Tribunal', 92 *Am. Soc'y Int'l L. Proc.* (1998) 48; Beard, 'International Security: Multiple Actors, Multiple Threats—Countering the Threat Posed by Non-State Actors in the Proliferation of Weapons of Mass Destruction', 92 *Am. Soc'y Int'l L. Proc.* (1998) 173; Farrior, 'State Responsibility in a Multiactor World: State Responsibility for Human Rights Abuses by Non-State Actors', 92 *Am. Soc'y Int'l L. Proc.* (1988) 299.

[37] Kamminga, Chapter 3 below, n. 7.

[38] *We the Peoples: Civil Society, the United Nations and Global Governance*, UN doc. A/55/817 (2004), p. 13.

seems to include, in addition to civil society, at least firms, parliamentarians, and local authorities.[39] The latter two are odd inclusions since they would normally be included in the public sector.

For some groups, the term non-state actors has assumed a specific meaning within their own context. The International Campaign to Ban Landmines, for example, uses the term to refer to 'armed opposition groups who act autonomously from recognised governments'. They thus encompass 'rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, liberation movements, and *de facto* territorial governing bodies'.[40] About 190 such non-state actors have been formally recognized on this basis.[41] While this is an understandable approach in the arms control area, such a definition will not get us very far for general purposes. Similarly the European Commission defines non-state actors as groups which: are created voluntarily by citizens; are independent of the state; can be profit or non-profit-making organizations; have a main aim of promoting an issue or defending an interest, either general or specific; and, depending on their aim, can play a role in implementing policies and defending interests. In trying to be more specific the EU indicates that they can include: 'non-governmental organisations (NGOs), trade unions, employers' associations, universities, associations of churches and other confessional movements, cultural associations, etc.'[42]

Another definition includes 'all those actors that are not (representatives of) states, yet that operate at the international level and are potentially relevant to international relations'.[43] The last of the criteria requires an actor to be sizeable, have a substantial and multinational constituency, to have been granted at least informal access by governments and intergovernmental organizations to political arenas, and to show that it is 'consequential to international politics'.[44] Although Bas Arts seems to adopt a fairly broad interpretation of his criteria, this definition clearly has a potentially quite restrictive set of requirements and one which, albeit not explicitly, seems tailored to fit fairly traditional patterns of international relations scholarship. It is unlikely for example that many of the Landmine Campaign's 190 non-state actors would qualify.

Perhaps the most comprehensive definition put forward in the scholarly literature is that crafted by Josselin and Wallace. It includes all organizations:

- largely or entirely autonomous from central government funding and control: emanating from civil society, or from the market economy, or from political impulses beyond state control and direction;

[39] Ibid., p. 25.

[40] http://www.icbl.org/wg/nsa/nsabrochure.html.

[41] This does not include farmers, drug cartels, or many of the smaller loosely organized non-state actors. Margaret Busé, 'Non-State Actors and Their Significance', at http://maic.jmu.edu/journal/5.3/features/maggie_buse_nsa/maggie_buse.htm.

[42] The Commission estimates that 20% of EU development assistance is channeled through non-state actors. 'Participation of non-state actors in EC development policy', note 3 above, p. 1.

[43] Bas Arts, *Non-State Actors in Global Governance: Three Faces of Power*, Max Planck Project Group on Common Goods, Bonn, Working Paper 2003/4, p. 5.

[44] Ibid.

- operating as or participating in networks which extend across the boundaries of two or more states—thus engaging in 'transnational' relations, linking political systems, economies, societies;
- acting in ways which affect political outcomes, either within one or more states or within international institutions—either purposefully or semi-purposefully, either as their primary objective or as one aspect of their activities.

Several characteristics of this definition are worthy of note. First, it is very wide-ranging and has the potential to accommodate a hugely diverse range of actors. Secondly, the focus is on those actors whose activities have a transnational dimension. Actors engaged solely at the national level in one state or another are not part of the definition. Thirdly, there is no necessary commitment to particular values or principles, as has often been suggested should be part of the appropriate definition of a human rights NGO (non-governmental organization). Fourthly, the definition is endlessly debatable, as the very first criterion illustrates: what level of governmental funding, support, or encouragement might disqualify a group as a non-state actor? Fifthly, the category is so open-ended that it will have limited utility as a basis for making specific policy prescriptions in the context of international law or the appropriate approaches to be followed by international organizations.

There have also been some official attempts in the context of the work of international organizations to come up with a definition of the term. Thus in the Cotonou Agreement between the EU and ACP states, in which a variety of specific roles is accorded to non-state actors, the term is defined as encompassing three groups: the private sector; 'economic and social partners, including trade union organisations'; and 'Civil Society in all its forms according to national characteristics'.[45] This wholly benign definition contrasts dramatically with the usage which has evolved in the context of the UN Security Council. This is best illustrated by reference to a 2004 resolution dealing with non-state actors in the context of efforts to contain the spread of nuclear, chemical, and biological weapons. Unusually, the resolution actually contains a definition of the term, albeit said to be for the purpose of this resolution only. It is any 'individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution'.[46] Further elucidation is provided by a later reference to the 'threat of terrorism and the risk that non-State actors such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery'. The so-called 'Resolution 1267 Committee' oversees the implementation of sanctions imposed on 'individuals and entities belonging or related to the Taliban, Usama Bin Laden and the Al-Qaida organization'.[47]

[45] Cotonou Agreement, note 3 above, Article 6(1).

[46] Security Council res. 1540 (2004), first preambular para.

[47] Security Council res. 1267 (1999), para. 6. The Committee's work is described at http://www.un.org/Docs/sc/committees/1267.

Resolution 1373 (2001) was adopted in response to the attacks of 11 September 2001 in the United States and applies to 'entities or persons involved in terrorist acts'.[48] The conclusion then is that the term non-state actors has come to be associated, at least in this central United Nations context, with terrorist groups. This is further evidence of the extent to which the meaning attributed to the phrase has become heavily context-dependent.

For present purposes, therefore, it seems more helpful to identify some of the key factors which are propelling non-state actors to greater prominence within the international human rights regime. They include, but are by no means limited to, the following.

Privatization. At the national level, the tidal wave of privatization that was unleashed in the 1980s has led, in many countries, to private actors being given responsibility for arrangements relating to social welfare services, prisons, asylum processing, schools, adoptions, health care provision for the poor, the supply of water, gas, and electricity, and a great many other functions previously provided or overseen by public actors.

Capital mobilization and private foreign investment flows. Globalization—driven by deregulation, the liberalization of trade, expanded opportunities for foreign investment, and the active promotion by the governments of industrialized countries and international agencies of a free enterprise economic environment—has facilitated an immense expansion since the 1970s in the wealth and power of transnational corporations. In terms of revenues, the 2003 sales of the world's biggest company (Wal-Mart at US$256 billion) made it larger than the economies of all but the world's thirty richest nations.[49] Its sales on a single day alone are greater than the annual Gross Domestic Product (GDP) of thirty-six countries in the world.[50] In Mexico, for example, it has become the largest private employer, accounts for 2 per cent of the country's GDP, and is credited with single-handedly reducing the national inflation rate.[51]

Trade liberalization and its employment consequences. In 1994 the ILO began a process of reinvigorating and adapting its approach to international labour standards. It culminated in the adoption of the International Labour Organization's (ILO) 1998 Declaration on Fundamental Principles and Rights at Work. In launching the process the Director-General of the ILO identified the growing role of non-state actors as one of the principal challenges flowing from globalization. The problem for the ILO, he noted, lies in 'the "state-centred" nature of ILO standards, in other words, the fact that the obligations arising from Conventions apply directly only to States'.[52]

[48] Security Council res. 1373 (2001), para. 2(a).

[49] Tim Weiner, 'Wal-Mart Invades, and Mexico Gladly Surrenders', *New York Times*, 5 December 2003, A1 at A9.

[50] Jerry Useem, 'One Nation Under Wal-Mart', *Fortune Magazine*, 3 March 2003, at http://www.ufcw135.org/z_news/n_onenation_under_wmt.htm.

[51] Weiner, note 49 above.

[52] *Defending Values, Promoting Change: Social Justice in a Global Economy: An ILO Agenda*, Report by the Director General for the International Labour Conference 81st Session, 1994, p. 56.

The expanding horizons of multilateral institutions. The United Nations and many other international organizations were recognized as long ago as the early 1950s as enjoying a form of international legal personality. But the implications of this status have changed radically since the end of the Cold War as these organizations and agencies are called upon to exercise a wide range of governmental functions in areas ranging from Kosovo and East Timor, to Afghanistan, and Iraq. Along with this dramatic expansion of functions have come many questions about the relationship between international human rights and humanitarian law and the personnel operating under the relevant international mandates.

The unleashing of civil society. Until the early 1990s the term non-governmental organizations seemed more than adequate to describe the role played by voluntary organizations in relation to the international community. Since then the opening up of all societies in response to global political changes and to the pressures and opportunities of globalization has created vast new opportunities. Civil society organizations today often have multi-million dollar budgets, employ very large staffs, and are engaged in a large number of countries. Their functions are by no means confined to issue advocacy. Many of them are highly operational and exercise great leverage in communities in which they oversee the expenditure of huge amounts of aid, provide a wide range of basic services, or implement major projects in the fields of environment, disarmament, and much else.

The privatization of security provision. While the 1980s saw widespread condemnation of the role of mercenaries in a range of different conflicts, the 2000s are seeing a broad and potentially almost unlimited role being accorded to private contractors in conflict situations. In Iraq for example a class action lawsuit was brought in the US Federal Court in June 2004 against two corporations (Titan International and CACI International) accused of having conspired with U.S. officials to 'humiliate, torture and abuse persons detained' in Iraq. The contractors provided a range of services to the U.S. government, including carrying out prisoner interrogations, a role they had also played in Guantánamo.[53]

The changing nature of conflicts. Although humanitarian law has always sought to reach out to all of the parties to armed conflicts, groups and individuals basing themselves upon the framework of international human rights law were much more wary of following suit. In recent years, however, this has changed significantly. Perhaps the best illustration of this is the work of the Special Representative of the UN Secretary-General for Children and Armed Conflict. Basing himself to a significant extent on the Convention on the Rights of the Child, as well as the Geneva Conventions, the Special Representative has in recent years sought and obtained commitments from groups as diverse as the Sudan People's Liberation Movement, the Revolutionary United Front in Sierra Leone, the Liberation Tigers of Tamil Eelam in Sri Lanka, and the Revolutionary Armed Forces of Colombia.[54]

[53] The text of the class action lawsuit is available at http://www.ccr-ny.org/v2/legal/september_11th/docs/Al_Rawi_v_Titan_Complaint.pdf.

[54] http://www.un.org/special-rep/children-armed-conflict/English/Commitments.html.

In all of these contexts the result of recent developments has been to highlight and/or expand the *de facto* roles played by non-state actors in national and international affairs. But the challenge confronting the international human rights regime in particular, and international law in general, is to establish a framework which acknowledges the rights and responsibilities of these diverse actors, while at the same time protecting the principles upon which the regime is based. A refusal to recognize and accommodate the new realities in relation to non-state actors will only serve to marginalize the existing arrangements and underscore the need to bypass it in devising future arrangements. An international human rights regime which is not capable of effectively addressing situations in which powerful corporate actors are involved in major human rights violations, or of ensuring that private actors are held responsible, will not only lose credibility in the years ahead but will render itself unnecessarily irrelevant in relation to important issues.

5. THE RESPONSE OF MAINSTREAM INTERNATIONAL LAW TO THE EMERGENCE OF NON-STATE ACTORS

By the standards of formal international law the question of the status enjoyed by non-state actors is a remarkably straightforward one. Indeed the issue is almost determined before the question can be asked as a result of the very terminology long favoured by international lawyers—the phrase 'non-state actors' makes it abundantly clear that, as far as international law is concerned, the key actors are divided into two categories: states and the rest. And what distinguishes the motley crew that make up the rest is overwhelmingly, if not entirely, the very fact that they are not states and can never aspire to be such. But the concept of international legal personality, and the acknowledgement by the International Court of Justice in its famous comment in 1949 that the 'subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community',[55] holds open the possibility that the categories might be meaningfully reconsidered in time.

As a result, international lawyers have long debated the circumstances under which entities other than states might also be characterized as 'subjects' of international law. The bottom line for the great majority of commentators is that while various actors have been accorded some form of international legal personality for specified purposes, this does not justify the conclusion that international law should treat them as subjects, and thus place them on a par, for at least some limited purposes, with states. In this sense, the term 'subjects' has been treated as a term of art in international law and one which can meaningfully be contrasted with the 'objects' of international law. Indeed the latter category can be defined not only with flexibility but even with generosity since no particular significance was thought to attach to the concept. Any entity could be deemed an 'object' as long as states chose

[55] Reparations for Injuries Case, 1949 *ICJ Rep.* 178.

to treat it as such. The phrase non-state actors, on the other hand, conveniently avoids confronting these terminological debates. From an international legal perspective the term 'actor' is a category seen as quintessentially derived from political science and thus, while carrying useful descriptive power, is (fortunately) unable to capture or convey any significant sense of legal capacity or personality.

International law textbooks continue to be remarkably faithful to this general line of thinking despite its ever-diminishing capacity to describe the evolving reality. This is not the place to enter into a systematic review of the shortcomings of the traditional reasoning but suffice it to say that the exclusionary nature of the conclusions reached almost always reflected the application of somewhat circular tests which were more or less intentionally designed to ensure a highly restrictive outcome. One example is enough. Writing at the beginning of the 1990s in a very lengthy international law textbook which emerged from a major UNESCO-sponsored endeavour, Bin Cheng defined international legal personality as 'the capacity to bear rights and obligations under international law'. It was an eminently reasonable definition but the set of criteria which he then laid out gave a very clear indication of just what types of entity might be able to satisfy the necessary requirements. To ascertain if an actor has international personality all we have to do is to ask if it possesses any duties or rights under international law:

> Concrete examples include the right to send and receive diplomatic missions ('rights of legation'), to conclude agreements ('right of treaty'), the right . . . to engage in legitimate armed conflicts; the right to a maritime flag; the right of diplomatic protection of nationals; the right to bring an international claim, to sue and be sued on the international plane; the enjoyment of sovereign immunity within the jurisdiction of other States; and the right to be directly responsible for any breach of one's own legal obligations . . . ; without forgetting above all acknowledged territorial sovereignty over a portion of the surface of the earth.[56]

Any entity can aspire to international personality, but it will need to look an awful lot like a traditional state in order to meet the requirements. Lest it be thought that Bin Cheng's approach reflects a pre-Cold War analysis, it is instructive to compare the response of international lawyers and political scientists in response to developments in international relations over the past fifteen years or so. The great majority of political scientists would endorse the view that since the end of the Cold War, 'state power [has been] in retreat across the globe and [there is] increasing evidence of the influence of transnational private actors in international and domestic politics'.[57] It follows that analytical frameworks, even for the realists, have to be expanded to take account of a wider range of actors than states. But do normative frameworks need to be expanded as a result?

[56] B. Cheng, 'Introduction to Subjects of International Law', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Paris, UNESCO, 1991) 23 at 38.

[57] Josselin and Wallace, 'Non-State Actors in World Politics: A Framework', in Daphné Josselin, and William Wallace, *Non-State Actors in World Politics* (Houndsmills, Palgrave, 2001) 11–12; for a detailed bibliography tracing the relevant international relations and political science literature see Arts, note 43 above, 41–53.

International lawyers have been much less favourably disposed towards such heretical thinking than political scientists or economists. One exception is Michael Reisman who argues that the state-dominated 'international decision process' embodied in the UN Charter has been replaced in recent years by a process in which the lawfulness of international actions is assessed, be it retrospectively or prospectively, by a group consisting not only of governments but also of 'intergovernmental organizations, non-governmental organizations and, in no small measure, the media'. In his view this new 'international legal process is more able than constitutive structures of the past to provide remedies for grave human rights violations'. But Reisman regrets the limitations of the media and the lack of representativeness of some of the NGOs, and ends by calling upon international lawyers 'to improve the world constitutive process so that it can address humanitarian and other issues and thus obviate unilateral action'.[58] While more recent events in relation to the invasion of Iraq by a 'coalition of the willing' do little to encourage a sense that a more improved constitutive process would lead to better decision-making or would eliminate the resort to unilateral action, his analysis is nonetheless amenable to a greatly enhanced role for a wide range of actors. Notably, however, he does not mention transnational corporations as one of the players in the new constellation.

The great majority of international lawyers, however, have been much less sanguine about the possibility of expanding the range of key actors given a place at the top table. Indeed, most of them have shown a marked reluctance to contemplate any fundamental rethinking of the role of the state within the overall system of international law. Various explanations might be suggested: an intrinsic lack of imagination; a natural affinity with the status quo; a deeply rooted professional commitment to internationalism, albeit one premised on the continuity of the system of sovereign equality; a reluctance to bite the hand that feeds; or simply the conviction that respect for that system has taken a great deal of time and human suffering to achieve and that it continues to offer a better prospect than any alternative that has so far been put forward.

It is instructive to consider a cross-section of the responses. A good illustration of affection for the status quo is to be found in the approach of a leading international lawyer in the context of a symposium which sought to explore the implications for the concept of statehood of 'increasing tendencies towards pan-European, international—and, indeed, supranational—institutionalism'.[59] Asked to reflect on the issue, Ian Brownlie wrote dismissively: 'Seeking signs of the "rebirth of statehood" is more than a little premature: there is no evidence that the State has died. It is an intellectual fashion to preach the end of the State and to attack sovereignty. But such iconoclasm has had no impact on the real world.' The fact

[58] Michael Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention', 11 *European Journal of International Law* (2000) 3, at 18.

[59] Malcolm Evans, 'Statehood and Institutionalism in Contemporary Europe: An Introduction', in M. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Ashgate, 1997) 1.

remains that since 1945 the existence of states has provided the basis of the legal order.[60]

He went on to identify two culprits. The first consists of certain (unnamed) powerful states which encourage talk of the demise of sovereignty in order to use it as a justification for projecting their own power. The second set of culprits are the political scientists who use their 'repertoire of facile abuse' to attack the concept of the state.[61] Insofar as it was useful to ask whether there might be alternative approaches to the traditional state-centrism, Brownlie suggested that those could only be the 'alternative models familiar to international lawyers: the condominium, trusteeship, and federation'. Since they tend to be both 'complex and transitional in purpose' they offer no real solace and so we are back to the state.[62]

Other international lawyers are more willing to comprehend the novelty of the challenges facing the international system but equally convinced that the state system must remain the bedrock of any workable approach. Richard Falk is an example of one who has long challenged the received wisdom in most aspects of the field and who has characterized 'global civil society as a bearer of a hopeful and progressive vision of the future of world order'.[63] Indeed for Falk and his collaborators in the World Order Models Project, transnational civil society holds the key to the future.[64] Firmly committed to the promotion of shared values in terms of peace, ecological awareness, and human rights, and animated by shifting political identities which transcend territorial boundaries, these groups will play an increasingly central role in overall governance structures. Ultimately, to the extent that 'global civil society becomes a reality in the imagination and lives of its adherents, the reality of territorial states will often recede in significance even though it may never entirely disappear'.[65]

But when it comes to the question of whether multinational corporations, the single most relevant category of non-state actors, currently have either moral or legal obligations, Falk answers in the negative. They have no 'established moral obligations beyond their duties to uphold the interests of their shareholders'; the efforts they make to 'improve their public image in relation to human rights are a matter of self-interest that does not reflect the existence or acceptance of a moral obligation'; and even long-term compliance with the standards contained in voluntary codes of conduct would take a long-time to 'ripen into a moral obligation'. He concedes that a 'framework of international legal obligations' for corporations would help protect human rights but applies strong caveats in that respect. Such a framework would

[60] Ian Brownlie, 'Rebirth of Statehood', ibid., 5. [61] Ibid. [62] Ibid.

[63] Richard Falk, 'Democratizing, Internationalizing, and Globalizing', in Y. Sakamoto (ed.), *Global Transformation: Challenges to the State System* (Tokyo, United Nations University, 1994) 475, 488.

[64] E.g. Richard Falk, 'The World Order Between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions', in Daniele Archibugi and David Held (eds.), *Cosmopolitan Democracy* 163 (Cambridge, Polity Press, 1995).

[65] Richard Falk, *On Human Governance: Towards a New Global Politics* (Cambridge, Polity Press, 1995) 212.

need to be widely endorsed at both the regional and international levels, by states rather than corporations, and in any event they would be likely in the short-term to 'accentuate human suffering' because international standards would reduce the competitiveness of the poorest countries.[66] Presumably he has in mind the much-contested case of labour rights,[67] rather than the charges of slavery, forced labour, and other fundamental abuses of which various corporations operating in places such as Myanmar have been accused.

Christian Tomuschat, another leading international lawyer with impeccable credentials as a human rights expert, is slightly less categorical than Falk. He emphasizes in a recent book that '[i]n human rights discourse, the State is the key actor', but by the same token he concedes that a 'concept that would visualize human rights exclusively as a burden on the governmental apparatus would be doomed from the very outset'. Lest this be taken as making a case in favour of imposing responsibilities on non-state entities, he adds that it 'does not mean that the individual as a holder of rights should concomitantly be subjected to legal duties either under domestic or international law'. His optimistic prescription is that '[g]overnments have always found ways and means to enforce [their] policies' and all that is really needed is 'that the intellectual frame of society [should condition] its practices in the field of human rights'.[68] In relation to transnational corporations he sums up the received wisdom with remarkable brevity. In response to various claims by human rights lawyers that such corporations should be subject to human rights obligations, he notes that: 'It is true that in particular in developing countries transnational corporations bear a heavy moral responsibility because of their economic power, which may occasionally exceed that of the host State. But on the level of positive law, little, if anything has materialized'.[69] In other words there is a strong moral case to be made but positive international law has not budged in the face of such amorphous pressures.

Finally, mention should be made of the law of state responsibility itself. In 2001 the International Law Commission adopted a set of final Articles on the Responsibility of States for Internationally Wrongful Acts.[70] These were approved by the U.N. General Assembly, which took note of them and commended them 'to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'.[71] One of the questions that arose in the context of the drafting process was whether various developments relating to the role of non-state actors in invoking international the rules of state responsibility at the international level in areas such as human rights, foreign investment, and environmental protection,

[66] Richard Falk, 'Human Rights', *Foreign Policy*, March–April 2004, 18, at 20–22.

[67] For a survey of the literature see Drusilla Brown, *International Trade and Core Labor Standards: A Survey of the Recent Literature*, Department of Economics, Tufts University, Discussion Paper 2000–05 (2000).

[68] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford, Oxford University Press, 2003) 320. [69] Ibid., 90–91.

[70] UN doc. A/56/10 (2001). [71] General Assembly res. 56/83 (2001), para. 3.

should be reflected in the Articles. In the end, the draft goes out of its way to protect any such acquired rights by providing that the part of the Articles dealing with the content of state's responsibility 'is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'.[72] This provision was included even though the commentary on the Articles, as approved by the Commission, made clear that they do not 'deal with the possibility of the invocation of responsibility' by non-state actors.[73] That, in other words, is a matter to be determined by the primary rules agreed to by states in whatever context and the Commentary notes that some procedures may well be available which would enable a non-state entity 'to invoke the responsibility on its own account and without the intermediation of any State'.[74]

Thus, from a non-state actor's point of view, the Articles are essentially neutral in that they neither discourage nor seek to promote those trends which favour an enhanced role for non-state actors in terms of invoking state responsibility. By the same token, they very clearly leave the door open for further developments in the future. Nevertheless, the Articles have been criticized by some commentators for not having gone further. Edith Brown Weiss, in arguing that more could have been done, points to two steps that might have been taken. One would have been to confirm that non-state actors are entitled to invoke state responsibility 'if the obligation breached is owed to them or an international agreement or other primary rule of international law so provides'.[75] That step would not seem to add a great deal but it would have made the existing approach more explicit. The other step would have been to recognize that non-state actors 'of one state *may* be entitled in certain circumstances to invoke the responsibility of another state if the obligation is owed to the international community as a whole'.[76] This second step would have been more dramatic and it is not surprising that the Commission, anxious to complete work which had taken too many decades already, did not wish to provoke the fears of states with the inclusion of such an additional element.

In its subsequent work, begun in 2002, the Commission has adopted an equally cautious approach but also one which does not close the door to non-state actors in its examination of the topic of the 'responsibility of international organizations'.[77] Draft Article 2 defines the term 'international organization' as referring to 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations

[72] Draft Articles, UN doc. A/56/10 (2001), Art. 33(2).

[73] The Commentary has been reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), Art. 33, para. 4.

[74] Ibid.

[75] Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', 96 *AJIL* (2002) 798, at 816.

[76] Ibid., emphasis in original.

[77] *Report of the International Law Commission on the Work of its 54th Session*, UN doc. A/57/10 (2002), chap. VIII, para. 458.

may include as members, in addition to States, other entities.'[78] The second sentence makes clear that the draft will not apply to any entity which is not composed, at least in part, by states or state organs or agencies.[79] The Commentary on the draft points out that it is designed to accommodate 'a significant trend in practice' according to which international organizations have a mixed membership including private entities. The report gives the World Tourism Organization as an example in that respect.[80]

6. OUTLINE OF THE BOOK

A. The Framework for Non-State Actors

As noted at the outset, the potential scope of an analysis dealing with non-state actors is almost without limit. In certain contexts, and particularly from a political science perspective of trying to map and navigate the new terrain, a wide-ranging approach is both appropriate and necessary. But in the context of a book dealing with the ways in which the international human rights regime has sought to come to grips with the rapidly changing role of non-state actors a significantly narrower approach is called for. In particular, the most important current debate relates to the role of 'transnational corporations and other business enterprises', to use the formula agreed upon by the drafters of the Norms proposed by the UN Sub-Commission for the Promotion and Protection of Human Rights in 2003. For that reason, the majority of the contributions to this volume address the legal and practical difficulties of holding such entities to account for conduct which violates international human rights law but is not adequately dealt with by the domestic law of the state in which the entity is operating. The remaining Chapters address the case of non-governmental organizations and of a particular international organization, the International Monetary Fund.

Before focusing individually on specific actors, August Reinisch in 'The Changing International Legal Framework for Dealing with Non-State Actors' (Chapter 2 below) provides an overview of the current state of the law. He notes that the increased concern with trying to hold corporations accountable for human rights violations represents a shift in the conventional understanding of human rights principles as limitations on state power.[81] Indeed, the focus on corporate behaviour may be regarded as an instance of a broader movement towards concern with the actions of non-state actors in international law. There has been a quantitative and qualitative proliferation of institutions concerned with human rights, from the more

[78] *Report of the International Law Commission on the Work of its 55th Session*, UN doc. A/58/10 (2003), chap. IV, para. 41.

[79] Ibid., para. 12.

[80] Ibid., para. 13.

[81] August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' at p. 42.

traditional treaty-based bodies to internal review mechanisms such as the World Bank's Inspection Panel.[82]

Reinisch highlights the increased interest over the last twenty years in using voluntary codes of conduct as a means of regulating corporations. He notes, however, that United Nations efforts to formulate a comprehensive set of principles failed in the early 1980s, and that in more recent years organizations such as the OECD and the ILO have developed codes relevant to their areas of activity. A novel development has been work on codes of conduct applying to international organizations themselves and to their operations in the field, as well as to codes governing NGOs. Reinisch argues that the heightened interest in codes of conduct emerged out of the increased demands for 'good governance' made on states,[83] which ultimately spilled over into a concern for good governance on the part of non-state actors. The key difficulty is that codes of conduct for both corporations and international organizations do not provide for strong supervisory or enforcement mechanisms. They do, however, offer a lightning rod for external pressure and scrutiny of conduct, and may engender such responses as consumer boycotts, negative publicity, and shareholder action if public opinion is mobilized around breaches of codes to which the non-state actor has professed adherence.[84]

Despite the fact that most codes lack enforcement mechanisms, there is a diverse range of national and regional laws which could be used to regulate the extraterritorial conduct of non-state actors in certain circumstances. Apart from the well known Alien Torts Claims Act in the United States,[85] there has been a revival of extraterritorial laws within the EU legal framework.[86] To the extent that there is a genuine effort by states to enforce international law through extraterritorial legislation, this may be a promising mechanism for the decentralized enforcement of international law. One dimension of this trend is a willingness to treat transnational corporations (TNCs) as 'accomplices' to human rights violations committed by states in which they operate subsidiaries.[87]

Reinisch traces the changing roles of international organizations and NGOs over the last thirty years, from a situation in which they were the 'good guys', and powerful states were the 'bad guys', to a context in which international organizations are increasingly challenged in terms of their own human rights performance.[88] Despite the intellectual energy now devoted to holding non-state actors accountable, Reinisch notes that international law still lacks an adequate conception of non-state actors as subjects.[89] There is some basis for the view that human rights obligations bind legal persons as well as states, but this is an implied rather than express consequence of existing human rights treaties.

The origins of the new preoccupation with non-state actors is argued to derive from a structural change in the international legal order, with a decrease in, and partial

[82] See p. 42. [83] See p. 53. [84] See pp. 55–6, 74–5.
[85] See Steinhardt for detailed discussion. [86] Reinisch, see pp. 62–64.
[87] See pp. 71–2. [88] See p. 69. [89] See pp. 76–8.

disappearance of, the concept of the state as a mediating factor between international law and individuals.[90] Moreover, the state's role as regulator and guarantor of human rights is diminishing due to the pervasive privatization of state functions. Tendencies towards outsourcing state regulatory functions or permitting greater degrees of self-regulation of corporate entities dovetail with the hegemony of neo-liberal economic doctrines and the accelerated mobility of finance capital.[91] The information revolution may also have increased the timeliness of information about the activity of non-state actors, making human rights violations more visible and better known in real time.

A promising development in the enforcement of human rights laws is an increased willingness for regional human rights courts such as the European Court of Human Rights to hold states responsible for non-state actors' conduct on their territory.[92] The direct accountability of non-state actors before international courts remains underdeveloped, something underlined by the International Criminal Court's lack of jurisdiction over legal persons.

B. Non-Governmental Organizations

Strong claims have been advanced in the past few years for the view that the role of NGOs, or more broadly of civil society, is indispensable in the building of a more equitable and effective international order. It has been argued, for example, that the active engagement of civil society, along with the corporate sector, 'is a critical if not imperative component in delivering policy outcomes that are timely, effective and legitimate. Creative institutional innovations are needed that connect governments, international organizations, civil society, and the corporate sector'.[93]

Menno Kamminga[94] traces the evolution of the one non-state actor which has long been recognized by international institutions: the non-governmental organization. He begins by noting the unease of many observers about the role which NGOs have come to play in certain important international contexts. He highlights the comments by the former President of the International Court of Justice, Gilbert Guillaume, who was highly critical of the fact that NGOs played important roles in relation to the Advisory Opinion on the legality of nuclear weapons and expressed the hope in response to an NGO letter-writing campaign to the Court that governments and inter-governmental institutions would be able to 'resist the powerful pressure groups which besiege them'.[95] Others have expressed similar concerns about the excessive influence wielded by NGOs, and the complaint has been expressed in strong terms by the Bush administration and its supporters in the United States.[96]

[90] See p. 77. [91] See pp. 80–2. [92] See pp. 83–5.
[93] Jan Martin Witte, Wolfgang H. Reinicke, and Thorsten Benner, 'Beyond Multilateralism: Global Public Policy Networks', at http://www.fes.de/IPG/ipg2_2000/artwitte.html.
[94] 'The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?', Chapter 3 below. [95] See p. 37.
[96] John Bolton, 'Should We Take Global Governance Seriously?', 1 *Chicago J. Int'l L.* (2000) 205 ('It is no exaggeration to say that, in United Nations circles, the demands of civil society to participate in

In an effort to clarify the focus of the Chapter, Kamminga seeks to define NGOs and, after noting that they are usually explained by reference to what they are not (governmental) rather than by what they are, explains the UN system for according certain degrees of status to such groups. He proceeds to see how NGOs measure up against the criteria proposed as traditional indicators of international legal personality. In relation to the capacity to conclude treaties he notes that any such right exists only under national law, if at all. His main focus is the International Committee of the Red Cross which, despite having the characteristics of a Swiss NGO, has been accorded international juridical capacity. In terms of the capacity to participate in international treaty-making he notes the case of the ILO, in which employers and workers' representatives participate in the negotiation of treaties, and then reviews the important drafting and lobbying roles that have been played by NGOs in various other treaty-drafting contexts. These include the UN Convention against Torture, the Framework Convention on Climate Change, the Landmines Convention, and the Statute of the International Criminal Court.

Under the heading of the capacity to bring international claims Kamminga notes that there are few if any pure cases of this sort but then reviews the rights accorded to NGOs and individuals enabling them to lodge complaints under various human rights treaties. Finally, he looks at liability under international law and concludes that there are rarely anything more than minor procedures for sanctioning them. In conclusion he observes that NGOs are certainly playing an increasingly prominent role in various international contexts. But while this role is sometimes reflected in their formal status, it remains generally 'extremely weak'.[97] Even if a set of proposals made by a panel of eminent persons in 2004 designed to enhance the role of civil society, and NGOs in particular, within the United Nations system were to be adopted, it is not clear that their roles would be greatly strengthened.[98] It should also be noted that Kamminga's analysis does not deal with NGOs in general and that the conclusions reached in relation to a chapter dealing with the role of business and other groups in the area of international economic law would differ in important respects.

C. International Organizations

While international organizations like the United Nations itself, the international financial institutions, or the World Trade Organization are regularly attacked for

decision-making on a level functionally equivalent to national governments are all but conceded'. Ibid., 216); Kenneth Anderson, 'The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations', 2 *Chicago J. Int'l L.* (2001) 371 ('[I]nternational organizations really do believe that they and international organizations ought to rule the world (with some help from Ottawa and Paris)'. Ibid., 388).

[97] See p. 109.

[98] *We the Peoples: Civil Society, the United Nations and Global Governance*, Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, UN doc. A/58/817 (2004).

one or another of their policies they are nevertheless often overlooked in discussions of the role of non-state actors in relation to human rights. There are several plausible explanations for that neglect. The first is that they are not considered to be non-state actors, since they are effectively acting as surrogates for states in some of the things that they do, and in any event their 'lords and masters' are states. The second is that they are usually conceded to enjoy a degree of international personality and thus their status *vis-à-vis* states is not considered to be as dramatically different as is the case with other non-state actors. A third explanation is that most of their activities are considered, although not by a good many NGOs, to be essentially benign. And a fourth, closely related to the others, is that they don't seem to fit easily into the category of non-state actors since the latter is often assumed to consist of groups, albeit as diverse as corporations and terrorists, who don't have a natural affinity with human rights and cannot plausibly proclaim their adherence to the relevant norms.

Against that backdrop, François Gianviti[99] focuses on the three aspects of the relationship between the International Monetary Fund (IMF) and one of the principal international human rights treaties, the International Covenant on Economic, Social, and Cultural Rights. They are: do the provisions of the Covenant have some 'legal effect' on the IMF; is the IMF obligated to contribute to the achievement of the rights recognized in the Covenant; and to what extent can the Fund, acting in accordance with its Articles of Agreement, take account of the relevant rights?

This Chapter is of particular interest because it is the first time that a senior official of the IMF (its Legal Counsel) has addressed these issues in a systematic fashion in the context of a careful legal analysis of the various considerations. His analysis does not deal with the broader question of whether some of the rights contained in the Covenant are part of customary law, along with some or all of those recognized in the other Covenant—the International Covenant on Civil and Political Rights—and might thus be binding on that basis on an international organization such as the IMF.

In relation to the Covenant he emphasizes the fact that it is a treaty addressed to states, and an instrument to which they can become parties. But the relevant rights are neither addressed to an international agency such as the IMF nor is it permitted to become a party, even if it wished to do so. Moreover, the relationship agreement entered into between the UN and the Fund creates a relationship between 'sovereign equals', as a result of which the Fund is not required to give effect to resolutions of the General Assembly or to international agreements entered into by UN member states. He attaches considerable importance in his analysis to an otherwise little noted provision of the Covenant (Article 24), which in his words: 'explicitly recognizes that "[n]othing in the present Covenant shall be interpreted as impairing the provisions . . . of the constitutions of the specialized agencies which define the respective responsibilities . . . of the specialized agencies in regard to the matters dealt with in the present Covenant" '.[100]

[99] 'Economic, Social, and Cultural Rights and the International Monetary Fund', Chapter 4 below.

[100] Ibid., see p. 118.

In quoting this provision, however, he omits a reference after the first ellipsis to the Charter of the UN and after the second to the responsibilities 'of the various organs of the United Nations'. As a result he emphasizes that the IMF's Articles of Agreement could only be modified by a formal amendment, but does not address the argument that permitting the IMF to remain altogether aloof from the treaty regime might impair the provisions of the UN Charter and thus itself require a Charter amendment in order to be sustainable.

Gianviti concludes that the Fund can still contribute through its policies and programs to the realization of the objectives spelled out in the Covenant, even if it has neither a legal obligation nor a constitutional mandate to do so systematically. But the bottom line is that the Fund 'is not free to disregard its own legal structure for the sake of pursuing goals that are not its own mandated purposes',[101] even if those 'goals' are human rights. If a stronger involvement with human rights is desirable then the appropriate course is to seek an amendment to the Fund's Articles of Agreement.

D. Corporations

The question of terminology looms large in this respect with different authors opting to focus on 'transnational corporations', 'multinational corporations', or 'multinational enterprises'.[102] Similarly each international organization which addresses these issues—including the UN, the ILO, the Organization for Economic Cooperation and Development (OECD), and the EU—seems to have its own terminological preference and usually offers a variety of reasons why its choice is better than the alternatives. At the end of the day, the differences do not seem especially compelling and thus no attempt has been made in this volume to standardize the terminology. The phrase transnational corporations (TNCs) is used in the present Chapter primarily because it has long been the term of choice in the context of the United Nations' deliberations on the matter.

The picture that emerges from the Chapters in this volume that address corporate responsibility is that international law's capacity adequately to regulate the cross-boundary activity of TNCs lags considerably behind the social and economic realities of globalized production and trade. Existing domestic and international legal mechanisms are, to a considerable extent, unable to ensure that their enforcement of human rights obligations is effective when it comes to the activities of TNCs and other non-state actors. Partly as a result, the past decade has seen a proliferation of efforts to formulate codes of conduct, guidelines, ethical principles, and other voluntary and non-binding arrangements. They all attempt to provide a lightning rod for consumer and public awareness campaigns that endeavour to regulate

[101] 'Economic, Social, and Cultural Rights and the International Monetary Fund', Chapter 4 below, at p. 138.

[102] Multinational corporations are said to reproduce their activities in a range of different nations, primarily in order to overcome barriers to trade, while transnational corporations are single firms pursuing an international division of labour in different countries. See generally Higgott *et al.* note 36 above.

corporate conduct indirectly by threatening brand reputations or affecting investor confidence. Several of the contributions to this volume address different dimensions of these diverse efforts.

Ralph Steinhardt[103] argues that despite the fragmentary and seemingly weak regulatory structure that is emerging at the moment, there is a real potential for the slow crystallization of a new *lex mercatoria* governing the conduct of corporations. He locates the principal sources for this new *lex mercatoria* in four areas: market-based regimes, domestic regulation, civil liability, and international 'quasi-regulation'. Like Reinisch, Steinhardt highlights the important role of international public opinion, and corporations' exposure to campaigns against their brands on the basis of their conduct. He considers the mixed experience of voluntary codes of conduct embraced by TNCs operating in apartheid South Africa, and the newer phenomena of 'rights-sensitive' product lines.[104] Social accountability auditing and ethical investment organizations are relatively recent practices which attempt to link market incentives more directly with corporate social responsibility.[105] Some of these campaigns have had high profile successes in persuading countries to cease activities in countries where human rights violations are endemic, due in no small part to concerted NGO advocacy and activism.

Steinhardt discusses five instances of domestic legislation intended to restrain or discourage TNC involvement with human rights violations abroad.[106] The U.S. Foreign Corrupt Practices Act of 1977 (designed to prohibit bribery of foreign governments by U.S. corporations) has been an effective standard setter for U.S. business, and appears to have been influential in shaping similar laws in other countries. Some states, including France and the United Kingdom, use securities laws to require companies to report to the market on human rights and environmental compliance. Import and export control laws continue to be used as a means of discouraging involvement with human rights-abusing countries, and government procurement and public expenditure laws may include human rights conditionalities that require companies to meet certain standards in their foreign operations before they can be eligible for public monies. Finally, specific legislation has been introduced in the U.S. to penalize insurance companies that fail to pay valid claims by Holocaust survivors. As Steinhardt points out, laws such as these seek to create a nexus between market-based regimes and legislative regulation, by creating requirements that expose companies to market censure through exposure of human rights violations, or threatening companies' access to public financing and government contracts.

The Alien Tort Claims Act has become a primary vehicle in the U.S. for attempting to hold TNCs accountable for human rights violations abroad.[107] Despite considerable procedural hurdles, several civil claims against corporations

[103] 'Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*', Chapter 6 below.

[104] See p. 183.

[105] See p. 184.

[106] See pp. 180–7.

[107] See pp. 194–6.

alleged to be complicit in grave human rights violations in foreign countries have survived strike-out motions. The cases have the potential to open up new understandings of corporate complicity in state human rights abuses, and Steinhardt summarizes the main kinds of wrongs which are actionable under ATCA.[108]

Finally, Steinhardt considers the regime of international 'quasi-regulation' that is emerging through international organizations. He points to bodies of principles promulgated by the ILO and OECD, and initiatives for a social clause under consideration by the WTO,[109] as evidence of an emerging 'cartel of values'. He then reviews some of the philosophical issues raised by imposing human rights obligations upon corporations, arguing that this imposition can be justified on a number of different grounds: deontological, utilitarian, and positivist.[110] There is no longer any basis for considering corporations to be the equivalent of purely private individuals, nor any convincing reason why a corporation should not be accountable for violations of international human rights law in the same way that it is liable for violations of domestic tort law or criminal law. Nevertheless, questions arise about how much corporate knowledge and involvement is required to hold a company responsible for human rights violations committed by a state in which it operates.[111]

Despite the limitations of existing mechanisms, Steinhardt is confident that together they promote the emergence of practices and habits that could form a new *lex mercatoria*: a body of law that is transnational in scope, grounded in good faith, reflective of market practices, and ultimately codified in the commercial law of nations and in international law. Codes of conduct, market-based regimes, civil litigation, and international principles reflect an intersection of the law and the marketplace.

David Weissbrodt and Muria Kruger[112] describe from the inside the process by which one of the most comprehensive attempts at formulating a corporate code of conduct was undertaken by the UN Sub-Commission for the Promotion and Protection of Human Rights, through its Working Group on the Working Methods and Activities of Transnational Corporations. Over a period of three years, the Working Group developed several drafts of what were initially called the Universal Human Rights Guidelines for Companies.[113] Weissbrodt himself was the key person in this endeavour and he and Kruger note that while there was a common desire to establish a binding code, the Working Group accepted the reality that political controversy would prevent the adoption of a treaty regulating TNCs and other businesses. Instead, the Working Group decided to implement the Guidelines as 'soft law' principles, and thereby introduce them into international law discourse and practice. In 2002 it adopted a revised draft entitled 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human

[108] See pp. 198–202. [109] See pp. 202–12. [110] See pp. 213–4.
[111] See pp. 215–7.
[112] 'Human Rights Responsibilities of Businesses as Non-State Actors', Chapter 8 below.
[113] See pp. 328–35.

Rights' ('the Norms'). Until such time as they are adopted by the Commission on Human Rights or another UN body such as the Economic and Social Council or the General Assembly, the document remains a draft, but it has been the subject of extensive consultations with human rights NGOs and companies.

The Norms seek to synthesize developments in treaty law which expressly or implicitly expand the scope of human rights obligations to non-state actors such as businesses, and clarify the extent of the obligations that apply directly to businesses.[114] The document pursues implementation through a number of avenues. First, it calls on businesses to adopt and implement the principles, and disseminate them amongst employees.[115] It also encourages businesses to conduct internal and external assessments of the extent to which current practices meet the standards in the Norms, and submit the assessment to an independent verification. Civil society entities, such as NGOs, trade unions, and business associations, are encouraged to take up the standards and use them as benchmarks for measuring performance, while intergovernmental organizations may also use them to inform the formulation of their own standards. States could use the Norms as a model for legislation, and domestic courts may also have regard to them. Thus, the hope is that the Norms will inform both business and state practice in setting standards and rules for business conduct, and so contribute to a harmonization of the substance of regulatory approaches.

Celia Wells and Juanita Elias[116] confront the difficulties inherent in attempting to hold corporations criminally liable for grave violations of human rights. The considerable barriers to enforcing the criminal liability of corporations in a domestic context are compounded internationally, not only due to the absence of an international criminal law specifically dealing with corporations, but also because of the complex corporate forms that are produced by relations of production in the age of globalization. Outsourcing, vertical disintegration, global commodity chains, and other production strategies complicate the legal attribution of responsibility where law (international and domestic) still largely presupposes discrete political communities defined in terms of territory.[117]

Wells and Elias review three different theories of corporate criminal responsibility: the agency principle, the 'controlling mind' approach, and the 'corporate culture' approach.[118] The first two theories seek to equate corporate responsibility with that of an individual actor, while the third takes a more holistic approach. The tendency to require an identification between the acts of an individual employee or manager and the corporation as a prerequisite to liability makes establishing an offence difficult in many common law countries. Within the EU there has been some convergence in corporate criminal liability frameworks,[119] and there appears to be a recent willingness among civil law countries to contemplate corporate criminal liability.

[114] See pp. 335–8. [115] See p. 341.
[116] 'Catching the Conscience of the King: Corporate players on the International Stage', Chapter 5 below. [117] See pp. 150–4.
[118] See pp. 156–57. [119] See p. 159.

Wells and Elias then review the complicity principles that might be applied to corporations in international law, distinguishing between first order and second order direct complicity (where corporations either actively assisted in implementing policies that violate human rights or knew that their cooperation would result in human rights violations) and indirect complicity,[120] where a corporation's activities help maintain a regime's financial and commercial infrastructure. They argue that domestic criminal law concerning complicity should not be used too readily in the development of international criminal law, as the domestic law is uncertain and conflicted.[121] Wells and Elias also consider the complicity principles contained in Article 25 of the Rome Statute, which contain three routes to accessory liability: instigation, assistance, and joint enterprise. However, the Rome Statute does not apply to legal persons, so can best offer guidance to domestic courts applying international law to the conduct of TNCs. The present potential for applying international law to companies remains limited, as the international criminal law to companies remains limited, as the international enforcement of corporate responsibilities is secondary to the protection of the economic rights of corporations.[122]

Olivier De Schutter[123] reviews the European Union framework for the accountability of TNCs for human rights violations. He first considers the general international law principles governing state responsibility for the protection of individuals within their jurisdiction, and notes that in current international law there is no state responsibility for the private acts of nationals abroad.[124] As such, states are responsible for human rights violations committed by non-state actors on their own territory, but not for the extraterritorial conduct of TNCs domiciled in their territory. Nevertheless, in a context where developing nations compete for foreign investment from TNCs, states may not have the incentive properly to regulate TNC activity on their own territory, or may not have the means.[125]

De Schutter explores whether the European Convention on Human Rights provides any basis upon which developed states can be required to hold TNCs domiciled in their territory accountable for human rights violations committed abroad. Recent case-law appears to hold that states are not responsible for human rights violations committed by their nationals extraterritorially, unless that territory is under the effective control of the state (as was Iraq, for example, under the terms of the Coalition occupation).[126]

EU trade and development policies provide a means for the EU to provide uniform incentives for developing states to enforce human rights standards, but raise the concern that trade conditions may be perceived as a form of protection.[127] Moreover, De Schutter argues, the use of trade conditionalities is at best a clumsy and indirect means of regulating TNCs.[128]

[120] See p. 161. [121] See p. 163. [122] See p. 166.
[123] 'The Accountability of Multinationals for Human Rights Violations in European Law', Chapter 7 below. [124] See p. 233.
[125] See pp. 235–6. [126] See pp. 240–9. [127] See pp. 253–60. [128] See pp. 260–2.

In the realm of civil liability, De Schutter contends that there is some scope under the terms of European Community Law for a TNC domiciled in an EU country to be sued in the courts of that country for a tort committed outside the EU, creating a possible analogy with the ATCA.[129] It seems, however, that this possibility remains untested, and a number of complex doctrinal questions, such as *forum non-conveniens* and the problem of applicable law, would have to be clarified by EU national courts, before such a claim could proceed.[130] There is also the problem of attributing the acts of a non-EU located subsidiary to an EU-domiciled parent company. De Schutter shows that the applicable principles are not free from controversy in EU courts.[131]

There does not exist an EU-wide corporate criminal code governing extraterritorial TNC conduct, but De Schutter suggests that suitable models for the formulation for such a legal regime could be found in existing initiatives to criminalize the extraterritorial sexual exploitation of children, and in the Belgian universal jurisdiction laws.[132] He recommends that such legislation should be based on the active personality principle and should apply universally recognized principles of international human rights law, rather than domestic standards.[133]

Finally, De Schutter reviews the EU experience with codes of conduct, particularly the attempt to apply a code of practice to EU companies dealing with the apartheid regime in South Africa, and the 1998 code of conduct concerning arms exports. These experiences suggest that in order for codes of conduct to be effective, two conditions must be met: the codes should impose clearly verifiable obligations on companies and violations should be sanctioned, and the standards set should be as uniform as possible.[134] He notes that the EU Green Paper on Corporate Social Responsibility stresses the importance of monitoring compliance with codes of conduct, and that some steps have been taken to create a European Monitoring Platform.[135] There would also appear to be considerable potential for the EU to set procurement and export credit conditions which require TNC compliance with human rights principles or codes of conduct, subject to the non-discrimination requirements of EU economic law.[136]

7. CONCLUSION

This Introduction sets the scene for the various analyses that follow. In particular, it has sought to shed some light on the approaches advocated by mainstream international lawyers to the challenges presented by the emergence of an important, and in many contexts powerful or at least influential, array of non-state actors.

The received wisdom that emerges very clearly from the analyses of most international lawyers may be summarized in the following terms: (i) the international

[129] See pp. 262–7. [130] Discussed at pp. 267–72. [131] Discussed at pp. 272–6.
[132] Discussed at pp. 283–6. [133] See p. 286. [134] See p. 299. [135] See pp. 301–2.
[136] See pp. 304–5.

legal framework is and will remain essentially state-centric; (ii) there is a very limited formal role for other international actors, although their participation in international decision-making processes is often desirable; (iii) transnational corporations should perhaps accept some moral obligations; but (iv) they have no clear legal obligations in respect to human rights apart from compliance with the law of the particular country in which they are operating. This is hardly a clarion call for reform, and it certainly has limited potential for responding effectively to the widely held perception that new approaches are indispensable if the accountability of non-state actors is to be promoted, thus ensuring that the international human rights regime is able to come to grips with one of the most pressing challenges confronting it.

For most international lawyers the assumption would be that it is possible within the confines of the existing system to do what needs to be done. That might include, for example, regulating transnational corporations, taking much more systematic account of the views of civil society, regulating the activities of private actors in cases where human rights values are otherwise left in jeopardy, and achieving these objectives by working through the state-centred mechanisms of international law. Whether this is in fact possible is a question to which many of the contributors in this volume address themselves. By way of conclusion it is striking to note how frequently notions of sovereignty, and of the prerogatives that are perceived to attach to it, are invoked within international settings to prevent developments which seek to adapt the overall system in order to enable it to respond adequately, or even just plausibly, to the new challenges.