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Public and Private in Human Rights Protection

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Exploring Responsibility
Public and Private in Human Rights Protection



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Lund, March 2005

Magdalena Bexell

LIST OF ACRONYMS

ATCA	Alien Tort Claims Act
CEO	Chief Executive Officer
CSR	Corporate Social Responsibility
GNPOC	Greater Nile Petroleum Operating Company
ICCAF	Inter-Church Coalition on Africa
ICHRP	International Council on Human Rights Policy
ILO	International Labor Organization
IR	International Relations
NGO	Nongovernmental Organization
OECD	Organization for Economic Cooperation and Development
SPLA	Sudan People's Liberation Army
TCCR	Taskforce on the Churches and Corporate Responsibility
TNC	Transnational Corporation
UN	United Nations
US	United States

CHAPTER ONE

EXPLORING HUMAN RIGHTS RESPONSIBILITY

Aim of the Study

Introduction

The theory and practice of international relations are full of dilemmas related to the allocation of responsibility. Consider the presence of genocide, starvation, HIV epidemics, and global warming. Each raises a multitude of questions on the character of responsibility. Who is responsible to take action in response to these problems? What possible limits exist for the scope of our responsibility? How can we understand the character of responsibility in a global context as opposed to in more bounded communities such as the state and the family?

International relations theorists have traditionally dealt mainly with relations between states, and not paid much attention to examining the spheres of responsibility of a broader category of actors in world politics. The end of bipolarity led, however, to an ambition to give the responsibility to protect human rights a more prominent role in international politics. This gave rise to increased research interest in the role of human rights norms and nonstate actors in international relations. Along similar lines, students of international law increasingly debate how the established international legal order ought to relate to nonstate actors that do not have human rights responsibility under international law.

In this study, I examine boundary-drawing processes involved in the international distribution of responsibility for human rights protection. There are three main elements involved in human rights protection: the *rights holder*, the *content of the right*, and the *duty-bearer*. Theoretically, the first element is least controversial, since all human beings are regarded as being morally equal and having the same rights. The second element is becoming less controversial as the body of international standards on the content of human rights is expanded. The third element raises more issues, since the identification of duty bearers and the scope of their responsibility are still under discussion in many respects (International Council on Human Rights Policy, 2003: 14, cf. Brysk, 2005). This third element is the focus of this study.

Since the creation of the United Nations, as a result of the atrocities committed by state actors in the Second World War, human rights protection has been established in public international law and international organizations as the responsibility of the state. The globalization of economic, social, political and cultural arenas of society accentuates persistent challenges and opportunities for the international protection of human rights, however. Economic integration has grown in intensity, and market liberalization has expanded the role and influence of actors in the economic sphere (Cutler et al. 1999a: 6). Today there is a keen debate regarding the character of responsibility of a range of actors other than states, such as the international community, nongovernmental organizations, armed opposition groups, and the private economic sphere and its corporations. One suggestion frequently heard is that the power of those nonstate actors has increased, and that this ought to lead to an increase in responsibility for human rights protection (e.g. Robinson, 2003; Collier & Wanderley, 2005; Cragg, 2000; McCorquodale & Fairbrother, 1999; The International Council on Human Rights Policy¹, 2002: 10).

¹ The International Council on Human Rights Policy is an independent Geneva-based institute conducting research into problems facing organizations working in the field of human rights. The ICHRP is international in membership and consultative in its approach.

In order to study the dilemmas involved in the distribution of responsibility for human rights protection in a wider theoretical setting, this thesis focuses on the distinction between public and private, especially its institutional expressions in an international context. The distinction is a constitutive ordering principle of social life, although the terms public and private have a multitude of connotations that evolve over time (Weintraub, 1997). The public-private distinction underlies a variety of institutional settings and discourses outlining the character of different spheres of society. It is realized in social practice through the institutional relations of politics and law (Turler, 1992: 235). The distinction also shapes disciplinary boundaries outlining different academic fields of inquiry. In the field of study of international relations, the public sphere of interstate relations has traditionally been the focus of attention. Globalization processes have, however, produced new arenas of power and conflict, spilling across the public-private divide as well as national boundaries (Brysk, 2005: 119).

The present study centers primarily on the relationship between, on the one hand, the human rights responsibilities of states, and, on the other hand, the responsibilities of private actors in the market sphere, particularly transnational corporations (TNCs). Private sector actors such as transnational corporations become part of the wider context of conflict in countries with persistent human rights abuses and civil war, by operating in those countries. The decisions made by companies present in such areas may potentially affect the conflict in positive or negative ways (International Peace Academy, 2001: 4, Swanson, 2002: 13). Sometimes the warring parties finance their activities through exploitation of the same natural resources that are the reason for the presence of TNCs. Oil, for example, can be a source of conflict, or exacerbate existing conflict (Chandler, 2000: 16).

Ongoing discussions to define the character of corporate social responsibility (CSR) raise fundamental moral, legal and political questions. The idea of a social responsibility of business has a trajectory from the beginning of the 20th century, primarily in a national context.

In brief, CSR can be said to stand for the idea that business could and ought to contribute to a more just and healthier society (see e.g. Wood & Logsdon, 2001: 84). More recent are the strong transnational, even global, dimensions of business and the topic of responsibility. In this context, the concept of CSR is being reconstructed through discussions among academics, in corporate circles, in political arenas, and in public debates, in fora on global, regional and local levels. The new corporate rhetoric of “corporate citizenship” or “global citizenship” indicates a desire on the part of corporations to be perceived as ethically conscious. Such so-called corporate citizenship “is about business taking greater account of its social and environmental – as well as its financial – footprints” (Zadek, 2001a: 7).

Of course, there is a range of national laws regulating corporate behavior to different degrees in different states. The development of CSR aims, however, at broadening corporate responsibility beyond mere compliance to the law, and especially at making TNCs voluntarily behave responsibly in countries without effective enforcement of national laws. The concept of corporate social responsibility is usually taken to include more than human rights responsibility, for example environmental and broader social concerns. The United Nations’ *Global Compact*, for example, consists of ten principles in the areas of human rights, labor standards, the environment and anti-corruption, to which large businesses can pledge to adhere.² In this study, the focus is on the elements of CSR dealing with human rights protection, though as a matter of definition, it is understood to be a broader concept in line with the above.

² For more details on the Global Compact see <http://www.unglobalcompact.org>, Ruggie, 2002 and 2004, and Sahlin-Andersson, 2004. This is by far the largest voluntary initiative in the corporate social responsibility domain, containing almost 2000 transnationally operating companies in 2005, half of which are based in developing countries. In addition, UN agencies and a large number of local and global civil society organizations participate.

Many matters of principle are brought to a head when examining TNC responsibility in the human rights field. Their transnational as well as private character challenges the features of the international human rights regime. Whereas the assumption that the economic profit motive is an obstacle to socially responsible behavior is frequently questioned today, bringing corporations into authority structures related to social issues raises questions of democratic accountability and legitimacy. It also raises questions about how the responsibility of business relates to the continuing primacy of state responsibility and advocacy efforts at improving governments' human rights practices.

Aim of the study

The examination of the distribution of responsibility to protect human rights benefits from being studied from the point of entry of several different academic disciplines, for example law, ethics, economics, sociology and political science, with each discipline giving prominence to different aspects of the topic. Political scientists, I argue, can make a contribution to this interdisciplinary field of research by giving primacy to matters such as power relations, democracy, accountability, the political tensions involved in the spread of international norms, and the changing role of the state.³

The topic of corporate social responsibility has not been given adequate attention in the field of international relations, however. As indicated above, this present study examines the tensions involved in the topic of corporate social responsibility in an international setting through the prism of the public-private distinction. Accordingly, in the analytical context of this study, the public-private distinction is located at the more overarching level, and the issue of corporate social responsibility is considered as one area where renegotiations of the distinction can be examined. The general aim of this study is to contribute to the understanding of the tensions involved in the corporate social responsibility topic in an international context.

For analytical guidance, I outline a conceptual framework centered on the public-private distinction and central dimensions of the concept of responsibility. The approach of this study is in line with general social constructivist ideas in the social sciences regarding the examination of how distinctions, dichotomies and categories are constructed, how they operate and are manifested in social practice, and how they are sustained and challenged (see e.g. Peterson, 1992a: 7ff, Burr, 2003: 2-5, Börjesson, 2003: 18-22).⁴ In this broad tradition, the implications of the historical

³ I include the study of international relations as part of the political science field.

⁴ Social constructivism is a broad term, encompassing analytical assumptions at several epistemological and ontological levels. This study will not, however, provide an account of the range of social constructivist literature in different fields.

specificity and contingency of present institutional arrangements are emphasized, and it is examined how societal boundaries of various kinds are institutionalized and affect perceptions of available choices for political practice (e.g. Berger & Luckmann, 1966: 71ff, Mouffe, 2000: 5, 105). Central to this analytical endeavor is to examine how relations of power, authority and knowledge are manifested in prevailing constructions of societal affairs, for example through boundary-drawing processes (see, e.g., Foucault, 1980, Hacking, 1999: 58, Peterson, 1992a: 19, Alvesson & Deetz, 2000: 13, 41).

In line with this analytical approach, the central research question of the study is: “how is the public-private distinction manifested in controversy on the responsibility of transnational corporations operating in zones of human rights violations?” This question is addressed both through an examination of the topic of corporate social responsibility on a theoretical level and through a closer look at a specific case of controversy regarding corporate responsibility.

For the case study, I have chosen not to examine the formal mechanisms of the wide range of existing CSR initiatives per se, such as partnerships, codes of conduct, or the work undertaken in international organizations. Instead, I examine a debate on responsibility for human rights protection in a concrete instance of human rights violations. Studying responsibility in an actual context of human rights violations makes the issue come to a head, and provides a more revealing picture of the politics and tensions involved in the governance of the human rights field. The focal case is the international controversy taking place between 1998 and 2002 concerning the operations of the Canadian-headquartered oil extraction company *Talisman Energy* in the context of the human rights violations committed by the parties to the civil war in Sudan.⁵ The concluding chapter of the study also contains brief

⁵ The reasons for choosing this case are provided in section 1.2

references to debates on the responsibility of other transnational oil companies in similar situations.

Responsibility can be distributed, internationally and domestically, according to different principles, such as legal and moral principles of various kinds. This study does not undertake a legal analysis of responsibility such as those surrounding the concept of corporate social responsibility in the academic field of international law. Nor does the study amount to an analysis of responsibility situated in the field of ethics. Instead, it performs an analysis of human rights responsibility by utilizing a vocabulary and conceptual framework of political science, as it centers on examinations of responsibility in relation to concepts and practices of public and private, power, authority, and accountability. In this setting, notions of legal and moral responsibility interact, and their role in controversies on the distribution of human rights responsibility can be analyzed in tandem, without implying an ambition to solve legal and moral uncertainties.

In sum, this study demonstrates what political scientists can contribute to the study of human rights protection, which is an area of study where interdisciplinary meetings are vital. It also demonstrates that a classic mind-set and vocabulary of the field of international relations run into problems when trying to grasp renegotiations of the public-private divide arising from the issue of corporate social responsibility.

Methodological Considerations

Conceptual framework, CSR analysis, and case study

The conceptual framework outlined in Chapter Three and Chapter Four of this study provides an analytical approach that guides the interpretation of the topic of corporate social responsibility (in sections 5.1 and 6.1) as well as the examination of the debate surrounding Talisman Energy (in sections 5.2 and 6.2). Accordingly, the study contains three levels of abstraction. First, at the most abstract level it contains a conceptual framework centered on the public-private distinction and responsibility. Second, at a less abstract level, it includes a theoretical examination of the CSR topic, guided by the previous level's framework. Third, at the most concrete level, it contains a case study guided by both preceding levels. The framework identifies an interpretative approach to the public-private distinction and provides analytical distinctions for examinations of responsibility. It helps us discern and interpret central conflict dimensions that are politically, morally and legally charged, relating to the character of corporate social responsibility and the operations of Talisman Energy in Sudan.

The conceptual framework is developed through a combination of literature on public-private and responsibility, drawn from the fields of political science, sociology and international law, and based on the same points of analytical departure as this study. The framework of this study can, arguably, guide analyses of other cases of debates on corporate social responsibility as well. It can be used to frame research questions, make assumptions, and guide interpretation. Obviously, contextualization is necessary to understand the full range of complexity in each individual case examined. Shared moral, political, economic and legal tensions and dilemmas appear in many contemporary cases of debates on corporate responsibility, however. By now global standards and initiatives concerning corporate social responsibility exist internationally, as well as increased moral pressures on transnational companies to behave responsibly. This implies that such companies

often face similar expectations and pressure. Both global CSR standards and standards relating to specific industry sectors, such as the oil sector, have proliferated over the past decade.⁶

A common criticism raised against case studies concerns problems related to generalization and the representativeness of a single case. Therefore, some comments on this are appropriate here. In this study, the first parts of Chapter Five and Chapter Six address general CSR dilemmas that are common to many industry sectors. At its most general level, the debate surrounding Talisman Energy also contains elements that are representative of a broader class of controversies on corporate social responsibility. What tensions and dilemmas are most prominent, and how they are manifested, will vary from case to case, though.

At the same time, critical choices and dilemmas concerning responsibility differ among industry sectors.⁷ The debate surrounding Talisman Energy should therefore primarily be considered representative of debates surrounding transnational corporations in the oil sector, headquartered in the Western hemisphere, that operate in zones of human rights violations. The debate on Talisman Energy is representative of debates surrounding such transnational oil corporations in that the topics of criticism are similar to many such debates, in that the assortment of actors criticizing the company is similar to that in other such debates, and in that the company, like others, has had to work out an approach to CSR issues over a relatively short period of time in response to a wave of criticism. The simple fact that a debate arose at

⁶ Examples of global general standards are the ten principles of the UN Global Compact, the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* of the International Labor Organization, and Amnesty International's *Human Rights Guidelines for Companies*. Examples of industry-specific standards are the *Code of Conduct – Guiding Principles* of The World Federation of the Sporting Goods Industry and the *Voluntary Principles on Security and Human Rights* elaborated by the governments of the US and the UK, companies in the extractive and energy sectors and NGOs.

⁷ The specific preconditions of the oil sector will be presented in the next section.

all makes this case share a feature with other debates. In addition, it is similar in that the company has been the subject of a class action lawsuit in the United States, as have several other oil companies.

One advantage of case studies is that they allow for the analysis of actual social processes more than do other modes of research. They are conducted over a period of time, which makes it easier to capture and analyze events, interactions, relationships, groups and institutions as they evolve over time. Case studies provide an ability to grasp change and acquire a clearer fix on interactions affecting change, unlike cross-sectional studies involving samplings at a single point in time (Snow & Anderson, 1991: 160). The case study allows the researcher to examine complex webs of social interaction, and the ebb and flow of social life over time. It can also be important in generating new ideas and theories in the field of social science (Orum et al., 1991: 9-13). The picture emerging from the examination of this case points to factors and dimensions to look for in other cases as well. The case study points to themes to elaborate on, theoretically and empirically, in further studies. This is similar to what Harry Eckstein (1975: 99-104) calls a “disciplined-configurative” case study, in which the theoretical base of case interpretation should always be made explicit, and which can point to a need for new theory in neglected areas.

As pointed out by Bent Flyvbjerg (1991: 149), formal generalization has traditionally been overvalued as a source of development of a scientific field, whereas the power of a good example has been undervalued. The generalizing tendencies taking place as researchers sum up their work in theoretical frameworks is characteristic of research, researchers and theories, though not of the object of study: society and societal actors (Flyvbjerg, 1991: 157). Rejecting the pursuit of law-like generalizations does not imply a rejection of more contingent generalizations, since attempts to understand domination, resistance, inclusion and exclusion in world politics, and the potential for meaningful transformations, may well demand such generalizations (Price & Reus-Smit, 1998: 275).

In this study, the examination of the case does not aspire to be a basis for judgments on theoretical discussions in terms of right or wrong, but to provide a contextualized understanding of how the theoretically advanced themes are manifested and made even more complex in social practice. The usefulness of the analytical framework for guiding the inquiry and for interpreting its findings is put to the test through the examination of the case, however.

I end this section with a brief note on epistemology. Systematic inquiry and comparative evaluation of intellectual and normative claims are by no means precluded by a move to post-positivism (Peterson, 1992a, Smith 2002: 35ff). Through intersubjectivity, deliberation and controversy, conventions and standards in academic research are crafted that can provide common frames of reference, even if not of agreement. Recognition of the embeddedness of the social science enterprise in power relations, time and space, does not entail relativism in the sense that “anything goes”. An awareness of the constructed character of knowledge does not (necessarily) imply a complete relativism in terms of the underpinnings of social inquiry (e.g. Winther Jørgensen & Phillips, 2000: 153ff, Alvesson & Deetz, 2000: 55, Flyvbjerg, 1991: 65-67). Adhering to this line of thought, I agree that:

the key issue is not accurate representation, but is interpretation, and interpretation without the possibility of ever pronouncing definitively on which one is correct (Smith, 2004: 514).

The recognition that the study of societal affairs cannot be value-neutral does not, I believe, exclude the possibility of normative analysis and methodology as a distinct analytical undertaking. Such analysis and methodology are not employed in this study, however. Building a coherent normative analysis on the most appropriate way of distributing

human rights⁸ responsibility is analytically and methodologically another enterprise than the approach taken in this study.

⁸ The intricacies of the concept of human rights will not be elaborated on in this study. See instead, for example, *Sovereignty, Rights and Justice. International Political Theory Today* by Chris Brown (2002) for a discussion of, among other things, the tensions between universalist and relativist human rights claims in an international political context.

Motivating the choice of the debate on Talisman Energy

There are several reasons for choosing to focus on the case of the debate surrounding Talisman Energy in Sudan.⁹ The *first* reason is that it illustrates a set of problems in a situation where it is not clear-cut what the appropriate character of corporate responsibility ought to be. It thereby helps us examine the dilemmas and balancing acts involved in the drawing of boundaries of human rights responsibility. Since it is not a question of violations committed directly by the corporation, but by the parties to the Sudanese civil war and Sudanese security forces, it is a case where moral notions such as complicity instead have a central role in debating the character of responsibility.

A *second* reason is that the case has a strong transnational dimension involving both influential private and public actors on the global arena. It thereby helps us examine the interactions between the range of actors nowadays participating in the webs of global governance of the human rights sphere.

A *third* reason is that the debate contains a mixture of legal, political and moral arguments and attempts at demanding both political and legal accountability, which makes it suitable for this thesis, located at the intersection of the study of international relations and international law.

Its clear delimitations in time is a *fourth* reason to choose this case, beginning in 1998 when Talisman Energy started its operations in Sudan, and ending in early 2003 when the company sold its Sudanese assets and left the country. This relatively brief time period facilitates an examination of the entire debate process. The examination of the process is limited in time and space, and the focus is both on the participating actors and the surrounding institutional context. Actors

⁹ A brief chronological overview of the debate process will be given in section 2.2, in order to facilitate the non-chronological examination of the debate in later chapters.

are considered partly shaped by the structures, context and arenas in which they act, while the structures in turn are affected by the undertakings of actors. This process focus facilitates an examination of conflict and dissension, and of how order is shaped, without implying an ambition to find underlying “real” motives of participating actors. Since the empirical material is presented in some detail, the reader can evaluate the researcher’s conclusions and claims (see Alvesson & Deetz, 2000: 223-228).

A *fifth* reason for choosing this case is that it merits more academic interest in itself on moral grounds. Despite the attention paid to it by advocacy groups, it has not been the subject of much academic attention, compared for example to the more famous case of Shell in Nigeria. The scales of the human rights violations committed, by the government’s forces and militias as well as by the armed opposition groups, in the Sudanese civil war during the time period concentrated on in this study in themselves motivate focusing on this case.

Finally, a *sixth* reason for choosing this case is that it sheds light on the specific preconditions that transnational companies in the oil sector face in the CSR area when operating in zones of human rights violations. Thereby, the case contributes to the understanding of CSR issues specific to the extractive sector, including oil, gas and mining companies, being a natural resource-based industry with large and long-term infrastructural investments in their country of operation. As extractive assets are geographically specific and impossible to move in the face of changing circumstances, and concession agreements are usually long-term, the extractive sector faces its specific preconditions for dilemmas of responsibility (International Peace Academy, 2001: 6).

If conflict increases, it is often significantly more expensive for oil companies to withdraw from a country than it is for most other types of industries, for example the manufacturing industry. This is due to the scale of oil company investments in production facilities, support infrastructure and pipelines (Swanson, 2002: 23). Several factors thus contribute to explaining why the oil industry is often involved in

controversies related to complicity in human rights violations: they must go where resources are found, they must plan for long-term and capital-intensive projects, and they must operate in partnerships with governments. In addition, energy supplies such as oil are strategic commodities and important for the economic development of states, security interests and international relations (Ganesan, 2000: 48).

In sum, the examination of this case furthers our understanding of the multitude of political, legal, economic and moral tensions involved in defining the scope of corporate social responsibility. However, the context and process surrounding the case is, obviously, unique. The unfolding of debates on corporate social responsibility varies from case to case, even though, at a more general level, the themes of such debates are often similar.

Debate analysis and the text material

As explained earlier, this study contains three different levels of abstraction. At its most concrete third level, the debate surrounding Talisman Energy in Sudan between 1998 and 2002 is examined, in order to obtain a richer and more contextualized understanding of how the public-private distinction is manifested in controversy on the allocation of responsibility for human rights protection. The study of this debate draws upon a range of text sources. All text material used is publicly available, since the object of study is a debate process in publicly accessible arenas. In sum, the material consists of reports from global and local NGOs, reports from Canadian investigation missions, newspaper articles, reports from the UN Special Rapporteur on the situation of human rights in Sudan, reports and news releases from Talisman Energy, oil industry journals, and books and articles containing references to Talisman Energy.

The examination of the debate surrounding Talisman Energy's operations in Sudan is best characterized as a debate analysis, where the ideas and arguments are examined in the context of the course of political events surrounding and shaping the debate process. It fits into the broad tradition of idea analysis in the social sciences, where one line of inquiry centers on relating the analysis of ideas to the surrounding social context and its power relations (as described in Bergström & Boreus, 2000: 165, 175). The term *idea* then refers to perceptions both of reality and of normatively desirable courses of action (p. 148). I do not undertake a close reading of a more limited number of texts as could have been done if the purpose was to do an argumentation analysis examining logics and chains of evidence, or a discourse analysis. However, a discourse analysis would also have provided rewarding interpretations of the texts in focus, especially as this study shares its general points of departure with many of the assumptions underlying different traditions of discourse analysis.

Texts such as those used in this study do not straightforwardly mirror a reality existing independently outside the text; rather, they

shape and construct worldviews and perceptions of reality. Texts express the thoughts, ideas and reflections of their authors, and they form part of social processes and relations as they perform actions through making demands and providing information (Bergström & Boréus, 2000: 16). Textual analyses underpinned by social constructivist assumptions often aim at examining how problems are framed and structured and what solutions are enabled or legitimated through the manner in which the problem is conceptualized (Hellspong, 2001: 147-156).

For analytical purposes texts can be considered to have a *textual* structure, an *ideational* structure and an *interpersonal* structure. In addition, an understanding of the specific cultural *context* where texts are developed and form part of social processes is important for analyzing texts. The first structure concerns grammar, syntax and text composition. The second concerns thematic content, statements, propositions, assumptions, and perspectives. The third structure concerns the communication of, for example, appreciation, consent, prohibitions, instructions, or requests. It also constructs a social framework setting the frames for interaction with its readers (Hellspong, 2001, Ch. 3).

In this study, the focus is on the ideational and the interpersonal structures, while the textual structure is not dealt with. In addition, the political and social context of the debate is central to the study. The purpose of the case study on controversy on human rights responsibility is thus to examine conceptualizations of the public-private distinction in the human rights sphere by studying the ideas and arguments expressed or reported in the material through the interpretative prism provided by the broader framework of this study.

The principle guiding the selection of material has been to include material from all participating actors in the debate process in order to encompass the full spectrum of views.¹⁰ This means that all newspaper articles I have found reporting on the debate process are not included if

¹⁰ The views of representatives of the Sudanese regime have only been available through media reporting and protocols from debates in United Nations fora.

they overlap in the content of reporting with many other articles. The same applies to instances where an actor participating in the debate has expressed arguments in similar directions in reports or statements in several channels.

Since the object of empirical study is the arguments of a clearly delimited debate such as they appeared in written form through publicly accessible fora at the time, I have chosen not to conduct interviews. The study does not have an ambition to go behind public texts and uncover hidden motives or unofficial views of participating actors, which might have been a motive for conducting interviews. Some of the material collected is already based on a large number of interviews, undertaken primarily by NGOs, UN Special Rapporteurs and other foreign investigation missions in Sudan, as well as by journalists. This gives the opportunity to use a large material based on information, including numerous interviews, that would not have been possible for one individual researcher to accomplish. Again, statements appearing from interviews made by others, for example in newspaper articles, were, as they appeared at the time, one element of the debate process.

The material will here be presented in greater detail. We can start with the main reports by the largest, best-known human rights NGOs: *Sudan, Oil, and Human Rights* by Human Rights Watch (2003), *Sudan: The Human Price of Oil* by Amnesty International (2000), and *The Scorched Earth: Oil and War in Sudan* by Christian Aid (2001). In addition, statements by smaller nongovernmental organizations such as the Inter-Church Coalition on Africa and the Taskforce on the Churches and Corporate Responsibility are included.

Reports of the various investigation missions that were undertaken during the time period in focus are also studied, such as *Human Security in Sudan: The Report of a Canadian Assessment Mission*, (2000, prepared for the Minister of Foreign Affairs, Ottawa), *Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan* (October 2001, commissioned by several agencies, e.g. the Canadian Auto Workers Union, World Vision Canada and others), and

Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy (January 2003, a joint initiative of Canadian research councils and the Law Commission of Canada).

The reports produced annually between 1999 and 2002 by the UN Special Rapporteur of the Commission on Human Rights on the situation of human rights in Sudan provide an additional source.

The material produced by the company Talisman Energy consists of its four annual reports on corporate social responsibility (from the year 2000 to 2004) and a couple of news releases. Statements by company representatives are also collected through newspaper articles reporting on the debate.

Newspaper articles reporting on the debate content and process are primarily taken from Canadian newspapers such as the *Globe and Mail*, *Report/News magazine*, and *Time Canada*. Journals of the oil industry such as the *Oil & Gas Journal* and the *Petroleum Economist* have provided articles as have economic magazines such as *The Economist*, *Canadian Business* and *African Business*.

Finally, two articles from academic journals (Idahosa, 2002, and Macklin, 2003) and a chapter on Talisman Energy in the book *Making a Killing: How Corporations Use Armed Force to Do Business* by journalist author Madelaine Drohan (2004) are also used as sources for the case study.

Outline of the Study

The aim of the study and its overarching analytical approach have been presented in *Chapter One* along with methodological considerations concerning the three different analytical levels of the study: the conceptual framework, the theoretical analysis of corporate social responsibility, and the examination of the debate surrounding Talisman Energy.

In *Chapter Two*, I locate the study in relation to the main fields of literature it draws upon, namely the study of human rights in international relations and the study of corporate social responsibility. I argue that the recent expansion of literature on human rights in international relations displays a lack of attention to other possible duty bearers than states, reflecting the traditional state centric mindset of international relations theory. The topic of corporate social responsibility implies a challenge to this mindset and to a range of constitutive distinctions that have shaped the IR-field. The present study makes a contribution to the multidisciplinary field of study of corporate social responsibility by putting the public-private distinction in focus, thereby locating the issues grappled with in this field in a wider theoretical setting and a longer time perspective.

In *Chapter Three*, I outline the study's approach to the public-private distinction, beginning with a brief historical outline of the development of the distinction. I point out that the distinction is not seen in dichotomous terms in this study though the terms are mutually constitutive and only assume meaning in relation to each other. Notions of what are the "natural" characteristics of public and private spheres of responsibility assume a taken-for-granted quality through their institutionalization in the organizations of social order. Institutionalized legal notions of public and private empower and shape knowledge of what the natural spheres of responsibility are for different kinds of actors. The relationship between the public-private distinction and boundary drawing between what is framed as political or nonpolitical matters is characterized as highly ambiguous.

The second half of Chapter Three is concerned with the public-private distinction in an international context. I elaborate on the relationship between public and private authority in webs of global governance and in the framework of international law. The pluralization of authority relations at the global level and the expansion of private sector self-regulation and standardization challenge the association of authority with public actors that are accountable through political institutions. References to states and the state system, the central analytical focus in international relations theorizing, incorporate constructions of public and private. Public-private is also one of the constitutive distinctions structuring international law. Notions of appropriate public and private responsibilities are institutionalized through the international legal edifice and thereby become subject to inertia to change.

The concept of responsibility is in focus for *Chapter Four*, where I distinguish between prospective and retrospective responsibility. The term responsibility is used in the study when referring to the obligations attached to a role in a forward-looking sense. In both practice and theory, we find limits to responsibility based upon a range of principles. The chapter explains that this study does not single out any particular such principle for analysis, but looks at the rich tapestry of responsibility principles facing actors in each particular situation. The chapter also opens up the question of the relationship between the moral agency of individuals and of organizations such as transnational corporations.

The second half of the chapter concerns the term accountability, which is used to refer to the backwards-looking sense of being held to account for how one has exercised one's role-responsibility. The public-private distinction shapes perceptions of the direction of accountability but the grip of the distinction is increasingly challenged by globalization processes and the spread of private regulatory authority. Together, Chapter Three and Chapter Four provide the conceptual framework of the study.

In *Chapter Five* the interpretative prism provided by the framework is employed to examine how the public-private distinction is manifested

in the distribution of responsibility for human rights protection. The chapter first examines this at a theoretical level, where I demonstrate how legal discourse and organizational practice reproduce the distinction between public sphere and private sphere responsibility. This is challenged, however, by claims that an increased influence of business and other private actors ought to be coupled to a less state-based framework for human rights protection. I also examine the development of corporate self-regulation and soft law mechanisms, located somewhere in between “hard” law and moral pressures. I point to the notion of a possible indirect responsibility for actions of others to whom an actor has a special connection. In the case of transnational corporations operating in zones of human rights violations committed by governments, such indirect responsibilities lead to charges of complicity.

In the second part of the chapter, I demonstrate how the public-private distinction is manifested in the controversy surrounding the responsibility of the Canadian headquartered oil company Talisman Energy in Sudan. In this controversy, the boundary between public and private responsibility is found to be a site of struggle. Reconfigurations of authority and power relations challenge the legitimacy of international law and organization. The examination of the debate on Talisman Energy helps us discern an emerging global public domain of action where nonstate actors such as transnational corporations and advocacy NGOs interact and set agendas and standards. We also see elements of contestation and antagonism, instability and inconsistency, challenging the boundary between public and private in human rights protection.

Chapter Six examines how the public-private distinction is displayed in the accountability dimension of corporate social responsibility. The diversification of mechanisms for holding corporations accountable is scrutinized in light of the principle of democratic accountability. A range of other accountability mechanisms has developed to hold transnational corporations accountable for their impact on social conditions. This expands the terrain of accountability in zones of

human rights violations where transnational corporations are present. Outside formal public accountability channels, we see in the chapter examples of powerful accountability mechanisms present in the case of Talisman Energy, drawing upon the private moral authority of human rights NGOs and church groups, aided by the media. Though initially met with disregard, those accountability mechanisms led to changing practices by the company over time. This points to private regulatory authority as a form of governance of the human rights area, testifying to a pluralization of authority relations and overlapping networks of authority. It indicates that the territorial boundaries of accountability systems related to human rights are slowly becoming recast into a less territorially defined transnational sphere of action, influence and answerability.

The final *Chapter Seven* summarizes the conclusions of the study and relates them to examinations of other debates on the responsibility of TNCs in zones of human rights violations. I discuss the notion of complicity, which is found to occupy a central role in such debates. The chapter also contains a reflection on continuity and change. Finally, I propose themes for further study on human rights protection, responsibility and accountability in international relations.

CHAPTER TWO

LOCATING THE STUDY

In this chapter, the study is located in the context of the main fields of academic inquiry it relates to, namely the study of responsibility and human rights norms in international relations and the study of transnational corporate social responsibility. The chapter also contains a brief overview of the unfolding of the debate surrounding the responsibility of Talisman Energy in Sudan.

The Study of Responsibility and Human Rights in International Relations

The dominance of the realist approach

International relations theorists have traditionally dealt mainly with relations between states and not paid much attention to discussing issues of the moral responsibility either of states, or of a broader category of actors in world politics. The discipline of international relations has defined its core concerns through a separation of the outside of a state from the inside, of economics from politics, of the public from the private, and of the moral from the practical, thereby privileging the study of some forms of violence in world politics at the expense of others (Smith, 2004: 510). Distinctions between community and anarchy, order and justice, international relations theory and political theory, the normative and the empirical, and between ethics and international relations, have shaped the discipline (Walker, 1993: 13-18, 50f, 73). The

point of departure of this study, however, is in line with R.B.J. Walker's claim (1993: 64) that "ethical principles are both constitutive of and central to international relations rather than just a marginal afterthought".

We ought to keep in mind the post-Second World War dominance of the theoretical approach of *realism* in the study of international relations. In this state-centric line of thought, a state is required to do what is most conducive to the survival of the state, as governments always have an overriding obligation to their own citizens to promote their interests. Clearly, the realist tradition is not amoral, but contains normative statements outlining the scope of responsibility. Norms that develop in international relations are, however, considered maxims of prudence to be abandoned when prudence so requires (described by Donnelly, 1992).

The realist tradition is also characterized by a skepticism concerning the possibility of international law to constrain the actions of powerful states. Rather, international rules and institutions are described as a tool interpreted by the powerful in their best interest (see e.g. Mearsheimer, 1994). The retention of such a power-law dichotomy has blocked developments towards a more sophisticated conceptualization of the significance of international law for international relations (Scott, 1994: 313). Going beyond this does not mean, however, to abandon the analytical point of departure that institutional practices, such as those pertaining to international law, are deeply structured and permeated by politics (Reus-Smit, 2004a: 36).

Writings focusing explicitly on theoretical and practical dilemmas related to human rights and responsibility within an academic international relations discourse were rare until the 1990s. The exception was the so-called English School established by scholars such as Hedley Bull (1977) and John Vincent (1986). The end of the Cold War and the expansion of military interventions for allegedly humanitarian purposes led, however, to a renewed and broader academic interest in studying dilemmas related to responsibility and human rights in an

international context. Writings on the interventions of the 1990s raise central issues of responsibility in an international context, usually in a state-centric perspective (e.g. MacFarlane et al., 2004, Evans and Sahnoun, 2002). Chris Brown (2004: 6) observes that the idea that great power status brings great responsibility is firmly established in the popular consciousness, primarily by virtue of such states' larger capacity to act. However, Brown (2004: 10ff) points out that from a (neo)realist perspective on international politics, the notion that power brings with it responsibilities does not carry much weight, since the notion of an international society does not make much sense in this perspective.

In tandem with the question of intervention, the study of various other aspects of human rights protection in an international setting proliferated in an international relations context after the end of bipolarity. The study of the role of norms, such as human rights norms, in international political processes, is by now a topic that is well established in the field of international relations. It is argued and demonstrated that states are influenced by shared understandings about appropriate behavior in addition to material factors and the distribution of power. This has added to existing criticism of realist international relations theory and has provided an incentive for an increasing number of international relations scholars to take an interest in international legal scholarship, and vice versa.

The influence of interdisciplinarity and IR constructivism

The renewed interest in interdisciplinary approaches reflects both perceived changes in international relations practices and diverse intradisciplinary dynamics in the fields of study of international relations and international law (see Slaughter et al. 1998 for an overview of this development, and the special issue of *International Organization* on legalization and world politics¹¹). Whether framed in terms of global governance, international regimes, international institutions, international norms or legalization of international relations, the phenomena studied in both fields are the patterns and tensions of the social, legal and normative framework of international society. The present study is part of the expansion of literature in the international law – international relations nexus. A critical understanding of international law requires recognition of both its consensual and coercive faces, and its character as a source of both conservatism and transformation (Cutler, 2003: 261).

In the academic study of international relations, a particular variant of constructivism has been carved out over the past decade as an approach to this field of study. It challenges a rationalist account of norms in insisting that identities and interests are not exogenously given but constituted through interaction. Such constructivist perspectives usually emphasize the mutual constitution of actors and structures, the interplay between normative/ideational and material structures in world politics, as well as the role of identity in the constitution of interests and actions (Price and Reus-Smit, 1998: 266-267).

The general approach of constructivism is, obviously, not a substantive theory of (international) politics per se, but a meta-theory on which constructivist theories of international politics can be based (Adler, 1997: 323). In an International Relations setting, however, constructivists do make assumptions and claims concerning the

¹¹ *International Organization*, Special Issue, vol. 54, no. 3, 2000.

subject matter as such, for example concerning the processes of norm dissemination internationally (see, e.g. Risse, Ropp & Sikkink (eds.), 1999, Keck & Sikkink, 1998). This has facilitated the rapprochement to the study of legal and other norms in the international system.

The main contributions of the rise of constructivism as employed in the field of International Relations, I believe, is the opening up for new kinds of research questions and widened meta-theoretical reflection. I agree, however, with the criticism voiced by Steve Smith (2000) of recent IR versions of constructivism along the position elaborated by Alexander Wendt (1999) in that those retain too much of a positivist epistemological stance and rationalist assumptions concerning ontology. Instead, Smith (2004: 503) emphasizes that there is no such thing as a value-free, non-normative social science and that there is no purely academic perspective isolated from ethics and power. All analytical perspectives, for example in the field of international relations, make assumptions about actors, identities and interests, and contain a mixture of statements about what is and what ought to be.

Few of the bridge-building efforts between the disciplines of international relations and international law contain a critical reconsideration of the basic concepts on which the bridge is supposed to be built. Dominant approaches in the two fields share three tendencies that reproduce a state-centric view of the global polity, obstruct the recognition of nonstate subjects and reject the moral foundations of law. First, a hierarchical model of rule borrowed from the domestic legal order renders the conceptualization of pluralism in legal regulation difficult. The second is a legal formalism that associates authority with the state as the subject and source of international law. Thirdly is a belief in the autonomy of the law as a self-contained order independent of influences from social, political, economic, moral, and religious spheres (Cutler, 2003: 73).

Along similar lines, David Kennedy (1999) claims that the convergence of the fields of international relations and international law has shaped a narrow consensus with common blind spots and biases.

For example, a shared sense that public order must be made by politics, and that private order builds itself through the work of the economic market, leads to an overestimation of the impact of globalization on the capacity for public governance (Kennedy, 1999: 105). Both disciplines, according to Kennedy (1999: 132), overemphasize the disconnection between public and private and the distinction between local culture and global governance.

In the literature on human rights in international relations, the focus is frequently on state behavior and transnational advocacy efforts to improve governments' human rights practices (e.g. Risse, Ropp, Sikkink, eds., 1999). The nonstate actor most often examined in academic studies is nongovernmental organizations aiming at improving states' human rights practices. The efforts of such NGOs participating in norm-formulation and compliance monitoring have been the focus of many recent studies, frequently promoting an IR version of a social constructivist approach (e.g. Keck & Sikkink, 1998; Price, 1998).

In comparison, little attention has been given to other nonstate actors that affect human rights in positive and negative ways, such as individuals, transnational corporations and other market actors, and armed opposition groups. The recent expansion of literature on human rights in international relations displays a lack of attention to other possible duty bearers than states, the party responsible under international law to fulfill human rights. Strikingly, two recent edited volumes on the politics of international law (Byers, 2000 and Reus-Smit, 2004), bringing together a number of influential international legal theorists and international relations scholars, do not touch upon the issue of corporate social responsibility, or the wider issue of the role of the transnational business sector in the topic examined.

However, the theme of corporate social responsibility increasingly receives attention from within the field of international relations, primarily through important works such as *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Hauffer, 2001), *Human Rights and Private Wrongs: Constructing Global Civil Society*

(Brysk, 2005) and “Reconstituting the Global Public Domain – Issues, Actors, and Practices” in *European Journal of International Relations* (Ruggie, 2004). Those are drawn upon in the present study. There also exists a growing body of research related to individuals (e.g. Simma & Paulus, 1999; Hawthorn, 1999) and to nonstate armed opposition groups (e.g. Nair, 1998; Zegveld, 2004), mainly located in the field of international law.¹²

In conclusion, the public-private division has profound significance for political scientists, including international relations scholars, in that the field of study of political science has been constituted by reference to the public sphere of politics and distribution of power. No shared understanding of the place occupied by the massive global corporate sector in world politics exists in the IR discipline (Ruggie, 2004: 500). Theories and literature remain surprisingly state-centric in spite of the impact of the corporate world on regulation and governance (Sahlin-Andersson, 2004: 129-131).

This study makes a contribution by focusing on the public-private distinction and examining the character of human rights responsibility of a nonstate actor, transnational corporations, that has not been given much attention in literature on responsibility, human rights and international relations. It contributes to the expansion of literature in the international law-international relations nexus, especially by not having a state-centric focus of inquiry. In addition, studying debates between several different nonstate actors such as NGOs, transnational corporations and the media, and state actors such as representatives of international organizations and individual states, helps us grasp the evolving patterns of the governance of the human rights area globally.

¹² The launching of the journal *Nonstate Actors and International Law* in 2001 also indicates this.

The Study of Transnational Corporate Social Responsibility

Research on corporations and social responsibility

References to the question of a social responsibility of business have appeared since the early 20th century. The evolution of the construct of corporate social responsibility from the beginning contained a concern with the power of business and the impact this power had on the lives of citizens. Against this background, it was discussed what responsibility to society businessmen reasonably ought to assume (Carroll, 1999: 269-71). Definitions of CSR and arguments for and against businesses being socially responsible proliferated in the 1960s and 1970s. There were also empirical examinations of the types of CSR activities in which corporations engaged. In the 1980s, writings on corporate responsibility fragmented into streams of literatures on the topic, such as business ethics, stakeholder management, and corporate social performance (Carroll, 1999: 284). From the 1990s onwards, writings on concepts of stakeholder theory and (global) corporate citizenship, as well as their more concrete applications, came to fore (e.g. Matten et al., 2003, Zadek, 2001a and 2001b, Andriof & McIntosh, 2001).

The post-Second World War era brought a couple of cases of corporate lack of responsibility for human rights to public attention. In the Nuremberg trials, representatives of I.G. Farben were found guilty of war crimes because of the company's use of forced labor in Nazi Germany. The role of the us-based United Fruit Company in the overthrow of the government in Guatemala in 1954 was heavily criticized, as well as the role of us-based International Telephone and Telegraph in the overthrow of the Allende government in Chile in 1973. In the 1970s and 1980s, several companies were criticized for investing in South Africa during the apartheid regime (Ganesan, 2000: 47). Unlike these instances of criticism of specific companies, whole industries, like the oil industry, have been criticized in the 1990s for complicity in human rights abuses.

The present study is concerned with examining how the public-private distinction is played out in the question of *transnational* corporations' responsibility for human rights protection. It will therefore focus upon literature dealing more or less explicitly with the responsibility of transnational corporations, usually headquartered in the West, when locating their operations in countries where human rights violations are widespread and persistent, usually in the global south. However, at a general theoretical level, many of the issues surrounding, for example, the relationship between public and private, ethics and economics, and power and responsibility, appear in both the domestic and the international contexts.

The literature on corporate social responsibility in a global context is interdisciplinary in character. It contains a mixture of ethics, economics, law and political science, as well as of normative and empirical/theoretical examinations and claims. The role of transnational companies in global affairs became more visible through the increase of literature dealing with various aspects of globalization processes, such as implications of shifts in power relations between states and the transnational business community (e.g. David C. Korten, 1995, *When Corporations Rule the World*, and Susan Strange, 1996, *The Retreat of the State: The Diffusion of Power in the World Economy*).

Equally, literature on the links between business operations and armed conflict is a field of analysis that is under expansion. The political economy of natural resources in armed conflict in general is examined, for example, by Terry Lynn Karl in *Oil Booms and Petro-States* (1997) and by Karen Ballentine and Jake Sherman in *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (2003). A concept of "corporate conflict prevention" is introduced as the relationship between public actor diplomacy and possible private sector contributions to preventing armed conflict is developing (see Haufler, 2004). In this context, Hocking (2004: 149) perceives both a "privatization" and a "publicization" of foreign policy and diplomacy. Privatization is visible in the sense that different issue areas of governments' foreign policy

agendas demand linkages with nonstate actors, eroding the distinction between public and private in the management of foreign policy. The publicization consists in an increased need to engage in communication with publics, so called strategic public diplomacy.

A main part of the CSR literature examines organizational efforts at increasing corporate responsibility, such as the possibilities and limits of various CSR initiatives (Ruggie, 2002), the development of international norms and codes on CSR (Muchlinski, 2003, Addo, 1999), as well as problems involved in the actual implementation of CSR (Wheeler et al., 2002, Kapelus, 2002), such as partnerships and different instruments for evaluating actual CSR performance (Nelson, 2002), and corporate self-regulation (Hauffer, 2001). Another part of the field of study of corporate social responsibility contains debates on the relationship between international human rights law and transnational corporations, and includes different legal interpretations of this relationship (see for example Ratner, 2001, International Council on Human Rights Policy, 2002).

At the policy-oriented level, the literature is expanding rapidly as several organizations work to develop policy recommendations for corporations on how to act when operating in conflict zones. Examples of such organizations are International Alert and the Prince of Wales Business Leaders Forum and research institutes such as the International Peace Academy, producing a large number of reports and case studies on the topic (for example Banfield, Hauffer & Lilly, 2003).

The more specific CSR context of interest to this study concerns the responsibility of transnational companies in the oil sector, when operating in zones of armed conflict and pervasive human rights violations, which are usually committed by non-democratic regimes and armed opposition groups. Case studies and general examinations of transnational oil companies in zones of human rights abuses and armed conflict have been undertaken both by human rights advocacy groups, by policy oriented research institutes, and in academic literature. The topic has been given increasing attention in the past decade as specific

cases have accentuated the responsibility of TNCs, primarily through reports by large human rights NGOs. Several NGOs, for example Human Rights Watch, Global Witness and Christian Aid, have reported on the behavior of TNCs present in zones of conflict, for example concerning the role of the oil industry in Angola's civil war, Shell in Nigeria, BP Amoco in Colombia, and Unocal and Total in Burma.

The role of Shell in connection with the execution in 1995 of activist Ken Saro-Wiwa and eight other Ogonis by the Nigerian dictatorship is the best-known case of criticism targeting a transnational oil company with regard to human rights. The spotlight on Shell led to a major shift in corporate awareness of issues arising from demands for a social responsibility of business. Since then, the energy industry has been at the center of debate of corporate responsibility (Ganesan, 2000: 47). The social responsibilities of Shell in its operations in Nigeria have been the subject of several academic studies (e.g. Livesey, 2002, and Wheeler et al., 2002).

Many studies of the general dilemmas of the oil industry and armed conflict are characterized by the ambition of making policy recommendations, such as those undertaken by research institutes like the International Peace Academy (2001, 2004) under its program on Economic Agendas in Civil Wars, as well as Fafo¹³ (e.g. Swanson, 2002), and the Fridtjof Nansen Institute in Norway.

In conclusion, the present study is located at the intersection of the study of human rights in international relations and the study of corporate social responsibility. It does not propose policy recommendations or discuss the motives of private business actors, but places the theme of a social responsibility of transnational oil companies in a larger analytical framework focusing on the ongoing construction of the public-private distinction in international relations. Many academic studies on corporate social responsibility touch upon

¹³ Fafo is an independent research foundation in Norway.

the public-private distinction, but few put it at center stage as this study makes a contribution in doing.

Studying Talisman Energy in Sudan

Having justified the selection of Talisman Energy as my case above, I will in this section introduce existing academic studies on the company and provide a brief chronological overview of the debate process surrounding its operations in Sudan.

There are few academic studies focusing at any length on the role of Talisman Energy in Sudan. In an article in the *Journal of Business Ethics*, Pablo Idahosa (2002) evaluates arguments for and against the continuation of Talisman Energy's operations in Sudan in the context of a broader discussion of tensions between the practice of business ethics and the promotion of development. Idahosa argues that Talisman Energy had not contributed to development, but was rather part of the problem and ought to end its operations in Sudan, and that this situation was likely to hold for any corporation operating in an environment such as Sudan. The Canadian government and other Western governments are criticized in the article for taking a passive stance towards the role of Talisman Energy in Sudan (Idahosa, 2002).

In an article in *Social Politics*, Audrey Macklin (2003), a member of the mission sent out by Canada's foreign minister to assess the human rights impact of Talisman Energy in Sudan, writes about her experiences in connection with the mission. Macklin undertakes a feminist reading of the encounter between the members of the assessment mission and the Nuer community of southern Sudan. She examines the interplay of globalization, neo-colonialism, race and gender by looking at the dynamics at one specific meeting between Canadian and Sudanese individuals discussing the role of Talisman Energy in connection with the human rights violations by the Sudanese government.

In addition, in a study on the adequacy and effectiveness of corporations' voluntary self-regulation regimes, Talisman Energy is included as one of the corporations examined along with Premier Oil, BP and Shell (Simons, 2004). It is argued that the self-regulatory regimes of these companies are flawed, inadequate and unable to ensure that TNCs are not complicit in human rights abuses in zones of

conflict. The general lack of compliance mechanisms and independent monitoring raises issues of credibility, as corporations may collect and report information as they see fit, it is concluded (Simons, 2004: 129).

Though rewarding analyses in themselves, those articles do not center on the more overarching tensions between public and private spheres of responsibility, as is done in the present study. The case of Talisman Energy in Sudan merits further academic study employing other analytical approaches. The case also merits going into the unfolding of the debate in greater depth and detail than the above presented journal articles have done. In order to enable this study's thematically structured analysis of the debate surrounding Talisman Energy, a brief chronological overview of the unfolding of the debate follows here.¹⁴

The us oil company Chevron discovered large oil reserves in southern Sudan in 1979-80 during a temporary relief in the long-running civil war in the country. As Chevron in 1984 announced its plans to build an oil pipeline from the south of Sudan to Port Sudan in the north, one of the armed opposition groups kidnapped and executed three Chevron employees. As a result, the company immediately stopped its project. After that, Sudan's oil reserves remained mostly untouched until 1993. Then a subsidiary of the Canadian oil company Arakis bought the rights to the fields identified by Chevron. Arakis formed the Greater Nile Petroleum Operating Company (the GNPOC), a collaboration among a number of international oil companies starting up operations in Sudan. Arakis became subject to the same criticism as Chevron, according to which oil revenues were taken from the south of Sudan to the north to finance the regime's war against the Sudan People's Liberation Army (the SPLA) of the south.

Talisman Energy, Canada's largest independent oil and gas exploration company, headquartered in Calgary, operated in Sudan between 1998 and 2002. Since 1992 the company has extended its investments and operations beyond Canada, to include the United

¹⁴ In this brief overview I do not provide references to the sources of the narration since they are available in Chapters 5 and 6.

Kingdom, Indonesia, Malaysia and Vietnam, and exploration activities in Algeria, Colombia, Trinidad and the United States. The company is listed on the New York and Toronto stock exchanges, and its President and CEO is Dr. James Buckee. When purchasing Arakis Energy Corp., Talisman Energy acquired Arakis' 25 % stake in the GNPOC. It committed US\$264 million to finishing the GNPOC project of constructing a 930-mile pipeline linking the oil extraction site to Port Sudan on the Red Sea.¹⁵

Criticism against Talisman Energy's operations in Sudan soon started to arise, primarily from global human rights NGOs such as Christian Aid, Human Rights Watch and Amnesty International, as well as from Canadian, US, Sudanese and other more local human rights groups. This criticism stated, in sum, that Talisman Energy was indirectly supporting the Sudanese regime through the oil revenues generated and the royalties paid to the regime, that the government used oil revenues to finance the war, and that legitimacy was provided to the Sudanese government through cooperation with a Western-based company. In addition, it was claimed that oil production fuelled the war and that the government killed and displaced large numbers of southern Sudanese to make way for the oil companies. The UN Special Rapporteur on the situation of human rights in Sudan also reported on oil-related human rights violations.¹⁶ Recommendations for action differed, however. Some demanded that Talisman Energy leave Sudan

¹⁵ For Swedish readers, it might be interesting to note that in August 2001, the Swedish-based company Lundin Oil was sold to Talisman Energy for \$400 million. The deal did not include Lundin Oil's Sudan assets, which Talisman Energy was not interested in buying. Those assets became part of the new company Lundin Petroleum. Any activity in the oil concession areas of Lundin Petroleum would have to await improvements in the security situation, company officials stated (*Petroleum Economist*, May 2, 2003).

¹⁶ Sudan acceded to the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* in 1986, to the *International Convention on All Forms of Racial Discrimination* in 1977 and to the *Convention on the Prevention and Punishment of the Crime of Genocide* in 2003. It ratified the *Convention on the Rights of the Child* in 1990.

and some that it use its influence on the Sudanese regime to make stronger demands on respect for human rights.

Large organizations holding shares in the company, primarily us and Canadian pension funds, also started to make demands on the company to leave Sudan, and many sold their entire assets in the company. The company's annual meetings became a forum for criticism from shareholders and demonstrators.

The Canadian government came under increasing pressure to hold Talisman Energy accountable, as public concern about the activities related to the company's operations in Sudan grew. The then Foreign Minister Lloyd Axworthy of the Liberal Party threatened to impose sanctions on the company, and initiated an assessment mission that resulted in the report *Human Security in Sudan: The Report of a Canadian Assessment Mission* in January 2000. The report concluded that oil had exacerbated conflict in Sudan and that the oil operations in which the company was involved added more suffering. The authors of the report did not advocate the withdrawal of Talisman Energy from the country or the imposition of sanctions against the company by the government, however. Instead they proposed ways in which Talisman Energy could try to ensure that oil revenues were used properly.

The us government, for its part, criticized the involvement of a Canadian company in Sudan and threatened to enact legislation against all corporations operating in Sudan. us companies were already banned from doing business in the country. Ultimately, however, us policies on this matter became subordinated to other concerns arising from its foreign policy agenda after the terrorist attacks on September 11, 2001.

The company's response to the criticism against its Sudan operations changed over the course of the four years it operated in the country. Initially, it claimed that reports of the situation in Sudan were misrepresented and exaggerated, and that its role as a business was not to deal with human rights issues. Over time, it increasingly reported it had pressured the Sudanese government to improve its human rights practices. In 2000, the company presented its first annual report on

its corporate social responsibility efforts, for example concerning community development. Throughout the debate, Talisman Energy claimed it did more good by remaining in Sudan and using its influence to promote improved human rights practices, both by the Sudanese government and by the other partners in the GNPOC oil consortium, the national oil companies of China and Malaysia.

By the end of 2002, however, Talisman Energy sold all its Sudanese assets to a subsidiary of India's state oil company. In 2001, Talisman Energy was sued in a United States district court in a class action suit under the *Alien Torts Claims Act*, accusing the company of facilitating what the plaintiffs claim was the Sudanese regime's campaign of ethnic cleansing against black and non-Muslim minorities, through its supply of financial and logistical support to the government. The case was still pending as of the writing of this study.

CHAPTER THREE

THE PUBLIC–PRIVATE DISTINCTION IN THE INTERNATIONAL SPHERE

In the first part of this chapter, I outline this study's theoretical approach to the public-private distinction, centering on the politics and power relations involved in boundary-drawing processes. In the second part, I elaborate on the public-private distinction in an international context, with regard to the interplay between public and private authority in the politics of global governance and international law.

Approaching the Public-Private Distinction

Most scholarly writings on the distinction between public and private have not explicitly referred to an international context, but rather to an intrastate context. First, this section contains a note on the historical development of public and private. Then I discuss manifestations of power relations involved in negotiating and institutionalizing the distinction and what is considered political.

Historical development of the distinction

The concepts of public and private have had different connotations as the distinction between them has developed throughout different historical epochs and societal contexts. Public-private can be thought of as one of the “grand dichotomies” of Western thought, subsuming a wide range of other distinctions and attempts to dichotomize the social

universe in comprehensive ways (Weintraub, 1997: 1). The origins of the distinction between public and private can be found in the life of the *polis* of classical Greece, where those defined as citizens in the public sphere were expected to fight for the city, and rule over others in the private sphere of the household (Brown, 2002: 128).¹⁷

In the English language, the first recorded uses of the word “public”, around the mid-15th century, identified it with the common good in society. The next century saw an added sense to “public” as that which is manifest and open to general observation. By the end of the 17th century, the pair “public” and “private” had acquired connotations more similar to present use, as public came to mean open to scrutiny of anyone, and private came to mean a sheltered region of life containing family and friends (Sennett, 1977: 16).

The development of the concept of private in the West thus has a long history through which a variety of views of what was implied by public dominated and thereby constructed a residual private realm (Bailey, 2002). One main characteristic of the modern system of territorial rule is the consolidation of all personalized and parcelized authority into one public realm. The monopolization on the part of central authorities of the legitimate use of force contributed to the constitution of a public sphere (Ruggie, 1993: 151). Notions of public and private have been institutionalized through the organization of societal life in different ways throughout history. With habitualization and institutionalization, choices are narrowed as habitualized actions become embedded as routines in a general stock of knowledge, making it unnecessary for each situation to be defined anew (Berger & Luckmann, 1966: 71-73).

In the tradition of liberal political thought, the public-private distinction is of central importance. In the thinking of John Locke, for example, the public sphere was associated with rationality, order and

¹⁷ For elaborate accounts of the development of the public-private distinction since early Western political thought, see *The Human Condition* by Hannah Arendt, 1958, and *Public Man, Private Woman* by Jean Bethke Elshtain, 1993 [1981].

authority, reason, knowledge and mind, whereas the private sphere was associated with subjectivity, desire, passion and body (Charlesworth & Chinkin, 2000: 30). The distinction constitutes a division of authority, where private relations are associated with a sphere of non-political processes and interactions, for example in the economy and family life, and public relations are associated with a sphere of politics. Liberal formulations have shaped dominant discourses on the public-private distinction and have also been formative for movements oppositional to the assumptions made in liberal thought (Turkel, 1992:1f; Cutler, 2003: 54-59).

The development of a perception of separate spheres spanned several centuries, at different rates in different states. With the rise of industrial capitalism in the late nineteenth century, a new private sphere of disembedded economics emerged. As industrialism developed, this third sphere came to comprise economic exchanges including wage labor, commodification, exchange and market relations. As the dualistic labeling of public and private was retained, the relationship among the spheres, and the politics of defining them, was obfuscated (Peterson, 1992b: 42f).

The use of “private” in connection with the operation of the market, property and economic enterprise is highly specific:

The specific use of private to refer to ‘the private sector’ or ‘private property’ is one very powerful, recent understanding (Bailey, 2000: 384).

The private sphere, in this more recent sense of the word, was constructed by disembedding, isolating, and insulating certain aspects of commercial activity from social and political controls (Cutler, 2003: 11). The multidimensional private-public distinction has often been used in this way to identify and separate areas of social life from public control, but exactly what is to be secured this way is historically variable (Bailey, 2000: 384). In the context of modern European state building,

the “private” developed to encompass everything that was not labeled “political” (Peterson, 2000: 15).

Accordingly, depending on what contrasts are focused on for analysis, we end up with multiple understandings of the spheres of public and private, where their overlapping boundaries are visible. Invocations of public and private are rarely attentive to the range of powerful alternative implications of the concepts (Weintraub, 1997: 2f). When “private” is understood as family/household, we have several “public”: *political* (government), *social* (civil society) and *economic* (market). When civil society and markets are distinguished from “public” understood as *the state*, they are deemed private and are depoliticized (Peterson, 2000: 16, Weintraub, 7ff). In addition, in ordinary usage of the word, “private” often refers to concerns with the self, identity, and feelings (Bailey, 2000: 396). The market economy and its large-scale impersonal world of contractual social relations are “private” only in a rather specific and ambiguous sense. This explains why it can be considered “public” in certain modes of contrasting public and private (Weintraub, 1997: 35).

The public-private distinction is thus a historically specific construct that has been transformed with changes in material, ideological and institutional conditions. The establishment of a distinction between public and private has been a prolonged and often conflictual historical process. Through this process of construction, public and private are co-constitutive cultural categories that are

best understood as a discursive phenomenon that, once established, can be used to characterize, categorize, organize, and contrast virtually any kind of social fact: spaces, institutions, bodies, groups, activities, interactions, relations (Gal, 2002: 81).

In sum, the public-private distinction is central in Western political thought and manifested in the institutions of social life, though in changing shape and prominence throughout history. The distinction between public and private is a constitutive ordering principle of

social life, though there is no essential meaning to those concepts. The distinction between public and private realms of social activity shapes the understanding and organization of social life (Turkel, 1992: 1). The distinction itself is deeply rooted and persistent, but its meaning shifts in use. Private and public are always locked in the same dance (Bailey, 2002).

The public-private distinction, power relations and institutionalization

Though a distinction, such as the one between public and private, becomes established, it is constantly redefined through social interaction and changing practices. The terms *distinction*, *division*, and *divide* are used interchangeably in this study, and are to be distinguished from the term *dichotomy*. The relationship between public and private is not viewed in dichotomous terms here. The terms *public* and *private* are always defined and assume meaning in relationship to one another. They also “bleed into one another” and are neither wholly self-contained nor stable (Elshtain, 1997: 167). Any notion of public or private only makes sense as one element in a paired opposition. Therefore it is important to note with what it is being contrasted, as was pointed out in the previous section (Weintraub, 1997: 4).

The constructed nature of categories, dichotomies and distinctions is emphasized in many social constructivist approaches. It is claimed that shared versions of knowledge on, for example, distinctions and categories, sustain some patterns of social action and delegitimize other forms of action (Burr, 2003: 2-5, Winther Jørgensen & Phillips, 2000: III).

All boundaries and categories are sites of struggle. Rarely is there consensus on the meanings of boundaries and categories. Rarely is there homogeneity on any side of a divide. Boundary making is about difference making for purposes of empowering or disempowering (Joseph, 1997: 75).

Because categories such as public-private, masculine-feminine, and empirical-theoretical are mutually constitutive and defined, and therefore presuppose each other, “transforming one necessarily transforms not only the other but the boundary between them” (Peterson, 1992a: 18). Rather than essential and categorically separable, the terms of such dichotomies are relational and their meaning embedded in historically specific contexts.

Underlying the importance of studying the public-private distinction is a view of power as not simply being a property of actors, but as residing in social practices, institutions and dominant conceptions of, for example, what the “natural” characteristics and responsibilities of public and private spheres are. Power is inherent in social relations, and is not to be conceived as an external relation taking place between preconstituted entities (Mouffe, 2000: 98ff, Foucault, 1980: 92-98, Clegg, 1989: 207). An understanding of power in “possessive” and material terms cannot accommodate the understanding of the power of international law as a socially constitutive practice and the degree to which power is a relational phenomenon (Reus-Smit, 2004b: 279f).

Because social reality is a matter of imposing meanings and functions on physical objects that do not already have those meanings and functions, the ability to create the underlying rules of the game, to define what constitutes acceptable play, and to be able to get other actors to commit themselves to those rules because they are now part of their self-understandings is perhaps the most subtle and most effective form of power (Adler, 1997: 336).

Power, in line with this approach, is considered not necessarily as being oppressive and restricting, but also enabling, forming knowledge and conceptions of truth, framing certain social practices as possible and others as impossible (Foucault, 1980: 119, 142). A *site of power*, then, is a context of interaction or an institutional milieu in and through which power operates to shape the capacities of people (Held, 1995: 173).

Locating power in the public sphere of state actions has the effect of denying the force of power relations in the private sphere of voluntary exchange and domesticity (Peterson, 2000: 15). The asymmetrical, hierarchical character of foundational dualisms in Western thought, such as public-private, has been made more visible through feminist scholarship. It is characteristically argued that

[t]he demarcation of public and private life within society is an inherently political process that both reflects and reinforces power relations, especially the power relations of gender, race and class. In this process, particular activities are recognized as defining the public realm and others as characterizing the private realm (Sullivan, 1995: 128).

Unreflective deployment of the terms public and private reinforces a view of their relationship as dichotomous and obscures their gendered political effects. The public-private divide implicitly and explicitly influences how we categorize practices and how we value them (Peterson, 2000: 26).

The relationship between the public-private distinction and the political-nonpolitical distinction is deeply ambiguous (Weintraub, 1997: 36). The drawing of the boundaries of the public-private division often influences what is considered to belong to a political sphere:

naming what is public and what is private is inherently political, because to draw the boundary is to define what is politicized and what is not (Peterson, 2000: 16).

A tension between what is perceived as matters of conflict and politics, and what is perceived as natural, objective and in a state of harmony, is persistent in the constitution of power and social order. Relations of power and antagonism, as well as an element of undecidability, are central in the dimension of the political and in the establishment of what is to be considered legitimate or not legitimate (Mouffe, 2000: 20, 31, 101). Concepts of public and private do not simply describe the social world in any direct way, but are better seen as tools for arguments about and in that world (Gal, 2002: 79). In this sense, the distinction is not only an analytical tool, but also a tool for legitimating particular results:

the public/private distinction defines the terrain upon which disputes are conducted, limiting the powers of some parties while expanding the powers of others (Turkel, 1992: 4).

This makes it important to examine who decides what is “properly” public or private since this is “an intensely political issue” (Cutler et al. 1999a: 20). The definition of an issue in terms of being political, technical or private can be seen as a “meta-political” question. In contemporary liberal democratic societies, the political is usually distinguished from the domain of private decision and from the domain of technical decision. An issue can become politicized by passing from a private into a public sphere or by passing from a technical domain into a domain of political contention, in the process conferring power in different directions (Starr & Immergut, 1987: 221-224).

In conclusion, the definition of an issue in terms of public or private has implications for how the issue is treated. The basis for using the term “public” to refer to state actors and actions lies in the state’s claim to be responsible for the general interests of a politically organized collective, as opposed to “private”, merely particular, interests (Weintraub, 1997: 5). What is defined as belonging to the public sphere becomes legitimated as objects of politics and public scrutiny, whereas matters taken to be private are depoliticized. To move an issue from the private to the public sphere in democratic societies is to subject it, though imperfectly, to open discussion and majority will (Starr & Immergut, 1987: 224). Public actors, such as those in government and public administration in democratic societies, are expected to take responsibility for a common good and to be governed by democratic values related to rights, citizen participation, transparency, accountability and representativity (see, e.g., Dunn, 1999; Cooper, 1998, Ch. 3).

As pointed out in the previous section, notions of public and private have been institutionalized through the organization of societal life throughout history. With institutionalization, it becomes taken for granted what rules and practices different actors ought to engage in.

An institution can be described as a set of rules that structure social interactions in particular ways, where knowledge of these rules is shared by members of the relevant community or society (Knight, 1992: 2, Holsti 2004: 18ff). Institutions are not identical with, but constitute a more abstract concept than, organizations, that contain decision-making procedures of different formal degrees. Institutions are the principal sites through which power is legitimized and organized in society. They specify socially sanctioned categories of agency and action, for example (Reus-Smit, 2004b: 281).

Institutions control human behavior by setting up predefined patterns of conduct, channeling conduct in one direction rather than in other theoretically possible directions. The controlling character of institutions is inherent in institutionalization as such, apart from possible sanction mechanisms of the institution. Institutions also have an enabling side, for example by specifying that certain actions will be performed by actors of certain types. For example, the institution of the law specifies punishments, who is to order punishments, who is to execute punishments, how and under what circumstances (Berger & Luckmann, 1966: 71-73). In this study, the institution of international law is in the focus for analysis, with particular attention being paid to one part of it, the international human rights regime.

In sum, constructivist assumptions related to distinctions and categories can guide analyses of boundary-drawing processes and power relations involved in institutional arrangements developed and naturalized through history. The drawing of borders between public and private is politically loaded, since it influences what becomes considered objects of politics. The distinction does not outline two spatially separate spheres, categorically opposed interests, or functionally independent activities. The terms *public* and *private* presuppose each other and only assume meaning in relation to each other.

Public and Private in an International Context

In this section, I explore the relationship between public and private authority in webs of global governance and in the international legal framework.

Public and private authority in global governance

In the governance of issue areas in the international sphere, the balance between public and private authority has varied over time. I use the term *authority* in the context of patterns of global governance relations as a way of conceiving of the relations and structures in which power is embedded (c.f. Cutler, 2003: 257). The concept of authority refers to institutionalized forms or expressions of power, which is legitimate in the sense that it refers to forms of “normative, uncoerced consent or recognition of authority on the part of the regulated or governed” (Hall and Biersteker, 2002: 4f). Authority can be said to exist when an individual or an organization has decision-making power over a particular issue area and is regarded as exercising that power legitimately, though such authority does not have to be associated with government institutions (Cutler et al., 1999a: 5). In fact,

at root the question of authority is an ontological one going to the very definition of politics and political activity one fixes upon (Cutler et al., 1999a: 17).

The concept of *private authority* is intended to allow for the possibility that not only public actors, but also private sector actors, such as market actors, nongovernmental organizations, and transnational religious movements, can exercise forms of legitimate authority. The boundaries of the issue domain over which the relationship of authority is recognized are often imprecise and subject to contestation, however (Hall and Biersteker, 2002: 4-6).

As pointed out earlier, the public-private division shapes social order, mediates freedom and necessity, and legitimates authority (Turkel, 1992: 7). The basis for most notions of authority is theorizing about domestic political authority, where it is associated with the public realm and the state. In the international realm, the absence of a central government makes it harder to identify a similar public realm, though the sphere of interstate relations can be conceived of as “public”. States have long been conceptualized as the main source of authority in the international sphere. One obstacle to identifying private authority is that only public actors are accountable through political institutions. Still, private authority can have effects that are comparable to those of public authorities in terms of the significance they have for citizens more generally (Cutler et al., 1999b: 369). Within international arenas, NGOs are often considered part of the private sphere of actors, whereas in a domestic context they are often considered part of a public sphere, as they are put in relief with the household sphere (Charlesworth & Chinkin, 2000: 31).

Through the prominence of the idea of sovereignty in world politics, political authority is linked with territory.

The contemporary differentiation between the state’s realm—politics—and the economy is itself a product of the modern interstate system and the meta-political authority imparted to it by the institution of sovereignty (Thomson, 1995: 222).

Since states mutually recognize each other’s meta-political authority, the boundaries between different spheres (political, economic, religious, cultural) are not only the subject of domestic politics but also of international politics. For example, the politics of international economic relations includes or is preceded by the politics of deciding what falls into the realm of economics or politics in the first place (Thomson, 1995: 222f). This “is not to say that activities defined as

apolitical are not intensely political but only that states will not treat them as political” (Thomson, 1995: 214).

Of interest to this study is the analytical distinction made by Hall and Biersteker (2002, Ch. 1) between different kinds of private authority: *market* authority (e.g. corporations, other market actors), *moral* authority (e.g. NGOs, religious movements), and *illicit* authority¹⁸ (e.g. mafias and mercenaries). Moral private authority can be divided into three subcategories: *authority of authorship*, those who possess useful expertise, *authority of the referee*, those claiming neutral status in a contested social situation, and *normative moral authority*, those who hold a moral claim to a normatively legitimate social purpose (Biersteker and Hall, 2002: 220).¹⁹

The spread of global regulatory governance beyond national and international levels implies a transfer of authority both upwards to a global level and downwards to a local or regional level. This regulatory authority is often focused on specific issue areas, in contrast to the general regulatory function of the state as traditionally perceived (Lipschutz & Fogel, 2002: 124). On the global level, governance consists of the activities of governments and nongovernmental actors who use control or steering mechanisms to make demands, frame goals, issue directives, and pursue policies in an issue area. Hierarchy is not a necessary prerequisite for governance, since the practices and institutions of governance often evolve in such a way as to be minimally dependent on hierarchical, command-based arrangements (Rosenau, 1997: 145f). In systems of governance, law is soft, whereas in systems of government, law is hard (Mörth, 2004: 1).

¹⁸ It is unclear in their categorization how “illicit” authority relates to the requirement of a perception of legitimacy as an element of authority.

¹⁹ In the debate on responsibility in connection with the operations of Talisman Energy in Sudan that is studied below, the focus is on the interplay between examples of market authority, moral private authority, and public authority.

The understanding of private international authority as a form of governance requires a move from associating public and authoritative activities only with the state. Nonstate-based actors in the international arena have often been accorded some form of legitimate authority in the sense that they perform the role of authorship over some domain. This means they are authors of policies, practices, rules and norms, they set agendas, certify, establish boundaries of action, and guarantee contracts, that is, some of the things traditionally associated only with the state (Hall and Biersteker, 2002: 4). This is seen for example in global climate governance and the insurance industry's response to the risks of climate change (Jagers & Strippel, 2003). At the same time, the existence of multiple sources of authority makes chains of accountability fluid and vague (Frykman & Mörth, 2004: 156).

A significant transformation in world order today is thus a pluralization of authority relations and a spread of overlapping networks of authority operating on many levels. This form of governance includes partial and temporary rule systems that co-exist in a relationship overseen by a multitude of players and institutional arrangements that often have unstable bases of legitimacy and may lack in effectiveness (Zadek, 2001a: 10ff). The lack of overarching regulation of corporations on the international level amounts to a gap in global governance that gives rise to forms of private sector governance, for example industry self-regulation. This is not an entirely new phenomenon since historically, the regulation of the private sector has changed between public and private actors (Hauffer, 2001: 15).

In countries with a weak capacity or will to regulate, the rules established in social arenas by companies themselves can complement or supplement government regulation, often in response to demands from NGOs who are unable to affect governments (Hauffer, 2001: 29).²⁰

²⁰ Examples of voluntary-based private initiatives in the CSR terrain are, besides the Global Compact, the Global Reporting Initiative, the World Business Council on Sustainable Development, Amnesty Business Groups, and Business for Social Responsibility.

This is one indication of the contemporary expansion of *standardization* as a form of regulation, facilitating co-ordination and co-operation on a global scale. Standardizers, which are often private sector organizations, cannot rely upon hierarchical authority or the imposition of sanctions. Their rules can gain acceptance on grounds of the benefit of co-ordination, on moral grounds, or, for that matter, be considered as expressions of unequal power relations (Brunsson & Jacobsson, 2000, Ch. 1). Attempts to limit “private wrongs” in the human rights field often begin by setting standards, as they are concerned with previously ungoverned areas. Standard setting may therefore be intertwined with social learning of appropriate behavior in an unknown situation (Brysk, 2005: 120).

The politics of global governance relations often centers on the global spread of norms of appropriate behavior, for example concerning human rights and the environment. The global aspirations of many norm spreading efforts, particularly in the human rights field, give rise to conflict originating in tensions between universalist and relativist approaches to rights. Actors engaged in establishing rules of behavior will often seek to justify their prescriptions by arguing that their interpretation of a norm can be related to higher values of the targeted community without logical contradiction. Norms are more likely to be influential if they resonate with existing discourses in specific settings (Reus-Smit, 2001: 526ff, Keck & Sikkink, 1998: 2-3, 17, Price, 1998: 628-630).

Through the expanding activities of private actors, both NGOs and TNCs, a *global public domain* is forming, containing “an increasingly institutionalized transnational arena of discourse, contestation, and action concerning the production of global public goods, involving private as well as public actors” (Ruggie, 2004: 504). The international public domain was traditionally constituted by states and the states system, which was mirrored in the UN Charter. A public domain is understood as an arena where expectations regarding legitimate social purpose and the roles of different sectors and actors in society

are articulated, contested and shaped. Its effect is not to replace the state system, but to embed state-based governance in broader social frameworks (Ruggie, 2004: 519).

In such a global public domain, reports on human rights violations are made known through the media, and targeted actors have to explain their behavior. The audiences to debates in such a sphere, for example between norm-violating governments and transnational advocacy networks, are usually Western states, Western publics, international organizations, and the domestic audience of the target state (Risse, 2000: 29). It becomes more likely that materially less privileged actors, such as NGOs, gain access and convince the audience the more an issue is subject to public scrutiny. Actors who can claim authoritative knowledge and/or moral authority are thought to be more able to convince a public audience than actors who promote “private” interests. This enhances the power and authority of many NGOs (Risse, 2000: 22).

Contestation and action in a global public sphere are permeated by power relations played out in efforts to establish appropriate interpretations of norm conflicts and legitimate authority. A public sphere (whether domestically or internationally) where power would be eliminated and antagonism vanished cannot be postulated. Every consensus in such a sphere appears as a temporary stabilization of something rather unstable, and entails some form of exclusion (Mouffe, 2000: 98ff, 104).

In conclusion, the pluralization and interlinkage of authority relations in patterns of governance globally challenge public notions of authority. This development raises questions of accountability, transparency, and representativeness, as those values are associated with the public exercise of authority and not in the same manner associated with private authority.

The public-private distinction in international law

Many of the theoretical arguments proposed concerning the public-private distinction in previous sections are applicable when examining the distinction in the international sphere as well. The public-private division is foundational in Western thought and shapes our discourses generally. This is also the case in the academic study of international relations (Peterson, 2000: 17). As states are a central analytical unit in international relations theorizing, references to states and the state system incorporate constructions of public and private. If the association of authority is limited to the public sphere, the political significance of, for example, transnational corporations is obscured. The public-private distinction in international law forms the foundation for establishing the territorial state and the states system as the dominant authority structures. This can eliminate potential rival claims to political identity and authority coming from individuals or corporate entities (Cutler, 2003: 36).

The distinction between public and private authority, both domestically and internationally, is central to both legal and political theory. Political authority is associated with the public realm of the state, whereas the private realm of individual and market activity is regarded as apolitical, since only public authorities are accountable through political institutions.

Westphalian-inspired notions of state-centricity, positivist international law, and 'public' definitions of authority are incapable of capturing the significance of nonstate actors, informal normative structures, and private, economic power in the global political economy (Cutler, 2003: 242).

In the academic field of international relations in general, the state/government is usually taken to constitute that which is public in the international arena. In contrast to this, economics, business and market activities are understood as private (Peterson, 2000: 18). The

incoherence of boundaries between states and the interstate system, as well as between states and markets, is increasingly exposed in the context of transnational political and economic relations, however. Unlike “the private” in the sense of the household sphere, “the private” in the sense of market forces is a site of power and influence. Both senses of private, however, are cast as depoliticized (Peterson, 2000: 24). Accordingly, the intricacies of the distinction are given an additional turn in an international context.

The scope of international law is defined by distinctions between public and private, resulting in a demarcation between private international law and public international law. Modern public international law identifies states as the subjects of law, and the sources of this law are generally considered to be international treaties and customary law based on state consent. In public international law, the authoritative subjects, actors and voices of the global polity are almost exclusively states. Its focus is matters relating to states, international organizations and to a limited extent matters related to individuals (Janis, 1993).

Private international law, on the other hand, regulates family matters and economic relations between individuals and private associations in an international context, as well as international economic relations and commercial transactions. It also includes principles governing conflicts and cooperation between national legal systems (Janis, 1993: 2). The conceptual status and autonomy of private international law as well as the nature of the relationship between public and private international law continue to be contested, however. The distinction between public and private international law is blurred by empirical changes, by the conceptual uncertainty of the status of private international law as an autonomous legal order, and by the ideological association of the private realm with civil society and the market and the public realm with the state and government (Cutler, 2003: 50-53).

In sum, public-private is one of the central distinctions structuring international legal discourse. Other, closely related, binary oppositions

of international law are legal-political, objective-subjective, order-anarchy, protector-protected, binding-non-binding, international-domestic, intervention-nonintervention. These distinctions operate on many levels and evolve over time (Charlesworth & Chinkin, 1995: 31, 49). Distinctions between public and private have both a descriptive and a normative aspect in the context of international law. Such distinctions descriptively aim at characterizing international affairs. Normatively, they are connected to political choices about where to intervene legally. Leaving 'private' issues to national rather than international regulation is one form of influence and political choice (pp. 56-57).

In a constructivist mode, A. Claire Cutler (2003: 32) is careful to point out that

[t]he distinction between private and public international law is not reflective of an organic, natural or inevitable separation, but is an analytical construct that evolved with the emergence of the bourgeois state.

With the passage of time and generational shifts, institutions, such as international law, become experienced as possessing a reality of their own, confronting the individual as an external and coercive fact. However, institutions still require legitimation, that is, ways in which they can be explained and justified. The institutional order develops a range of legitimations of both cognitive and normative interpretations, which are transmitted to new generations through socialization (Berger & Luckmann, 1966: 76-79). The knowledge transmitted through the cognitive element of legitimation tells us why things are what they are and what constitutes right and wrong actions. The normative element of legitimation justifies the institutional order by providing normative dignity to its practical imperatives (p. III).

Despite the fact that institutions have a tendency to persist, once formed, institutionalization is not an irreversible process (Berger & Luckmann, 1966: 99). Socially constructed phenomena change as

a result of concrete actions of individuals and groups of individuals. However, institutionalization and habituation limit the imagination of human action. Unless they become too problematic, institutions tend to persist (Berger & Luckmann, 1966: 134f).

Since international law is indeterminate, a premium is placed on interpretation. When international lawyers are engaged in legal interpretation, they are engaged in normative theorizing, as they are outlining prescriptions with distinctive meaning and content (Reus-Smit, 2001: 585). International law “lives” in the ways in which actors reason argumentatively about the character of international rules,

about the form of these rules, what they prescribe or proscribe, what their jurisdictional reach is, what new rules should be enacted, how these relate to established rules, and about whether a certain action or inaction is covered by a given rule (Reus-Smit, 2004a: 41).

In sum, international law frames and institutionalizes conceptions of public and private in an international sphere, for example regarding what responsibilities are associated with the respective spheres, albeit subject to continuous change in interpretation and influence.

Summary of the Chapter

This chapter has provided an entrance to the public-private distinction, built on basic points of departure in line with a social constructivist approach to phenomena such as categorizations and divisions of societal spheres and actors. The politics and power relations involved in such boundary-drawing processes, and competing claims to knowledge about their character, have been elaborated on both in the context of intrastate society and in the context of international relations.

The categories of public and private are best comprehended as mutually constitutive and defined and thereby presupposing each other. The public-private distinction permeates Western political thought and the institutions of societal life. As notions of public and private have been institutionalized through the organization of societal life over long time periods, they have come to facilitate, enable and empower actions based on a generally established stock of knowledge and legitimating claims about them. However, they also delimit and restrict perceptions of how things could have been otherwise, and call into question the legitimacy of alternative truths and courses of action.

We have seen that though the distinction is a constitutive ordering principle of social life, it has different shapes depending on what spheres are put in relief to each other. When private is understood as the household sphere, the spheres of politics, civil society and the economy can be understood as public. When the state is considered that which is public, civil society and markets are, in addition to the household, understood to be private. The drawing of boundaries between public and private shapes conceptions of what becomes the object of politics; therefore the boundary drawing itself is politically loaded, or, rather, a meta-political activity. To move an issue from the private to the public sphere in democratic societies is to subject it, however imperfectly, to open discussion and majority will.

In a global context, references to states and the state system incorporate constructions of public and private. The distinction also structures the edifice of international law in both the representation

of international affairs present in it, and in what issues it regulates and what issues it neglects. Both public and private authority are visible in the expanding webs of global regulatory governance developing around issue areas such as the protection of human rights and the environment. Private actor influence can be based, for example, on moral authority, as in the case of human rights NGOs, and on market authority, as in the case of transnational corporations. Processes of norm dissemination and the establishment of appropriate behavior involve numerous private actors of different character. All arenas where processes of norm dissemination take place involve power relations and hierarchies between actors.

The pluralization of authority relations beyond the public sphere of interstate-based organizations involves challenges related to accountability, transparency and representativeness. They also point to the constantly changing character of the public-private distinction, despite an inertia resulting from its institutionalization in law, political institutions and social practice.

CHAPTER FOUR

DIMENSIONS OF RESPONSIBILITY

This study examines how the public-private distinction, which was the focus of the previous chapter, is manifested in controversy concerning transnational corporations' responsibility for human rights protection. In this chapter, I introduce analytical distinctions that can guide an examination of responsibility, but that are not limited to an understanding of responsibility in the context of human rights protection. The relationship between responsibility and accountability is specified, as a basis for the following chapters.

Responsibility

In this section, the temporal dimension of responsibility is outlined and different principles guiding a distribution of responsibility are introduced.

Responsibility distinctions

An extension of responsibilities under the international human rights regime to new kinds of actors invites an examination of questions about responsibilities and rights within and beyond humanly constructed borders. Extensive literatures in the disciplines of philosophy, ethics, law and political science inquire into the concept of responsibility and its different elements. The aim of this section is not to give an account of the trajectory of the concept in those different disciplines, but to

outline analytical distinctions that will clarify the use of the concept of responsibility in this study.

Initially, we can establish that clear-cut definitions of the concept of responsibility are rare. Since the root of the word stems from the Latin *respondeo*, meaning “I answer”, J. R. Lucas (1993: 5) states that

the central core of the concept of responsibility is that I can be asked the question ‘Why did you do it?’ and be obliged to give an answer.

We can begin by distinguishing between *prospective* and *retrospective* responsibility. To bear prospective responsibility for something is to have a duty or obligation, in virtue of some role that one fills, to ensure that something occurs or obtains (Zimmerman, 1992: 1089). Prospective responsibility can be directed at the production of good outcomes (“productive responsibilities”), at preventing another actor from producing bad outcomes (“preventive responsibilities”) or at avoiding doing harm (“protective responsibilities”) (Cane, 2002: 32). People exercise responsibility and are held responsible in society by carrying out the expectations and obligations of a multitude of more or less well-defined roles, such as employee, parent, and citizen. Many such roles are not clearly defined, often because there is little agreement about the boundaries and content of responsibility associated with them (Cooper, 1998: xvii).

In taking on a particular role, one assumes responsibility for certain affairs, both in the sense of a *positive* responsibility to answer for what we actually do, but also in the sense of a *negative* responsibility for bad situations that we fail to avert (Lucas, 1993: 54). If someone takes on a high public office, for example, that person has to live with the consequences of his or her inaction as much as those of his or her actions.

Retrospective responsibility, on the other hand, implies bearing responsibility for something in the past, whether this responsibility concerns having failed to fulfill a duty (being blameworthy), or having

done something good (being praiseworthy). Thus, in a temporal sense, responsibility looks in two directions: backwards and forwards. Concepts such as accountability, answerability and liability deal with the backwards-looking sense of responsibility. Concepts such as obligations, duties, roles and tasks belong to the forwards-looking sense of responsibility (Cane, 2002: 31).

Herbert J. Spiro (1969: 14-20) distinguished among three main senses of the concept of responsibility; responsibility as *cause*, responsibility as *obligation*, and responsibility as *accountability*. In the first sense, responsibility means a claim that someone or something helped bring about an outcome, without implying that the person or thing will have to answer morally or legally or in any other way for it. This is to say, as suggested by Spiro, that sunspots are responsible for faulty telecommunications. This sense of responsibility is not dealt with in this study. Second, to say that someone is responsible in the sense of obligation means that someone is required to undertake specific tasks. The content of obligation can be defined according to different principles in different situations. Thirdly, accountability refers to someone having to answer for, or render account of, the way in which that person carries out his or her tasks.

In a similar vein, H.L.A. Hart (1968: 212-230) distinguished among four main uses of the term responsibility; *role-responsibility*, when a person occupies a distinctive place in a social organization to which specific legal, moral or other duties are attached, that person is properly said to be responsible for the performance of these duties; *causal-responsibility*, where it is possible to substitute “responsible” with “caused” in the past tense; *liability-responsibility*, to be responsible in a legal sense for an act or some harm is to have sufficient connection with the act or harm according to laws of liability; and *capacity-responsibility*, the assertion that a person has capacities of understanding, reasoning and control of conduct in order to be considered able to be responsible for his or her actions.

The next Chapter Five of this study is concerned with *prospective* responsibility, the so-called *role*-responsibility outlining the *obligations* attached to a role. This forward-looking sense of the concept will be called *responsibility* in this study. It answers questions concerning who is responsible and for what. In the context of this study, this means to examine what is considered to be the responsibility attached to the role of being a public actor (in this case a government) or a private actor (in this case a transnational corporation) in the human rights field.

Chapter Six is then concerned with *retrospective* responsibility, that is, responsibility in the sense of *answerability*, *accountability*, and, to a certain extent, legal *liability*. This backwards-looking sense of the concept will be called *accountability*. It gives rise to questions concerning how and by whom accountability is demanded, and from whom it is demanded. In the context of this study, this leads to an inquiry into how the public-private distinction is manifested in the ways in which transnational corporations are held accountable for their impact on human rights.

Distributing responsibility

The distribution of responsibility can be based on legal, moral, or customary social principles, or on principles related to an actor's role in bringing about an outcome, to the capacity of an actor to discharge responsibility, or to principles assuming that people with special ties of different kinds have more responsibilities towards each other (see, e.g., Miller, 2001, Lucas 1993: 54-55, Zimmerman, 1992: 1089). For example, the degree of responsibility that an actor bears when confronted with genocide can be said to depend upon the extent of the actor's knowledge of atrocities, the actor's involvement prior to and during the atrocities, and the actor's capability to prevent or suppress atrocities (Krosiak, 2003: 161).

Both legal and moral principles for distribution of responsibility are part of a rich tapestry of responsibility and require attention if we are to make sense of the whole. The relationship between law and morality is symbiotic, especially in relationship to complex concepts such as responsibility. Moral ideas on responsibility are absorbed into law, and laws affect how people reflect upon responsibility in the moral sphere (Cane, 2002: 13-16). In the context of this study, this is a point of departure, since the study is not focusing on one particular kind of principle for distribution of responsibility, but aims at covering the "rich tapestry of responsibility" facing actors in each specific context. However, given the influence of the international legal framework in shaping conceptions of public and private human rights responsibility, legal principles will often be the take-off point of inquiry.

Law and policy are made through a political process by which the structure of responsibility is shaped in society (Spiro, 1969: 45). In practical application, law and morality differ in character. Law usually possesses institutional resources that morality lacks and therefore legal versions of responsibility have a richness of detail lacking in moral versions of responsibility. Morality can be vague and indeterminate in a way that law cannot be, since courts have to answer many detailed questions about responsibility. Courts cannot leave disputes

of responsibility unresolved. Legal sanctions are backed by the state's institutionalized coercion powers in a way that morality is not (Cane, 2002: 12).

In both practice and theory, we find limits to an actor's responsibility based upon a wide range of possible factors. Connecting to themes prominent in a larger debate framed in the language of communitarianism and cosmopolitanism, we find different kinds of moral boundaries for the scope of responsibility. In what we can summarily label a *cosmopolitan* approach, national boundaries are not considered to have moral significance and people are considered to have global responsibilities (see e.g. O'Neill, 2000, Held 1995). In principle, the domain of obligation is all human beings, but in practice, the sphere of obligation is determined by the sphere of effective action (Dower, 1998: 23). Writings on cosmopolitan citizenship suggest that states are not the only moral agents in international relations, and that individuals and nonstate actors have important moral duties to the rest of humanity. Those duties, however, have been consistently overshadowed by their membership of sovereign communities (Linklater, 1998: 205). Cosmopolitanism comes in many forms, but a core of it is that all human beings live in "one moral community". Any form of organization has to be assessed in terms of how well it enables human beings to achieve well-being (Dower, 1998: 185).

In contrast to this, *communitarian* approaches emphasize that one holds responsibilities above all to those to whom one stands in some relation informed by factors such as "sentiment, affection, shared traditions, convention, reciprocity or contract" (Dower, 1998: 23). A world moral community and obligations on the global level are seen as marginal because the cited factors are not strong enough at this level. Whether an individual or a corporation, absent a global government and strong global norms, one has to defer to the norms of the local community or state. The individual is embedded in a particular social context and is not seen as a detached moral agent. Rights and duties apply primarily to those who share the bonds and identity of the same

community, through for example descent, culture or citizenship. Though ethical principles can be of universal form, communitarians claim that boundaries can legitimately be relatively impervious (O'Neill, 2000: 187-189).

In conclusion, those two positions contain an intricate mixture of normative and descriptive claims. They make visible to us how perceptions of boundaries of responsibility in international affairs depend on prior assumptions about the perceived nature of moral obligation and moral agency. Those assumptions lead to differing constructions of the boundaries of public and private responsibility for human rights.

Central to examinations of distribution of responsibility is also the identification of what kinds of actors can be held responsible. A contentious issue with regard to this is whether only *individuals* can be bearers of moral agency, or whether responsibility can be distributed to a *collective* of individuals, as was debated for example in the case of Germany after the Second World War. More central to this study, though closely related to the question of collective responsibility, is the question of whether abstract entities, such as *organizations*, states, bureaucracies, and transnational corporations, can be seen as bearers of moral responsibility. This is often claimed not to be possible since only individuals are considered in possession of the criteria necessary for moral deliberation. Neither groups nor organizations are then considered to be moral agents in a sense distinct from the agency of their individual members (see, e.g., Kerlin, 1997).

In another approach to this question, however, it is argued that organizations can be morally blameworthy although they do not have minds and emotions of their own. The criteria for ascribing responsibility are then different. In the line of argument proposed by Toni Erskine (2003: 24), organizations can be candidates for moral agency if they have an identity that is more than the sum of the identities of their constitutive parts, a decision-making structure, an identity over time and a conception of themselves as a unit. According to those criteria for moral

agency, states, transnational corporations, the UN, transnational NGOs, paramilitary organizations, and transnational religious organizations all qualify for being moral agents, but not the international community or the Internet (Erskine, 2003: 25). She points out, however, that opening up the question of moral agency in international relations threatens to open a Pandora's box of puzzles and contradictions.

This approach does not imply that the moral responsibility of individuals can be sidestepped. It aims at providing a complementary focus of responsibility since many organizations have greater capacities for deliberation and action than individuals do (Erskine, 2003: 26). When condemning an organization, such as a corporation, past and present officials and boards are condemned, but also the practices of the organization, the internal and external relationships that persist even if the individuals participating in those relationships change (Thompson, 1987: 76). Still, the relationship between the responsibility of individuals and the responsibility of organizations remains unclear, arguably.

In a constructivist mode, Peter Cane (2002: 41) claims that neither law nor morality contains "real responsibility" as both moral and legal personality and responsibility are human artifacts. The practice within which moral agency is constituted must be understood as situated in history, in geography, and in relationship to other social practices (Frost, 2003: 87). Moral agency, therefore, can be understood as "a social construct with no content prior to or outside of social historical processes" (DeWinter, 2003: 139). This involves a process of drawing boundaries around entities and providing rhetorical justification for the significance of those boundaries (p. 147). In sum, the question of whether organizations, such as transnational corporations, can be held morally responsible as organizations is opened up though by no means settled, through a constructivist approach to the issue of moral agency.

An examination of the allocation of responsibility, in conclusion, can productively inquire into what principles are drawn upon to justify its distribution and its boundaries, as well as into how the possibility of moral agency of organizations is perceived.

Accountability

Being answerable

As established in the previous section, we can distinguish between three main senses of the concept of responsibility: responsibility as obligation, responsibility as accountability and responsibility as cause. In this study, responsibility as obligation, that is, the prospective role-responsibility in virtue of some role that an actor fills, will be the focus of Chapter Five. The following Chapter Six focuses on responsibility as accountability, that is, the retrospective aspect of responsibility. Accountability is accordingly seen as a retrospective mechanism that involves a presumption of monitoring and sanctioning instruments (Fearon, 1999: 55). Standards of accountability for violators of the law are decided through a political process that structures the relationship between causal responsibility and accountability (Spiro, 1969: 45).

At a general level, accountability means answerability for one's actions or behavior (Dunn, 1999: 298). Accountability entails being answerable to someone for something (Goodin, 2000: 2). If A is accountable to B, B is entitled to ask A why A did what he or she did, and A is obliged to answer. This normally involves an entitlement on the part of B to assess A's answer authoritatively, to reprimand or instruct A to act differently (Lucas, 1993: 184).

The person A is accountable to the person B if there is an understanding that person A is obliged to act in some way on behalf of person B, and B is empowered by formal institutional or informal rules to sanction or reward A for A's performance in this capacity (Fearon, 1999: 55). For example, elected politicians are accountable to their electorates, employees are accountable to their employers, chief executive officers (CEOs) are accountable to their boards and boards are accountable to shareholders, in this sense (Fearon, 1999: 55).

In the terminology of Spiro (1969), *explicit* accountability refers to someone having to answer for, or render account of, the way in which that person carries out his or her tasks. The extent, decisions and

actions for which the person would have to render account, and the effects of this account upon the person, are roughly known in advance. For example, the US Secretary of State will have to answer to the Senate Committee on Foreign Relations.

Implicit accountability, then, refers to situations where the actor lacks prior knowledge of the extent of decisions and actions for which the actor will have to render account. The person is then unexpectedly affected by consequences of decisions made by others. In order to obtain a sound situation of responsibility, argues Spiro (1969: 24), one ought to seek to convert implicit accountability into explicit accountability, so that an individual has a wider prior knowledge of which decisions and actions he or she will be held accountable for.

An *accountability mechanism* is “a map from the outcomes of actions (including messages that explain these actions) of public officials to sanctions by citizens” (Manin et al. 1999: 10). Mechanisms of accountability derive value from their actual use, leading to incapacitation, but also from the belief that they might be used, hence deterrence (Elster, 1999: 257). In the ideal case, the exercise of authority requires, in a democratic age, the expressed consent of the governed, and mechanisms through which to hold policy-makers accountable. Effective accountability requires both mechanisms for reliable information between decision-makers and the governed, and mechanisms for imposing sanctions. Examples of such mechanisms are, both in national and international settings, physical sanctions, voting in elections, withdrawal of political support, legal responsibility, and shaming (Held & Koenig-Archibugi, 2004: 125-127).

This study puts the topic of accountability in an international setting. The themes raised in the previous chapter on the public-private distinction in an international sphere pointed to a diversification of authority relations in webs of global governance. This diversification leads to a need, I claim, to inquire into the accountability dimension of global governance, as authority expands beyond public sphere actors, governments, states and interstate organizations. In the next section,

the accountability dimension of governments in a domestic and international context is outlined and related to the accountability of nongovernmental organizations (NGOs). Accountability in the case of corporate social responsibility is then the theme for Chapter Six of this study.

Accountability of governments and NGOs

In democratic political systems, accountability aims at making political actors systematically responsive in terms of the policies the electorate prefers, and the results the electorate wants achieved. The central purpose of accountability is thus to check the arbitrary exercise of political power (Goodin, 2000: 2). The main accountability mechanism in a democracy is elections, a sanction determining whether or not to extend a government's tenure, amounting to a contingent renewal of that tenure. Governments are accountable if citizens can sanction them appropriately, retaining those who perform well and withdrawing from office those who do not perform well (Manin et al., 1999: 10). In addition to elections, retrospective accountability can be achieved through other less formal mechanisms, such as holding the actor under scrutiny up to public ridicule by being named in parliament, or to private opprobrium through reprimands from superiors (Goodin, 2000: 3). The embarrassment factor is a major accountability mechanism, which for example the media uses, in holding politicians accountable.

Political parties in a democracy owe accountability to the electorate since they derive their responsibility from it (Spiro, 1967: 142f). Accounts of the exercise of delegated responsibility should be rendered in reply to the question "was responsibility exercised on behalf of the purpose for which it was delegated?". The bureaucrat, according to Spiro (1969: 168f) owes accountability to three different kinds of authority: individuals and groups affected by the bureaucrat's decisions; sources of the delegated responsibility of the bureaucrat; and interpreters of the constitutional framework within which this interaction takes place. Conflicting claims of accountability thus easily arise.

Via principles of delegation, public bodies such as executive agencies, bureaucracies and interstate organizations are held accountable. Elected bodies delegate specific tasks to such public bodies. Public administrators are accountable to their organizational superiors and for the conduct of their subordinates, they are accountable to elected officials for carrying out their wishes in accordance with public policies,

and they are accountable to the citizenry for taking into account their preferences (Cooper, 1998: 68).

A congruent relationship between political decision-makers and the recipients of political decisions resulting in consent and legitimacy through elections in bounded political communities, cannot be assumed, however, in times of global interconnectedness, if ever (Held, 1995: 16-18). Taken-for-granted assumptions about sovereignty and political community obstruct the recognition that national communities by no means exclusively determine policies for themselves (Held, 1995: 224ff). Therefore, David Held (1995: 267ff) argues that the territorial boundaries of accountability systems must be recast so that issues escaping the control of states can be brought under greater democratic control. Democracy can only be sustained by ensuring the accountability of all interconnected power systems involving both political and economic spheres, he argues.

Stating that wherever power is exercised there should be mechanisms of accountability raises several problems in relation to international institutions and internationalized governance systems. The view that international institutions (e.g. UN agencies, international financial institutions, the World Trade Organization) are legitimized and held accountable indirectly through the participating governments is increasingly questioned. The question of the public accountability of international institutions cannot be answered by pointing to the control governments exercise over them, since disparities among governments are part of the problem (Held & Koenig-Archibugi, 2004: 125f, Held 1995: 139). The growth of global governance institutions has only included weak, if any, formal accountability mechanisms. Therefore, Scholte (2004: 212) argues, “the conventional statist formula of democratic accountability does not suffice in relation to present-day expanded global governance”.

Due to the weaknesses of public accountability mechanisms of international organizations, such as the UN, vis-à-vis the wider public, the expectation is often that the organizations of civil society can bring

greater public control and legitimacy to such institutions. The growing influence and resources of transnational civil society groups (primarily NGOs) have been invaluable for improving surveillance of human rights practices worldwide and for holding governments accountable to their human rights obligations. Indeed, civil society organizations have on many occasions made international institutions more accountable and transparent, through monitoring their policies, seeking redress for mistakes, and by advancing the creation of formal accountability mechanisms (Scholte, 2004: 217).

This increasing influence of NGOs has, however, brought with it a querying of their own accountability, legitimacy and representativeness (see, e. g., Anderson, 2000; Hayden, 2002). This contains a questioning of seeing transnational NGOs as a force for democratizing the conduct of international relations and institutions such as the United Nations. On the same grounds, public-private partnerships, such as the Global Compact, are questioned, as well as entirely private partnerships in the social area, comprising NGOs and transnational corporations, such as the Fair Labor Association.

Public international organizations are themselves in need of legitimacy and look to NGOs to provide it for them, to stand in for “the people”. By involving and having the moral and political approval of international NGOs, international organizations claim to have overcome their democratic deficit to a certain extent (Anderson, 2000: 112-120). An international NGO, however, can in many cases be characterized as

a relatively small, highly professional, entirely elite organization funded by foundations and wealthy individuals in the Western democracies, and having no discernible base outside international elites (Anderson, 2000: 117).

In relation to their own activities, most civil society groups have very limited accountability mechanisms (Scholte, 2004: 230). Formally, NGOs are not accountable to anyone outside their membership base, though

in practice they are to some extent accountable to their funders, and in some cases to tax officers of governments. NGOs, Robert Hayden (2002: 61) argues, do not form a component of democratic rule, but can help to provide the information necessary to force political accountability. Large NGOs, such as Human Rights Watch, would, however, be the first to declare that their legitimacy is based on their own conception of international human rights and not on democratic pillars. The organization does not pretend to represent anyone but itself (Anderson, 2000: 118).

The potential of NGOs to democratize global governance arrangements can be compromised if their own accountability is neglected. They might lose moral credibility and thereby undermine one of their main sources of authority. In addition, unaccountable bodies often fail to correct shortcomings in their own performance. If civil society organizations wish to expand their involvement in global governance webs, they need to become more accountable, Jan Aart Scholte argues (2004: 232).

The assurance of accountability from decision-makers, in conclusion, is challenged both by globalization and by the spread of private authority, whether moral or market based, in global regulatory governance. Conceptions of the direction and scope of accountability are shaped by the public-private distinction, as the notion of accountability has traditionally been placed in a line of thinking of democratic theory, in a national setting of democratic society and public actors.

Summary of the Chapter

This chapter, in combination with the earlier Chapter Three, provides a conceptual framework that can be used as a guide for examinations of the tensions of corporate social responsibility, both on a theoretical level and in concrete cases. This chapter has provided an identification of the focus of the two following chapters on human rights responsibility in the context of the public-private distinction: namely, responsibility and accountability.

Chapter Five of this study, accordingly, is concerned with *prospective* responsibility, the so-called *role*-responsibility outlining the *obligations* attached to a role. It answers questions concerning who is responsible and for what. In the context of this study, this means examining what is considered to be the responsibility attached to the role of being a public actor (government) or a private actor (transnational corporation) with regard to human rights protection.

A range of principles determining the allocation and scope of the spheres of responsibility of public and private actors respectively guides the distribution of responsibility. This study does not single out any particular principle, but examines the complex melting pot of such principles present in each specific case. However, as demonstrated in the previous chapter, the international legal framework has institutionalized conceptions of public and private scope of human rights responsibility, and therefore, legal principles often become the take-off point of inquiry.

Chapter Six, then, is concerned with *retrospective* responsibility, that is, responsibility in the sense of *accountability*, and to a certain extent, legal liability. It answers questions about how accountability is demanded, who demands accountability, as well as from whom it is demanded. In the context of this study, this leads to an inquiry into how transnational corporations are held accountable for how they exercise the responsibility that is the focus of chapter five. Since the distinction between responsibility and accountability is an analytical division, there

will be inevitable overlaps in the substance of the examination of the debate on Talisman Energy in Chapters Five and Six.

The notion of accountability has primarily been studied in a national setting of democratic society. In this study, the notion of accountability is transferred to a transnational setting, where it is challenged by the diversification of authority relations in governance arrangements, as introduced in the previous chapter. Demands for new modes of assuring transparency and accountability arise as governments, nongovernmental organizations, transnational corporations, private foundations and interstate organizations form partnerships and cooperate in webs of global governance, for example in the field of human rights protection.

CHAPTER FIVE

DISTRIBUTING HUMAN RIGHTS RESPONSIBILITY

In the first part of this chapter, I look into how the public-private distinction is manifested in the distribution of responsibility for human rights protection under international law. In the second part, I examine the controversy about distribution of responsibility with regard to central themes in the debate surrounding the operations of Talisman Energy in Sudan.

Allocating Responsibility

In this section, the distribution of human rights responsibility between states and nonstate actors, particularly transnational corporations, is examined with regard to tensions between international law, soft law and moral pressures.

State responsibility under international law

The development of international law has shaped conceptions of the character of the responsibility of public and private actors with regard to international human rights norms. The international legal framework is the main point of reference for debates on the distribution of human rights responsibility. In public international law, concepts of group and organizational responsibility are important. The domestic law priority given to individual human beings is reversed since the archetypal international legal entity is the state (Cane, 2002: 42). International law sets out the obligations of states to ensure that national laws and

procedures enforce international human rights standards with regard, for example, to transnational companies.

The principle of *state responsibility* is central in international law. It refers to the distinction between conduct that can be attributed to the state, and for which the state can be held responsible by the international community, and conduct that is attributed to private persons, and for which the state is not considered responsible internationally. The latter is subject to regulation by national legal systems. The principle of state responsibility thus distinguishes “public” actions for which the state has to answer internationally, from “private” actions for which the state is not seen as accountable since they are not carried out by agents of the state (Charlesworth and Chinkin, 1995: 148).

Accordingly, under international law, states are responsible for the humanitarian situation in their territory; they are the ultimate guardians of their population’s well being. States should always take measures to protect human rights, regardless of who the violator of rights is. If states fail to make efforts with “due diligence” to try to prevent violations by nonstate actors, they are themselves guilty of violating humanitarian principles (Scheinin, 2000: 42). This is established, for example, in judgments by the European Court of Human Rights and the Inter-American Court of Human Rights. Along similar lines, Amnesty International (2000b: 5) emphasizes that under international law the state has clear responsibilities for human rights abuses committed by nonstate actors. This means that the responsibility of states extends beyond violations committed by individuals acting on behalf of the organs of the state (such as the police and the military). The human rights obligations of the state are to be fulfilled in relation to any acts by individuals, groups or institutions that violate the human rights of others within its territory. The state can be considered responsible if it fails to take reasonable measures to prevent or respond to human rights violations regardless of the identity of the abuser (Amnesty International, 2000b: 6).

However, Amnesty International also points out that it is important not to overlook the original abuser's responsibility, and that efforts to hold states responsible must be seen in relation to other complementary measures to hold nonstate actors directly responsible for human rights norms (p. 9). The concept of *due diligence* strives to establish a threshold of action and effort that a state must demonstrate it has reached in order to be considered having fulfilled its responsibility to protect human rights when those rights are threatened by nonstate actors (Amnesty International, 2000b: 7, International Council on Human Rights Policy, 2002: 54).

The historic focus in international law on violations committed directly by agents of the state against the individual has contributed to a silence surrounding many abuses, for example against women. Since international human rights law has been conceptualized as a constraint on the power of the state apparatus, abuses against women committed by other actors have not been framed in human rights language. The recognition of violence against women in the family as a human rights violation, for example, has been limited because of the principle of state responsibility and norms shielding the family from intervention (Sullivan, 1995: 126-131). In addition, human rights activists have traditionally targeted public state-sanctioned abuses, away from the private sphere where most violations of, for example, women's human rights take place.

Feminist criticism of how the public-private distinction is played out in a neglect of protection of women's rights in the family/household sphere sense of private is not straightforwardly applicable when examining private in the sense of economic actors in a market sphere. The power dynamics of the former in relation to the public/state sphere are different from the latter, since the market sphere is a site of power in ways that the household sphere is not. In both cases, however, an invisibility and depoliticization results from institutionalized notions of public and private in the human rights field. At a more general level, it can even be claimed that

the fields of international law and organization are experiencing a legitimacy crisis relating to fundamental reconfigurations of global power and authority (Cutler, 2001: 133).

In sum, states' exercise of power over their citizens is restrained under international human rights law. The state is also in charge of ensuring that other actors on its territory respect human rights. Through its institutionalization in law and international organizations, the public-private distinction holds a grip on the distribution of human rights responsibility and establishes a boundary between public and private spheres of responsibility. Based on this study's approach to the public-private distinction, we see that legal human rights discourse and organizational practice reproduce and uphold the distinction between public sphere responsibility and private sphere responsibility by focusing mainly on states as protectors and violators of human rights (c.f. Peterson & Parisi, 1998: 134; Charlesworth & Chinkin, 2000: 148). An artificial legal and perceptual divide has been created between abuses committed by state actors and abuses committed by nonstate actors, whether individuals or organizations (Peters & Wolper, 1995: 2). We begin to see the tensions, arising from the weakness of enforcement mechanisms, between the clarity of a state based system of human rights responsibility and a more diversified allocation of responsibility.

Nonstate actor responsibility under international law

Although the international human rights regime is based on the notion of the state as the ultimate guardian of its population's welfare, some limited direct international regulations of nonstate actors have long existed, such as early treaties that outlaw piracy and slavery. International human rights law and humanitarian law (two parts of public international law) establish duties for nonstate actors to a limited extent. Actors other than states that have certain obligations under international law are armed opposition groups and private individuals, as well as international organizations. Individuals and international organizations have been recognized as having international legal personality derived from states, and can be considered "derivative" subjects as opposed to the "original" subjects, states (Jägers, 1999: 263).

Armed opposition groups have duties to respect some basic principles of international humanitarian law, according to the regulations on internal armed conflict in common Article Three of the Geneva Conventions and provisions in the Additional Protocols to those Conventions. Newer international humanitarian law and human rights law treaties concerning, for example, antipersonnel landmines and child soldiers also contain provisions relating to this kind of nonstate actor.

Three kinds of individual duties can be found in international human rights rules: (1) duties of individuals working for state agencies to respect human rights, (2) duties of individuals to exercise their own rights responsibly, and (3) more general duties of individuals towards other individuals and communities (The International Council on Human Rights Policy, 1999: 15). The 1948 *Genocide Convention* also imposes duties on individuals, which was supported by the proceedings of the Nuremberg Tribunal. Attention to the responsibility of individuals has increased with the International Criminal Tribunals for the former Yugoslavia and Rwanda as well as with the coming into being of the International Criminal Court. Still, the main effect of human rights law is to regulate the behavior of states, not individuals or other nonstate

actors (International Council on Human Rights Policy, 1999: 54, 2002: 57).

The reiteration that states should maintain law and order in compliance with due process does not, in many contexts, satisfactorily respond to the situation on the ground (Nair, 1998). States are often unwilling or unable to meet their international obligations and to use national legal systems to enforce responsible behavior, for example on the part of transnational corporations. Then the question of international enforcement of states' human rights duties arises. In addition, the question of imposing direct international duties on transnational companies also arises and is increasingly debated.

International mechanisms address corporate responsibility mainly through state obligations to hold companies accountable. Intergovernmental organizations have developed international standards on corporate responsibility, such as the OECD *Guidelines for Multinational Enterprises* (1976/2000) and the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977). Those treaties refer explicitly to duties of companies, but both rely on the voluntary co-operation of companies and contain rather weak procedures. They do not provide remedies to victims, and companies are not publicly identified. The governments of the thirty OECD member states plus three non-members have adopted the OECD guidelines (ICHRP, 2002: 117). In addition, the UN has long had a working group on transnational corporations under the Sub-Commission on the Promotion and Protection of Human Rights, which presented *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* in 2003.

International human rights law is thus caught in its framework of state responsibility for human rights violations and is unable to deal fully with the changing role of the state in times of globalization processes. This leads to claims going beyond the limitations imposed by the public-private distinction, stating that a more flexible framework of human rights law must be developed within which responsibility for human

rights violations is not exclusively state-based (e.g. McCorquodale & Fairbrother, 1999: 764). Indeed, the role of states in human rights protection is contradictory. On the one hand, states adopt new human rights standards in an increasing number of issue areas. On the other hand, they sometimes delegate authority without accountability to private actors (Brysk, 2005: 17). As many of the traditional places where human rights violations occur are being privatized, and many of the organizations and individuals who threaten human rights are found in the private sphere, human rights law ought to be made applicable to the actions of private bodies, Andrew Clapham argues (1995: 20-23).

In sum, a decreasing control of the state apparatus over events within its territory is a recurring argument for extending international legal obligations to nonstate actors, and for not relying entirely on the individual state to regulate nonstate actors within its territory. References to changing relations of power provide the baseline for this chain of argument.

The narrow focus of human rights law on state responsibility is not only out of step with current power relations, but also tends to obscure them. The exclusive concern with national governments not only distorts the reality of the growing weakness of national-level authority, but also shields other actors from greater responsibility. The focus on state responsibility also creates a false sense of rigidity or inevitability about social and political hierarchies and existing inequities (Jochnick, 1999: 59f).

The International Council on Human Rights Policy (2002: 10) bases its recommendations on similar thoughts:

Just as human rights law was initially developed as a response to the power of states, now there is a need to respond to the growing power of private enterprise, which affects the lives of millions of people around the world. The law is not and should not be static. It must evolve if it is to meet the needs of societies, and should reflect prevalent economic,

political and social norms, including ethical values. The concept of the sovereignty of states, which has been eroded by the development of human rights, should not be replaced by a new corporate sovereignty, which is unrestricted or unaccountable.

Public international law, in summary, does contain provisions relating to nonstate actor responsibility for human rights protection. Privatization and a perception of an increased power of nonstate actors lead, however, to demands for more far-reaching and efficient regulation of nonstate actors. Again, we can recall trains of thought from this study's previous chapters, emphasizing that law does not exist as a fixed body of neutral and objectively determinable rules, but as a construct of and deeply embedded in international society (Cutler, 2003: 103-4).

Soft law regulation and moral pressure

In its preamble, the *Universal Declaration of Human Rights* of 1948 states that

THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Though the declaration is not a legally binding document, this indicates a broad allocation of responsibility for human rights protection. At several world conferences of the United Nations, heads of states from a majority of the world's countries have affirmed in declarations and statements that companies ought to contribute to social development. The *Johannesburg Declaration on Sustainable Development* of 2002 (paragraph 27), for example, states that:

We agree 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.

However, declarations and summit statements are not legally binding in the way that governments are bound by international conventions they have signed and ratified. Instead, they amount to what is called *soft (international) law*, which consists of declarations, resolutions, guidelines, principles and other high-level statements by groups of states. They “are neither strictly binding norms nor ephemeral political promises” (International Council on Human Rights Policy, 2002: 73). Global soft law regulation is not a substitute for national law, but it

can bring coherence to standards for companies whose operations encompass many countries.

Voluntary codes of conduct adopted by individual companies and in public-private partnerships fit into this wide category of soft law, and have a potential to be a more effective tool for influencing company behavior than international legal regulation. In the regulation of international economic relations, soft law is becoming the norm, which reflects the influence of commercial actors and their concern “that rules be flexible, adaptable, porous and not too constraining on state sovereignty and freedom of action” (Cutler, 2002: 189). The *soft law* concept as such is, however, controversial among international lawyers, since it can be considered to blur the distinction between law and non-law (Engström, 2002: 51, Mörth, 2004: 5-6). This concerns, for example, exactly how soft a regulatory instrument can be and still be considered “law”. The idea of soft law is by critics considered to erode the concept of law and the distinction between law and non-law.

Soft law regulation is spreading to more and more areas of society. It is characterized by being voluntary to adhere to, by lacking direct legal sanctions, and by leaving wide scope to the regulated party to translate the rules to its specific domain (Jacobsson et al., 2004: 163ff). As touched upon in the elaboration on authority relations and global governance in Chapter Three, soft regulation does not necessarily take place in hierarchical relationships, but often through networks and horizontal authority relations. Soft law regulation tends to confirm prevailing power relations, established interests and understandings, and to be an insufficient instrument for regulation in highly conflictual situations (Jacobsson et al., 2004: 184ff, Sahlin-Andersson, 2004: 149). Soft law can in many issue areas be seen as a transitional mode of rule-making but in other areas as a law-making method in its own right (Mörth, 2004: 3).

The earlier introduced United Nations’ *Global Compact* initiative is not a legal mechanism, but an initiative of a voluntary character that can be considered to fit into the wide category of soft law. Its network

structure makes it neither clear nor formalized who is responsible for what and who is controlling whom. Perhaps its low boundaries of entry explain the ease with which the Global Compact has been embraced by such a large number of different actors (Sahlin-Andersson, 2004: 143, 148).

As expressed in the first two of the ten principles of the *Global Compact*, the view that corporations are morally complicit if they gain advantages from human rights violations that another actor, such as a political regime or a subcontractor, has committed, is gaining ground today:

Businesses should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses (*Global Compact*, Principle 1 and 2).

Four main situations in which charges of complicity can be made to different degrees, according to the International Council on Human Rights Policy (2002, Ch. VII), are (1) when a company actively assists in human rights abuses committed by others, (2) when a company is in formal partnerships, such as joint ventures, in which a government commits abuses when carrying out its part of the agreement, (3) when a company benefits from opportunities created by others' human rights violations, such as government suppression of trade union activity, and (4) when a company is silent although it is aware of grave human rights violations. The sphere of influence of a company will usually be taken to encompass those to whom the company has a political, contractual, economic or geographical proximity (p. 136). The company has the highest degree of responsibility if its connection both to the victims of human rights abuse and its connection to the authority violating human rights are strong (p. 141).

The notion of complicity draws upon a distinction between a *direct* responsibility for our own actions and an *indirect* responsibility for the actions of others. Following Sir Geoffrey Chandler (2000: 20), the *direct*

responsibilities of a company relate to the stakeholders, that is, those on whom it depends for successful business, and those who are affected through its operations. In his list of direct responsibilities, Chandler includes, for example, the profitable conduct of business, employment conditions and environmental care in line with international standards, no bribery and corruption, security arrangements that respect human rights, and general monitoring of company impact on local communities.

Possible *indirect* responsibilities represent moral dilemmas, since the direct responsibility lies with governments, but where the government's human rights violations might not have occurred without the presence of oil exploration that foreign companies are involved in. Such indirect responsibilities include human rights violations committed by governments, misuse and inequitable division of revenues by governments, official corruption, distorted development of the country and economic inequality (Chandler, 2000: 20).

Notions of complicity and indirect responsibility give expression to the moral tensions arising from a legal distinction between public and private responsibility for human rights. We find the soft law concept located somewhere between "hard law" and moral pressure. From a moral cosmopolitan perspective, as introduced in the previous chapter, one could argue that the actions and interests of corporations and stakeholders cannot be fully captured in contracts and law. Businesses are in this perspective considered not only bound by the rules of a local political community, but also responsible to collective moral norms of a global community. They are encouraged, across all cultures and sites of operations, to maintain processes consistent with collective norms of a global community that take precedence over local norms in cases of conflict.

The corporation is expected not only to undertake local philanthropy but also to contribute to secure non-local conditions that are supportive of global norms (Wood and Logsdon, 2001: 96-98). The kind of cosmopolitanism preferred by Nigel Dower (1998: 187) implies

pushing international economic actors to behave in ways that really promote economic well-being, and thus challenging the power of the transnationals insofar as they tend to cause poverty or promote inappropriate forms of development.

This position does not draw a strict boundary between public and private in the domain of social responsibility. Neither does it exclude the possibility of moral agency of corporations. On the contrary, the social responsibilities of large corporations are considered extensive.

From a more communitarian-oriented perspective, moral demands on a company to act responsibly could arise from its embeddedness in, and impact on, a local community. Because of its important role in society, the company ought to reflect community values and contribute to the good of the community. Long-term community relations are considered as well as short-term ones. The company is expected to assume responsibility for any harm done to the local community. Depending on the character of the community, the scope and character of responsibility varies from one corporation to another and from one site to another (Wood and Logsdon, 2001: 93-95). This position, in summary, considers companies morally responsible within a bounded community, where its degree of closeness and impact determines the boundaries of its responsibility.

In sum, the *soft law* concept reflects the firm grip of the public-private distinction on the international legal framework, where only states are considered legal subjects. For many different reasons, the moral pressures directed at companies cannot be met by adapting the legal framework, but a middle course is found in the expanding notion of soft law. We see a rich tapestry of responsibility, containing a mixture of moral and legal demands for socially responsible action facing TNCs in a global sphere. Moral demands for responsibility are often based on arguments related to power and capacity, mirroring the discussion of private authority in Chapter Three.

It may by now seem to the committed reader as though an extension of international legal responsibility to transnational corporations would

be a fine solution to meeting changing global circumstances and better addressing contemporary challenges to human rights protection. However, besides obstacles inherent in the international legal structure, and the advantages of a clear allocation of responsibility, the next Chapter Six will render this comprehension more intricate and problematic, as we enter into the terrain of accountability. First, though, I turn to looking into how notions of public and private are manifested in the debate on responsibility surrounding the operations of the transnational oil company Talisman Energy in Sudan.

Distributing Responsibility for Human Rights Protection: The Debate on Talisman Energy in Sudan

How is the public-private distinction manifested in the controversy surrounding the distribution of responsibility for human rights protection in connection with the operations of Talisman Energy in Sudan? In order to enable an examination of this, I break down the examination of the debate into four sections in terms of the main themes of responsibility present in it. First, this concerns the general character of corporate responsibility for human rights, profit-making, and community development. Second, it concerns responsibility for the use of oil revenues, and, third, the human rights impact of Talisman Energy's business partners. Finally, the theme is about oil companies' impact on conflict dynamics.

Together, these themes provide a picture of the web of tensions and dilemmas faced by the participants in a controversy concerning the character of the responsibility of a foreign oil extraction company operating in a country with high and persistent levels of human rights violations.

Responsibility for profit-making and human rights

The main channel through which the company's own stance on its social responsibility in general, and in the Sudanese context in particular, was spread was through its annual reports on corporate social responsibility (Talisman Energy, 2000, 2001, 2002 and 2003). Such CSR reports have become an increasingly common element in large firms' annual reporting procedures over the past decade. Talisman Energy's CSR reports outline the company's views on the character of its social responsibility, and present what the company perceives as dilemmas in the field of social responsibility. They also report on concrete efforts undertaken by the company in the area of human rights protection and the social sphere

more generally. The reporting of the concrete measures undertaken is verified by PricewaterhouseCoopers in the CSR reports.²¹

Here, a couple of representative quotations will indicate how the company framed its social responsibility. In its Corporate Social Responsibility report 2000 (p. 4), Talisman Energy stated that

[c]orporate social responsibility means conducting activities in an economically, socially and environmentally responsible manner. It also includes working together with stakeholder groups to identify constructive solutions to shared problems.

According to the *International Code of Ethics of Canadian Business*, adopted by the company in December 1999, such stakeholders should include local communities, Canadian and host governments, local governments, shareholders, the media, customers and suppliers, interest groups, and international agencies.²² In its CSR report 2000 (p. 4), the company explained that

[w]e believe that our operations bring direct benefits to the communities in which we operate including creation of jobs, expansion of local infrastructure and support of community projects that create opportunities for a better future. As a responsible business we also

²¹ *PricewaterhouseCoopers* provides industry-focused assurance, tax and advisory services for public and private clients in the areas of corporate accountability, risk management, acquisitions, and performance improvement. It has also audited Shell's CSR reports.

²² Talisman Energy became a member of the earlier mentioned *Global Compact* in February 2004, i.e. after its Sudan operations had ended. In the letter to Kofi Annan formally confirming Talisman Energy's support for the Global Compact principles, CEO James Buckee committed "to make the Global Compact and its principles part of the strategy, culture and day-to-day operations of our Company" (http://www.talisman-energy.com/socialresponsibility/global_compact.html, last accessed March, 2005).

believe it is our duty to observe and promote ethical business practices, and advocate respect and tolerance by and for all people.

In its CSR report 2002 (p. 36), the company stated that

[w]e recognize the need to conduct our activities in a responsible manner. It is consistent with and supports our primary role, which is the creation of value for our shareholders.

Its CEO, James Buckee, maintained that

[w]e also recognize that strong performance is required in the safety, environmental, and social areas to retain our position as a successful energy company (Talisman Energy, 2002: 2).

The economic elements of “creation of value for shareholders”, “economically responsible” and “successful energy company”, stated to be the “primary role” of the company, are thus characterized as being in a mutually supportive relationship with human rights elements relating to “ethical business practices”, “socially responsible”, “respect” and “tolerance”.

In an *Oil & Gas Journal* article (Nov. 13, 2000), Jacqueline Sheppard and Reg Manhas, two directors of the company, wrote that implementing the *International Code of Ethics for Canadian Business*

involves setting and acting on proper standards of corporate behavior and taking care to avoid being political or taking on the social development mandate that properly belongs to governments.

The *International Code of Ethics for Canadian Business* states, among other things, that “we will support and promote the protection of international human rights within our sphere of influence; and not be complicit in human rights abuses”. It also maintains that “national governments have the prerogative to conduct their own government

and legal affairs in accordance with their sovereign rights”, but that “all governments should comply with international treaties and other agreements they have committed to, including the areas of human rights and social justice”.

The company directors cited above connect to a view of business as apolitical, in that it ought not to take on a social mandate, which is one manifestation of how the public-private distinction forms frames of reference in thinking about responsibility. If compared to the statements on responsibility in the CSR reports, we perceive an ambiguity and contradiction within the company’s discourse on CSR. In the same article, Sheppard and Manhas argue that “[o]perating in countries with social and political systems different from those of western democracies requires respect of foreign cultures while preserving a company’s core values”. They also claim that

[b]ecause social issues involve value judgments and often produce highly emotional responses, satisfactory consensus may not always be achieved. In these cases, Talisman will continue to work through discussion and other forms of positive influence to resolve differences (*Oil & Gas Journal*, Nov. 13, 2000).

Through this characterization of social issues as “emotional”, where “value judgments” are present and “consensus” is not always a possible outcome, the social affairs of the public sphere are constructed as different in character from the usual pursuit of business affairs. Paradoxically, this resembles how the private sphere in the sense of family/household has traditionally been characterized in contrast to a public sphere, as elaborated on in Chapter Three.

In its CSR reports, the company enumerates several initiatives it has taken in the social domain. Such tangible benefits to the local community, according to Talisman Energy in 2000, were five medical clinics, three schools, new roads, electric power in several communities, supplies of vaccines, water supplies, emergency shelters, volunteer work of Talisman employees with Sudanese charities, and population growth

in the main villages in the area of the Greater Nile Petroleum Operating Company oil concession (*Oil & Gas Journal*, Nov. 13, 2000). In 2002, the company initiated a model farm within the GNPOC concession area to instruct Sudanese farmers on improved farming methods in order to reduce dependency on aid, and to improve investment in the local economy. Around 45 farmers participated in the model farm in 2003 (Talisman Energy, 2003: 20).

The company claimed it knew what it was getting into in Sudan and that it hoped to be an internal influence for moderation by the Sudanese government. It was pointed out by a spokesman of the company that the government would pump oil with or without Talisman Energy, and that the company helped the people living in the oil areas, by building roads and a hospital. "There are local people at the gate every morning looking to earn \$5 a day", the spokesman said (*Report/News magazine*, December 6, 1999).

The UN Special Rapporteur on the situation of human rights in Sudan pointed out in his report in 2001 that in spite of the infrastructure provided by the oil companies to the local population, oil exploitation had continued to have a negative impact on the human rights situation. The Special Rapporteur claimed that no matter what oil companies would provide in terms of social services, their doing business in a war-torn country would continue to face international criticism until military warfare ended in the country (UN Special Rapporteur report 2001: 13).

Most NGOs and assessment missions reporting on oil exploration and human rights violations in Sudan did not, for their part, focus on what the exact level of community development efforts of transnational companies ought to be. Many regarded this as a less vital matter than the question of whether the responsible course of action was to stay in the country and deliver protests to the government, or to leave the country in protest against the government's human rights violations (the latter was demanded, for example, by Freedom Quest International, a Canadian NGO, in *Report/News magazine*, January 03, 2000).

Christian Aid (2001: 33) called upon oil companies to suspend operations, though not to sell their investment, until a just peace agreement had been agreed. Corporate responsibility in the Sudanese context, according to Christian Aid, included publicly made demands to the government of Sudan and opposition groups to renew peace efforts, to bring up reports of human rights violations, and to invite human rights monitors. It also included ensuring that company infrastructure was not used for military purposes and that codes of conduct were fully implemented. Similar demands for a suspension of oil development activities by Talisman Energy, and other oil companies in Sudan, were made by Human Rights Watch (2003: 525), the Canadian Inter-Church Coalition on Africa (February 2000), and the New Sudan Council of Churches (November 2000).

In its report *Sudan: The Human Price of Oil*, Amnesty International (2000: 11) stated it believed companies were responsible for the way in which the local community was treated as a result of their operations.

Amnesty International believes that respect for human rights should be a central issue for any company which is involved in a war-torn environment such as southern Sudan. It believes that the company's profit-making interests and the government's interest in exploiting oil resources to increase state income can both be best assured by a secure environment in which human rights are respected.

In identifying the company's interest as "profit-making" and the government's interest as "exploiting oil resources to increase state income" and pointing out that those interests best can be "assured by a secure environment in which human rights are respected", Amnesty International appealed to the economic self-interest motive for protecting human rights. In similarity to the view put forward by the company, Amnesty International indicates that there is no contradiction between respecting human rights and making profit; on the contrary, those goals are reinforcing each other. We see how the justification of prescriptions is made with reference to values and incentives already prevailing in

the normative framework of the target actors, the oil corporations (c.f. Chapter Three). The possibility of moral agency of an organization such as a transnational corporation is presupposed, both by the corporation itself and the NGOs (c.f. Chapter Four).

Throughout the debate on the responsibility of Talisman Energy in Sudan, the company seemed to be struggling with managing the boundary between what was presented as apolitical private activities and political, public responsibility activities. In its 2000 CSR report (p. 17), the company explicitly acknowledged this struggle in stating that

[t]he area of advocacy is one that is new to Talisman, and the Company is continually learning and developing what it believes to be appropriate 'boundaries' for our efforts. We need to ensure that we can express our views and raise issues that concern us in an effective manner. We will continue to explore what is responsible in terms of corporate political influence and to what extent and under what circumstances that influence should be used. As with many human rights issues, opinions vary widely on this matter.

The 2001 CSR report of the company declared that corporations are increasingly being asked to step into roles that have traditionally been the domain of governments and international bodies, such as the United Nations. Therefore, defining what is properly expected of a company "needs to be more clearly articulated and more rigorously debated" (Talisman Energy, 2001: 5).

In the emerging type of issues that are grappled with in respect of CSR, argued Talisman Energy vice president Jacqueline Sheppard, "you have to examine the role of an international or multinational corporation and try to figure out what its role ought to be". This should, according to Sheppard, be defined by applicable law, conventions and international standards emerging around the world. The analysis of what is appropriate "and what is or is not a natural aspect of the corporate body" ought therefore to be done by lawyers (cited in *Corporate Legal Times*, Oct. 2001). The company, in conclusion, established that it was a

subject of social responsibility, but that it found the boundaries between its social responsibility and what ought to be the social responsibility of the government unclear and up to a wider range of lawyers and debaters on CSR to figure out.

When commenting on the sale of the Sudanese assets of the company in 2002, Talisman Energy's President and CEO James Buckee explained that

Talisman's shares have continued to be discounted based on perceived political risk in-country and in North America to a degree that was unacceptable for 12% of our production. Shareholders have told me they were tired of continually having to monitor and analyze events relating to Sudan. We are encouraged by recent developments in Sudan, but had to weigh all possible outcomes against having a firm and fair offer, in hand, right now. Selling our interests in the project resolves uncertainty about the future of this asset (Talisman Energy, October 30, 2002).

Buckee also said that a program would be established to ensure the continuity of funding of Talisman development projects, such as the provision of shelter and clean water, until 2005. Talisman Energy opened a community development legacy office in Sudan in order to ensure support for these programs and to seek new funding partners (Talisman Energy, 2003: 20). An expected bump in stock prices on the announcement of the sale of the company's assets in Sudan did not occur, however. The main expected growth areas for the company at this point were said to be its assets in the North Sea, Malaysia, Vietnam and Trinidad (*Canadian Business*, Dec. 9, 2002).

The company stated in 2002 that, in parallel with the general development of the corporate social responsibility field, its own responsibility policies and practices had matured over the past four years.

The challenges associated with working in Sudan forced us to take a long hard look at our business and establish a firm position on what we

felt were the appropriate roles and responsibilities of a corporation. This became critically important as we were operating in a country in a state of civil conflict where such boundaries can become blurred (Talisman Energy, 2002: 36).

In conclusion, one way in which the public-private distinction was played out in the debate on the human rights responsibility of Talisman Energy in Sudan was through the justification of why the company had a general responsibility to promote human rights. Human rights protection, social responsibility in general and economic profit were framed as mutually supportive in efforts at bridging the public-private divide. Translating this into concrete company practice meant the provision of tangible social services, such as schools and water supplies. Such efforts did not satisfy those critics calling for a change in the company's overall relationship to its business partner, the Sudanese regime.

In the company's way of justifying its exit from the country, we see tensions in its corporate social responsibility discourse become manifest as economic elements (such as discounted shares, resolving uncertainty, firm and fair offer), come to prevail over its human rights elements. Here, the relationship between economic profit and human rights, which had previously been constructed as mutually supportive within the discourse of corporate social responsibility, appears more conflicting.

Legal interpretations of the boundaries of responsibility are not available for guiding the company's balancing acts. We see, however, an example of soft law guidance in the *International Code of Ethics for Canadian Business* and also how open this code is to interpretation in this context. It provides general moral guidance, but does not provide direct answers in concrete efforts at drawing boundaries between public and private responsibility and between political and apolitical activities. Talisman Energy has to find out for itself what human rights advocacy and moral responsibility imply for a private actor in the Sudanese context.

There is no ‘real responsibility’ out there to be found. We recognize this from the conceptual discussion on responsibility in Chapter Four.

The reports of nongovernmental organizations on the role of transnational oil companies in Sudan demonstrate how private authority is manifested in this local context. First, it is demonstrated in the sense that the NGOs exercise *normative moral authority* due also to the attention their reports receive internationally. Second, it is demonstrated in the sense that the *market authority* of transnational corporations such as Talisman Energy becomes visible. Those expanding activities of private actors of entirely different kinds bear witness of an emerging *global public domain*, containing a transnational arena of discourse, contestation, and action concerning the production of global public goods, such as human rights protection. It involves private (NGOs, Talisman Energy) as well as public actors (as for example the UN Special Rapporteur), and constitutes an arena where expectations regarding legitimate social purpose and the roles of different sectors and actors in society are articulated, contested and shaped (c.f. Chapter Three).

Responsibility for the use of oil revenues

A second central responsibility theme raised in the debate on corporate responsibility in Sudan was the character of the company's responsibility for how the revenue from the oil extraction it participated in was used by the Sudanese government. This raised larger issues of fairness and equal wealth distribution of the income stemming from the natural resources of a country with massive poverty and a highly repressive regime.

Foreign investors had long been reluctant about involvement in Sudan, due to concerns about security of employees and investments, and negative publicity. Throughout the 1990s, the Sudanese oil industry was still in rudimentary form, only producing small amounts of oil for local use, and the country imported most of the petroleum it needed (Human Rights Watch, 2003: 169). As this was beginning to change, Amnesty International (2000: 11) stated that

[o]il – and the revenues that oil production is expected to generate – has persuaded investors to overlook the Sudanese government's reputation in favour of optimistic predictions of future oil-fuelled development in Sudan.

Talisman Energy's acquisition of a 25 % share of the Greater Nile Petroleum Operating Company (GNPOC) in 1998 provided the necessary infusion of capital for the oil consortium to complete its 930 mile pipeline for the transportation of oil from fields in southern Sudan to an export terminal in Port Sudan on the Red Sea in the north. Talisman Energy brought money, technical knowledge, credibility and an ability to find oil to the GNPOC project (*Canadian Business*, Dec. 10, 1999).

Oil started flowing through the pipeline in July 1999. The first exported cargo of oil departed in September 1999 (*Oil & Gas Journal*, Jan. 13, 2003). Shortly after the opening of the oil wells, a rebel group based in the north bombed and damaged a section of the pipeline, a damage it took three days to repair (*Canadian Business*, Dec. 10, 1999). An attempt by the SPLA to blow up the oil pipeline in August 2001 was

prevented. However, the SPLA stated it would continue its attacks until oil exploration came to a halt (*Oil & Gas Journal*, Jan. 13, 2003).

Nevertheless, the oil revenue of the government increased from almost none in 1998 to 45% of its total income in 2002. Sudan became self-sufficient in oil and stopped the costly importation of crude oil for the first time (Human Rights Watch, 2003: 346ff). Concerns regarding how the income from oil exports was used soon appeared. Two Canadian assessment missions concluded that oil revenues were financing an extension of the civil war by the government, and that the presence of Talisman Energy did not have a positive impact on how the government distributed oil revenues (*Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan*,²³ 2001: 36). Along similar lines, *Human Security in Sudan: The Report of a Canadian Assessment Mission*²⁴ (2000: 67) claimed that Talisman Energy should make publicly clear that it acknowledged the destructive impact of oil extraction and that the company ought to work towards the establishment of a trust fund for setting aside Sudanese oil revenues in an arrangement acceptable also to southern Sudan. Oil operations ought not to be continued until a fair sharing of oil resources was provided for, demanded the New Sudan Council of Churches (Nov. 2000).

In a similar manner, Christian Aid (2001: 22) argued that foreign oil companies were complicit in human rights violations in Sudan in four main ways: (1) they requested the government of Sudan and its militias to provide security for the oil fields; (2) infrastructure paid for by the companies was used by government forces for military purposes; (3) revenues from oil production increased the government's ability to wage war; and (4) the uncritical presence of oil companies added

²³ An investigative mission commissioned by five Canadian agencies, for example the Canadian Auto Workers Union, Steelworkers Humanity Fund, and the United Church of Canada.

²⁴ Prepared for the Canadian Ministry of Foreign Affairs

credibility to a government that systematically violated human rights and humanitarian law.

For Talisman Energy's part, CEO Buckee claimed that the company shared concerns that oil revenues might be used for military purposes rather than for development. He stated that the continuing conflict hampered the ability of Talisman Energy to get independent access to oil areas for external human rights monitors: "[c]oncerns regarding the perceived infringement of national sovereignty expressed by the Government of Sudan continue to hamper our efforts in this regard" (Talisman Energy, 2001: 15). The company claimed that it had limited ability to address the issue of the expenditure by a sovereign government of its revenues (Talisman Energy, 2000: 28).

The *International Code of Ethics for Canadian Business* states, however, that

[w]e believe that [...] we can facilitate the achievement of wealth generation and a fair sharing of economic benefits [...] wealth maximization for all stakeholders will be enhanced by resolution of outstanding human rights and social justice issues [...] We will strive within our sphere of influence to ensure a fair share of benefits to stakeholders impacted by our activities.

The company claimed it had been engaged in continuous dialogue with the Sudanese government regarding human rights issues and that it would continue to advocate at the highest levels to the Government of Sudan that it make a sincere effort to negotiate a just peace, and that oil development should be viewed as a key to reconstruction of the country (Talisman Energy, 2000: 29, 2001: 17, 27).

A leading spokesman of the government acknowledged in 1999 that the government was using oil money to finance the construction of weapons factories (*Multinational Monitor*, Oct. 2000). CEO Buckee explained in 1999 that the government of Sudan had assured him that oil revenues would be used to build roads, schools and hospitals for the benefit of the Sudanese people. Buckee also claimed that the situation

in Sudan was misrepresented, and that “[t]here is a huge machine generating false things about Sudan and it’s very hard to separate fact from fiction” (*Petroleum Economist*, 1999). The company claimed that, as a result of its efforts, the funding for community development provided by the oil consortium GNPOC had tripled in one year between 2001 and 2002 (Talisman Energy, 2001: 5).

The UN Special Rapporteur on the situation of human rights in Sudan argued in 2002 that “the use of oil revenues, the rights to development and the need to develop a wealth-sharing arrangement with the South are inextricably linked elements to be considered for a sustainable peace”. The use of oil revenues, he stated, ought to be based on a transparent process for wealth-sharing arrangements involving relevant stakeholders (UN Special Rapporteur report 2002: 12).

The efforts of Talisman Energy to bring up human rights issues with the Sudanese government were rejected by the government. The Sudanese minister of oil claimed that it was not for Talisman Energy to talk about human rights in Sudan (*African Business*, June 2001). The Sudanese government was resentful of the company’s political activists, and pointed out that Sudan did not need Talisman Energy in order to extract oil (*Economist*, Sept. 2, 2000). This was also mirrored in the United Nations, where the Special Rapporteur demanded to see evidence that the Sudanese government was right in claiming it used oil revenues for development matters. The Sudanese UN representative, along with the representatives of Syria, Iran and Libya, claimed this request violated sovereignty and was an unacceptable interference in matters within the jurisdiction of the government of Sudan. The Sudanese representative also denied the claims that oil had a negative impact on the human rights situation in the country, since his government was using oil revenues to improve social services throughout the country, especially in the south (UN General Assembly, 9 Nov. 2001).

In conclusion, the debate concerning the use of oil revenues provides an illuminating example of the moral tensions involved in drawing boundaries of responsibility. The oil revenue topic can be

called a problem of indirect responsibility, and it is filled with charges of complicity in human rights violations on the part of Talisman Energy. By describing its efforts at influencing the Sudanese government to use oil revenues appropriately, the company draws an image of itself as taking responsibility for human rights protection, in putting pressure on others to behave responsibly. These efforts are in line with increased international demands for transnational companies' concern for human rights, and indicative of a renegotiation of where human rights responsibility resides along the public-private dimension. However, knowledge of how strong and persistent those efforts were is entirely lacking.

Talisman Energy's efforts at influencing the government's use of oil revenues are described as being hampered by the government's reference to the principle of sovereignty, and by the company's limited ability to address an issue such as the expenditure by a sovereign government of its revenues. The Sudanese government, for its part, also draws upon a once firmly-established and powerful construction of state sovereignty in using terms of sovereign jurisdiction and unacceptable interference. References to violations of sovereignty were the Sudanese government's main line of defense in the United Nations when being questioned on development and human rights matters. In referring to "the company's political activists", the government reinforces the public-private distinction by representing pressures for human rights as "political activity". Implicit in this we discern the disapproval of the engagement in such activity by a private actor.

Responsibility for business partners' human rights impact

How far does a private company's responsibility extend with regard to the human rights impact of the actions of its business partners? This was a third theme in the debate. Talisman Energy approached this question in its *Sudan Operating Principles* that set operating standards in the areas of human rights, community participation and environmental protection. The company pointed to its three different levels of influence when trying to realize the objectives of the principles. One was at the level of the company itself, where it had direct control and responsibility. The next level was the oil consortium, the Greater Nile Petroleum Operating Company (the GNPOC), where realizing the principles depended on the agreement and support of the company's business partners in the GNPOC. The third level was general advocacy vis-à-vis governments and international organizations. Here, the company stated it had minimal control, but still had a responsibility to undertake advocacy for human rights (Talisman Energy, 2000: 9).

The partners of Talisman Energy in the GNPOC, where the company owned 25 %, were, in addition to the Sudanese regime, the state-owned oil companies of China and Malaysia, together comprising 60 % of the GNPOC.²⁵ Since those two business partners were both state-owned, they could in a theoretical sense be considered public actors. The different companies brought different kinds of contributions to the GNPOC.

Security, in all its forms, was the Sudanese government's contribution to the oil development. Talisman provided expertise, China provided manpower, and Sudan provided an army and loyal militias who not only protected the pipeline and facilities, but also aggressively cleansed the oil fields of people (Drohan, 2004: 264).

²⁵ US companies did not invest in Sudan, since US regulations prohibited trade and investment in Sudan due to the Sudanese government's alleged connection to terrorism (Christian Aid, 2001: 23). The role of the US government will be examined in the next chapter.

Both China and Malaysia had growing mutual interests with Sudan at the turn of the millennium. China imported large quantities of oil, and had made it a matter of national security to diversify its energy sources, making the oil imports from Sudan a significant part of its strategy. China was prepared to defend its investments in Sudan by providing military support to the Sudanese regime (International Crisis Group, 2002: 68). Sudan was also a growing market for Chinese arms, fighter aircraft and other goods (International Crisis Group, 2002: 69, Human Rights Watch, 2003: 457).

Sudan, for its part, needed access to the oil market in China, the international credit, the arms supplies, and the political cover in the UN Security Council that China provided to it, as Western countries raised concerns over terrorism or human rights in the United Nations. For Malaysia, Sudan was an important alternative oil source, and Sudan needed the bridge loans provided by Malaysia to facilitate Sudan's adherence to the demands of the International Monetary Fund (International Crisis Group, 2002: 68).

Amnesty International (2000: 2) reported that foreign oil companies expected the Sudanese government to use its security forces to protect the staff and assets of the oil companies and to provide a secure environment at large. The organization also claimed that many foreign companies tolerated human rights violations by turning a blind eye to the violations committed by government forces in the name of protecting the security of oil fields, and that some companies allegedly had employed private military and security companies. They indirectly contributed to the continuation of violations, Amnesty International argued (2000: 10), along with Christian Aid (2001: 23f).

Human Rights Watch (2003: 520-525) concluded that oil corporations such as Talisman Energy were complicit in human rights violations in Sudan in several ways, since they could not ensure that their operations did not facilitate or benefit from human rights abuses. The

independent report *Deconstructing Engagement* (2003: 51)²⁶ concluded that self-regulation by Talisman Energy in Sudan had proved ineffective in ensuring that the company would not be complicit in human rights abuses.

The company profits and benefits from human rights violations committed by the government as systematic displacement enhances security for Talisman's oil operations [...] Any use at all by government forces of oil facilities therefore makes the oil companies complicit in the government's military activities and associated human rights abuses. Talisman's human rights monitoring program is completely inadequate.

The issue of the conduct of the security forces providing protection for oil operations was one of the most problematic for the company in Sudan, conceded by the company to be an area where it had little ability to apply any controls (Talisman Energy, 2002: 8). However, the company pointed out that the safety of its own employees was its first priority, and that it supported the need for military protection to ensure the safety of its employees. The company also said it understood "the right of a sovereign state to protect its national assets" (Talisman Energy, 2001: 18).

Talisman Energy had established a *Security Policy* that would assist the company in promoting respect for human rights and advancing best practices in its relations with governments, joint venture partners and third parties. The security policy stated that Talisman Energy should conduct itself in accordance with the *Voluntary Principles on Security and Human Rights*,²⁷ and should endeavor to ensure that

²⁶ Written by G. Gagnon et al. (January 2003), being a joint initiative funded by the Law Commission of Canada and the Social Sciences and Humanities Research Council of Canada.

²⁷ For web addresses to the *Security Policy* and the *Voluntary Principles*, see "Miscellaneous" in the references section of this book.

contractors, and other third parties conducting activities for Talisman Energy, complied with those principles. The *Voluntary Principles* were elaborated by the governments of the United States and the United Kingdom, in cooperation with NGOs and companies in the extractive and energy sectors, in late 2000. The principles state, inter alia, that

we recognize that security and respect for human rights can and should be consistent [and] that governments have the primary responsibility to promote and protect human rights and that all parties to a conflict are obliged to observe applicable international humanitarian law.

The principles also contain different sections on the relationship between companies and the public provision of security on the one hand, and between companies and private security on the other hand.

The state-owned oil companies of the GNPOC were “reported to be wryly amused by their partner’s earnest efforts to observe human rights” (*The Economist*, Sept. 2, 2000). Still, the consortium adopted a *Code of Ethics* in September 2000 that established guidelines and principles for the protection of human rights and a framework through which the consortium could address human rights issues (Talisman Energy, 2000: 16). The company’s efforts at developing an agreement governing the provision of security in the oilfield areas throughout 2001, however, were ultimately rejected by the government of Sudan. The government’s reason, according to Talisman Energy (2001: 17), was that the provision of security was the prime responsibility and prerogative of governments and that it was not appropriate for a company residing in and operating under the laws of Sudan to address such issues.

Officials of the company pointed out that Talisman Energy could not require its GNPOC partners to pledge allegiance to the standards to which Talisman Energy was committed. The company arranged, however, for security staff of the GNPOC to attend a human rights training program in Canada. It also provided financial support to the Sudan’s

Humanitarian Aid Commission for a conflict-resolution database to coordinate peace efforts (*Oil & Gas Journal*, Nov. 13, 2000).

When selling its Sudan assets in 2002, Talisman Energy (Oct. 30, 2002) commented that

[t]he corporate responsibility policies and procedures implemented within the Greater Nile Petroleum Operating Company, the operator of the project, as a result of our advocacy efforts, such as the GNPOC Code of Ethics and human rights training, have influenced and, we hope, will continue to influence the operations of the consortium in the years to come. We also hope that the economic benefits of oil field development will play a constructive role in the Sudan peace process.

In conclusion, the public-private distinction is given an extra dimension in this context, as it was the government of Sudan and the state-owned companies of China and Malaysia that violated human rights in the name of “security”. Transnational private sector actors such as NGOs and Talisman Energy criticized and aimed at regulating the behavior of those state actors. The efforts of Talisman Energy to persuade the state-owned companies of China, Malaysia, and Sudan to adhere to voluntary principles of human rights were, however, unsuccessful. At the same time, we see an expansion of the assumed sphere of private responsibility, supported by the internationally agreed standard of the *Voluntary Principles on Security and Human Rights*. We also discern the weakness of interstate mechanisms for human rights protection in the case of Sudan.

The company claimed that a lack of capability to influence its business partners prevented greater control of the human rights practices of security forces, though a Code of Ethics was adopted, allegedly as a result of its advocacy. As we have seen, several voluntary codes of conduct were present in the efforts to address the human rights violations connected to oil field security. In this conflict-laden situation, the soft law instrument turned out to be weak, as the supposedly regulated parties did not themselves demonstrate any interest in it.

In this debate process, Talisman Energy appeared both in the role of regulator and regulated; the latter through self-regulation as well as through pressure from external actors. Tensions surrounding the security issue arose between, on the one hand, the company's proclaimed ambition to promote responsible practices from security forces guarding the oil fields, and, on the other hand, the company's assertion that the safety of its own employees was its first priority and that it understood the "right of a sovereign state to protect its national assets". Again, we see the presence of charges of complicity based upon an underlying notion of indirect moral responsibility for the behavior of others, to whom one stands in a cooperative relationship.

Responsibility for conflict dynamics

A final core theme in the debate surrounding Talisman Energy concerned the overall impact of oil operations, in which the company was a key player during this time period, on the long-lasting civil war of Sudan. According to NGO and UN reports, government forces fighting in southern Sudan used infrastructure, such as roads and airstrips, paid for by the companies. In retaliation, armed opposition groups attacked government-controlled cities. In addition, the SPLA opposition targeted oil installations and declared oilfields and oil companies legitimate military targets. As a result, international humanitarian law, for example common Article Three of the Geneva Conventions including the protection of the civilian population in times of armed conflict, was widely violated by both sides of the conflict (Christian Aid, 2001: 1, UN Special Rapporteur on the situation of human rights in the Sudan, 1999, 2000, 2001 and 2002).

The UN Special Rapporteur on human rights in Sudan established in several reports that the oil issue was exacerbating the conflict. In his 1999 report (p. 12), the Special Rapporteur stated that

[t]he economic, political and strategic implications of the oil issue have seriously compounded and exacerbated the conflict and led to a deterioration of the overall situation of human rights and the respect for humanitarian law, as well as further diminishing the already slim chances of peace.

The UN Special Rapporteur claimed the violations were chiefly attributable to the government army and government-sponsored militias, but that the SPLA also was responsible for a number of serious violations, abductions, and summary executions (Report 1999: 21). In 2001, the Special Rapporteur noted that “relevant sources agree that exploitation of the oil reserves has led to a worsening of the conflict, which has also turned into a war for oil” (Report 2001: 13). In 2002, the UN Special Rapporteur reported he was shocked to read witnesses’

accounts of the scorched earth tactics used by the government air and ground forces in order to clear oil-rich areas (Report, 2002: 6). Similar conclusions regarding the impact of oil exploration on the civil war and the level of human rights violations were made by Amnesty International (2000), Christian Aid (2001), Human Rights Watch (2003), the Inter-Church Coalition on Africa (2000), the New Sudan Council of Churches (2000), in *Human Security in Sudan* (2000), in *Deconstructing Engagement* (2003), and in *Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan* (2001).

To what extent is a private oil corporation headquartered in a foreign country responsible for the impact of oil exploration on the conflict dynamics of a civil war in the country where it operates? Christian Aid (2001: 3) stated that oil companies in Sudan were contributing to the extension of the war by permitting government forces to clear new areas for them to exploit. Beginning in September 1999, Talisman Energy started paying royalties to the Sudanese government of US\$20 million per month (*Oil & Gas Journal*, Jan. 17, 2000). Responding to requests that Talisman Energy ought not to do business with the Sudanese regime, CEO James Buckee stated he believed the company did more good for the Sudanese people by keeping cordial relations with the government, by nudging government officials and continually bombarding them with questions. Buckee claimed he believed the current Sudanese leaders wanted to bring peace to the country.

They will say I am a dupe of the government, but the government is basically trying to salvage something decent out of a big mess (Buckee quoted in *Globe and Mail*, Oct. 13, 1999).

At the same time, he claimed at the company's annual meeting in 1999 that it was not up to him to defend the Sudanese government and that Talisman Energy was in Sudan for business and did not take sides in the issue of the civil strife (Drohan, 2004: 247).

The company established, however, that choosing to operate in a country with internal conflict increased the need for rigorous commitment to corporate social responsibility principles (Talisman Energy, 2000: 5). CEO Buckee stated that “[i]n Sudan, where conflict and reported human rights violations are widespread, I believe our responsibility is great” and that “[w]e also believe in using our corporate influence to promote peace and economic development when operating in areas of conflict” (Talisman Energy, 2002: 7-8).

In the case of foreign oil companies in Sudan, Christian Aid (2001: 23), was one among the debaters arguing that the governments of the states where the oil companies were headquartered also had responsibilities with regard to the impact of the companies abroad. The Canadian government-initiated assessment report *Human Security in Sudan* (2000: 65) concluded that it was a prominent perception of many southern Sudanese that Talisman Energy was in active collaboration with the government of Sudan, both economically, politically and militarily, and that the government of Canada was indifferent to that collaboration. The view that the home state, where the headquarters of the corporation are located, ought to prevent its citizens and corporations from acting irresponsibly abroad is spreading. Since the home state benefits by its transnational corporations’ activities abroad, it arguably has a moral duty to control how corporations’ incomes are earned (Engström, 2002: 18-19). The scope of this responsibility is not, however, clarified in international law.

The then Canadian minister of foreign affairs, Lloyd Axworthy, was well known for his efforts at establishing Canada as a middle-power leader in humanitarian affairs globally, through his “human security” approach to foreign policy, taking leadership in issues such as the establishment of the anti-landmines convention. Lloyd Axworthy later said he had warned Talisman Energy ahead of time not to invest in Sudan. He stated one reason for this was the administration’s fear that the company would call on its help if the company was attacked in the conflict, for example through kidnappings, and that this lack

of responsibility on the part of the company would cost the Canadian administration a lot of money, time and effort. As the company went ahead into Sudan anyway, Axworthy said he “was amazed that the company could be so stupid—and so flagrant” (Drohan, 2004: 264).

The perceived lack of Canadian responsibility for the impact of a Canadian-headquartered company abroad led to criticism of the Canadian government. For example, a director of the Canadian NGO Freedom Quest International, (writing in *Report/News magazine*, January 03, 2000) stated that:

[f]or those of us raised with Canadian values, this is a moral nightmare [...] Canadians have always prided themselves on their support of human rights. For Canada to be the object of such international criticism is disturbing. The Sudanese are shocked to find Canadians siding with their ruthless oppressors [...] Dare we suspect that in the boardrooms and discussion chambers of our nation’s businesses and bureaucracies the corporate bottom line can outshout the moral cry of ‘never again’? [...] Any positive influence which this company might have in the country is outweighed by the damage this moral cover provides for the regime.

In 1999, an oil rig guarded by Sudanese army troops in the GNPOC concession area was hit by a rebel attack, and two Sudanese workers were killed as well as three army soldiers (Human Rights Watch, 2003: 399). Talisman Energy had never talked to the opposition in Sudan, the company claimed (*Canadian Business*, Dec. 10, 1999). An SPLA spokesman stated that: “Talisman comes from a society that we thought would not just concentrate on profits but would also look at morals” (cited in *Time Canada*, Nov. 22, 1999). As the SPLA made military gains in 2000, it threatened to overrun the oil fields. This possibility was acknowledged to a Canadian newspaper by a Talisman spokesman off the record, claiming that “[t]he SPLA has no legitimacy in the south [...] But we don’t want to talk about that because they could be in charge” (*Report News magazine*, Dec. 18, 2000).

In the company's CSR report 2002, Buckee maintained he was particularly proud of the company's ongoing efforts to support community development projects in Sudan, and of "our ability to participate constructively in the Sudan peace process by offering practical support to international efforts to end the long-running civil war" (Talisman Energy, 2002: 3). This support was demonstrated by the provision of information and assistance to the team led by the US Peace Envoy to Sudan (John Danforth) and to the Center for Strategic and International Studies, as well as by the ongoing dialogue with the Canadian Department of Foreign Affairs and International Trade (Talisman Energy, 2002: 9).

During the entire debate, Talisman Energy faced demands to leave the country and thereby cut its ties to the Sudanese government. The company, however, stuck to the view that the appropriate moral response to the armed conflict was to stay in Sudan and to use its corporate resources in such a manner as to encourage peace and community development (Talisman Energy, 2001: 5). Two top officials of the company claimed that if Talisman Energy withdrew, oil would continue to flow but the community development undertaken by the company would end.

The pursuit of economically sound ventures by the private sector can be an effective tool for opening countries to new ideas, values, and influences (cited in *Oil & Gas Journal*, Nov. 13, 2000).

Its efforts in that direction did not satisfy those calling for another kind of responsibility that would address the more overarching problems related to oil exploration and human rights violations. Christian Aid (2001: 3) argued, for example, that foreign oil companies ought to help in the process of developing oil under a new set of terms, and that

[c]ompanies have failed to take proper responsibility for displacement and other human rights violations [...] in the wider context, deliveries of tents for temporary shelter for displaced villagers, or supports for

water boreholes or a 60-bed hospital, look very feeble indeed. A sticking plaster while disaster spreads.

In October 2002, however, the company's policy of "constructive engagement" as the morally right thing to do, changed, as it announced it would sell its Sudan assets to New Delhi-based ONGC Videsh Ltd., the international unit of India's state-owned Oil & Natural Gas Corporation (*Oil & Gas Journal*, Jan. 13, 2003). Initially, Talisman Energy's GNPOC partners, having the right of refusal over any sale, blocked the deal. Industry sources claimed that two of the partners, the China National Petroleum Corp. and Malaysia's state oil company Petronas, wanted to increase their stakes in the GNPOC, but that the Sudanese government objected to this. Eventually, the Chinese dropped their demands as did Petronas after being offered another asset (*Oil & Gas Journal*, Apr. 7, 2003).

The sale was completed in March 2003. This brought to a close the NGO campaign against Talisman Energy. While welcoming the company's decision to leave Sudan, Human Rights Watch (2003: 437) stated it believed Talisman Energy continued to share in the complicity of the oil companies operating in Sudan for the human rights abuses committed (by the government) in Sudan during the company's time of operation there.

In conclusion, the public-private divide, I argue, obscures recognition of the intensely political impact of the presence of large foreign natural resources companies in conflict zones. Boundaries between public and private responsibility are drawn, though not in any consistent manner, in the balancing acts of the company when trying to please both the Sudanese government and the international human rights community. Such balancing is seen when the company, on the one hand, pays royalties to the Sudanese government, fears that the SPLA opposition is in charge in the South, and reflects upon the legitimacy of the SPLA. On the other hand, the company claims not to take sides in the conflict since it is in Sudan for business. At a later stage, the

company reported on its constructive participation in the Sudan peace process through its support of US and Canadian initiatives.

The public-private dimension is also displayed in the disagreements over how far the Canadian government's responsibility reached with regard to the activities of the Canadian-headquartered private actor Talisman Energy. The debate on Talisman Energy is one indication that the view that the home state ought to prevent its citizens and corporations from acting irresponsibly abroad is increasingly spread. How the responsibility of the Canadian government ought to be exercised in practice turned into a matter of conflict, however. The lack of forceful action against Talisman Energy is contrasted in the debate with "Canadian values" and the establishment of an image of Canada's "normal" identity as being one of a defender of human rights.²⁸

²⁸ The next chapter contains a more elaborate examination of the role of the Canadian government.

Conclusions of the Chapter

In this chapter, I have examined the web of moral, political and legal tensions and dilemmas faced by participants in controversy on the character of the role-responsibility of a foreign oil extraction company operating in a country with high and persistent levels of human rights violations. The public-private distinction is expressed in this in several ways. It defines the terrain upon which the dispute is conducted. Through its institutionalization in law and international organizations, the public-private distinction holds a grip on the distribution of human rights responsibility. The international legal framework constructs states as the party responsible to protect human rights. Institutional and legal mechanisms of the international human rights regime thereby reproduce and uphold the distinction between public and private responsibility by focusing mainly on states as protectors and violators of human rights. An invisibility and depoliticization of the impact and authority of, for example, transnational corporations results from institutionalized notions of public and private.

At the same time, we see that the boundary between public and private responsibility is a site of struggle. Reconfigurations of authority and power relations challenge the legitimacy of international law and organizations. The international legal boundary between public and private responsibility for human rights protection is questioned by moral notions of complicity and indirect responsibility. The expansion of soft law instruments, for example in the area of corporate social responsibility, bears witness of change and a gradually increasing overlap of public and private in definitions of where responsibility of human rights protection is located.

This is demonstrated in the debate surrounding the operations of Talisman Energy in Sudan. We see boundary-drawing processes at work in the efforts to define the sphere of responsibility for transnational corporations present in zones of persistent human rights violations. Outside of interstate legal mechanisms, a transnational corporation, drawing upon its market-based authority, and a range of

nongovernmental organizations, drawing upon moral authority, debate in a horizontal relationship the distribution of responsibility for human rights protection. References to soft law instruments proliferated in the debate, aiming at defining which social practices were to be framed as acceptable and possible. Competing claims to knowledge about this abound in the emerging global public domain of discourse, contestation and action that is related to the production of global public goods.

In the debate on Talisman Energy, a tension between public and private spheres of responsibility was seen in the discourse of corporate social responsibility. Economic elements related to the creation of value for shareholders and successful business were characterized as being in a mutually supportive relationship with human rights elements relating to ethical business practices. In efforts at bridging the public-private divide, human rights protection and economic profit were constructed as mutually supportive aims. Later, in the manner of argument used by the company to defend its exit from the country, the relationship between economic profit and human rights protection appeared more conflicting.

We found the notion of complicity, based on an indirect responsibility, to hold an important role in allocating responsibility in the debate on Talisman Energy in Sudan. Underlying this notion is a proliferating view of a cosmopolitan moral responsibility of transnational corporations for their impact on human rights conditions. In the debate on Talisman Energy, the notion of complicity captured a moral condemnation of the co-operation of a Canadian-headquartered company with the Sudanese regime. Particularly, the notion was alluded to in demonstrating the inappropriateness of the company benefiting from conditions arising as a result of the regime's human rights violations. In a non-democratic setting, the public-private distinction is given an extra dimension, as supposedly "public" actors, governments, do not fulfill their legal human rights obligations.

The public-private distinction is also displayed through references to state sovereignty, as sovereignty has traditionally been a constitutive

feature of the main public actor of the international sphere, i.e. states. Talisman Energy's efforts to influence the government's use of oil revenues were described as being hampered by the government's reference to the principle of sovereignty, and by the company's limited ability to address an issue such as the expenditure by a sovereign government of its revenues. The Sudanese government itself drew upon an at earlier times firmly established and powerful construction of state sovereignty in using terms of violations of sovereignty and unacceptable interference.

Furthermore, the public-private divide serves to obscure recognition of the intensely political impact of the presence of large foreign natural resources companies in conflict zones. This is seen in the balancing acts of the company, as it paid royalties to the Sudanese government, feared that the SPLA opposition was in charge in the South, while at the same time claiming that it was not taking sides in the conflict since it was in Sudan for business.

The public-private dimension, finally, is also manifested in the disagreements over how the Canadian government ought to relate to a private actor such as Talisman Energy. To what extent the home state ought to prevent its corporations from acting irresponsibly abroad turned into a matter of conflict, in the absence of legal guidance, but in the presence of moral criticism against Canada. The lack of resolute action against Talisman Energy was contrasted with "Canadian values" and the image of Canada's "normal" identity as being a defender of human rights and a proponent of the spread of the concept of "human security" globally.

By way of conclusion, we find that institutionalized legal notions of public and private empower and form knowledge of what the natural spheres of responsibility are for different kinds of actors, but we also see elements of contestation and antagonism, instability and inconsistency, challenging the boundary between public and private in human rights protection.

CHAPTER SIX

DEMANDING ACCOUNTABILITY

In this chapter, I examine how the public-private distinction is displayed in efforts to hold transnational corporations accountable for how they exercise the responsibility that was the focus of the previous chapter. First, I look into this with regard to accountability mechanisms being used in connection with transnational companies. In the second part of the chapter, I investigate different paths of accountability in the case of Talisman Energy in Sudan.

Accountability and Corporate Social Responsibility

In this section, the diversification of mechanisms for holding corporations accountable is elaborated on and the idea of CSR is examined in the light of principles of democratic accountability.

Accountability mechanisms

Institutionalized mechanisms for holding corporations accountable for their impact on human rights conditions are, as pointed to previously, the national legal systems of host countries, home countries, and in some cases, of other countries. The protection of human rights then becomes dependent on the efficiency of the national and international legal human rights machinery. The corporation can be held accountable in human rights and other social areas by governments and court systems of other states than the one of its own headquarter, for example through the use of the *Alien Torts Claims Act* in the United

States. However, transnationalized production challenges the model of corporate accountability taking place through governmental regulations and supervision, resulting in an “accountability gap”. Competition for internationally mobile capital impairs the accountability relationship between TNCs and governments, giving TNCs more opportunities to evade accountability, though not to be entirely “footloose” (Koenig-Archibugi, 2004: 239-245, Held, 1995: 245). An invisibility of corporations under international law results as corporate accountability is filtered through the lens of state sovereignty (Cutler, 2003: 201).

International human rights law perpetuates the notions that private actors are, and by implication should be, only accountable to states, not individuals, and that other states are, and should be, only accountable to their own population (Jochnick, 1999: 60).

The effectiveness of legal accountability mechanisms sometimes depends on political willingness to use them. For example, governments can adopt legislation concerning selective purchasing that sets criteria in social and other domains for companies that wish to obtain government contracts. Another mechanism available for governments is their regulative authority on stock market listings, through which governments can impose conditions for oil companies concerning, for example, transparency of payments to host governments. In theory, home governments can impose unilateral requirements on oil companies headquartered in their jurisdiction. This is, however, more likely to be done in multilateral fora, such as the OECD, due to the competitive disadvantage faced otherwise (Swanson, 2002: 41-3).

In thinking about accountability mechanisms of transnational corporations we can replace “public officials” by “corporate managers” and “citizens” by “shareholders” (c.f. Chapter Four). Via formal mechanisms of accountability, the company board is accountable to the owners of the company, i.e. the shareholders. The market in itself can also function as an accountability mechanism, by subjecting corporations’

actions to the workings of markets in which consumers' wishes are expressed. The success of market strategies in holding corporations accountable to human rights norms then becomes dependent on the different stakeholders having sufficient resources to make their preferences felt in the market, since markets will only be responsive to stakeholders with money (Goodin, 2002: 4). If it is indeed the case that promoting CSR results in a "win-win" situation where both corporate profit and social issues improve, there is no reason for governments to get involved in regulating it, since market mechanisms will force companies to adopt CSR, some debaters argue (e.g. Bergkamp, 2002: 151).

In practice, though not through formalized accountability mechanisms, corporations headquartered in the West are increasingly becoming accountable to a wide range of stakeholders, through non-governmental advocacy groups that monitor their impact on human rights, environmental and social conditions. Through the monitoring and pressure campaigns that NGOs and consumer groups undertake against oil companies operating in conflict zones, the market can function as an accountability mechanism. The adoption of a rhetoric of responsibility and codes of conduct by corporations can be seen as a double-edged sword in this context. On the one hand, it allows corporations to point to their rhetoric as proof of being committed to social issues. On the other hand, it gives a point of leverage for movements aiming at pushing for actual compliance with the rhetoric (DeWinter, 2003: 150).

NGO and consumer pressures might be most effective in modifying actions directly under the control of the company, for example the behavior of its own security personnel or the decision whether to stay in a country with a repressive regime. The damage that negative publicity can inflict on company images can provide a market incentive to respond to NGO criticism. One weakness of this accountability mechanism is that, given limited funds, NGOs have targeted the companies most likely to respond to criticism. The companies replacing western companies

that have left a country with extensive human rights violations after NGO pressures might have a worse record and be less susceptible to NGO pressure (Swanson, 2002: 37).

The success of NGO campaigns demanding accountability from transnational corporations in conflict zones depends to a large extent upon the degree to which the target companies are susceptible to external pressure, primarily consumer pressure. Such pressure is usually most effective when the target company has a broadly recognizable brand and where the misdeeds of the company are flagrant enough to induce consumer reactions. Therefore, companies with a lower public profile, such as those that have diversified holdings or those dealing in generic commodities like oil and timber, may be less susceptible to consumer pressure. Unfavorable publicity is often a precondition for corporate responsiveness to pressures, but such publicity may be fleeting (International Peace Academy, 2001: 11).

The mass media can significantly broaden or restrict the possibilities for NGOs to demand accountability. If the media give considerable publicity to NGO reports and statements, their campaigns for accountability can attract a large audience. If, on the other hand, the media ignore NGO campaigns, the general public is less receptive and the targeted party might feel less pressured to take responsibility (Scholte, 2004: 227). Investor activism is an additional accountability mechanism working through the market, often based on reports and pressure from NGOs and media. As many large institutional investors have adopted codes of conduct governing their investment decisions, CSR criteria are increasingly taken into consideration in investor decisions as to where to sell and buy stocks (Swanson, 2002: 38).

Complementing those accountability mechanisms available for use by governments, shareholders and consumers, we find public-private partnerships in the area of CSR being formed over the past decade. We here again encounter the idea of self-regulation, through cooperation in nonhierarchical “learning” networks, so-called multisectoral public policy networks. Such networks bring together public sector actors,

for example governments and international organizations, and civil society actors, NGOs, as well as for-profit actors such as businesses, in a wide range of issue areas (see, e.g., Benner et al., 2004). As public-private partnerships are formed and responsibility is shared, the site of accountability becomes more unclear. Two traditional mechanisms, electoral and hierarchical accountability, are not applicable in networks (Benner et al., 2004: 198). Public-private partnerships with regard to social issues, for example the UN Global Compact, are therefore met both with positive expectations and criticism (for this debate, see Nelson, 2002; Ruggie, 2002; Transnational Resource and Action Center, 2000).

Alternative mechanisms that are important in holding networks accountable are *public reputational* accountability (naming and shaming strategies), *peer* accountability (monitoring by members of the same professional community), *market* accountability (markets can reward or punish market actors of networks), *financial* accountability (accounting to donors for the use of funds), and, to a minor extent, *legal* accountability (Benner et al., 2004: 199f). We also recognize those as central accountability mechanisms from earlier in this section.

In summary, demanding accountability is a retrospective exercise, involving a presumption of monitoring and sanctioning instruments. It aims at obtaining answerability for actions or lack of action. Accountability mechanisms also derive value from their deterrent effect. A range of both public-sphere based and private-sphere based accountability mechanisms now exist to monitor and sanction corporations for their impact on human rights conditions. As CSR thinking spreads and accountability mechanisms develop, the scope of implicit accountability gradually turns into explicit accountability (compare section 4.2). Thus the situations for which corporations will have to render account become increasingly known to them in advance. In practice, effective accountability depends on a combination of factors such as political will, the resources and strategies of NGOs, investor interest in CSR and consumer sensitivity to CSR issues. Such factors,

however, are most likely to focus Western headquartered transnational corporations.

The diversification of accountability mechanisms for holding corporations accountable to human rights norms is one example of the spread of global regulatory governance beyond national and international levels. Clear chains of accountability towards shareholders are complemented with a pluralization of accountability relations to a range of stakeholders in a more scattered pattern. This overlapping network of exercise of authority amounts to a less territorially bounded system of accountability. It does not necessarily connect decision-makers and decision-takers within territorially bounded political communities, but often rather connects decision-makers and human rights activists. The next section deals with how this pluralization of accountability mechanisms relates to the traditional statist formula of democratic accountability based in the public sphere setting of a democratic state's political institutions.

CSR and democratic accountability

Companies increasingly initiate self-regulation in the CSR field in the form of codes of conduct, internal monitoring mechanisms and external reporting, auditing and verification procedures. A lack of enforcement mechanisms of voluntary codes leads to a perceived credibility problem, however, and demands for clearer chains of accountability. Codes of conduct developed by individual companies or industry associations often lack in legitimacy among outside observers (Swanson, 2002: 39, Simons, 2004). The International Council on Human Rights Policy (2002: 159) claims that, in the absence of a framework of legal accountability, voluntary approaches will remain contested and ineffective.

The alleged difficulties of demanding accountability from a broader range of actors than those responsible under law to protect human rights underly criticism against an extension of responsibility. Authors skeptical to the entire idea of CSR emphasize that the responsibility for protecting human rights ought to rest with actors in the public sphere that are supposed to be governed by democratic ideals about participation, transparency, accountability and representativity. The primary responsibility of a corporation is not towards a wider range of stakeholders, but to manage the assets of its shareholders within the limits of law. According to this view, one ought not to confuse public sphere responsibilities with private sphere responsibilities (see for example Bergkamp, 2002; Henderson, 2001; Friedman 1970). In the literature on business ethics, a frequently quoted claim by Milton Friedman is that the social responsibility of business is to maximize profits and that if they went beyond this objective, corporations would impede public authorities in exercising their proper responsibilities (Friedman, 1970).

Corporations must, it is claimed, not enter the scene to fill the gap when governments fail to protect human rights. International efforts at promoting human rights ought in that case to be directed at increasing governmental accountability for human rights protection. If

government is inefficient in achieving public policy objectives, measures to improve government would be called for rather than shifting public responsibilities to private entities (Bergkamp, 2002: 149-150). This position is sometimes coupled to the claim that the perception that the power of business has increased is false. On the contrary, it is claimed that the combination of privatization and liberalization has reduced the power of business because of increased competition (Henderson, 2001: 57-58).

According to this position, it is emphasized that irrespective of the fact that corporations will be less efficient in their operations if managers assume other goals than profit, it is not up to corporations to define social standards. This ought to be done by democratically elected representatives, such as parliament and government. Those organs ought also to legally define what measures profit-maximizing corporations should take to best promote the common good. The imposition of obligations to the public on private corporations results in illegitimate government. No nonstate actor, whether a business or an NGO, has an inherent right to full participation in processes where the responsibility for decisions, implementation, and consequences, ought to reside with politically accountable governments (Henderson, 2001: 73, Bergkamp, 2002: 152). Public authorities alone have coercive powers, make laws, collect taxes and employ armed forces and police (Henderson, 2001: 57). Along similar lines, Dirk Matten et al. (2003: 118) claim that if corporations take over vital functions of governments, they ought also to take over to the same degree the type of accountability that democratic societies demand from governments. Since this is not the case, Matten et al. consider ideas of “corporate citizenship” as far from being a solution to urgent problems, but part of the urgent problem itself.

If corporate executives are held responsible for the public good and held accountable to a range of stakeholders, they would not be agents of shareholders but civil servants, it is argued. The owners of the corporation would be forced to make their private property serve

the public good without being compensated, which in the end would undermine the entire institution of private property and produce disincentives for economic activity (Bergkamp, 2002: 146).

The stakeholder model of CSR thinking is, in summary, considered to undermine accountability, since being accountable to all amounts to being accountable to no one. The interests of the wide range of stakeholders are inherently conflicting, and all of them cannot be met simultaneously. In addition, the group of stakeholders whose interests would have to be taken into account according to CSR ideas is open-ended. In practice, determining what the interests of a specific stakeholder group amounts to is difficult. In effect, Bergkamp points out (2002: 147), a workable stakeholder model would require a democratic accountability mechanism with stakeholder voting rights and elections by majority vote. The stakeholder model thus eliminates the existing model of accountability of corporate governance, in which directors are accountable to shareholders and managers are accountable to the board of directors. The stakeholder model would instead result in a complete loss of accountability, Bergkamp argues, since it does not provide an operationalizable measure against which the performance of directors and managers can be assessed: “Accountability to multiple masters dilutes or effectively kills accountability” (Bergkamp, 2002: 147).

From a position based on an overall positive view of the idea of corporate social responsibility, concerns in the same directions are voiced. As the non-profit and business communities take increasing part in the delivery of public goods, the more the overarching stewardship that democratic and accountable government provides is needed “to ensure that it all adds up to the right level delivered in the best way to the right people” (Zadek, 2001b: 32). Voluntary approaches are stated to be problematic because there are few ways for the public to influence private authority dealing with public goals related to social issues: “[w]ithout the public having a voice, these new forms of regulation appear to be undemocratic and illegitimate” (Hauffer, 2001: 2). The problems corporate self-regulation aims at addressing are often problems

of governance at the national level, where much of the responsibility for resolving social problems in an accountable and democratic manner ultimately rests. Corporate self-regulation is not part of a democratic political process where values such as participation, accountability and equity are aimed at (Hauffer, 2001: 121-122).

A principle of *global* accountability “which acknowledges the need for mechanisms to hold global institutions such as corporations to account globally” is proposed. It would contain a global basic framework of principles underpinning social and environmental accounting, auditing and reporting (Zadek, 2001b: 40). The ambition to formulate globally enforceable rules of accountability aims at encouraging countries where transnational corporations are headquartered to accept more responsibility for regulating their companies’ impact in other countries (Zadek, 2001b: 41).

In conclusion, the public-private distinction constitutes the frame of reference for thinking on the accountability dimension of corporate social responsibility. The demarcation of public and private spheres, filtering corporate accountability through the lens of state sovereignty, supposedly makes chains of accountability clearer, whereas the idea of corporate social responsibility is considered by critics to risk making relationships of accountability more vague. By drawing a firm boundary between public and private spheres of accountability, the democratic values associated with the public/governmental sphere and its authority on social issues are expected to be safeguarded. Equally, chains of accountability are expected to be clearer and more enforceable in both the public and the private spheres of responsibility if a strict boundary is upheld. The distinction between public and private, and its institutionalization, here define the realm of the possible and the desirable.

However, at a less abstract theoretical level perhaps, the topic of accountability is given another point of departure in the context of authoritarian societies where human rights violations are most widespread, and where democratic accountability is entirely lacking

in the first place. In such a context, references to public and private, separating a sphere of politics from a sphere of business, are less successful as tools of argument about the appropriate constitution of social order. The insufficient interstate-based enforcement of human rights norms in such countries gives rise to demands on nonstate actors, both NGOs and business, to take part in the global governance of human rights. From this follows a pluralization of accountability mechanisms, as we saw earlier, and ideas about a less territorially based and bounded system of accountability globally.

Demanding Accountability: The Debate on Talisman Energy in Sudan

In this section, I examine how the public-private divide is manifested in the efforts undertaken during the time of Talisman Energy's operations in Sudan (1998 to 2002) at holding the company accountable towards its responsibility statements and codes of conduct. There will be certain inevitable overlaps with the previous chapter, since the distinction between responsibility and accountability is an analytical tool more than a mirror of the debate process.

Demands for accountability were made by, in order of appearance in this section, NGOs, shareholders and investors, the home state Canada, the US government, and the US court system. Indeed, the absence of interstate human rights mechanisms and other states in this accountability terrain itself demonstrates the grip of the public-private distinction on spheres of action. Targeting an individual company is not within the realm of the UN, for example. Reports by the UN Special Rapporteur on human rights in Sudan concerned violations committed by the regime and the opposition forces, only mentioning oil companies in passing.

Holding Talisman Energy accountable: NGOs and media

To repeat, holding transnational corporations accountable for human rights norms is institutionally and legally the responsibility of states, the main public actors in the international and domestic arenas. Nongovernmental human rights organizations have made strong demands on more governmental efforts in this respect. Accountability demands have often not been raised in intergovernmental fora due to political constraints, though. In their efforts at holding transnational corporations accountable for their impact on human rights, NGOs are less restricted by political and economic considerations than states claim to be.

Nongovernmental critics of Talisman Energy included organizations of different sizes and character, such as networks of churches, global well-known human rights NGOs, smaller more issue-specific human rights NGOs, Sudanese refugees, and anti-slavery groups in the US. Issuing reports and statements criticizing the company's role in Sudan, those organizations were given attention in the media, and demanded replies and changing practices from the company. Reports by the largest most well-known human rights NGOs, such as Human Rights Watch (*Sudan, Oil, and Human Rights*, 2003), Amnesty International (*Sudan: The Human Price of Oil*, 2000), and Christian Aid (*The Scorched Earth: Oil and War in Sudan*, 2001), were influential in setting the terms of debate and affecting the course of the debate, partly because of the media attention given to those reports.

In connection with Talisman Energy's purchase of the Sudanese assets of fellow Canadian oil company Arakis Energy in 1998, the company's CEO James Buckee stated that media coverage overplayed the Sudan dangers and that a lot of the stories were exaggerated (*Corporate Legal Times*, Oct. 2001). Reports of human rights violations were denounced by Buckee as partisan reporting of issues and a coordinated attack, which did not necessarily represent the truth (*Multinational Monitor*, Oct. 2000). Through Buckee, Talisman Energy denied helping the Sudanese government in any way. He claimed that Sudan and Talisman Energy were unfairly the targets of criticism. Buckee pointed out that oil development would take place with or without Talisman Energy.

Sudan is not the most perfect place, but geez, look at Angola. There is lots of other nasty places. Why us? Why Sudan? [...] we are not supposed to be defending Sudanese history or the Sudanese government or anything else. We're just a business (Buckee cited in *Multinational Monitor*, Oct. 2000).

Buckee stated that Sudan was losing a propaganda war because it made a poor job of presenting a better face (*Globe and Mail*, Oct. 9, 1999). Referring to reports of ethnic cleansing as hearsay, Buckee also objected

to allegations that the Sudanese government committed genocide, displaced civilians and launched slave raids. He stated that accusations of slavery were “grossly misrepresented and possibly manipulated” and that allegations of genocide were “just rubbish” (*Multinational Monitor*, Oct. 2000). The company hired a large PR firm in order to defend the company against what Buckee labeled a coordinated attack aiming at shutting down oil production in Sudan as long as the civil war lasted (*Canadian Business*, Dec. 10, 1999). Buckee told the media that the issues arising from the company’s Sudan operations were taking up more time than they should and were distracting many company employees (Drohan, 2004: 270). An investor relations manager of the company commented on the ongoing media reporting:

A couple of activists with clever use of technology and the Internet make you believe that the weight of the world is behind them (cited in *Canadian Business*, Dec. 10, 1999).

A Talisman Energy consultant insisted that the company would overcome “its public relations problems” through efforts such as building new medical clinics and digging numerous water wells for the Sudanese living near the oil fields (*Report/News magazine*, Dec. 18, 2000). Journalist reports, in August 2000, that the number of Chinese troops present in Sudan was increasing as a result of the Sudanese government’s expanded efforts at countering the military campaign of the Sudan Peoples Liberation Army (SPLA), were denied by the Chinese government, the Canadian Department of Foreign Affairs, and Talisman Energy spokespersons (*Report/News magazine*, Oct. 9, 2000).

This initial approach to media reports and NGO demands on accountability eventually changed. With the production of the first Corporate Social Responsibility report of the company in 2000, its rhetoric towards human rights NGOs seemed to soften. In a relatively short time period, Talisman Energy changed its approach to the issue of the human rights violations committed by the Sudanese government.

From a denial of the existence of violations and a claim of a lack of credible reporting, the company began accepting certain responsibility to protest against the government's oil-related human rights violations, for example concerning the armed forces' use of company airstrips for bombing raids against civilians. The pressure from NGOs for more forceful protests to be made by the company against the Sudanese regime kept up until the company took the decision to leave Sudan.

In conclusion, outside of intergovernmental political arenas, accountability is in this case demanded by one kind of private authority (NGOs helped by the media) from another kind of private authority (a TNC). The private moral authority of international NGOs is visible in this, as well as how unprepared the company appeared to be to becoming the target of moral criticism. Initially it tried to undermine the legitimacy and authority of NGOs by representing their reports as "clever use of technology", "partisan reporting", "a coordinated attack", resulting in "rubbish" and "public relations problems". Through the influence of NGOs and media, knowledge about oil-related human rights violations was spread to a more general audience.

Demands for accountability were met by the company's references to just being a business, claiming that the issue distracted company employees. This allusion to notions of appropriate public and private roles was not accepted by those demanding accountability, however. As the company reported it had started talking to the Sudanese government about human rights issues, the lack of transparency and public verification surrounding those talks made calls for accountability continue. As effective accountability requires transparency, verification procedures and publicly available information, we see how private self-regulation encounters a credibility problem when it does not fulfill these requirements.

Holding Talisman Energy accountable: shareholders and investors

In an entirely different setting than the above, another kind of accountability pressure outside of public international human rights organizations was seen in the actions undertaken by shareholders and investors.

Talisman Energy CEO James Buckee hailed the company's purchase of Arakis Energy in August 1998 as a "rare opportunity with spectacular potential". Buckee was confident that support for the engagement in Sudan would increase over time (*Multinational Monitor*, Oct. 2000). When commenting on the dangers of operating in a civil war zone, CEO Buckee said he believed the security risk to be very acceptable (*Petroleum Economist*, Dec. 1999). Buckee stated in August 1998 that he was prepared for immediate investor nervousness over the deal, but that he believed the market would come onboard in time as it saw the opportunity for Talisman Energy of the deal (*Corporate Legal Times*, Oct. 2001).

Talisman Energy is listed on both the Toronto and the New York stock exchanges. The company's shares fell in value after the 1998 US bombings in Sudan, as well as in the week that Canadian Foreign Minister Axworthy announced the Canadian investigation of Talisman Energy's impact in Sudan (*Petroleum Economist*, Dec. 1999). In December 1999, the controversies surrounding Talisman Energy's Sudan operations had shaved more than a billion dollars off the company's market capitalization (*Report/News magazine*, December 6, 1999). From October 1999 to December 1999, Talisman Energy stock declined more than 15% (*Oil & Gas Journal*, Jan. 17, 2000).

Talisman Energy shareholders, both institutional and individual, took different sorts of action in response to NGO reports of human rights violations in connection with Talisman Energy's presence in Sudan. Several churches and other organizations holding shares tried repeatedly to get the company to follow strict standards in dealings with Sudan (*Christianity Today*, Nov. 15, 1999). The Canadian Inter-Church Coalition on Africa (ICCAF), for instance, complained both to Talisman

Energy president James Buckee and to the Canadian government. The ICCAF coordinator demanded that the government use legislation to stop Talisman Energy from operating in Sudan, whereas the Secretary of State responded no such measures could be used without cutting off Canada's humanitarian aid to Sudan (*Christianity Today*, Nov. 15, 1999).

The president of the American Anti-Slavery Group asked the New York City Council to get rid of the Talisman Energy shares in its investment and retirement funds. Following this, the New York City Comptroller wrote to Talisman Energy president Buckee, stating that

[a]s long-term investors, we believe a company that is cavalier about its moral and social responsibility presents an unacceptable investment risk. The expanding divestment campaign against Talisman Energy for alleged complicity in the horrors in Sudan is just one indication of that risk (cited in *Christianity Today*, Nov. 15, 1999).

The divestment campaign spread as the US Committee for Refugees called for a worldwide divestment of Talisman Energy shares until the company ceased its partnership with the Sudanese government (*Christianity Today*, Nov. 15, 1999).

In the fall of 1999, the Texas Teachers Retirement Fund unloaded all of its 100,000 Talisman Energy shares. About the same time, an investment house based in Rochester, New York, unloaded its 1.2 million shares. Both these investors claimed the divestitures were undertaken for financial, not moral, reasons (*Corporate Legal Times*, Oct. 2001). In December 1999, the California Public Employees Retirement System sold its shares in Talisman Energy (*Corporate Legal Times*, Oct. 2001). In February 2000, the world's largest private pension system, TIAA-CREF (the college teachers' fund), sold its shares in Talisman Energy amid pressure from student and religious groups, saying that profits from Talisman Energy were helping to finance the war in Sudan (*Christianity Today*, February 7, 2000). Equally, the \$82 billion New Jersey Division of Investment sold all of its 780,000 shares in Talisman Energy, despite

positive performance of the company's stock. The director of the New Jersey Division said the fund had become concerned with the performance prospects of Talisman Energy, and that Sudan's human rights record was "the major contributing factor to the fund's fear of poor returns" (*Pensions & Investments*, February 7, 2000).

Other institutional investors did not join the divestment campaign. The Ontario Teachers' Pension Plan Board, owning 4 % of Talisman Energy's shares, announced, for example, that despite lobbying from outside groups and its own members, it would not sell its shares (*Corporate Legal Times*, Oct. 2001).

In sum, major public and private investors joined the divestment campaign against Talisman Energy. In May 2001, around ten institutional shareholders had divested more than three million Talisman Energy shares, at a value of about US\$ 100 million. In an effort to keep the price of the shares up, the company announced it would buy back US\$ 300 million of its own shares as a response to the divestment campaign (Human Rights Watch, 2003: 489f).

The company's annual shareholder meetings became a forum for protesting groups and shareholder activism. In 1999, Canadian NGOs attempted to submit a proposal for a shareholder resolution to the annual meeting of Talisman Energy. This proposal asked the company's board of directors to assure shareholders that the company's operations did not increase the capacity of the Sudanese government to engage in war. Talisman Energy refused to include the proposal on the meeting agenda, instead writing a letter to shareholders stating that experience to date confirmed that Talisman's involvement could be carried out in a responsible, ethical manner (Human Rights Watch, 2003: 394f).

In May 2000, the company announced a record high quarterly cash flow, earnings and production volumes, calling it a spectacular performance: "With a record drilling program now underway in Canada and expansion in the North Sea, Indonesia and Sudan, this momentum will continue" (Talisman Energy, May 2, 2000). However, at Talisman Energy's annual meeting in May 2000, CEO Buckee continued to face

numerous accusations that the company was fuelling the Sudanese civil war (Human Rights Watch, 2003: 416). A coalition of large church-based institutional investors, along with the New York City Pension Fund, suggested a resolution calling on the company to issue an independently verified report on its compliance with international human rights standards within six months. The management of the company suggested a resolution for a similar report to be produced within a year. In a vote between the two resolutions, the one of the management passed (*Corporate Legal Times*, Oct. 2001).

A Corporate Social Responsibility department was set up in the company to deal with corporate responsibility issues throughout the organization. On the individual level, specific performance contract clauses allocate responsibility for implementing *The International Code of Ethics for Canadian Business* to the top managers of the corporation. Those performance contracts translate the overall business plans of the corporation into more concrete objectives. Achievements toward these objectives link, in combination with the general success of the company, directly to the annual compensation of the top managers (Talisman Energy, 2000: 5).

In September 2000, management approved the *Sudan Operating Principles*, initiated at the annual shareholder meeting in May 2000. In the process of producing its first report on corporate social responsibility, Talisman Energy turned to the risk-management services group at PricewaterhouseCoopers' Calgary office, which had verified CSR reports by BP and Shell. Since the resolution called for an independently verified human rights compliance report, verification had to be a feature of the whole process. PricewaterhouseCoopers' personnel interviewed various kinds of stakeholders in Sudan, such as NGOs, church groups, village people, and government officials. By using this auditing process, the company aimed at lending third-party credibility to the CSR report (*Corporate Legal Times*, Oct. 2001).

The resulting *Corporate Social Responsibility Report 2000: Sudan Operations* was met with criticism from several NGOs. Amnesty

International, for example, stated it was disappointed that the report did not adequately address the topic of the human rights impact of the company's operations in Sudan. While the report contained information on social investments made by the company, it did not accurately reflect the overall human rights situation in the country, Amnesty International claimed. The organization was concerned that there was little evidence that Talisman Energy had taken effective action in its efforts at protecting human rights, for example at meetings between company officials and Sudanese government officials (Amnesty International, May, 2001).

Along similar lines, the Taskforce on the Churches and Corporate Responsibility²⁹ (TCCR, 30 April 2001) stated that the CSR report "has served to confirm shareholder misgivings and to aggravate their frustration". A main deficiency, according to the TCCR, was that the terms of corporate responsibility evaluation were narrowed from the terms proposed by shareholders. The TCCR claimed that Talisman Energy was too selective in what it chose to include in its definition of "social" responsibility. The organization also raised doubts as to the role of PricewaterhouseCoopers in the verification process, and pointed out that no independent human rights monitor was cited in the verification.

Truly independent observers examining the larger picture can only conclude that Talisman's presence is indeed contributing to the deteriorating situation in the Sudan. [...] The verification has been conducted under terms of reference that produce a whitewash (TCCR, 30 April 2001).

²⁹ The Taskforce on the Churches and Corporate Responsibility (TCCR) is an ecumenical coalition of the major churches in Canada, established in 1975. Its purpose is to promote social and ecological responsibility in Canadian-based corporations and financial institutions.

The TCCR questioned how it would be possible to avoid future complicity, given that the company had demonstrated an inability to influence the Sudanese government.

At the company's annual meeting in 2001, critics demonstrated in favor of Talisman withdrawal from Sudan (Human Rights Watch, 2003: 428). Equally, at the annual meeting in 2002, the company's role in Sudan was heavily criticized both inside the meeting and outside it by demonstrators (Human Rights Watch, 2003: 434).

In conclusion, how is the public-private distinction displayed in this process? If the conceptual framework of Chapters Three and Four of this study seemed abstract, we here see central themes of those chapters manifested in a concrete situation. Outside formal public accountability channels, a powerful accountability mechanism is seen in the divestment campaign in which institutional investors holding large amounts of shares in the company decided to sell their shares. In this sense, the pension funds and the shareholder groups demanding increased reporting on CSR issues are concrete examples of how private economic power is used in a way amounting to political advocacy, making visible the politically charged impact of a company in a conflict zone. This points to private regulatory authority as a form of governance of the human rights area, testifying to a pluralization of authority relations and overlapping networks of authority (compare section 3.2). Yet a report on corporate social responsibility, as well as the efforts reported on, did not amount to the level of responsibility demanded from NGOs and institutional investors.

Holding Talisman Energy accountable: the home state Canada

The international petroleum industry in the international political economy of the post-Cold War era is radically different from the 1970s, but remains as highly politicized as it was then. For example, the United States is accused of using the denial or approval of access to oil markets and international capital as a tool of foreign policy, by unilaterally placing sanctions on companies and countries (Morse, 1999: 1, 14). In the oil sector, home state governments are often helping companies to secure contracts in host countries, and sometimes possessing stakes in the company. This can make the home country less likely to take a stand against the practices of the host country regime (Swanson, 2002: 25).

The Canadian government came under increasing pressure to hold Talisman Energy accountable, as public concern about the activities related to the company's operations in Sudan grew. Foreign Minister Lloyd Axworthy threatened to impose sanctions on the company and initiated an assessment mission that undertook a study of the human rights impact of Talisman Energy's presence in Sudan.³⁰ The company applauded the initiative, believing such a report would vindicate it, as company officials felt that the public demanded something of it that went far beyond its role and was more in line with what could be expected from government (Drohan, 2004: 266).

The mission resulted in the report *Human Security in Sudan: The Report of a Canadian Assessment Mission* in January 2000.³¹ The report concluded (p. 65) that oil had exacerbated conflict in Sudan.

³⁰ In the days following Axworthy's mentioning of the possibility of sanctions against Talisman Energy, the company's shares lost 11% on the Toronto stock exchange (Human Rights Watch, 2003: 402).

³¹ The report became known as the "Harker Report" after the head of the assessment mission, John Harker.

We cannot but conclude that our own observations and investigations only add to the growing body of evidence and information that identifies Sudan as a place of extraordinary suffering and continuing human rights violations, even though some forward progress can be recorded, and, significantly that the oil operations in which a Canadian company is involved add more suffering.

The report questioned whether Talisman Energy lacked influence on the Sudanese regime or if it chose to exercise its influence too rarely (*Human Security in Sudan*, 2000: 65). The authors of the report did not advocate the withdrawal of Talisman Energy from the country or the imposition of sanctions against the company by the Canadian government, however. Instead they proposed ways in which Talisman Energy could try to ensure that oil revenues were used properly. Talisman Energy ought to make clear publicly that it acknowledged the destructive impact of oil extraction and that it would work towards the establishment of a trust fund arrangement for the sharing of oil revenues (p. 67).

The report also recommended that the Canadian government not apply sanctions against the company. Still, the report required firm action from the Canadian Minister for Foreign Affairs, such as rendering certain exports to Sudan subject to scrutiny by the Canadian government. This would provide Canada with leverage over Talisman Energy as to compliance with the codes adopted by the company (*Human Security in Sudan*, 2000: 69). Those suggestions were not followed, however (*Multinational Monitor*, Oct. 2000). The report also pointed to the responsibilities of the shareholders to compel ethical behavior on the part of the company (*Human Security in Sudan*, 2000: 70).

The conclusions of the report made Foreign Minister Axworthy back away from his threat of imposing sanctions, and to agree that a policy of engagement would provide more benefits for the Sudanese people. In addition, Talisman Energy had lobbied other ministers of the Canadian government to ensure that Axworthy would not get the

needed support to take action against the company (Drohan, 2004: 27of).

The decision not to impose sanctions was welcomed by CEO James Buckee, stating that the involvement of Talisman Energy had drawn attention to the problems of Sudan in a way which would prove beneficial for the country, and that “the light of the world’s scrutiny is a powerful force for change and increased government presence by Canada – and we hope by others – will go a long way to accelerate the peace process in Sudan” (Talisman Energy, Feb. 14, 2000). Buckee pointed out that Talisman Energy was a business, not a state, but that it had already raised many of the issues spoken about by Axworthy with the Sudanese government (*Oil & Gas Journal*, Jan. 17, 2000).

One of the members of the assessment mission, Audrey Macklin, writes that

[e]ven though [the mission’s] focus is on investigating the complicity of a Canadian company in human rights abuses, our role in legitimating the West (‘see, Canada really does care about human rights’) is self-evident (Macklin, 2003: 263).

She is disappointed that the Canadian government did not take any meaningful action in response to the report *Human Security in Sudan*, such as sanctioning Talisman Energy or compelling it to withdraw from Sudan (Macklin, 2003: 281). Others have argued that the Canadian government chose to ignore the recommendations of the report, motivated by a concern to ensure that Canadian-based companies maintained a competitive edge in the oil and gas sectors that had become highly lucrative (Idahosa, 2002: 235).

Criticism against the Canadian government continued, for example, from the Inter-Church Coalition on Africa (March 2, 2000) stating that

[b]y failing to take effective action against Talisman Energy Inc.’s operations in Sudan, the Canadian government appears to be

encouraging a form of corporate immunity in conflict situations and situations of serious human rights abuses.

Canadian Foreign Minister Axworthy, for his part, claimed “I got ahead of myself” and that he was unable to get support for action against Talisman Energy from fellow ministers.

In the views of my senior officials, I should just have left it alone, taken a couple of bad hits from the human rights groups and then left it (Axworthy cited in Drohan, 2004: 273).

He was told by government lawyers that he would be acting illegally if he imposed sanctions. He doubts that he could have taken any action politically anyway “because I got a lot of pressure from around town” (cited in Drohan, 2004: 271). Axworthy decided to open up a Canadian government office in Khartoum to observe the situation, but any further action would be taken through the United Nations and the IMF.³² Axworthy’s later attempt to raise the issue in the UN Security Council was prevented by the Arab League, the Organization of African Unity and China (Drohan, 2004: 274).

In September 2000, Sudan’s foreign minister visited Canada to take part in a Canadian government-sponsored international conference on war-affected children along with foreign ministers from around thirty other countries. Demonstrations took place against the invitation of the Sudanese minister to Canada. Human rights groups claimed the minister’s presence violated the sanction imposed on Sudan in 1996, according to which entrance into Canada by members of the Sudanese government would be denied or restricted. The blame was pinned on Lloyd Axworthy for allowing the Sudanese minister’s entry. Inside the conference, a representative of the United Nations Children’s

³² The United States removed its ambassador from Sudan in 1996. The United Kingdom restored diplomatic contact with Sudan in 1999.

Fund (UNICEF) criticized this soft-power approach to the Sudanese government (*Report/News magazine*, Oct. 9, 2000).

In May 2001, a group of Canadian church leaders called for a moratorium on oil development in Sudan and urged the Canadian government to take high-level initiatives to bring about an end to the war (*Christian Century*, May 16, 2001). The debate on the extent to which the Canadian government ought to hold Talisman Energy accountable spread into Canadian domestic politics. It forged coalitions between the Liberal and the Canadian Alliance caucuses, while the issue also split those caucuses internally. Liberals refused to initiate sanctions against Talisman Energy (*Report/News magazine*, Dec. 18, 2000). Left-wing as well as centre-right politicians condemned the ruling Sudanese National Islamic Front for persecuting Christians and causing starvation for 2.5 million people, and advocated non-engagement. Others also condemned the Sudanese regime, but pointed to the abuses committed by the SPLA, and claimed only a policy of economic engagement could improve the lives of ordinary Sudanese (*Report/News magazine*, April 30, 2001). Since 2000, the Canadian government has made no public statements regarding Talisman Energy's presence and impact in Sudan (*Deconstructing Engagement*, 2003: 32).

In conclusion, the extreme political sensitivity involved in demanding accountability based on a principle of home state responsibility was apparent in the case of the Canadian government's relationship to Talisman Energy. Controversy between members of the Canadian government, between different political parties and within parties resulted in a lack of effective efforts at holding the company accountable on the part of the home state. This led to heavy criticism against the Canadian government, especially against the background of its efforts to assume leadership in other human rights issues. In the end, the scope of what was in the government's regulatory domain in terms of human rights protection was not expanded in this case. We perceive a gap in global regulatory governance, resulting from the home state's invisibility in international law (compare section 3.2).

Holding Talisman Energy accountable: the US government

The United States has traditionally favored isolating Sudan. Under President Clinton, the US raised pressures on the country, which culminated in the imposition of unilateral sanctions in 1997. An activist US Congress pushed for further measures, which would include capital market sanctions against foreign companies operating in Sudan (International Crisis Group, 2002: 62). It also banned US companies from doing business in the country (*Petroleum Economist*, Dec. 1999).

In August 1998, the US bombed a Khartoum factory said to be producing chemical weapons for Osama bin Laden. According to the Sudanese government, the factory made pharmaceuticals (*Time Canada*, Nov. 22, 1999). This occurred three days after the announcement of the planned Talisman Energy takeover of the oil company Arakis' Sudanese assets. Because of the US bombings, the company stated it was reconsidering the acquisition of Arakis, but decided after a week that it would go forward with it (Human Rights Watch, 2003: 171).

In order to comply with US trade regulations, Talisman Energy hired a Washington DC law firm as it stepped into Sudan, to ensure that its Sudan operations were kept legally and financially separate from its operations in the US. It also hired independent auditors to ensure that money raised from selling shares in the US was not used for the company's investment in Sudan (*Oil & Gas Journal*, Jan. 17, 2000).

In October 1999, US Secretary of State Madeleine Albright attacked Talisman Energy's involvement in Sudan. Secretary Albright said that some companies had the mistaken view that investment in states run by dictators would improve the lives of the people of the state, whereas the revenues more likely would be used to suppress those people (*Petroleum Economist*, Dec. 1999). Albright regretted that a Canadian company did business in a country that the US described as a state sponsor of terrorism (*Canadian Business*, Dec. 10, 1999). In this last week of October 1999, the company lost about \$700 million in value (*Canadian Business*, Dec. 10, 1999). Three days after Albright's condemnation, Canadian Foreign Affairs Minister Lloyd Axworthy took the step of publicly expressing

grave reservations about the presence of Talisman Energy in Sudan (*Petroleum Economist*, Dec. 1999, *Canadian Business*, Dec. 10, 1999). If it became evident through the Canadian assessment mission to Sudan that oil extraction exacerbated the conflict in Sudan, the Minister would consider using economic and trade restrictions (*Report/News magazine*, December 6, 1999).

After the release of the report *Human Security in Sudan*, Axworthy announced he would take no action against Talisman Energy. In reaction to this choice of policy by the Canadian government, the US State Department voiced its concerns about the way in which companies provided hard currency to a government that violated human rights (*Time Canada*, Feb. 28, 2000). The US issued economic sanctions in February 2000 against the partners of the Greater Nile Petroleum Operating Company. The reasons given were concerns that investment in Sudan's oil sector would strengthen the capacity of the Sudanese regime to intensify the war against its own people. The sanctions applied only to the activities of the joint venture GNPOC and not to other business transactions with the individual companies involved in the consortium. According to the sanctions, US citizens and companies and their foreign branches were prohibited from engaging in most trade transactions with GNPOC or the Sudan state oil company (Sudapet). US companies violating those regulations could be subject to criminal penalties, and individuals could be fined or imprisoned (*Oil & Gas Journal*, Feb. 28, 2000).

The sanctions were expected to have little impact on the operations of the company, Talisman Energy said, since its activities in Sudan were structured at arm's length from the US activities of the company (*Oil & Gas Journal*, Feb. 28, 2000). With regard to proposed US legislation, the company stated that "[w]e are in compliance with all laws in the jurisdictions in which we operate, including the laws of the United States, and intend to remain in compliance" (Talisman Energy, June 13, 2001).

The Securities and Exchange Commission, regulating us stock markets, decided in 2001 to watch more closely Talisman Energy and other foreign companies doing business in countries subject to us sanctions. This move had the political support not only of the us administration, but also of us oil companies who did not like to see their Canadian competitors operate under different rules than themselves (Drohan, 2004: 284).

Pressure groups of various kinds in the United States were concerned that non-us oil companies were undercutting the economic boycott, under which us companies were obliged not to do business in Sudan. A continuous pressure was kept up on Talisman Energy from us activists, since a large number of us-based pension funds and institutional investors held Talisman Energy shares. Human Rights Watch (2003: 492) claimed that the impact of us economic sanctions on Sudan was undermined by foreign companies who were benefiting from access to us capital markets. In the process of convincing the us administration to bar these foreign companies from us capital markets, campaigners brought great pressure on oil companies and the financial community, although the efforts were unsuccessful in the end (Human Rights Watch, 2003: 492).

An amendment to the bill called the *Sudan Peace Act* would give the us President the authority to prohibit oil companies operating in Sudan from raising capital in the us. Confronted with this threat, CEO Buckee said that if Talisman Energy had to choose between remaining in Sudan and losing its access to the New York Stock Exchange, the company would choose access to the stock exchange (Human Rights Watch, 2003: 494). In the end, the *Sudan Peace Act* passed the Senate without the amendment, because the Bush administration considered such capital market sanctions an unacceptable tool that would undermine the growth of the American economy (Drohan, 2004: 285).

After the terrorist attacks in the United States on September 11, 2001, the Sudanese government arrested alleged terrorist sympathizers and began sharing intelligence information with Western countries. In

response, after persuasion from the us, the United Nations lifted its earlier sanctions on Sudan. The aftermath of September 11 appeared to signal a shift in the relationship between the United States and Sudan (International Crisis Group, 2002: 65). According to a us State Department spokesman, the us would henceforth be open to friendlier relations with Sudan. Shortly after the sanctions were lifted, the Sudanese regime launched a new offensive in the southern part of the country (*Report/News magazine*, November 19, 2001).

In conclusion, the us administration's demands for accountability of oil companies in Sudan were part of a larger international political framework of relationships between the United States and Canada, and between the United States and Sudan. The involvement by the United States in the regulation of foreign oil companies in Sudan reflected its economic and political status, as well as international political developments more generally, particularly pertaining to the aftermath of September 11, 2001.

The actions of the us pointed to the political possibilities available for influential states when the international legal framework is silent, by using sanctions, public criticism, and threats of legislation. This was supported by us oil companies and human rights advocacy groups, and facilitated by the attractiveness and dominance of us stock markets, as seen in Talisman Energy's response to the proposed amendment to the us Sudan Peace Act. However, in the end those efforts at holding Talisman Energy and other oil companies operating in Sudan accountable for their relationship with the Sudanese government became subordinate to the changing us foreign policy agenda after September 11, 2001. It also became subordinate to economic considerations according to which the amendment would "undermine the growth of the American economy".

Holding Talisman Energy accountable: US courts

The international legal system has not elaborated mechanisms to hold private economic actors accountable when being in partnership with governments violating human rights. Courts in the United States have, however, demonstrated a recent willingness to hear arguments against transnational corporations under the US *Alien Tort Claims Act* (ATCA). This Act gives US district courts jurisdiction over civil actions for tort committed in violations of US treaties or international law, when such violations occur outside the territory of the United States (Olsen, 2002: 720). Established in 1789 to invoke claims against piracy, it is now used for a wide range of cases, for example to demand accountability from TNCs when operating outside the United States.

After Talisman Energy finalized the sale of its assets in Sudan in early 2003, developments in the legal sphere continue to put the spotlight on its role and responsibility in the country. In November 2001, the company was sued in the US District Court for the Southern District of New York by the Presbyterian Church of Sudan, three individual citizens of Sudan, and “on behalf of all others similarly situated”. The plaintiffs accused Talisman Energy of facilitating what they claimed was a campaign of ethnic cleansing against black and non-Muslim minorities, through its supply of financial and logistical support to the government.

The plaintiffs sought recovery in a class action suit under the above-mentioned US Aliens Tort Claims Act. In the complaint, it is stated that:

Talisman has deliberately and intentionally facilitated, conspired in or aided and abetted in the use of Sudanese armed forces in a brutal ethnic cleansing campaign against a civilian population based on their ethnicity and/or religion for the purpose of enhancing its ability to explore and extract oil from areas of southern Sudan by creating a *cordon sanitaire* surrounding Talisman’s oil concessions (*Class action complaint*, 2001).

The two US lawyers representing the plaintiffs were part of the legal team representing Holocaust victims in lawsuits involving the Aliens Tort Claims Act against Swiss, German and Austrian corporations that led to a \$1.25 billion settlement in 1998. Potentially, the lawsuit against Talisman Energy could seek hundreds of millions of dollars in the form of a trust fund for victims, one of the lawyers argued (*Globe and Mail*, Nov. 8, 2001).

In March 2003, a Southern District of New York federal judge refused Talisman Energy's request to dismiss the case. The company had claimed that jurisdiction was lacking in the Southern District for the lawsuit *The Presbyterian Church of Sudan v. Talisman Energy Inc.* In response to the company's argument that a corporation was legally incapable of violating international law, the judge pointed out that the company had failed to cite a single court case supporting that proposition (*New York Law Journal*, 20 March 2003).

Instead, the judge argued that states might exercise universal jurisdiction with regard to violations of so-called *jus cogens* norms, that is, norms related to fundamental standards of humanity, such as slave trade and genocide, and that this can be done with regard to companies too. The judge dismissed arguments made by the company that the legal process ought to take place in Sudan, if anywhere, pointing out that the US had an interest in targeting human rights violations internationally. He also dismissed the company's claim that the case would intrude upon US foreign relations with Sudan (*New York Law Journal*, 20 March 2003).

Talisman Energy, for its part, stated it regarded the allegations in the complaint to be entirely without merit and that the company was vigorously defending the case (Talisman Energy, 2003: 3). Cases such as this usually take many years to reach a decision on. The process of court interpretation of the ATCA is only beginning and the courts are slow (Olsen, 2002: 722). The class action suit against Talisman Energy is pending as of the writing of this study.

The litigation provides a source of political pressure, even if it is rare that contemporary lawsuits under the Aliens Tort Claims Act yield compensation to plaintiffs (Macklin, 2003: 279). An increasing number of cases are filed against TNCs under the ATCA, especially against US-based oil and gas TNCs. Thus, Texaco is prosecuted by indigenous groups for alleged environmental damage in Ecuador between 1972 and 1992. Nigerian plaintiffs have filed suit against Chevron, claiming that human rights abuses occurred as Chevron attempted to quell unrest against the Nigerian government in 1998. Unocal has been sued by Burmese refugees alleging that Unocal was a partner to the government in human rights abuses occurring in conjunction with construction of a pipeline through Burma (Olsen, 2002: 721-722).

Lobbyists of the oil industry have been pushing the US Congress to repeal the ATCA. In 2002, the Bush administration intervened in a lawsuit brought against Exxon by the International Labour Rights Fund, claiming that applying the ATCA might obstruct efforts at fighting terrorism (*Economist*, 2003: 62).

The Bush administration moved to restrict the use of the Alien Tort Claims Act as it urged the US Supreme Court in May 2003 to review how the Act was being used. The administration claimed the Act was never intended to cover the kind of cases in which the Act now was drawn upon, such as those regarding alleged human rights abuses involving companies outside the US. Therefore, the administration was concerned that foreign policy affairs were decided by the courts instead of by governments. A range of business groups came to the support of the administration, for example the US Chamber of Commerce and the US Council for International Business, claiming that the act threatened to make it impossible for American companies to invest anywhere in the world for fear of “frivolous lawsuits” in US courts (Drohan, 2004: 328f). In June 2004, the US Supreme Court agreed that the act had been interpreted too broadly and that courts ought not to impinge on the foreign policy ability of the administration, but the court did not

prohibit foreign victims of human rights abuse from filing suits in US courts (Drohan, 2004: 329).

In summary, we see a legal accountability mechanism in use, though not in the home state or the host state of the company in focus, but in a state where the company is listed on the stock exchange. The public-private distinction is manifested in the arguments surrounding the appropriate use of the ATCA. Arguments aiming at delegitimizing US courts' use of the act point to the political implications of applying it to the operations of foreign companies overseas. The legitimacy of this accountability mechanism is challenged on grounds that it "might obstruct efforts at fighting terrorism" and that "courts ought not to impinge on the foreign policy ability of the administration". Through this, the political significance of transnational corporations is obscured. Perceptions of their impact are depoliticized in a separation of politics and economics that traditionally has been supported by boundary-drawing between public and private spheres.

The fact that the case is raised at all in the US court system bears witness of change, though this change is not a development supported by the US administration, as we saw in this section. In this tug-of-war between legal, economic and political considerations, the company reinforces the public-private distinction by claiming it is legally incapable of violating the principles of international law. The public-private distinction's grip on legal accountability mechanisms, however, is challenged as the judge refers to fundamental standards of humanity, and their possible application also to private companies. The slowly growing importance of thinking related to universal jurisdiction and *jus cogens* norms provides a bridge between legal accountability and moral pressures in the case of private transnational actors.

Conclusions of the Chapter

In times of global interconnectedness, the relationship between decision-makers and decision-takers does not conform to chains of accountability as envisaged in assumptions about sovereignty and territorially bounded democratic political communities. Boundary-drawing between public and private forms conceptions of which topics are considered to belong to a political sphere, thereby subjecting their treatment, however imperfectly, to citizen participation, transparency, majority will and political accountability. Though only public actors are accountable for the common good through political institutions, a range of other accountability mechanisms has developed to hold private actors, such as transnational corporations, accountable for their impact on general social conditions. This expands the scope of the terrain of accountability in zones of human rights violations where transnational corporations are present.

In this chapter we have seen how the public-private distinction gives rise to controversy surrounding the accountability dimension of corporate social responsibility. The demarcation of public and private spheres, filtering corporate accountability through the lens of state sovereignty, makes chains of accountability clearer, whereas the idea of corporate social responsibility risks making accountability chains more diffuse. As principles of democratic accountability and the common good reside within public spheres, the spread of accountability for human rights issues to transnational corporations encounters suspicion. Self-regulation is considered to jeopardize the democratic values traditionally associated with the regulation of social issues by public actors in democratic institutions. However, in a nondemocratic setting, these concerns are less convincing. In the case of Talisman Energy, its efforts at self-regulation did not satisfy demands for transparency and public insight into its dealings with the Sudanese regime and its other business partners in the GNPOC.

We have also seen the public-private dimension displayed in the disagreements over how the Canadian government ought to demand

accountability from Talisman Energy. The company, for its part, expected that responsibility for dealing with the Sudanese conflict would be taken where it considered it to properly belong, by governments. Others were disappointed that the Canadian government, having instruments of monitoring and sanctioning available, chose not to use them. The scope of what was in the government's regulatory domain in terms of human rights protection was in the end not expanded in this case.

The public-private distinction is also played out through the arguments surrounding the appropriate use of the Alien Tort Claims Act in US courts. Both the Bush administration and Talisman Energy stated this was an inappropriate forum in which to raise claims of human rights violations abroad. The company reinforces the public-private distinction by claiming it is legally incapable of violating the principles of international law, and that any legal process ought to take place in Sudan. The US administration claimed foreign policy affairs were being decided by courts instead of by governments. The earlier US administration had, for its part, attacked Talisman Energy's involvement in Sudan, stating that revenues from oil exploration were likely to be used to suppress the people of Sudan. This was supported by both US oil companies and NGOs.

The public-private distinction's grip on legal accountability mechanisms is challenged as the federal judge of the Southern District of New York referred to *fundamental standards of humanity*, and their possible application also to private companies, and on these grounds refused to dismiss the case. The slowly growing importance of thinking related to universal jurisdiction and *jus cogens* norms such as fundamental standards of humanity, provides a bridge between legal accountability and moral pressures in the case of private transnational actors.

The lack of interstate enforcement of human rights norms in many countries, in combination with the home state's invisibility in international law, in practice give rise to an accountability gap for TNCs operating in those countries. However, outside formal public accountability channels, we saw in this chapter examples of powerful

accountability mechanisms present in the debate on Talisman Energy, drawing upon the private moral authority of human rights NGOs and church groups, aided by the media. Though initially met with disregard, over time this accountability mechanism led to changing practices by the company and increased efforts at self-regulation.

The divestment campaign in which large institutional investors decided to sell their shares is another example of how private authority is used in a way amounting to effective accountability demands. This makes visible the politically charged impact of a company in a conflict zone. It points to private regulatory authority as a form of governance of the human rights area, testifying to a pluralization of authority relations and overlapping networks of authority. In conclusion, it indicates that the territorial boundaries of accountability systems related to human rights are slowly becoming recast into a less territorially defined transnational sphere of action, influence and answerability.

CHAPTER SEVEN

CONCLUSIONS: PUBLIC AND PRIVATE IN HUMAN RIGHTS PROTECTION

In this final chapter, I summarize the conclusions of the study and present ideas for further studies of responsibility, human rights protection and public and private authority in global governance.

The Scope of Human Rights Responsibility

Here I sum up the study's findings in terms of how the public-private distinction is manifested in theoretical debates on corporate social responsibility, as well as in the case of transnational oil companies operating in zones of human rights violations.

Public and private in human rights protection

This study has demonstrated how both the theory and practice of international human rights protection are confronted with new challenges as processes of globalization continue to expand the domain of transnational activity, influence, regulation and contestation. Using the public-private distinction as an analytical prism has proven to be a fruitful method for examining debates on responsibility for human rights protection. This study has conceptualized the public-private distinction in a manner that, hopefully, has reflected its complexities and ambiguity. We have seen that the manifestations of the public-

private distinction continue to develop in this area as they have done throughout history.

The terms *public* and *private* are mutually constitutive and only assume meaning in relation to each other. Depending on what spheres of social order are put in relief with each other, we see different features of the distinction: compare putting the family/household sphere in contrast to a civil society sphere, or putting the market sphere in contrast to the government sphere. Within international arenas, NGOs are usually labeled private actors as they are contrasted with states and interstate organizations. In a domestic context, on the other hand, they are often considered part of a public civil society sphere, as they are put in relief with a private household/family sphere.

As notions of public and private are institutionalized and become taken-for-granted knowledge, that is, naturalized, references drawing upon the distinction empower certain actions and delegitimize others. The exercise of power is legitimized and organized through institutions containing sets of rules specifying socially sanctioned categories of agency. We have in this study particularly analyzed the international human rights regime, one subset of the broader institution of international law. We have seen how the public-private distinction structures this legal system, establishing the territorial state and the states system as the dominant site of authority and power. However, the international legal edifice develops and changes through reinterpretations, new treaties and changing norm hierarchies, while remaining subject to inertia resulting from its institutionalization in the organizations of the international sphere.

This study has found the public-private boundary to be a key site of struggle in the corporate social responsibility field. Despite its ambiguity, it is a crucial organizing category. The spheres of responsibility of public and private actors are defined and understood in relationship to each other. Transforming the character of the responsibility of transnational corporations implies transforming the boundary between public and private. The ability to create such underlying rules of the game and to

define what constitutes acceptable play, as pointed out by Adler (1997: 336), is a subtle and effective form of power. As increased corporate responsibility for human rights protection does not imply a reduced responsibility of states, it is theoretically primarily a case of overlapping spheres of responsibility. This ultimately makes the boundary less visible, as the categories “bleed into one another” as expressed by Elshtain (1997: 167).

The examination of the debate on the responsibility of Talisman Energy in Sudan has furthered our understanding of the multitude of political, legal, economic and moral tensions involved in the issue of distribution of responsibility for human rights protection. We have seen how the drawing of a boundary between what was framed as political or apolitical matters was done in an inconsistent manner. This reflected the complexity of the relationship between a boundary between public and private and a boundary between political and nonpolitical issues and actors. Company representatives framed human rights protection as a social issue that ought to rest within the political sphere of governmental responsibility. This relates to criticism against the idea of CSR based on democratic theory and its requirements of accountability, representativity and transparency, as discussed in Chapter Six, but is an argument that in an entirely non-democratic setting was not convincing to a critical spectator.

We have also seen both market based and moral advocacy based exercise of authority in the sphere of human rights protection. The relationship between public and private authority in the governance of issues in an international setting has varied over time. This study has demonstrated how the boundaries of the issue domain, over which authority is recognized and claimed, are imprecise and subject to contestation. The spread of regulatory authority beyond the state goes both to private transnational authorities, to international organizations, and to local levels. Private regulatory authority is often focused on standardization of specific issues in contrast to the general regulatory function of the state. This study has demonstrated that a new global

public domain is gradually forming, where both public and private actors articulate, shape, and contest expectations concerning legitimate social purposes, aiming at the protection of global public goods (Ruggie, 2004).

This pluralization of authority relations, in summary, implies normative dilemmas related to securing accountability. This study has revolved around a tension between a spread of responsibility across public-private divides to connect the exercise of power with responsibility, and, on the other hand, demands for clear chains of accountability and respect for values associated with the public exercise of authority in a democratic setting.

Public and private in the debate on Talisman Energy in Sudan

The study of the debate surrounding Talisman Energy's responsibility in Sudan has enriched and contextualized our understanding of controversies arising from the tensions involved in ideas of corporate social responsibility. The debate was filled with manifestations of the public-private distinction in thinking about responsibility. In fact, one could argue that the public-private distinction defined the terrain upon which the debate was conducted. The category of public responsibility was framed as the residual one, where all responsibility that was not explicitly identified as belonging to private actors rested. The debate demonstrated an intricate interlinkage and mixing of arguments referring to ethical, economic, legal and political justifications of how responsibility ought to be allocated. It shed light on an arena of transnationalism, coexisting with the more state-centric original features of the international human rights regime.

The debate on Talisman Energy concerned the general character of corporate responsibility for human rights and community development. More specifically, it concerned the scope of the company's responsibility for how oil revenues were used by the Sudanese regime, for its business partners' impact on human rights, and for the wider conflict dynamics. The public-private divide created tensions within the discourse of corporate social responsibility. Several debaters characterized economic elements of "creation of value for shareholders" and "successful energy company" as being in a mutually supportive relationship with human rights elements relating to "ethical business practices". In efforts at bridging the public-private divide, human rights protection and economic profit were thus construed as mutually supportive aims. However, in the argumentation used by the company to defend its exit from Sudan, the relationship between economic profit and human rights protection appeared more complex.

The uncertainty involved in drawing boundaries of responsibility in the Sudanese context were not only apparent from the study of the company's framing of its position on CSR dilemmas, but also explicitly

acknowledged by company representatives, pointing to learning processes and the evolving character of the CSR field. Many NGOs were careful to emphasize the primacy of irresponsibility on the part of the Sudanese regime. Appeals to corporate social responsibility were not intended to reduce attention to or criticism against the human rights violations committed by the regime and the opposition forces.

The political sensitivity involved in demanding accountability based on a principle of home state responsibility was seen in the debate surrounding the actions of the Canadian government concerning Talisman Energy. Here we can perceive a gap in global regulatory governance, resulting from the home state's invisibility in international law. The involvement by the United States in the regulation of foreign oil companies in Sudan, on the other hand, reflected its economic and political status, as well as international political developments more generally, particularly pertaining to the aftermath of September 11, 2001. Demands made by the United States government for accountability of oil companies in Sudan were part of a larger international political context of relationships between the United States and Sudan.

The public-private distinction was also played out through the arguments surrounding the appropriate use of the *Alien Torts Claims Act* in US courts. The political significance of companies is obscured through arguments aiming at delegitimizing courts' use of the act by pointing to the political implications of applying it to transnational companies. The public-private distinction is reinforced through the arguments stating that the company is legally incapable of violating international law. The influence of the distinction is challenged, however, by references to *jus cogens* norms and universal jurisdiction by a US judge.

In the debate on Talisman Energy we saw examples of powerful accountability mechanisms drawing upon the private moral authority of international NGOs and upon the market authority of shareholders and investors. Through the influence of NGOs and media, connecting to a powerful global discourse on human rights, demands for accountability were placed on the agenda of a more general audience

as well as company shareholders. The divestment campaign in which large institutional investors decided to sell their shares is an example of how private economic power is used in a way amounting to political advocacy, making visible the politically charged impact of a company in a conflict zone. This points to private regulatory authority as a form of governance of the human rights area, testifying to a pluralization of authority relations and overlapping networks of authority.

Effective accountability requires both mechanisms for reliable information between decision-makers and the governed, and mechanisms for imposing sanctions. The distinction between public and private leads notions of democratic accountability to reside with public actors and spheres, and complicates the spread of accountability for human rights issues to transnational corporations. In the ideal case, the exercise of authority requires, in a democratic age, the expressed consent of the governed, and mechanisms through which policy-makers can be held accountable. Even if the company reported it had started talking to the Sudanese government about human rights issues, the lack of transparency and public verification surrounding those talks made calls for accountability continue. Again, we see how the public-private dimension is played out in the context surrounding accountability demands, as effective accountability requires transparency, verification and publicly available information.

The transnational oil industry and boundaries of responsibility

In the introduction I argued that the debate surrounding Talisman Energy in Sudan was in many respects representative of debates surrounding other transnational oil corporations operating in zones of human rights violations. Here I will briefly relate my examination of the case of Talisman Energy to other studies on oil companies in zones of human rights violations.

A study on the experiences of the transnational oil company Shell in Nigeria describes a learning process similar to that of Talisman Energy. Shell initially sought to defer issues relating to development, resource sharing and politics to the Nigerian state (Wheeler et al., 2002: 305). Over time, however, Shell recognized the need for a more sophisticated attitude towards issues of human rights and other responsibility areas, while the challenge remains to translate this into genuine responsiveness to stakeholders at the local level in Nigeria (p. 314).

The study of Shell points to one concrete example of boundary drawing in the exercise of CSR, namely the difficulties involved in the establishment of dialogue between the company and various stakeholders in Nigeria in the absence of shared perceptions of the situation. The very act of selecting certain stakeholders for dialogue with the company is an act of boundary drawing that might provide a delegitimization of those who are not selected (Wheeler et al., 2002: 309).

In an analysis of the first corporate social responsibility report of the Royal Dutch/Shell Group, Sharon M. Livesey (2002: 328) sees a discursive joining of economics, business pragmatism, and rationalism on the one hand, and ecology, caring and ethics on the other hand, within a wider discourse on sustainable development. Profits and ethical principles were considered compatible because of the social contribution of wealth-producing activities. The report was important in setting forth Shell's construction of the meaning of sustainable development in the terms of a commercial entity (Livesey, 2002: 330). The changing discourse also produced changes in Shell's practices concerning sustainable development. Shell emphasized, however, the

limits of its power and its apolitical nature. The recognition of the need to take environmental and social considerations into account, and to commit to stakeholder dialogue, moved the company towards more engagement in processes that were necessarily political, the author claims (Livesey, 2002: 335-336). This is similar to what was seen in the case of Talisman Energy, though the term “sustainable development” was not so frequently referred to in that debate.

Another example of boundary movement comes from a study of the relationship between the Amazonian Indigenous Peoples Movement and transnational oil companies operating in Ecuador. This study describes “a quasi-public role” for TNCs on multiple levels in the global system (Burke, 1999). In the Ecuadorian case, companies and indigenous groups communicated without the presence of state representatives, and the companies responded to policy requests from the indigenous groups living in oil rich areas. The companies began to change their behavior not only with respect to policies affecting their own profit, but also with respect to policies towards other actors in society. They assumed quasi-public roles in taking on responsibilities traditionally associated with the state, such as health services, education and other social services (Burke, 1999: 231). Those companies, accordingly, adopted social responsibility measures similar to those of Talisman Energy, though this was done in a different societal context than the one of Sudan’s long-running civil war.

In the case of the us-based oil company Occidental Petroleum operating in Ecuador, Judith Kimerling (2001) sees a problematic confusion between the development of private industry standards and public legal norms. This is because oil companies are driven by their profit interests, and private standards lack democratic safeguards in the form of public disclosure and consultation and government review, she claims. This is similar to what we have seen earlier in this study, both in a general theoretical debate on CSR and in the case of criticism against the codes of conduct of Talisman Energy. The standards elaborated by Occidental Petroleum contributed to an arbitrary legitimization of

norms that were defined by special interests, Kimerling argues (2001: 445). The company used the invocation of international standards on environmental protection to wrap itself in an image of corporate responsibility to reassure government officials and stakeholders. Therefore, Kimerling claims, the international community must move beyond accepting statements of principles to developing mechanisms that can be used to monitor and verify claims made by transnational corporations. Again we recognize the tension between the clarity of a state-based system of human rights protection, and a spread of responsibility to meet changing global conditions and sites of power.

In sum, themes related to defining the scope and boundaries of responsibility, and to tensions between private self-regulation and public state regulation, are also found in debates on other transnational oil companies that have been subject to criticism for lacking in responsibility.

The notion of complicity

The contestation and renegotiation of societal boundaries, such as those demarcating spheres of responsibility of public actors and private enterprise actors respectively, open up for a struggle over what is to be perceived as appropriate behavior. The public-private distinction penetrates debates on the boundaries of transnational corporations' responsibility for human rights protection internationally. On a more concrete level, this was seen in the debate on the responsibility of Talisman Energy in Sudan. This study has found that the notion of *complicity* occupies a central role in this debate.

As I noted in Chapter Five, the notion of complicity captures the moral, political and legal tensions involved in the idea of an *indirect* responsibility for the actions of others to whom one has a connection of some kind. This concept, arguably, subsumes the tensions and grey zones in between legal and moral boundaries of responsibility in contexts of widespread human rights violations. It demonstrates that business relationships, like any social relationships, are unavoidably ethical, although perhaps with their own ethical dilemmas and difficulties. Ethics cannot be seen as a sort of supplement to economics (Roberts, 2003: 250).

In the case of Talisman Energy charges of complicity were primarily made by various NGOs issuing reports on the impact of foreign oil companies in Sudan. As seen in the previous two chapters, NGOs demonstrated in which concrete ways this complicity was seen in the company's relationship with the Sudanese government. The primary charge of complicity concerned that the company was in formal partnership, joint venture, with a government that committed human rights abuses when carrying out its part of the agreement.³³ Accusations of complicity were made by connecting the exercise of power, authority

³³ Recall that this is one of the four charges of complicity presented in Chapter Five.

and responsibility and by identifying situations where their relationship was asymmetrical, where authority was being exercised without accountability.

Definitions of complicity depend on prior assumptions as to what the responsibility of transnational corporations in conflict zones ought to be. It might be defined as encompassing all involvement of a TNC in such zones, though such a definition is too wide to be analytically or practically meaningful. Indeed, the notion of complicity can refer to cases where private sector actors deliberately seek economic profit from conflict, but also to unintended side effects of routine operations. An example of the latter is that the revenues from the commodities companies produce may contribute to finance the continuation of conflict (International Peace Academy, 2001: 4).

In addition, knowledge about human rights violations can be considered a prerequisite for complicity, for connecting the exercise of power and responsibility. Critics of Talisman Energy demanded that the TNC obtain such knowledge on its own initiative in its zone of operation. They did not accept a lack of knowledge of violations as an excuse. Several critics pointed out that the company could not claim to be ignorant of the situation. Deciding not to act when having knowledge about violations, and when action would have been possible, entails moral, though not necessarily legal, complicity (Vetlesen, 2000: 529). However, we also saw that, though several actors had knowledge of violations, far fewer had the ability or the will to influence the Sudanese government and its other GNPOC business partners in oil exploration. To what extent Talisman Energy actually had the capacity to influence the government remained a point of contention.

Assessing corporate performance requires examinations of “whether a business is *doing what it can do* given its range of external options and internal competencies” (Zadek, 2001a: 9). A spectrum of possibilities is created at every point in time by external and internal factors that define a corporation’s practical scope for action.

Whether and how a corporation acts within its degrees of freedom must be the test of responsibility, and indeed the basis on which management decisions are framed (Zadek, 2001a: 9).

Even though there is limited choice as to *where* to go for a resource-based industry such as the oil industry, since the location of oil resources is dictated by geology, there is a choice *whether* to go and *in what manner* to undertake a venture. The measure of success for oil companies has undergone change, now not only depending on the provision of a cheap and secure source of energy, but also depending on the way in which that energy is provided (Chandler, 2000: 5-6).

Other transnational oil companies have faced situations and charges of complicity similar to those of Talisman Energy. One study on oil companies operating in Nigeria argues that the acknowledgement of the difficult context of oil operations in the country does not absolve the oil companies from a share of responsibility, whether by act or omission, for human rights abuses (Manby, 1999: 299). Companies claim they cannot be involved in such political matters as human rights, but they still lobby governments on highly political aspects of their terms of operations, such as tax matters. In Nigeria, the dominant position of the oil companies brings with it a special responsibility to protect human rights, Bronwen Manby argues. Ultimately, however, the solution is for the Nigerian government to negotiate terms of production acceptable to the communities where oil is extracted (Manby, 1999: 300).

Equally, a study of foreign oil companies operating in Angola claims that oil revenues generated by transnational companies, finance the conflict and act as strong disincentives for rival groups to reach durable agreements. Businesses sustain the reluctance of the Angolan elite to engage in reform. Oil companies claim that they do not have a political role and that they do business with whoever is in power, and that the Angolan conflict does not matter much for the course of oil production (Le Billon, 2000: 128). However, according to this study, some foreign oil companies, for example Elf Aquitaine, are

reported to be involved in Angolan political and financial affairs and to help financing arms purchases (p. 129). The study proposes that in the absence of governmental accountability for the use of oil revenues, corporations need to extend their responsibility to foster respect for human rights (p. 133).

In sum, both the debate on Talisman Energy in Sudan and the debates on other Western headquartered oil companies operating in Angola and Nigeria contain charges of moral complicity in human rights violations. In this context, the notion of complicity captures the ethical tensions of boundary drawing between public and private spheres of responsibility in the domain of human rights protection. The boundaries of corporate responsibility can be considered to be determined by the purpose of a company, the extent of the company's impact, and the values of contemporary society. If we see the purpose of a company, the profitable provision of a service or product, as a constant, it can be argued that the interaction between corporate impact and the values of society in recent years has extended the boundaries of responsibility (Chandler, 2000: 5).

From the point of view of oil companies, the rapidly evolving agenda of sustainable development, which includes human rights protection and a broader social responsibility, is considered one of the most challenging new paradigms for the international petroleum industry. The Group Chief Executive of BP, for example, claims that we can begin to see the emerging shape of a new kind of oil industry, "with different boundaries, a modern agenda and a new balance of objectives" (Browne, 2000: 181). This refers to the extension of performance criteria, beginning with financial results, but extending to environmental protection and growth and responsibility, recognizing the long-term involvement of companies in the communities in which they work.

As pointed out by an advisor to the oil industry, it is now necessary for companies to think in terms of a so-called *triple bottom line*, focusing on economic prosperity, environmental care, and social justice. To refuse this line of thinking is to risk extinction (Elkington, 1999: 139).

Major transnational companies will increasingly be forced to pass this approach down their supply chain to subcontractors and suppliers.

At the same time, a collective action problem stemming from market economic competition is said to be faced by transnational oil companies aiming to take responsibility. This consists in a possible loss of competitive advantage to less responsibility-minded rivals, a problem of defection. Thereby, socially responsible companies risk bearing the costs alone for supplying the public good of responsible behavior that others may benefit from without contributing, a free-rider problem (International Peace Academy, 2001: 8, Swanson, 2002: 24). Accordingly, the dynamics of the market economy are stated to lead to contradictory effects for CSR of the oil industry. On the one hand, it leads to problems of taking social responsibility related to market dynamics such as long-term investments, capital intensity and free-rider problems. On the other hand, market dynamics are stated to lead to an imperative of economic necessity to act socially and environmentally responsibly.

The notion of complicity, in conclusion, is found to be central in the context of transnational oil companies present in zones of conflict and human rights abuse. It expresses the moral and political tensions involved in the idea of an indirect responsibility, where the perpetrator of human rights violations is a political regime with which the company has a business relationship. It points to a moral responsibility raised if one gains advantage from conditions arising as a result of other actors' violations of human rights. Importantly, notions of complicity are not intended to reduce attention to those who commit human rights violations in the first place, in this case non-democratic political regimes. Indeed, appeals to corporate responsibility are not intended to absolve states from the responsibility to protect human rights through their legal systems or through the international human rights regime, or withdraw international demands that states enforce human rights norms regardless of who the violator is (cf. Muchlinski, 2001: 44, Hauffer, 2001: 122).

Change and Continuity

As described in Chapter Three, manifestations of the distinction between public and private develop and change over time. This study has demonstrated that, though the distinction is a powerful reference in debates on the distribution of responsibility for human rights protection, the boundary between public and private responsibility is a site of struggle and is increasingly subjected to renegotiation. Indeed, this study has examined both continuity and change.

Accounts of rapid change proliferate in the interdisciplinary literature relating to corporate social responsibility, and, for that matter, in the field of study of international relations. Making comparisons over time, there is no doubt that the domain of transnational corporate social responsibility has undergone change over the past two decades. The rapidly expanding number of initiatives in this domain, whether undertaken by states, interstate organizations, NGOs, business, or in partnership constellations, bears witness to this.

In the case of the petroleum industry, demands for increased participation in human rights protection have proliferated rapidly and through non-legal channels. As we have seen in this study, moral norms of corporations' responsibility have spread, followed by an expansion of soft law instruments.

A business management which recognizes only those human rights which are already enforced by law or treaty may be surprised by the force of public opinion. Ideas reach further than enforceable law, and enforceable law itself moves [...] Private actions – political, social or economic – are taken in response to ideas of human rights which go beyond what has been legally formulated or is likely to be declared as a result of government negotiations (Mitchell, 1998: 227).

The results of an assessment of the character of change depend upon what contrasts are submitted for comparison, however. Following K.J. Holsti's vocabulary for assessing change in the institutions of

international life, we can conceive of change as novelty/replacement, as addition or subtraction, as increased or decreased complexity, as transformation, reversion, or obsolescence (Holsti, 2004: 12-17).

Taking a bird's-eye view of the institution of international law, Holsti (2004: 155-170) perceives examples of increased complexity as well as of novelty and obsolescence. In the area of human rights, he considers the form of change primarily as *increased complexity*, not transformation. Still, he argues, this is not true for all aspects of the international protection of human rights. In the area of the personal immunity of foreign heads of states, Holsti sees true *transformation* of considerable legal and diplomatic significance, as old ideas, conventions and laws have been overturned, for example through the establishment of the International Criminal Court and the Pinochet case (p. 160 ff).

Change in the form of *novelty* can be seen in a more firmly established responsibility to intervene in humanitarian emergencies as well as in the establishment of procedures for individuals' right to appeal the actions of their own state. Finally, he sees elements of change in the form of *obsolescence* related to principles of conquest and the sovereign right to use force (p. 170). Other than this, Holsti (2004: 177) concludes that principles related to sovereignty, territorial integrity, legal equality and the binding character of international treaties underlying international practice have not changed significantly over the past three centuries.

The history of international law is primarily one of slow, accretive change, with a great deal of debate every step on the way (Holsti, 2004: 304).

The major sources of change in the institution of international law, argues Holsti (2004: 301), are a need for regulating transnational processes, human rights sensibilities and anti-war sentiments. We see, in conclusion, that international law can be a source of both conservatism and transformation.

Were the norms related to corporate social responsibility to have been more strongly institutionalized and to have had a taken-for-granted quality in corporate practice, we could have spoken of *transformation*. However, the developments studied in this thesis are best conceived of as *increased complexity* in the institution of international law, or more particularly in its human rights regime. This is especially the case considering the soft law character of corporate social responsibility standardization. Based on the present study, we can agree with Holsti that the sources of this change may well be increased human rights sensibilities and a need for regulating transnational processes.

Even if the application of human rights norms to new areas of social life is not always accepted and turned into practice and law, it affects the agenda for future discourse on the topic. Previously ungoverned activities are gradually incorporated under international agendas and standards, as demonstrated by Alison Brysk (2005) in the areas of children's migration, campaigns for financial accountability, and issues related to access to medicines globally and the role of pharmaceutical companies therein. The global human rights agenda is expanded and changed by the identification of new bearers of existing rights, by the establishment of new causal mechanisms of accountability, and by the adoption of normative standards for a new practice or a changing social condition. New norms, actors and strategies have led to some policy change to limit private wrongs, but far less than needed, Brysk concludes.

A new wave of global consciousness and transnational struggle has introduced new norms and strategies that chart possibilities for safeguarding human dignity across public-private borders. Such possibilities for global governance still founder too often over lack of resources, inconsistent institutionalization, or diffuse responsibility (Brysk, 2005: 117).

Along similar lines, Virginia Haufler (2001: 112) concludes that industry self-regulation, incrementally and unevenly, has changed some

behavior, though the evidence of this is scattered and hard to analyze in a systematic manner. The changes she perceives regarding industry self-regulation in the areas of international environmental protection, labor standards abroad and information privacy, are “neither profound nor revolutionary”, occurring in many cases only at the margins.

The interplay between civil society organizations and transnational corporations, as seen in this study, represents one instance of a broader historical development leading to the emergence of a global public domain that is not identical with the states system. This domain is a transnational non-territorial formation, anchored in norms, expectations and institutional networks within, across, and beyond states. It transforms governance by embedding the system of states in broader social frameworks (Ruggie, 2004: 519-521). In line with Holsti’s statements about novelty, Alison Brysk claims that human rights have come to constitute “a compelling challenge to state sovereignty and a modest scaffolding of global governance to limit states’ repression of their own citizens” (Brysk, 2005: 127). Global civil society is an increasingly important arena of global politics, as growing authority is exercised by transnational corporations, experts and professionals, and religious groups, also becoming the target of local and global political action (Brysk, 2005: 16).

Within the CSR domain we can perceive differences with regard to the changing role of business in the area of human rights protection and in the area of environmental protection. These are the two main areas where the responsibility of corporations has come to the fore globally. As demonstrated by the recent volume *The Business of Global Environmental Governance* (Levy & Newell, eds., 2005), the role of business in global human rights governance is not comparable in scope and prominence to the role of business in global environmental governance. The volume demonstrates that corporations are critical players in the architecture of global environmental governance, where firms become prominent political actors through being investors, innovators, experts, polluters and manufacturers. A state-centric model of interstate bargaining

cannot capture the role of business in global environmental governance (Newell & Levy, 2005: 329).

The international protection of human rights is more institutionalized and defined legally in state-centric terms, through the UN system, whereas the environmental area is less formally institutionalized in such a manner. The human rights advocacy movement came later than the environmental movement to seeking the engagement of business, since governments were regarded as the target of activism. Human Rights Watch first contacted Shell regarding its role in Nigeria in 1995, and the UK Section of Amnesty International set up a Business Group in 1991 (Chandler, 2000: 8). Over time, industry groups and advocacy movements have become more willing to work together on shared concerns. Environmental advocacy groups have taken the lead in pursuing dialogues and partnerships with the business community, while the human rights advocacy community has more recently begun working together with business in a way it would not have done ten years ago (Hauffer, 2001: 119).

In conclusion, this study has examined change and continuity in one domain where changing manifestations of the public-private distinction are played out. We have seen change amounting to greater complexity in the international protection of human rights. Change is most visible at the stage of agenda-setting, discursive positioning, in a new consciousness and public opinion, and in the domain of standardization through the incorporation of previously internationally ungoverned activities under international standards. This results in a spread of norms related to CSR and a proliferation of soft law instruments and public-private partnerships. Change is also seen in the growing visibility and influence of an arena of transnational action and contestation.

Further Study of Human Rights Protection and Global Governance

Human rights protection

The study of international relations has been shaped by a range of constitutive distinctions, such as public-private, economics-politics, normative-empirical, domestic-international and outside-inside. All those have more or less explicitly been present and explored in this study. Their influence on the theory and practice of world politics ought to be reflected upon in further studies, putting other distinctions than the one between public and private at center stage. As pointed out in Chapter One, general social constructivist ideas in the social sciences can be a point of departure for examining how such distinctions, dichotomies and categories are constructed, operate and are manifested in social practice, as well as how they are sustained and challenged. We need to study how societal boundaries drawn from such distinctions are institutionalized and affect perceptions of available choices for political practice, and how relations of power, authority and knowledge are manifested through boundary-drawing processes.

Acts of boundary drawing are always present in the exercise and definition of responsibility. Self-evidently, no individual or organization can be responsible for everything. On what basis boundaries of responsibility are drawn and ought to be drawn is a line of inquiry that can be pursued with regard to many pressing problems related to human rights. Deepened interdisciplinary inquiry into the dimensions of the concept of responsibility and its institutional expressions can be undertaken with regard to issues such as access to HIV medicines, global warming, trafficking, sweatshop labor, and drug trade, to mention but a few with a salient public-private dimension that come to mind. At its most general level (Chapters Three and Four), the conceptual framework of this study can be used to examine responsibility in those other issue areas. It can be complemented with theoretical literature

more specific to those areas (as is done in the first sections of Chapters Five and Six of this study concerning CSR).

Chapter Three can also provide guidance for interpretations of how notions of public and private are manifested in topics not necessarily relating to responsibility, but to other areas where the distinction frames notions of what is possible and desirable. Despite the inherently problematic and confusing character of the public-private distinction, as elaborated in Chapter Three, it is an inescapable element of the theoretical vocabularies, as well as of the institutional and cultural landscape, of modern societies, to be approached with due caution and conceptual self-awareness (Weintraub, 1997: 38).

Connecting more closely to the specific inquiry of this study, the conceptual framework outlined here can serve to guide analyses of other cases of debates on corporate social responsibility in zones of human rights violations. The picture appearing from the examination of the debate surrounding Talisman Energy in Sudan points to factors and dimensions to look for in other cases as well. Shared moral, political, economic and legal tensions and dilemmas appear in many debates on corporate responsibility. For example, as this study has shown, bringing private transnational corporations into authority structures related to social issues raises questions of accountability, representativeness and transparency, values associated with the accountability of public actors in a democratic setting. Equally, it raises questions about how an increased responsibility of business actors relates to the continuing primacy of state responsibility, and advocacy efforts at improving governments' human rights practices. These are central themes to pursue further.

Equally, the notion of democracy can be elaborated more than this study has aimed at doing. Different theoretical conceptions of democracy might lead to different assessments of the issues involved in spreading responsibility, especially with regard to accountability. In the case of soft law regulation, Frykman and Mörth (2004) perceive different degrees of accommodation between such law and liberal, deliberative and republican conceptualizations of democracy respectively. Unless the

delegated power of policy formulation to non-elected actors is closely monitored, transparent and open for public scrutiny, they see a possible misfit between liberal democracy and soft law. If the emphasis is placed on efficiency and output legitimacy rather than input legitimacy, the degree of accommodation between liberal democracy and soft law could be greater, presupposing that soft law renders decision-making more effective. In a less state-centric and more deliberative notion of democracy, soft law is not necessarily a threat to democracy (Frykman & Mörth, 2004: 159-160). In addition, as this study has emphasized, placing soft law regulation in an entirely non-democratic setting renders it less problematic from a point of view of democratic theory.

This study has connected to several dimensions of the phenomenon of globalization. The relationship between the economic dimensions of globalization and different concrete forms of exercising and regulating CSR can be examined more in detail than this study has aimed at doing. What does an increased transnationalization of business and the expansion of a global marketplace imply for the regulation of businesses' impact on society? In an international relations context, should we understand the role of the state as a site connecting regulation of economic globalization and human rights protection? Given the diversity of state characteristics, capabilities and resources, does it make sense to speak of these issues in global terms at all?

Global governance and cosmopolitanism

Processes of globalization continue to lead to an expansion of new arenas of power and conflict, spilling across the public-private divide as well as across national boundaries. Against this background, the theme of corporate social responsibility, I re-emphasize, ought to be given more attention on the interdisciplinary agenda at the international relations-international law nexus. It connects nicely to a larger debate on the overall character of global governance. The concept of governance as opposed to government opens up for the possibility of a multiplicity of authority relations, both public and private, not necessarily implying that the state loses in authority, but that its role changes (Boström et al., 2004: 14ff).

The examination of responsibility for human rights protection undertaken in this study, in conclusion, contributes to the understanding of the character of the broader global governance of the human rights field. It has implications concerning democracy and accountability in a global context, made all the more central as we witness a development towards hybrid forms of governance. This is seen in the increase in public-private partnerships, the proliferation of soft law initiatives, the diffusion of responsibility, and the weakness or lack of accountability mechanisms on the global level. Still, this study has pointed to the existence of a range of accountability mechanisms beyond state-based chains of accountability. Less territorially bounded systems of accountability appear as decision-makers are challenged not primarily by “decision-takers”, but by a global network of human rights activists. The representativeness and legitimacy of these activists themselves is a subject worthy of further inquiry in examinations of expanding terrains of accountability.

We saw a concrete example of the proliferation of soft law mechanisms in the case of Talisman Energy, illustrating how the soft law codes were a tool for the company to carve out its position on issues of corporate social responsibility. This was done both through the formulation of company-specific codes and codes for the GNPOC oil

consortium, and by drawing upon codes elaborated in a wider setting by governments, NGOs and oil companies in cooperation. Regulation based on voluntary approaches and codes of conduct serves as a bridge between different spheres of society and modes of organization. In practice, though governed by different principles of organization, the spheres of state, market and civil society are closely interlinked. At a closer look, voluntary approaches are not always so voluntary. They can have compulsory effects and a strong formative impact (Boström et al., 2004: 17ff). The implications of an expansion of soft law instruments ought to be subject to further inquiry. In particular, the developing relationship between “hard” international law and soft law needs attention in further study on standardization efforts in different issue areas.

Taking an even broader outlook, in conclusion, the issues examined in this study constitute one subset of what is in focus for David Held’s and his associates’ visionary thinking on global cosmopolitan democracy (e.g. Held, 1995, Archibugi, Held & Köhler, 1998, Scholte, 2004). Held’s (1995) *cosmopolitan model of democracy* is based on the idea of a system of democratic governance on the global level, involving a reassessment of the conceptual and institutional bases of democracy. The conventional statist formula of democratic accountability does not suffice, Scholte claims (2004: 212), in relation to expanded global governance. The nature of the accountability of regional and global organizations as well as of private transnational actors to citizens of the states in which they operate, and to other groups they affect, “remains an acute and pressing question”, Held argues (1995: 139).

In a cosmopolitan approach resting on a global conception of justice, Onora O’Neill (2000: 182f) emphasizes that we ought not to presuppose that the sole context and guarantors of justice should be a set of mutually exclusive territorial units, i.e. states. A wider range of actors that are not territorially bounded, including the international banking system, transnational corporations, communications networks, and transnational NGOs, ought to be considered as well. If such actors escape

the control of states, then an account of justice must look not only to the constitution of just states, but to the construction of organizations and networks such as the above as primary sites for achieving just relations.

Emerging plural structures of power and authority with weak mechanisms of accountability coexist with the states system. We ought to remember that in the ideal case, a state-based system of human rights protection has the advantage of a clear allocation of responsibility, and a possibility for using national and international laws and enforcement mechanisms for guarding human rights globally.

The kind of effective state administration that is needed to manage the impact of globalization ought not to be considered hampered by measures that defend the rights of the individual – just to the contrary, the best justification for a strong state is precisely that it can protect the rights of the individual (Brown, 2002: 245).

We have seen in this study that in one case of absence of such a state, a range of accountability mechanisms developed to hold transnational corporations accountable to their codes of conduct and for their relationship to state actors committing human rights violations. As human rights norms become increasingly important in international relations, a pluralistic model of global governance evolves “to weave a greater web of accountability for private wrongs” (Brysk, 2005: 125). These accountability mechanisms are of a less systematic and comprehensive character than the supposedly more encompassing accountability spheres of democratic governments. The role of these accountability mechanisms merits more attention in the larger theoretical project of cosmopolitan democracy and institution building.

This study has examined the continuously evolving relationship between public and private in human rights protection. Spheres of responsibility overlap in multiple ways, as do sites of power and chains of accountability, globally and locally. In the end, examinations of how global processes are manifested at the local level, in a Sudanese village

as well as in a London suburb, are key to continued inquiry into what is possible and desirable in terms of ensuring sustainable human rights protection.

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