Responsibility of transnational corporations in international environmental law: three perspectives

André Nollkaemper, University of Amsterdam

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ANDRÉ NOLLKAEMPER

I. Introduction

This chapter examines recent developments pertaining to the international responsibility of transnational corporations for activities that may cause harm to the environment. While the position of transnational corporations in international law has been subjected to previous analyses, also in regard to The author would like to thank Janneke Nijman, Erika de We, and Gerd Winter for their helpful comments on an earlier draft of this article and Elizabeth Perel for research assistance. The Pioneer programme on the Interactions between Public International Law and National Law, sponsored by the Netherlands Organization for Scientific Research (NWO).

1 The chapter uses the definition of transnational corporations that is contained in the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (hereafter: ‘Draft Norms on the Responsibilities’). The term transnational corporation refers to ‘an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively’. The Draft Norms on the Responsibilities are annexed to UN Doc. E/CN.4/Sub.2/2002/13, 15 August 2002. Much of what will be said in this chapter applies equally to other corporations. However, because of the transnational nature of their activities, transnational corporations pose particular challenges for international environmental law.

international environmental law, there are reasons for a new consideration of the topic.

First, transnational corporations substantially contribute to the worldwide stress on the environment. Many acts that deplete natural resources, contribute to the depletion of the ozone layer and to climate change, deplete fish stocks, clear-cut forests, move waste across boundaries, and so on, are not performed by states, but rather by economic entities operating in more than one state. Recent data indicate that the detrimental effects of the activities of transnational corporations on the worldwide environment are substantial. In the perspective of the book of which this chapter is a part, it can be said that transnational corporations pose a considerable challenge to global environmental governance.

Secondly, there is a variety of recent initiatives of a political and/or legal nature that seek to improve international regulation of transnational corporations. Noteworthy is the work of the ILC on international liability, the adoption of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights by the UN Subcommission on the Promotion and Protection of Human Rights, and the United Nations Global Compact.

This chapter will examine and comment on these recent developments and, more broadly, analyse the responsibility of transnational corporations from the perspective of general international law. It does not examine in detail the various principles and rules that have been applied to transnational corporations in codes of conduct, through self-regulation, or otherwise. On these issues ample literature exists. Rather, this chapter seeks to assess what these principles and rules tell us about the way in which the international legal order addresses activities of transnational corporations that result in environmental problems of international concern.

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6 See, n. 2 above.

7 The United Nations Global Compact, available at www.unglobalcompact.org/Portal/

8 See, with further references, Jonas Ebbesson, Chapter 8.
Apart from certain conceptual clarifications relating to the different use of the term ‘responsibility’ in public international law, on the one hand, and the discourse on ‘corporate responsibility’, on the other (section II), the chapter makes essentially four arguments. First, it argues that the responsibility of corporations is largely determined by a normative order that operates separately and largely independently from public international law and indeed from any other legal order (section III). Secondly, it argues that as far as the legal dimension of responsibility of corporations is concerned, international law relies heavily on responsibility defined and effectuated via the national legal order (section IV). Thirdly, it argues that as far as it is envisaged that international law itself would directly regulate the responsibility of corporations, the forms and modalities have as yet hardly been thought through; in any case, they cannot simply be transplanted from the law of responsibility as that applies to states and international organisations (section V).

II. The term ‘responsibility’

Documents and literature dealing with the international responsibility of transnational corporations use the term ‘responsibility’ in at least two different meanings.

First, the term ‘responsibility’ is used to refer to the legal consequences that arise out of a breach of international law. This use of the term is consistent with the meaning of the term in the work of the ILC in its work on responsibility of states and of international organisations. In this meaning, the term does not refer to particular standards of conduct (so-called ‘primary rules’), but rather to obligations that result from a breach of the standards of conduct that apply to them (‘secondary rules’). It is in this meaning that the term is used, for instance, by Crawford and Olleson when they write (after having discussed the relatively clear secondary rules applicable to states and international organisations) ‘[t]he position so far as . . . corporations . . . are concerned is far less clear: just as it is doubtful whether they are in any meaningful sense ‘subjects’ of international law, so it is doubtful whether any general regime of responsibility has developed to cover them’.

Secondly, the term ‘responsibility’ is used as shorthand to refer to the obligations applicable to transnational corporations. In the terminology used by the ILC, the term then refers to primary rules of conduct. The term ‘responsibility’ has in this meaning occasionally been applied to states. For instance, Principle
21 of the 1972 Stockholm Declaration provided that states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. However, in regard to states, the term is not often used in this meaning. It is noteworthy that the ICJ referred to the rule that must ensure that activities within their jurisdiction or control do not cause damage to the environment of other states (which in the 1972 Stockholm Declaration was referred to as a ‘responsibility’) as an obligation, rather than as a responsibility. In contrast, in regard to transnational corporations, this use of the term ‘responsibility’ is more common. It is, for instance, in this meaning that the term appears to be used in the concept of ‘corporate responsibility’ adopted by the International Chamber of Commerce and in the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights. These documents speak of obligations, not of the consequence of the breach of obligations. It also is in this meaning that the term is used in much of the literature.

Sometimes it is not really clear in which of the two meanings the term responsibility is used and the analysis may become somewhat confused. Though there is an obvious relationship between responsibility in the meaning of obligations and responsibility in the meaning of consequences arising out of a breach of an obligation, the difference between the two concepts is significant and they should be clearly distinguished in any discussion on the position of transnational corporations in international law.

### III. Private responsibility

The responsibility of corporations is largely determined by a normative order that operates separately and largely independently from public international

law and indeed from any other legal order. In part as a response to shortcomings perceived in the second and third model to be discussed below, private responsibility has become increasingly relevant for environmental policies of transnational corporations. It encompasses the various modes of self-regulation adopted by individual transnational corporations and more collective arrangements within the private sector. This form of responsibility is often discussed under the heading of corporate responsibility. Responsibility in this meaning is an ambiguous term, but primarily appears to relate to obligations assumed by corporations (primary rules), rather than to rules that define that corporations that violate rules of conduct should be accountable and face the consequences for their actions (secondary rules).

Although corporate responsibility is often discussed in one breath with the position of transnational corporations in international law, this form of ‘responsibility’ has nothing to do with responsibility in international law. It is neither based on the violation of norms that according to the sources of international law are binding on transnational corporations, nor are the consequences of a violation of standards of conduct in any way determined by international law. Of course, this does not mean that this form is not or cannot be of much relevance for the actual operation of corporations: it simply means that public international law has a limited domain and that there are other normative orders operating outside that domain – normative orders that may, moreover, use their own concepts and terminology.

From the perspective of general international law, this form of private regulation can be construed in two ways. First, one can take the position that the international legal order is an all-encompassing legal order that necessarily regulates all behaviour in international society. It then may be said that international law regulates transnational corporations by granting them a liberty to determine their own responsibilities. This does not mean that corporations can do whatever they want: their liberty coexists with the liberty of states to regulate corporations. Since international law also protects the power of the

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17 e.g. ICC Business Charter for Sustainable Development, available at, www.iccwbo.org/home/environment_and_energy/sdcharter/charter/about_charter/about_charter.asp
state to regulate and control corporations, the liberty it leaves to corporations may have limited effects.\(^\text{19}\)

This first construction of the position of transnational corporations in the international legal order is, however, somewhat odd, as it assumes that international law regulates (by granting a liberty) persons that it recognises only to a limited extent as legal persons.

Secondly and more plausibly, one can take the position that, in contrast to the national legal order, the international legal order is not an all-encompassing legal order. This situation has been explained in constitutional terms: the international legal order does not possess a 'Gesamtverfassung' that grasps the entire community.\(^\text{20}\) Rather, it is a limited order that governs only part of international transactions, in particular those of entities exercising public authority. This model recognises that the political domain of the international legal order is, compared to other systems, relatively undeveloped. International law determines the scope of public authority of states and international governmental organisations, but these do not fully reflect and organise a global community.\(^\text{21}\)

It may be true that, as Teubner writes, 'wo sich autonome Gesellschaftsektoren entwickeln, werden zugleich eigenständige Mechanismen der Rechtsproduktion herausgebildet', but these would not necessarily have to be integrated or linked to the political public order system.\(^\text{22}\) Private norms that are adopted to steer corporate behaviour, such as corporate responsibility or 'lex mercatoria',\(^\text{23}\) could be said to constitute a private subsystem\(^\text{24}\) that is not subjected to international law.\(^\text{25}\)

In certain respects, one could say that the deference of the international legal order to the private sector is a political choice and not a necessary consequence of the limits of the legal system. Nonetheless, it is to be reorganised that the interventions of the public sphere are limited due to the political structure of representation of the common interest and the power of corporations. The allocation of power within the global system supports a pluralistic legal structure, whereby persons and entities that are not incorporated in and regulated

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19 The failed attempt to negotiate a multilateral agreement on investment was in part an attempt to limit that power and to enhance the liberties of the private sector. See Stern, B., How to regulate globalization, in Byers, M. (ed.), The role of law in international politics, Oxford (Oxford University Press) 2000, pp. 247–268, at 249.
24 See Teubner, op. cit. p. 6; Robé, op. cit. pp. 68–71; Stern, op. cit. p. 261 nn: 'Law, as a creation of states, has to compete with other, private means of regulation.'
25 Stern, op. cit. pp. 262–263.
Responsibility of Transnational Corporations

by the public international legal order may form their own normative system.26 That perspective helps in part to explain why direct regulation of transnational corporations has as yet not really been achieved.

Even though formally corporate responsibility is not a part of the international legal order, it is not necessarily isolated from international environmental law. It is a plausible hypothesis, though one in need of more empirical research, that principles of international environmental law have had a large measure of ‘persuasive’27 or ‘influential authority’28 on the development of corporate responsibility.

Private norms adopted by way of self-regulation may also in other ways be legally relevant for international law. An assessment of the contents and effect of principles of corporate responsibility is helpful for understanding the possibility of development of international law in this area. Because the main principles of international environmental law are written for public rather than for private entities, they need to be ‘translated’ to the private sector (see further section V). An assessment of experiences in self-regulation and corporate responsibility seems greatly helpful in understanding the possibility to apply particular primary international rules to corporations.29

Also, private rules may be relevant for the application of international environmental law in judicial practice. For example, it has been reported that norms of corporate responsibility have been invoked before and applied as principles of interpretation in domestic cases.30

The fact that corporate responsibility regulation can be legally relevant for international environmental law, of course, does not change its legal status. As noted in a different context by Prosper Weil, between showing due interest in normative developments not based on the sources of international law ‘and integrating them into the normative system under the cover of a sliding scale of normativity, there is a gap that can be bridged only at the cost of denying the specific nature of the legal phenomenon’.31

The role played by corporate responsibility serves as a useful reminder of the limited domain of responsibility in public international law and indeed of public international law itself. The regulation of responsibility of corporations beyond the national legal order need not take place in the international legal

29 Ong, op. cit.
30 Muschinski, op. cit. p. 129.
order. Much of the debate on international legal personality of transnational corporations (that usually serves as a stepping stone towards a discussion of international legal responsibility or liability) is rather abstract and may be of little help in an actual understanding of the form and scope of responsibility that guide the operation of transnational corporations.32

IV. Responsibility under national law

The second model for responsibility of transnational corporations is responsibility under national law. This has long been the dominant model for regulation of responsibility of transnational corporations. For many decades, international law has attempted to resolve any problems that the activities of transnational corporations may pose for public values, by strengthening national legal orders. International law has to some extent clarified the obligations of states (both ‘host states’ and ‘home states’) to control private entities, and has confirmed that failure to impose and enforce obligations on corporations may, in terms of secondary rules, result in the responsibility of the state.33

In this model, international law does not directly address the responsibility of transnational corporations. Rather, it addresses the obligations of states vis-à-vis private corporations. Following Kelsen, one can say that most parts of international environmental law oblige the state, and that the state subsequently determines in its own legal order the rules by which corporations have to comply, and the responsibilities they incur if they fail to do so, in order to ensure that the state can comply with its own obligations under international law.34

The dominance of this regulation at the same time explains and is a result of the limited status of transnational corporations in international law. It is true that in certain narrow respects, transnational corporations have acquired a legal status that is independent from the national legal order of the state in which they are incorporated and/or of the state in which they are active. That holds true in particular for the position of transnational corporations under regional or bilateral investment treaties that grant corporations certain rights of protection and sometimes the right to bring legal action before


international arbitral tribunals. Some writers allow on this basis for the possibility of some form of international legal personality. For instance, Friedmann stated that corporations acquire a ‘limited ad hoc subjectivity to the extent that their transactions are controlled by the norms of public rather than private international law’. Yet, the status of transnational corporations is a limited one. The international legal order has overwhelmingly made use of political rather than legal instruments to influence the activities of transnational corporations. Malanczuk writes that while writers and governments in Western countries are usually ‘prepared to admit that . . . companies have some degree of [limited] international legal personality’, even the most influential global multinational corporations such as IBM and Unilever ‘have not been upgraded by states to international subjects proper’. Brownlie notes that ‘[i]n principle, corporations of municipal law do not have international legal personality’.

Even though we can accept that the concept of legal personality is a compound concept and that transnational corporations do not need to possess all rights and duties that are possessed by states in order to be reorganised as legal persons, one has to acknowledge that the position of transnational corporations in the international legal order is weak. Their lack of full international legal personality leaves transnational corporations in principle subjected to the national legal order of one or more states.

All this is reflected in international environmental law, which directs its rights and duties at the state and relies on the way in which the state in its national law controls corporations. Illustrative of the reliance of general international law on national law is the current work of the International Law Commission (ILC) on transboundary harm. It was widely reorganised in the ILC as well as in the United Nations General Assembly that the ‘operator’ (that is ‘any person in command or control of the activity at the time the incident

37 See section IV.
39 Ibid., p. 102.
41 The ICJ noted: ‘The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights’: ICJ, Reparations for injuries, Advisory Opinion, ICJ Reports 1949, p. 178.
causing transboundary damage occurs’), should bear primary responsibility for environmentally harmful activities. Special Rapporteur Rao, having reviewed the comments in the Sixth Committee, noted:

Any scheme of allocation of loss should place the duty of compensation first on the operator. The operator is in control of the activity and is also its direct beneficiary. This approach would adequately reflect the ‘polluter pays’ principle, in particular the policy of internalizing the costs of operation. Accordingly, the operator is required to obtain the necessary insurance coverage and show appropriate financial guarantees.

However, the text adopted by the ILC envisaged that the obligations of prevention and compensation are imposed on the state, not directly on the operator. The Draft Articles on International Liability in case of Loss from Transboundary Harm arising out of Hazardous Activities provide, for instance, that each state should take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.

Only in a few instances, international environmental law determines in detail the responsibilities to be applied to private operators. The best examples in this category are the liability conventions that determine, for those states that accept them, the detailed contents of national law and more particularly the rules of liability that apply to private operators who cause damage to the environment. To a certain extent, these types of obligations rely on the national legal order. For instance, they rely for their application on national courts that have jurisdiction in regard to the claim.


e.g. Article 19 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993.
One might also construe this latter type of treaties as direct regulation of corporations by international law. The liability conventions impose direct liability on operators. Hyde noted that, in light of the fact that national courts would exercise jurisdiction in regard to acts that international law criminalises (but the argument can be applied by analogy to liability of corporations), it is:

not unscientific to declare that [the individual] is guilty of conduct which the law of nations itself brands as internationally illegal. For it is by virtue of that law that such sovereign acquires the right to punish and is also burdened with the duty to prevent or prosecute.

If one adopts this perspective, one can say that this form of regulation and responsibility straddles indirect responsibility under national law and direct responsibility under international law, to be discussed in section V.

Another way in which international law could directly be relevant for responsibility or liability at national level, is that states may choose to make international environmental law directly applicable to transnational corporations in the national legal order. If they do, it might be said that in those states, international environmental law directly controls the activities of corporations. However, there is very limited evidence that this has been done. It has often been discussed whether this could apply to the Alien Tort Claims Act (ATCA) of the USA. Through application of national tort law, combined with a liberal reading of international law, corporations can be held liable for environmental damage. However, lower courts have been reluctant to accept the position that environmental harm would be a violation of international law in the meaning of the ATCA. The decision of the US Supreme Court in *Sosa v. Alvarez Machain* appears for all practical purposes to have blocked the way to an application.

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49 e.g. Article 6 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993: 'The operator in respect of a dangerous activity mentioned under Article 2, paragraph 1, sub-paragraphs a to c shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he was exercising the control of that activity.'


of the ATCA to environmental law. It was held that ‘courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms’. This makes it very unlikely that any international environmental norm would be a basis of jurisdiction or a cause of action. In other jurisdictions the situation is not much different. For these reasons, the direct role of international law in regulation and responsibility of corporations is likely to remain limited.

Apart from the limited possibilities that international law would directly determine either the obligations (primary norms) or responsibility/liability (secondary norms), international law operates through and is dependent on national law. This does not mean that responsibility under national law is of limited relevance for a proper regulation of transnational corporations. It has often been said that, because of the transnational nature of transnational corporations, reliance on national law would be of relatively limited use for the regulation of transnational corporations and that regulation of transnational corporations should be strengthened by lifting corporations from the national to the international legal order. Though there may be cases where the national legal order is unreliable because the state is unable or unwilling to enforce laws against transnational corporations, for instance in cases of collusion between states and corporations or in cases of weak or failing states, there is something odd about that argument. In general, the regulatory power of the national legal order is superior to the power of the international legal order. Also, when subjects are regulated by international law, it commonly is appreciated that the effectiveness of regulation is contingent on national rather than international law. International regulation as such will at best be the beginning of an answer to the practical problems of environmental degradation caused by transnational corporations and will eventually have to rely on the national legal order.

Rather than denying the potential for reliance on national law and embracing the international legal order, the better and perhaps more realistic approach would seem to be to strengthen the responsibilities of both home states and host states, to strengthen the regulatory power of states, and to improve coordination of national legal systems, for instance by clarifying rules on jurisdiction, applicable law, enforcement, transboundary access to decision-making, participation in impact assessment procedures, and access to courts. This is at least in part the route that also has been advocated for the ILC. In this respect, the

53 See http://supct.law.cornell.edu/supct/html/03-339.ZO.html
56 See A.E. Boyle, Chapter 23.
second paradigm is not only the traditional paradigm of international law, but also the paradigm that holds the most prospects for improving regulation and effective environmental performance by transnational corporations.

Apart from the interaction between international law and national legal orders, there may also be an interaction between corporate responsibility (which, as noted above, functions largely in separation from international law) and the national legal order. However, like international law, principles of corporate responsibility in general seem to operate independently from national law. Determinations of responsibility and liability of corporations in the national legal order will proceed on the basis of national law, both in terms of obligations and principles of liability. In legal terms, corporate responsibility not only is separated from the international legal domain but also from the national legal order. However, this is an area where more research in the practice of courts may be useful.

V. Direct responsibility in international law

In addition to the development of corporate responsibility and responsibility under national law, we have seen cautious steps for the development of a third model: direct responsibility of transnational corporations in the international legal order. This development is based on the premise that, on the one hand, corporate responsibility would provide insufficient guarantees for proper environmental policies and, on the other hand, national legal orders would be incapable of providing sufficient degrees of protection. Subjecting transnational corporations directly to international law has been thought to be able to fill these lacuna.57

The policy arguments for such a development are particularly strong when multinational corporations are beyond the control of both the home and the host state. There is an analogy here with the development of international human rights law and of international law on individual criminal responsibility – two areas where, because of the inadequacy of national law, international law addresses private persons directly.

As yet, the international legal order has largely confined its approach to transnational corporations to normative instruments that rely on political rather than legal authority. States and international organisations have adopted a variety of texts that call on transnational corporations to adopt and implement certain policies, without imposing legal obligations or responsibilities. The best example is the OECD Guidelines for Multinational Enterprises, as revised in 2000.58 These provide, inter alia, that:

58 See www.oecd.org/dataoecd/56/36/1922428.pdf
Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, *and in consideration of relevant international agreements, principles, objectives, and standards*, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development (emphasis added).

The document lists a range of particular actions that should be undertaken by enterprises, including the establishment of a system of environmental management that would provide for collection of data regarding the environmental impacts of their activities, the establishment of measurable objectives and targets for improved environmental performance, and monitoring and verification of progress toward environmental objectives or targets.

Another recent political initiative is the adoption, in August 2003, by the UN Subcommission on the Promotion and Protection of Human Rights of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*.\(^59\) The document applies international principles related to human rights (pertaining to such diverse areas as labour, health, non-discrimination, and safety), including a provision on environmental protection, to transnational corporations and other business enterprises:

Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

A third development at the political level is the Global Compact, launched in 2000. This is a mechanism that brings companies together with UN agencies: the Office of the High Commissioner for Human Rights, the International Labour Organisation, the United Nations Environment Programme, the United Nations Development Programme, and the United Nations Industrial Development Organisation. The involvement of the UN in this collaborative effort with the private sector is authorised and supported by the General Assembly.\(^60\)

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\(^{60}\) A/RES/55/215; A/RES/56/76; A/RES/58/129.
and also on that basis can be considered as a means for the organised international community to further sustainable development by cooperating with the private sector.\footnote{See generally Kell, G. and Ruggie, J. G., Global markets and social legitimacy: the case for the 'Global Compact', \textit{Transnational Corporations} 8 (1999), pp. 101–120.}

Finally, the 2002 World Summit on Sustainable Development recognised that ‘in pursuit of its legitimate activities the private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies.’\footnote{A/CONF.199/20, para. 27.}

These developments are noteworthy because they indicate that the international community (organised in the Commission on Human Rights, the World Summit on Sustainable Development or other forums), has recognised a responsibility to protect international public (environmental) values by influencing the private sector directly, not only through states.

However, these developments do not carry direct legal consequences for transnational corporations, neither in terms of primary or secondary rules. To the extent that they envisage the need that corporations answer for the consequences of their policies, for instance through monitoring processes in the framework of the OECD\footnote{See Tully, S., The 2000 review of the OECD Guidelines for Multinational Enterprises, \textit{ICQL} 50 (2001), pp. 394–404.} or possible processes that may be developed in conjunction with the \textit{Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights},\footnote{Para. 16 states: ‘Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms.’} that would be a political and not a legal ‘responsibility’. In fact, the documents largely seem to rely on private forms of responsibility and, as such, defer to the first model of responsibility (section II). For instance, the World Summit on Sustainable Development agreed that ‘there is a need for private sector corporations to enforce corporate accountability, which should take place within a transparent and stable regulatory environment.’\footnote{A/CONF.199/20, para. 29.}

In legal scholarship there has been some support for the proposition that the actions at the political level should be transformed into direct international legal regulation and possibly also responsibility of transnational corporations.\footnote{Joseph, op. cit.} Various scholars have proposed international conventions that would impose direct obligations on corporations.\footnote{See Jonas Ebbesson, Chapter 8; Hongju Koh, op. cit. p. 273.} One could say that such legal development would partly integrate the free-standing private order in, or at least link it with, the public international legal domain. In the words of Teubner, such
developments would create a ‘mischungsverfassung’ between the public and the private domain.68

There is no theoretical or conceptual barrier to such a development. The argument that transnational corporations do not possess international legal personality does not impede the direct imposition of international environmental principles. In fact, personality would simply follow such an imposition.69

At the same time, it is clear that, as noted above, the organisation of political power at the global level is not conducive to such a legal development. Also, it is clear that many states may have political objections to such a development and also fear potential legal consequences. One pertinent objection may be that an international procedure against a corporation may implicate the home state or the host state, when the corporation would take the position that it complies with the (defunct) legislation of the state in question. Another objection may be that granting transnational corporations the status of legal persons in the international legal order might reduce the controlling power of the national legal order.

Probably caused by such more or less plausible objections, the state of the law is not encouraging. There are no indications that the types of principles presently contained in the OECD Guidelines or the draft UN Norms of the Global Compact would be made legally binding on corporations, let alone that a system of secondary rules would emerge. Indeed, it has been suggested that the move towards public-private partnerships in the United Nations may, in fact, discourage a development of the law.70 Present international law also does not provide for a general principle of direct civil responsibility (or liability) or criminal responsibility of corporations in international law. There is no treaty or state practice that allows us to identify a general principle to that effect.71 As to criminal responsibility, while one can accept that in areas where individuals can be held responsible, such responsibility can be extended to corporations, this is of little relevance for violations of environmental law since an act that causes harm to the environment in principle will not entail individual responsibility.72 It also seems very doubtful whether, outside the category of

68 Teubner, G., see n. 20 above; cf. Hongju Koh, op. cit. p. 273 (referring to ‘private-public regimes’).
71 But see Ratner, op. cit. p. 497 (arguing that in cases where the state is responsible for certain acts of private actors, ‘those actors can also be held responsible for that same conduct under international law’).
72 Hongju Koh, op. cit. p. 265; Ratner, op. cit. p. 494. It is to be taken into account, though, that the jurisdiction of the International Criminal Court does not extend to corporations.
The absence of substantial legal development in this area is matched by an absence of fundamental legal thinking on the question of what the responsibility of transnational corporations, if it were to be developed, would look like. It is to be recalled that corporate responsibility has little, if anything, to do with responsibility of corporations under international law. If we are to see a development towards responsibility of corporations in international law, there are several fundamental issues to be considered. The four most pertinent issues appear to be the way in which such norms would be made binding on corporations; the way in which the legal obligations and responsibilities would be lifted into the public order; the translation of public (primary) norms to private entities, and the application of responsibility norms to private entities.

The first question is how the objective to make rules of international law binding on corporations is to be achieved. This problem is somewhat comparable to similar questions that have arisen in the past with regard to the application of international law to international organisations and de facto regimes or rebel movements. For organisations, the problem is solved by allowing international organisations to become a party to treaties. For de facto regimes, the problem (at least as far as international humanitarian law is concerned) is solved, in principle, by the understanding that when a state becomes party to a humanitarian law treaty that provides obligations for rebel groups, rebel groups within its territory also are bound to the rules contained in that treaty. The second approach appears more relevant for transnational corporations than the first one. However, the situation differs because transnational corporations are characterised by the fact that they, at least to some extent, escape the control of the national legal order. A treaty which would meaningfully regulate obligations and responsibilities of corporations would be in need of substantial ratification.

The second and closely related question is whether and how such a treaty would actually achieve its purpose of directly regulating the obligations and responsibilities of corporations. It would primarily bind states. Imposing direct obligations and responsibilities on corporations most likely would remain dependent on effectuation of the obligations and responsibilities in national law – much like human rights law or much of international criminal law. But in that case we will not actually be speaking of international responsibility of corporations, just as the responsibility of most of international criminal law that is effected in national courts is based on national law. The other alternative would

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73 Hongju Koh, op. cit. p. 267.
be to create an international forum, somewhat comparable to international criminal tribunals, that in fact would effectuate an international responsibility. While this need not necessarily be of a criminal nature, it is, however, a very unlikely prospect.

The third question is whether and how norms of public law can be applied to private entities. Principles of public international law are drafted as public law norms applying to public authorities. Can norms that were developed to apply to states be applied to private entities? The nature and purpose of state authority is widely different from the nature and purpose of authority exercised by corporations. As a consequence, the principles and underpinnings of public international law and corporate responsibility are also different. It may not be possible to solve the legal problems created by a shift in authority from the public to the private sphere by a wholesale and non-discriminate transfer of public international law norms to the private sphere.

The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (‘Draft Norms on the Responsibilities’) illustrate the problem. They consider that transnational corporations are obligated to respect generally reorganised responsibilities and norms in a long list of over thirty treaties and other instruments. This includes some treaties that pertain to private actors, including civil liability treaties (such as the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment) and criminal law treaties (such as the Torture Convention). But, it also includes a wide variety of treaties that can be characterised as public law instruments: the addressees are states, and they require state action for their application. They oblige transnational corporations to ‘carry out their activities in accordance with relevant international agreements, principles, objectives, responsibilities, and standards with regard to the environment’. However, many of these agreements, principles, objectives, responsibilities, and standards require political decisions, as well as a reordering of governmental priorities and legislation. Can these principles, which often rely on balancing private rights with the public interest, really be applied without substantial adjustment to private entities? Such standards will provide insufficient guidance to the courts and will be of little or no use in determinations of corporate liability. A blanket transfer of public norms to the private sphere may fail to recognise that while public law norms may need to be translated to the private sphere, they cannot simply be transplanted without adjustment.

76 But see Ratner, op. cit., pp. 513–514, suggesting that the balancing of interests between individual rights and state interests could be replaced by a balancing of interests between individual rights and the interests of an enterprise. Arguably, the same reasoning could be applied to the balancing of interests that is part of international environmental obligations.
Responsibility of Transnational Corporations

In the translation of public to private standards, one also will have to take into account the nature of the corporation. The Draft Norms on the Responsibilities raise the question of whether one set of public international law principles can, without discrimination, be applied to all corporations. As they are presently formulated, they apply to all ‘transnational corporations and other business enterprises’. That may not be a problem for principles that require corporations to refrain from ordering killings. But is it possible to apply principles that require more positive action, for instance in the sphere of labour rights or environmental protection, to all corporations? The possibility to comply with certain norms may be dependent on power, resources, capabilities, and factual situations and these norms will have to be subject to some form of due diligence standard.

The OECD Guidelines and the Global Compact are more attuned to the specific position of transnational corporations. The Global Compact contains three principles pertaining to the environment: businesses should (1) support a precautionary approach to environmental challenges; (2) undertake initiatives to promote greater environmental responsibility; and (3) encourage the development and diffusion of environmentally friendly technologies. In this respect, these non-legally binding norms, just as the norms adopted voluntarily by the private sector, offer a better model for legal regulation of transnational corporations than a large part of state-oriented public international law.

The fourth question concerns the application of secondary rules to transnational corporations. It has already been noted that it is not immediately obvious what role an international responsibility of corporations would actually play, given its reliance on national law. Nonetheless, in assessing the options for legal development, the question of the nature of responsibility of corporations may need to be considered.

It is a plausible proposition that once international law would directly impose primary norms on transnational corporations, secondary rules would also become applicable. However, the question then arises as to the nature and scope of such responsibilities. Several authors have considered that the secondary rules of state responsibility may be applied to responsibility of corporations. The Draft Norms on the Responsibilities state, somewhat confusingly:

Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with

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77 It is to be noted, though, that there is no general acceptance that rebel groups, who are bound by primary norms, are responsible for their acts under international law; see Zegveld, L., Accountability of armed opposition groups in international law, Cambridge (Cambridge University Press) 2002.

78 Hongju Koh, op. cit. p. 268 (applying the rule of state ‘complicity’ to corporations); Ratner, op. cit. pp. 495–496.
these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.79

The last words seem to suggest that international law contains principles of responsibility that are attuned to the specific characteristics of transnational corporations. While there may be parallels between responsibility of states and responsibility of corporations (not surprising since state responsibility law in part is derived from national law analogies that as such are applicable to corporations), there can be no automatic transposition. The nature of the organisation of states, the rules that apply to them, as well as the nature of the defences that states may invoke, cannot automatically be applied to corporations.80

The application of public international law norms also raises the question of the relationship between obligations and responsibilities of private entities on the one hand and of states on the other. If one accepts a set of independent obligations of transnational corporations with accompanying responsibilities, these will most likely coexist with the obligations and responsibility of states. The Draft Norms on the Responsibilities recognise that states have the primary responsibility in regard to the protection of human rights (one must presume that that also applies to the provision dealing with environmental protection). The coexistence of such responsibilities would raise questions of joint and several liability, primary and subsidiary responsibility, etc. On such issues, little work has been done.

VI. Conclusion

Responsibility of transnational corporations for activities that cause harm to the environment is a multidimensional problem. They are scattered among different levels of regulation: between national and international levels and between public and private spheres of regulation. In this sense, responsibility of transnational corporations is a preeminent example of ‘multilevel governance’. In this complex group of forms of regulation, the role of public international law is modest. It leaves matters of responsibility to the private sectors and national law – perhaps because that is most efficient, perhaps also because, given the position of states, there is no real alternative. There appears to be limited support to develop rules that would directly regulate transnational corporations in the international legal order, and even less to develop international enforcement mechanisms. It seems that the role of international law will continue to be an indirect one that exerts its influence through the obligations and policies of states. Beyond this, the modest role of the international legal

79 At para. 18. 80 Ratner, op. cit. pp. 495, 519.
order is best seen as providing a somewhat incoherent framework for political decision-making that influences both national laws and policies and private arrangements within the private sector.

If international law were to develop in the direction of direct responsibilities of transnational corporations, critical questions need to be faced. These relate to the conditions of responsibility, the nature of responsibility (civil, criminal, or ‘international’), reparation, and its relationship to the responsibility of states. In literature, one senses an overestimation of the possibility to translate the law as it applies to states and other public entities to transnational corporations. As yet, there is a certain imbalance between the expanding literature on the topic of responsibility of transnational corporations on the one hand, and the embryonic understanding of the nature of such responsibility on the other.

Whether or not it is worthwhile to spend much time on developing proper concepts of international responsibility for corporations remains to be seen. The better approach would seem to be to strengthen the responsibilities of both home states and host states, to strengthen the regulatory power of states, and to improve coordination of national legal systems, for instance by clarifying rules on jurisdiction, applicable law, enforcement, transboundary access to decision-making, participation in impact assessment procedures, and access to courts. In that respect, it is national rules on responsibility and liability (although possibly guided by international law) that offer the best prospects to contribute to improved environmental performance of transnational corporations.