

TOWARDS SHARED ACCOUNTABILITY IN INTERNATIONAL  
HUMAN RIGHTS LAW

TOWARDS SHARED  
ACCOUNTABILITY  
IN INTERNATIONAL  
HUMAN RIGHTS LAW

Law, Procedures and Principles

Arne VANDENBOGAERDE



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd  
Sheraton House | Castle Park  
Cambridge | CB3 0AX | United Kingdom  
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169  
Email: mail@intersentia.co.uk  
www.intersentia.com | www.intersentia.co.uk

*Distribution for the UK and Ireland:*

NBN International  
Airport Business Centre, 10 Thornbury Road  
Plymouth, PL6 7 PP  
United Kingdom  
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331  
Email: orders@nbninternational.com

*Distribution for Europe and all other countries:*

Intersentia Publishing nv  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21  
Email: mail@intersentia.be

*Distribution for the USA and Canada:*

International Specialized Book Services  
920 NE 58th Ave. Suite 300  
Portland, OR 97213  
USA  
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832  
Email: info@isbs.com

Towards Shared Accountability in International Human Rights Law: Law,  
Procedures and Principles  
© Arne Vandenberghe 2016

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Cover image: Glasbild mit Kneifer, Kandinsky Wassily (1866–1944) © Centre Pompidou, MNAM-CCI, Dist. RMN-Grand Palais / Droits réservés

ISBN 978-1-78068-386-7  
D/2016/7849/87  
NUR 828



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

## PREFACE

Although “international human rights law” is a commonly used phrase, the term is slightly misleading in the sense that so little of this law has been international in nature or in scope. Rather, what has evolved over time has been a system where the responsibility to protect universal human rights – and even the responsibility for violating human rights standards – has been confined to the territorial boundaries of each country. Moreover, although the essence of human rights is to protect the dignity of each and every human being, the law that has been created for this purpose has placed a straightjacket on itself by ignoring some of the most insidious threats to human security.

In this extraordinarily thought-provoking book, Arne Vandenbogaerde attempts to bring international human rights law much closer to what he refers to as the “daily realities of our globalized world.” What this reality shows is this: that so often human insecurity is the result of the acts and omissions of a confluence of actors operating from a variety of places. To be sure, in many instances these harms will come from the hands of one’s own state. However, as globalization gallops forward, there are many more instances and opportunities for the policies and practices of one state to have a profound effect – both positive and negative – on human rights protections in other lands, and this is particularly the case in the area of economic, social and cultural rights.

Beyond this, what empirical evidence is now starting to show is that non-state actors pose just as great a threat – arguably, even more of a threat – to human wellbeing than do states. If one doubts this, consider the fact that many of the wealthiest entities in the world are privately held corporations. And one of the things that make them so rich and so powerful is that they frequently set up their operations in countries where governments are weakest and, not coincidentally, where large segments of the host population are destitute and deprived of their human rights.

If one were sum up Vandenbogaerde’s book in one line it would be this: power demands accountability. Unfortunately, accountability and enforcement have been the weakest links in the human rights chain. Thus, while governments the world over have been quite willing to become party to a myriad of human rights conventions, what states have also done, almost as a collective action, is to denude international human rights law of any real force.

Rather than calling for still more law, which has almost become a gag reflex for human rights scholars, especially lawyers, Vandenbogaerde focuses his

attention on the array of accountability mechanisms that already exist. More than that, however, Vandenberg provides a clear and cogent analysis of how international human rights law can truly become “international,” in the sense of defending against violations from all sources, territorial and extraterritorial alike, but also how it can re-claim the title of truly being “law”: by holding accountable all entities that wield power over us.

Mark Gibney

Raoul Wallenberg Visiting Professor of Human Rights and Humanitarian Law,  
Lund University and the Raoul Wallenberg Institute  
Belk Distinguished Professor, University of North Carolina – Asheville

## ACKNOWLEDGMENT

This book is an adapted version of my PhD thesis, which I defended at the University of Antwerp in May 2015. I would like to thank all the members of the jury and in particular the members of my PhD commission who have systematically reviewed my work during the last couple of years.

In 2009 I wrote an email to Professor Wouter Vandenhole explaining that I was dissatisfied with the drafted OP-ICESCR as it did not address the obligations of foreign States or non-State actors such as corporations. The email could have been easily ignored because I had no real clear idea or plan on how to do a PhD (or any funding possibilities). Yet, Wouter kindly replied and we started working together. Wouter subsequently introduced me into the academic world and pushed me to become the (more or less) decent researcher I am now. The thesis received the 2015 Max van der Stoel Human Rights Award which is testament to the excellent guidance I have received. I am very proud to have had Wouter as a supervisor and even more to be able to continue working together as colleagues and friends. Any errors that remain are my sole responsibility from now on.

The law and development research group at the University of Antwerp was my institutional home during these years. I need to thank all my colleagues and in particular Ellen, Rachel, Gamze, Tamo, Claire, Dominique, Vicky and Katrien.

This PhD was written during my employment as coordinator of an international research networking programme (GLOTHRO) that focused on the issue of transnational human rights obligations. The different workshops, conferences and meetings during those four years allowed me to meet and talk to the best in this field (even when this was in a freezing Finnish lake). It is impossible to name and thank them all but some deserve some special thanks. I would like to thank Mark Gibney as he has surely influenced my research and writing over the years. Margot Salomon and Martin Scheinin certainly also deserve my gratitude as they not only provided interesting reflections on my work, but also provided me with a inspiring home in the hills of Florence that allowed me to finish the thesis. Josh, Tara, Charlene, and Sofia have accompanied me as GLOTHRO youngsters throughout this journey and good companions they were, and will be.

Acknowledgment

My parents and brother have supported me throughout these last years in many ways. They are always there for me and I could not have done this without them.

This books needs to be dedicated to my wife and my beautiful son. They surely put the importance of this research into perspective.

Arne Vandebogaerde  
Barcelona, 10 January 2016

# CONTENTS

<i>Preface</i> .....	v
<i>Acknowledgment</i> .....	vii
<i>List of Abbreviations</i> .....	xv

## **Chapter 1**

<b>Introduction</b> .....	1
1.1. The Tension between Law and Fact .....	1
1.2. The ‘Retreat’ of the State and the Power of Non-State Actors .....	6
1.3. Expanding the Duty-Bearer Side of Human Rights Law .....	14
1.4. Outline of the Book .....	17

## PART I

### UNDERSTANDING ACCOUNTABILITY

## **Chapter 2**

<b>The Concept of Accountability</b> .....	21
2.1. Objective .....	21
2.2. Actors in the Accountability Process .....	25
2.3. The Dimensions of Accountability .....	26
2.4. Types of Accountability .....	29
2.5. Defining accountability .....	34
2.6. Accountability and Responsibility .....	36
2.6.1. The Distinction Between the Two Concepts .....	36
2.6.2. Accountability in International Law .....	38
2.7. Conclusions Part I .....	42

## PART II

### ACCOUNTABILITY IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW: PROCESSES, PRACTICE AND LIMITS

## **Chapter 3**

<b>State Reporting Procedures at the International and Regional Level</b> .....	47
3.1. Introduction .....	47
3.1.1. State Reporting Procedures in the UN Treaty Body System .....	47



3.1.2.	The State Reporting Procedure in the Inter-American system . . .	55
3.1.2.1.	The Reporting Procedure in the American Convention ..	55
3.1.2.2.	The State reporting procedure of the San Salvador Protocol .....	57
3.1.3.	The State Reporting Procedure in the African System .....	59
3.1.4.	The State Reporting Procedure in the European System .....	62
3.2.	Practice .....	63
3.2.1.	Accountability for States' Extraterritorial Obligations in the State Reporting Procedures .....	64
3.2.2.	The Accountability of Corporations in State Reporting Procedures .....	76
3.2.3.	The Accountability of International Organizations in State Reporting Procedures .....	81
3.3.	Conclusions – State Reporting Procedures in the International and Regional Systems .....	85

**Chapter 4**

**Individual, Collective and Inter-State Complaint Procedures in the  
International and Regional Accountability Framework .....**

4.1.	Introduction .....	89
4.2.	Individual and Collective Complaint Procedures .....	90
4.2.1.	The Individual Complaints Procedures in the UN Treaty System ..	90
4.2.2.	The Issue of Jurisdiction .....	94
4.2.3.	International Assistance and Cooperation .....	95
4.2.4.	Standing .....	96
4.2.5.	State-Centred Scope .....	99
4.3.	The Individual Complaints Procedure in the Inter-American System ..	100
4.4.	The Individual and Collective Complaints Procedure in the European System .....	103
4.4.1.	The European Convention for the Protection of Human Rights and Fundamental Freedoms .....	103
4.4.2.	The Additional Protocol to the European Social Charter Establishing a Collective Complaints Procedure .....	105
4.5.	The Individual and Collective Communications Procedure in the African System .....	107
4.6.	The 'Individual' 1503 Complaints Procedure of the Human Rights Council .....	110
4.7.	Inter-State Procedures .....	116
4.7.1.	The Inter-State Procedure in the UN Treaty Bodies .....	116
4.7.2.	The Inter-State Procedure in the Inter-American Human Rights System .....	120

4.7.3. The Inter-State Procedure in the African System . . . . .	122
4.7.4. The Inter-State Procedure in the European System . . . . .	123
4.8. Practice . . . . .	124
4.8.1. Introduction . . . . .	124
4.8.2. The Accountability of States' Extraterritorial Obligations in the Communications Procedures . . . . .	124
4.8.3. The Accountability of Corporations in the Communications Procedures . . . . .	131
4.8.4. The Accountability of International Organizations in the Communications Procedures . . . . .	136
4.9. Conclusions . . . . .	138
<b>Chapter 5</b>	
<b>Inquiry Procedures in the International and Regional Accountability Framework . . . . .</b>	<b>141</b>
5.1. Procedures . . . . .	141
5.1.1. The Inquiry Procedure of the UN Treaty Bodies . . . . .	141
5.1.2. The Inquiry Procedure in the Regional Systems . . . . .	145
5.2. Conclusions . . . . .	145
<b>Chapter 6</b>	
<b>International Peer-Review Accountability Mechanisms . . . . .</b>	<b>147</b>
6.1. Introduction . . . . .	147
6.2. The Universal Periodic Review Process of the Human Rights Council . .	147
6.3. Practice . . . . .	152
6.4. Conclusions . . . . .	153
<b>Chapter 7</b>	
<b>Special Procedures in the International and Regional Systems . . . . .</b>	<b>155</b>
7.1. Procedures . . . . .	155
7.1.1. Special Procedures of the Human Rights Council . . . . .	155
7.1.2. Special Procedures in the Inter-American System . . . . .	162
7.1.3. Special Procedures in the African System . . . . .	164
7.2. Practice . . . . .	165
7.3. Conclusions . . . . .	168
<b>Conclusions Part II . . . . .</b>	<b>171</b>

PART III  
 CONTOURS OF A MULTI-DUTY BEARER FRAMEWORK

**Introduction** ..... 177

**Chapter 8**

**Admissibility Criteria in a Multi-Duty Bearer Framework** ..... 179

8.1. Compatibility *Ratione Materiae & Locus Standi* ..... 179  
     8.1.1. Introduction ..... 179  
     8.1.2. Compatibility *Ratione Materiae* ..... 179  
     8.1.3. Compatibility *Locus Standi* ..... 187  
         8.1.3.1. States as Agents of Accountability in Human  
             Rights Law ..... 188  
         8.1.3.2. Individuals as Accountholders ..... 194  
     8.1.4. Conclusions ..... 199  
 8.2. Compatibility *Ratione Personae* ..... 202  
     8.2.1. Choosing the Respondent ..... 203  
     8.2.2. Incompatibility *Ratione Personae* ..... 207

**Chapter 9**

**Attributing Obligations in a Multi-Duty Bearer Framework** ..... 211

9.1. Introduction: The Challenges of Attributing Obligations ..... 211  
 9.2. The Notion of Jurisdiction in International Human Rights Law ..... 213  
     9.2.1. Attribution of Obligations versus Attribution of Responsibility... 213  
     9.2.2. Attribution of Obligations versus Attribution of Conduct ..... 221  
     9.2.3. Terminology: Attribution of Obligations ..... 223  
 9.3. Limiting the Attribution of Obligations in the Field of ESC Rights ..... 225  
 9.4. Decentering Territory ..... 228  
     9.4.1. The Universality of Human Rights & Globalization ..... 228  
     9.4.2. Dismissing Territory? ..... 232  
     9.4.3. The Concept of Primary Duty-Bearers ..... 232  
     9.4.4. Terminology: Human Rights Obligations ..... 236  
 9.5. Attribution of Obligations to States ..... 238  
     9.5.1. Introduction ..... 238  
     9.5.2. Attributing the Obligation to Respect ..... 239  
     9.5.3. Attributing the Obligation to Protect ..... 241  
     9.5.4. Attributing the Obligation to Fulfil ..... 247  
     9.5.5. Intermediate Conclusions ..... 254  
         9.5.5.1. Principles of Attribution ..... 254  
         9.5.5.2. An Assessment of ETO Principle 9 ..... 256  
         9.5.5.3. Remaining Challenges ..... 260

9.6. Attribution of Obligations to Corporations . . . . .	262
9.6.1. Introduction . . . . .	262
9.6.2. Attributing Positive Obligations to Corporations. . . . .	263
9.6.3. Division of Obligations between TNCs and Other Duty-Bearers: Implications for the Attribution of Obligations. . . . .	272
9.6.4. Intermediate Conclusions . . . . .	274
9.7. Attribution of Obligations to International Organizations . . . . .	275
9.7.1. The Concepts of Competences and Activities . . . . .	276
9.7.2. Institutional Developments and Practice . . . . .	281
9.7.2.1. The Accession of the EU to the (OP-)CRPD and the ECHR . . . . .	281
9.7.2.2. Attributing Obligations to UNMIK. . . . .	284
9.7.3. Division of Obligations between IOs and other Duty-Bearers: Implications for the Attribution of Obligations . . . . .	287
9.7.4. Intermediate Conclusions . . . . .	291
9.8. Conclusions Part III – The Attribution of Obligations in a Multi-Duty Bearer Framework. . . . .	292
9.8.1. Deterritorialization . . . . .	292
9.8.2. Activities . . . . .	293
9.8.3. Legal Capacity. . . . .	294
9.8.4. Division of Obligations . . . . .	296
9.8.5. Final Remarks . . . . .	297
<b>Conclusion: Contours and Viability of A Multi-Duty-Bearer Framework</b> . . . . .	299
<i>Bibliography</i> . . . . .	319

## LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights of the Child and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
Additional Protocol	Additional Protocol to the European Social Charter
Advisory Panel	Kosovo Human Rights Advisory Panel
African Charter	African Charter on Human and People's Rights
African Commission	African Commission on Human and People's Rights
American Convention	American Convention on Human Rights
American Declaration	American Declaration of the Rights and Duties of Man
CAT	Committee against Torture
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on Migrant Workers
CRC	Committee on the Rights of the Child
CRC Convention	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
Disappearance Convention	International Convention for the Protection of All Persons from Convention Enforced Disappearance
Discrimination Convention Elimination of All	International Convention on the Forms of Racial Discrimination
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ESC	Economic, Social and Cultural

ETO Principles	Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights
European Charter	European Social Charter
European Social Committee	European Committee of Social Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IE	Independent Expert
IE environment	Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment
IE foreign debt	Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly ESC rights
IE international order	Independent Expert on the promotion of a democratic and equitable international order
IE solidarity	Independent Expert on human rights and international solidarity
IFI	International Financial Institution
ILC	International Law Commission
IO	International Organization
Migrant Workers Rights Convention	International Convention on the Protection of the Migrant Workers and Members of Their Families
NSA	Non-State actor
OAS	Organization of American States
ODA	Official Development Assistance
OHCHR	Office of the High Commissioner for Human Rights
OP-CRC	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities

OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
San Salvador Protocol	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
SR	Special Rapporteur
SR extreme poverty	SR on extreme poverty and human rights
SR food	SR on the right to adequate food
SR health	SR on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
SR indigenous	SR on the rights of indigenous peoples
SR migrants	SR on the human rights of migrants
SR water	SR on the human right to safe drinking water and sanitation
Tilburg Principles	Tilburg Guiding Principles on World Bank, IMF and Human Rights
TNC	Transnational corporation
Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UN Guiding Principles	UN Guiding Principles on Business and Human Rights
UN Norms	Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights
WG business	Working Group on the issue of human rights and transnational corporations and other business enterprises