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# HYBRIDIZATION OF INTERNATIONAL RESPONSIBILITY FOR BUSINESS-RELATED HUMAN RIGHTS ABUSES

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## SUMMARY

The subject of this doctoral dissertation is the application of the rules of international law of responsibility to cases of business-related human rights abuses in a manner that can be conceptualized as hybridization of responsibility.

The starting point for the study was the observation that in the era of modern globalization, the imposition of certain rigors on the cross-border activities of multinational corporations that would limit the risk of abuse goes beyond the regulatory capabilities of individual states. The scale of the undesirable phenomenon of these actors contributing to human rights violations in all sectors of the economy and in various areas across the globe calls for the search for solutions at the level of public international law. *Prima facie,* it can be noted, however, that this system structurally contributes to strengthening the position of corporations, ensuring the protection of their rights, for instance in the area of investment law or even human rights. Moreover, by recognizing their autonomous legal personality in individual domestic legal systems and allowing for piercing the corporate veil only in narrowly defined circumstances, it helps parent companies to avoid liability for the actions of their subsidiaries. It was, therefore, necessary to consider whether despite such a state of affairs, it is possible to identify in the existing

conditions certain international legal instruments that could contribute to curbing harmful corporate practices and improving the standards of the human rights protection in the context of business activities.

The concept of hybridization of responsibility took center stage in this research. The notion of hybrid is used in the doctrine of public international law in relation to various phenomena, such as hybrid tribunals or hybrid wars, and the common denominator for various cases of the application of this concept is the description of a certain combination of opposing features. The dissertation used this concept, casting it in a double role: on the one hand, the role of an analytical perspective serving to diagnose accountability gaps, and on the other – of a tool allowing to go beyond the constraints imposed by the binary categories on which the system of public international law rests. The structure of the dissertation was therefore determined by the sequence of the following dichotomies: public sphere/private sphere, hard law/soft law, international legal system/domestic legal systems, and fragmentation/constitutionalization. Using the concept of hybridization, it was pointed out how those dichotomies (especially the first three of them) contribute to perpetuating and aggravating the corporate impunity, and on that basis means for their simultaneous contestation were identified. The examination of the binaries permitted to recognize the following parameters of the model of hybrid responsibility for business-related human rights abuses:

(a) The multiplicity and differentiation of actors contributing to business-related human rights abuses, with the particular significance of contributions of private actors – it consists of at least direct international responsibility of the state and indirect international responsibility of the corporation,

(b) The applicable legal framework characterized by the prevalence of international soft law instruments, which are capable of producing certain secondary normative effects (influencing the formation, interpretation, and application of binding norms), with the central position of the UN Guiding Principles on Business and Human Rights,

(c) The available remedies and implementation of hybrid responsibility shaped by multi-level interactions between the international legal system and domestic legal systems,

(d) Damage (an adverse human rights impact) as the constitutive element of hybrid responsibility that links contributions of relevant actors,

(e) The circumstances in which hybrid responsibility arises: the context of collisions between sectoral as well as state and non-state regimes.

In the Introduction to the dissertation, the research problem was presented and the scope of the research field, which was determined by the specific terms used in the title, was outlined. A thesis was formulated that with respect to international responsibility for business-related human rights abuses, a process of hybridization can be observed, with its product being the development of responsibility that can be characterized through the model set forth above. Reference was also made to the research methods used, among which the doctrinal method was the leading one, supported by the comparative legal method and some elements of critical legal approaches to international law.

Chapter One was aimed primarily at finding an answer to the question of who will bear responsibility in the proposed model. It was noted that in situations of business-related human rights abuses, we will often deal with complex constellations of actors contributing to the damage that comprise especially states and corporations, and in some situations also international organizations and individuals. The multiplicity of actors comes hand in hand with their differentiation: states representing the public sphere and corporations belonging to the private sphere form distinct governance regimes, and their specificity translates into different rules determining their ability to bear responsibility in international law. An important aspect of the analysis in this area was the inquiry into the applicability of the norms codified by the International Law Commission in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts to such cases. It was argued that the conduct of a corporation can be characterized as internationally wrongful only if it can be attributed to the state on the basis of, e.g., the state exercising effective control over the corporation or the corporation performing elements of governmental authority. Although the possibility of autonomous corporate responsibility was accepted, regardless of the controversies regarding corporate international legal personality, the likelihood of its incurring was assessed as low due to the virtual absence of obligations imposed on these actors under public international law (human rights treaties do not impose obligations on corporations and there are no sufficient grounds to assume that they may be bound by customary law in this field).

The institution of responsibility in international law is based on the categorical separation of the public sphere from the private sphere; it treats the latter as an area excluded from its scope of application. Demonstrating that this boundary is the result of political choice and does not reflect any natural state of things, led to the examination of whether it can be transcended

in order to reduce accountability gaps. In that regard, two twin tools have been identified that enable, to some extent, the interpenetration of the public and the private spheres. Firstly, this can be achieved through the expansive interpretation of the state's positive human rights obligations, requiring it to take actions aimed at preventing violations committed by private actors and ensuring access to remedies in the event of their occurrence. Second, a key element of the UN Guiding Principles, corporate human rights due diligence, can be viewed as advancing human rights norms through a unique combination of private corporate governance methods with some guarantees of public accountability (e.g., requiring stakeholder consultations). The model of hybrid responsibility makes use, therefore, of those two distinct due diligence standards: the one directed to the state, and the other to the corporation, and this way the expansion of the scope of protection of the rights-holders in the private sphere is achieved.

Chapter Two started with an attempt to catalog the sources of norms the violations of which will trigger hybrid responsibility. In most cases, it will be possible to identify a treaty or customary norm in the human rights field opposable to the state to which a particular action or omission is attributed. However, at the international level the patterns of the corporate conduct are determined primarily by soft law instruments, such as the above-mentioned UN Guiding Principles or the OECD Guidelines for Multinational Enterprises. When characterizing the business and human rights normative universe, we can talk about two types of domination of soft law: quantitative (expressed in the overwhelming number of instruments of this type) and qualitative (due to the speciality and higher level of precision of these instruments). However, international responsibility will not arise in the absence of a violation of a binding international norm. At the same time, the strict rejection of soft law instruments as completely devoid of the capability to produce normative effects results in the deepening of accountability gaps.

Therefore, a more nuanced perception of normativity as a certain continuum was advocated in lieu of the simplistic hard law/soft law divide. From this perspective, specific processes enabling the wider use of soft law instruments in determining responsibility and liability for business-related human rights abuses were analyzed: domestication, judicialization, and contractualization. Domestication involves the incorporation of norms, principles, and standards defined by soft law instruments into domestic legal orders. In this context, special attention was paid to the practice of adopting laws related to mandatory human rights due diligence, which has recently grown in popularity, especially in European countries. Next, judicialization allows for the use of soft law in the interpretation and application of hard law by judges sitting at national and international courts. Finally, contractualization involves assuming, by way of a

contract, an obligation to comply with the standards expressed in soft law instruments. Hybrid responsibility of business-related human rights abuses should rely on those processes to a significant extent: secondary normative effects of soft law produced through them can considerably contribute to diminishing the corporate accountability gaps.

Simultaneously, Chapter Two highlighted the evolutionary dynamics of the presented normative universe. Forecasts were presented regarding the slim chances of the adoption of a binding treaty on business and human rights, as well as of the development of new customary norms and general principles. The former was justified by profound differences in the positions of the negotiating states, revealing fundamentally conflicting views of the role of corporations, and the second by the lack of universality of the observable practice. In the context of these prognoses, hybridization of responsibility appeared not as an ephemeral interim solution, but as a proposition suitable for long-term application. What is more, even if new international norms in the business and human rights area in fact emerge – whether treaty or customary – certain additional conditions will have to be fulfilled by them to invalidate the advantages of the proposed model. Firstly, the creation of such norms will have to be accompanied by the development of effective mechanisms for enforcing violations. Secondly, corporations will have to be addressees of such norms. It should be noted that if the new norms impose obligations only or primarily on states, the division into direct international responsibility of the states and indirect international responsibility of the corporations, which characterizes hybrid responsibility, will be maintained.

Chapter Three presented considerations on the implementation of hybrid responsibility for business-related human rights abuses. The conclusions presented previously allowed to assert that this responsibility will be divided between two levels: the level of international law (direct international responsibility of the state) and the level of domestic law (indirect international responsibility of the corporation). Whenever the state breaches its international obligations, it will be obliged to provide full reparation for the damage caused, although without mobilizing domestic institutions and resources, ensuring victims' access to an effective remedy will encounter significant difficulties. Meanwhile, domestic legal systems remain largely underdeveloped in terms of the remedies they offer in the cases of business-related human rights abuses, and most often they fall short of the full realization of the internationally defined standard. Moreover, accountability of individual actors contributing to business-related human rights abuses may be simultaneously pursued in various fora, i.a., before domestic and international

courts, as well as National Contact Points, national human rights institutions, or through arbitration. In practice, this makes a holistic assessment of specific factual patterns challenging.

Given these difficulties, an integrated approach to remedy has been proposed, which is aimed at optimizing the protection available to individuals under international human rights law. In the substantive dimension, it concerns the parameters of reparations that victims of abuses are entitled to. In this respect, it imposes the primacy of restitution, specifies the goals that reparations are supposed to serve (both with respect to private as well as public interest), and also requires, in some cases, the application of punitive sanctions. In the procedural dimension, an integrated approach to remedy requires the state to increase the effectiveness of available grievance mechanisms. With regard to individual mechanisms, it is possible to decode more precise directives addressed to the state – for instance, in relation to courts, it should take measures to facilitate concerted adjudication. Thus, in a case where an international court assesses a state's responsibility for contributing to a human rights violation and, in parallel, a domestic court examines the conduct of a corporation in the same state of facts, the integrated approach to remedy indicates that they should attach weight to each other's factual findings. It was pointed out that international law performs various functions *vis-à-vis* domestic institutions, e.g., compels them to act (the case of obliging the OECD states to establish National Contact Points), strengthens them (e.g., the Paris Principles as a benchmark for national human rights institutions), and secures the outcomes of proceedings before them (the New York Convention of 1958 safeguarding the recognition and enforcement of awards handed in business and human rights arbitration). In other words, due to the factual and legal complexity of cases of business-related human rights abuses, the implementation of hybrid responsibility cannot rely on a single institution or body. The integrated approach to remedy is intended to ensure synergy between the various available grievance mechanisms and maximize the chances that victims of abuses will receive reparations in line with international standards.

Finally, the fragmentation/constitutionalization dichotomy highlighted in Chapter Four could be viewed as a characterization of the broader background in which the process defined as the hybridization of responsibility for business-related human rights abuses is taking place. These phenomena were analyzed both at the level of the transformation of the institution of international responsibility and the system of international law as such, which permitted to draw some further conclusions regarding the parameters of hybrid responsibility.

The study of the impact of fragmentation and constitutionalization on the institution of international responsibility made it possible, in particular, to recognize the significance of

damage in the hybrid responsibility model as an element linking the actions and omissions of individual actors contributing to the adverse human rights impact. Hybrid responsibility was also analyzed there through the prism of other key areas of change in the international law of responsibility, such as the plurality and diversity of actors incurring responsibility, the development of certain *lex specialis* aspects, or the evolution from a more private law-like towards a public-oriented nature of responsibility. It was concluded that a differentiated system of responsibility may be beneficial to strengthening the protection of human rights.

In turn, the study of fragmentation and constitutionalization in relation to the changes in the international legal system allowed to pay attention to the context of regime collisions in which hybrid responsibility arises. Two types of collisions requiring distinct management methods were distinguished. Collisions between sectoral regimes were examined first – when deciding on issues of human rights obligations of particular actors, relevant grievance mechanisms will often need to apply and interpret at the same time rules from different areas of law, especially international investment and trade law. In this respect, it will be necessary to apply collision rules and systemic integration, however, the significant limitations of these tools were also noted. The second-level collisions are those between state and non-state regimes, where international law clashes with what is external to it (e.g., corporate codes or the new *lex mercatoria*). Regarding them, a postulate was formulated to embrace certain procedural guarantees that constitute the foundations of global administrative law. Tensions can be reduced and some minimum compatibility of regimes can be achieved if grievance mechanisms respect such principles as participation, transparency, and reasoned decisions. For those reasons, the indicated methods for resolving collisions of both types should constitute an inherent repertoire of tools used by grievance mechanisms that make findings on hybrid responsibility for business-related human rights abuses.

The dissertation ended with a Conclusion that summarized the analyzed parameters of hybrid responsibility for business-related human rights abuses. It was confirmed that the concept of hybridization fulfilled its role as an analytical perspective allowing to diagnose accountability gaps, and at the same time as a tool that can contribute to a considerable extent to overcoming the observed limitations and reaffirming the relevance of international law in the face of challenges related to cross-border activities of corporations. It was also indicated that the proposed solutions may find wider application as public international law's pluralism continues to increase. At the same time, they maintain an appropriate balance between the capacity for further adaptation to the observed pluralistic trends and the preservation of the fundamental role

of the state in international law – the state remains the guarantor of compliance with international human rights law and bears the primary responsibility for ensuring access to remedies. Further optimization of responsibility for business-related human rights violations, although theoretically possible, would require changes in the applicable legal framework. Given the unlikelihood of the conclusion of the business and human rights treaty and the development of new norms of international law in this area (especially norms that would become a direct source of obligations for corporations), it seems that *de lege lata* this is the optimal solution from the point of view ensuring the protection of internationally recognized human rights.

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